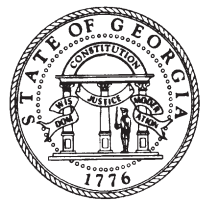
OFFICIAL CODE OF GEORGIA ANNOTATED

With Provision for Subsequent Pocket Parts

Prepared by

The Code Revision Commission
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and
The Editorial Staff of LexisNexis®



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(Chapters 1 through 10)

Including Acts of the 2023 Session of the General Assembly of Georgia
and Annotations taken from the Georgia Reports
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THE STATE OF GEORGIA

OFFICE OF SECRETARY OF STATE

I, Brad Raffensperger, Secretary of State of the State of Georgia, do hereby certify that

the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia; all as the same appear on file and record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 1st day of July, in the year of our Lord Two Thousand and Twenty-three and of the Independence of the United States of America the Two Hundred and Forty-Seventh.

Brad Raffensperger

Brad Raffensperger, Secretary of State

Preface

This volume cumulates and replaces the 2007 edition of Volume 6 of the Official Code of Georgia Annotated, as supplemented by the 2022 Cumulative Supplement. The 2007 Volume 6 and its 2022 Cumulative Supplement may thus be recycled or, if so desired, may be retained for historical purposes.

This volume contains all laws specifically codified in Title 9, Chapters 1 through 10, by the General Assembly through the 2023 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through May 19, 2023. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2021, 2022, and 2023 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2021 Session of the General Assembly, the user should consult the Georgia Laws.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

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Equitable remedies and proceedings in equity generally, T. 23, C. 3.

Law reviews.

For annual survey article discussing trial practice and procedure, see 51 Mercer L. Rev. 487 (1999).

For survey of 1999 Eleventh Circuit cases on trial practice and procedure, see 51 Mercer L. Rev. 1291 (2000).

For annual survey article discussing trial practice and procedure, see 52 Mercer L. Rev. 447 (2000).

For article, "The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform," see 44 Ga. L. Rev. 433 (2010).

For annual survey on trial practice and procedure, see 69 Mercer L. Rev. 1249 (2018).

For article, "Surges and Delays in Mass Adjudication," see 53 Ga. L. Rev. 1335 (2019).

For article, "An Empirical Evaluation of Proposed Civil Rules for Multidistrict Litigation," see 55 Ga. L. Rev. 221 (2020).

RESEARCH REFERENCES

ALR.

Validity and construction of agreement between attorney and client to arbitrate disputes arising between them, 26 A.L.R.5th 107.

CHAPTER 1

GENERAL PROVISIONS

Sec.
9-1-1. Uniform Unsworn Declarations Act.

9-1-1. Uniform Unsworn Declarations Act.

(a) This Code section shall be known and may be cited as the "Uniform Unsworn Declarations Act."

(b) As used in this Code section, the term:

(1) "Law" includes a statute, judicial decision or order, rule of court, executive order, and administrative rule, regulation, or order.

(2) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(3) "Sign" means, with present intent to authenticate or adopt a record:

(A) To execute or adopt a tangible symbol; or

(B) To attach to or logically associate with the record an electronic symbol, sound, or process.

(4) "Sworn declaration" means a declaration in a signed record given under oath. Such term includes a sworn statement, verification, certificate, and affidavit.

(5) "Unsworn declaration" means a declaration in a signed record not given under oath but given under penalty of perjury.

(c) Except as provided in subsection (d) of this Code section or otherwise precluded by law, this Code section shall apply to an unsworn declaration by a declarant who at the time of making the declaration is physically located outside the boundaries of the United States, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States.

(d)(1) Except as otherwise provided in paragraph (2) of this subsection, if a law of this state requires or permits use of a sworn declaration in a court, administrative, or arbitral proceeding, an unsworn declaration meeting the requirements of this Code section has the same effect as a sworn declaration.

(2) This Code section shall not apply to:

(A) A deposition;

(B) An oath of office;

(C) An oath expressly required by statute to be given before a specified official other than a notary public;

(D) An oath expressly required by statute to be made pursuant to the requirements of Code Section 9-10-113;

(E) An instrument expressly required by statute to comply with Code Section 44-2-15; or

(F) An oath required by Code Section 53-4-24.

(e) If a law of this state requires that a sworn declaration be presented in a particular medium, an unsworn declaration must be presented in the same medium.

(f) An unsworn declaration under this Code section shall be in a form and content substantially as follows:

"I declare under penalty of perjury under the law of Georgia that the foregoing is true and correct, and that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States.

Signed on the ____ day of _____, _____ at
Date Month Year

_____
City or other location, and state or country.

_____
Printed name

_____
Signature."

(g) In applying and construing this Code section, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

(h) This Code section modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of such act, or authorize electronic delivery of any of the notices described in Section 103(b) of such act.

History.
Code 1981, § 9-1-1, enacted by Ga. L. 2023, p. 120, § 1/HB 80, effective July 1, 2023.

Effective date.

This Code section became effective July 1, 2023.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2023, "a" was inserted between "in" and "form" in subsection (f).

CHAPTER 2

ACTIONS GENERALLY

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Cross references.

Derivative actions against directors and officers, § 14-2-831.

Provision that county is not liable to cause of action unless made so by statute, § 36-1-4.

Giving of written notice to municipality regarding claim for money damages on account of injuries to person or property, § 36-33-5.

Law reviews.

For annual survey article on trial practice and procedure, see 50 Mercer L. Rev. 359 (1998).

ARTICLE 1

GENERAL PROVISIONS

RESEARCH REFERENCES

ALR.

Nature of termination of civil action required to satisfy element of favorable termination to support action for malicious prosecution, 30 A.L.R.4th 572.

9-2-1. Definitions.

As used in this title, the term:

(1) "Action" means the judicial means of enforcing a right.

(2) "Civil action" means an action founded on private rights, arising either from contract or tort.

(3) "Penal action" means an action allowed in pursuance of public justice under particular laws.

History.

Orig. Code 1863, §§ 3175, 3177, 3178; Code 1868, §§ 3186, 3188, 3189; Code 1873, §§ 3251, 3253, 3254; Code 1882, §§ 3251, 3253, 3254; Civil Code 1895, §§ 4930, 4932, 4933; Civil Code 1910, §§ 5507, 5509, 5510; Code 1933, §§ 3-101, 3-102, 3-103.

Cross references.

Status of "civil action" as single form of action for purposes of Civil Practice Act, § 9-11-2.

For corresponding provision relating to criminal procedure, § 17-1-2.

JUDICIAL DECISIONS

"Action" and "cause of action" distinguished. — Word "action," as defined by this section, differs from a cause of action in that the latter is the right itself. Alexander v. Dean, 29 Ga. App. 722, 116 S.E. 643, 1923 Ga. App. LEXIS 175 (1923), aff'd, 157 Ga. 280, 121 S.E. 238, 1924 Ga. LEXIS 34 (1924).

Object of action. — The object of an "action," as defined by this section, is to redress or prevent a wrong. Southern Ry. v. State, 116 Ga. 276, 42 S.E. 508, 1902 Ga. LEXIS 79 (1902); Citizens' & S. Nat'l Bank v. Hendricks, 176 Ga. 692, 168 S.E. 313, 1933 Ga. LEXIS 255 (1933).

Petition of an immediate writ of possession is an "action" within the meaning of O.C.G.A. § 9-2-1. Flateau v. Reinhardt, Whitley & Wilmot, 220 Ga. App. 188, 469 S.E.2d 222.

Levy of an execution is a "judicial means" provided by law for "enforcing a

right." Miller County v. Bush, 28 Ga. App. 130, 110 S.E. 515, 1922 Ga. App. LEXIS 342 (1922).

RESEARCH REFERENCES

C.J.S.
1A C.J.S., Actions, §§ 1, 74 et seq., 83. 7A C.J.S., Attorney General, § 65 et seq.
ALR.
Effect of action as an election of remedy or choice of substantive rights in case of fraud in sale of property, 123 A.L.R. 378.

9-2-2. Actions in personam; actions in rem.

(a) An action may be against the person, or against property, or both.

(b) Generally, a proceeding against the person shall bind the property also. A proceeding against property without service on the person shall bind only the particular property.

History.
Orig. Code 1863, § 3176; Code 1868, § 3187; Code 1873, § 3252; Code 1882, § 3252; Civil Code 1895, § 4931; Civil Code 1910, § 5508; Code 1933, § 3-104; Ga. L. 1982, p. 3, § 9.

RESEARCH REFERENCES

Am. Jur. 2d.
1 Am. Jur. 2d, Actions, § 28 et seq.
C.J.S.
1A C.J.S., Actions, § 87.

9-2-3. Remedy for every right.

For every right there shall be a remedy; every court having jurisdiction of the one may, if necessary, frame the other.

History.
Orig. Code 1863, § 3174; Code 1868, § 3185; Code 1873, § 3250; Code 1882, § 3250; Civil Code 1895, § 4929; Civil Code 1910, § 5506; Code 1933, § 3-105.
Law reviews.
For comment on Henson v. Garnto, 88 Ga. App. 320, 76 S.E.2d 636 (1953), regarding recovery by wife under doctrine of respondeat superior for injuries caused by husband, see 5 Mercer L. Rev. 209 (1953).

For comment on Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956), recognizing child's right of action for prenatal injuries suffered prior to viability, see 8 Mercer L. Rev. 377 (1957).

For note on defamation in radio and television, see 15 Mercer L. Rev. 450 (1964).

For article discussing the inefficiency of mandamus and impeachment as remedies for judicial inaction, see 5 Ga. St. B.J. 467 (1969).

For note, "Whose Sperm Is It Anyways in the Wild, Wild West of the Fertility Industry?," see 34 Ga. St. U.L. Rev. 847 (2018).

JUDICIAL DECISIONS

Derivation of section from common law, see Tingle v. Harvill, 125 Ga. App. 312, 187 S.E.2d 536, 1972 Ga. App. LEXIS 1312 (1972).

Section to be construed with O.C.G.A. § 44-12-21. — Former Civil Code 1910, §§ 3652 and 5508 (see now O.C.G.A. §§ 9-2-3 and 44-12-21), relating to rights and remedies to enforce chose in action, were construed together, and were based on the common law since the Statute of Westminister 11 (13 Edw. 1, ch. 24) was enacted. Moore v. City of Winder, 10 Ga. App. 384, 73 S.E. 529, 1912 Ga. App. LEXIS 527 (1912).

Meaning of "remedy." — Term "remedy," when properly used, signifies and is limited to the judicial means or method whereby a cause of action may be enforced, including also the application of the measure of damages appropriate to the relief sought. Hamlin v. Johns, 41 Ga. App. 91, 151 S.E. 815, 1930 Ga. App. LEXIS 467 (1930).

Remedy for arrest and detainer under void warrant. — When a person has been arrested and detained under a void warrant, the remedy is an action for false imprisonment. Wilson v. Bonner, 166 Ga. App. 9, 303 S.E.2d 134, 1983 Ga. App. LEXIS 2054 (1983).

Action between spouses. — Former Code 1933, §§ 3-104, 79-205, and 79-206 (see now O.C.G.A. §§ 1-2-6 and 9-2-3) have been in each Code of Georgia, and do not purport to change the common law with respect to the right of one spouse to sue the other. Holman v. Holman, 73 Ga. App. 205, 35 S.E.2d 923, 1945 Ga. App. LEXIS 422 (1945).

Malicious institution of lunacy proceedings. — Former Code 1933, § 105-801 (see now O.C.G.A. § 51-7-40) which provided for a statutory cause of action for malicious prosecution of a criminal case, was not all inclusive, and did not preclude a cause of action where lunacy proceedings were instituted maliciously, in view of former Code 1933, § 3-104 (see now O.C.G.A. § 9-2-3). Guth v. Walker, 92 Ga. App. 490, 88 S.E.2d 821, 1955 Ga. App. LEXIS 617 (1955).

Relief of surety. — To the extent to which Ga. L. 1943, pp. 282, 283 (O.C.G.A. §§ 17-6-31 and 17-6-71) fail to describe procedure by which surety may be relieved after final judgment, provisions of former Code 1933, § 3-105 (see now O.C.G.A. § 9-2-3) may be resorted to. Fields v. Arnall, 199 Ga. 491, 34 S.E.2d 692, 1945 Ga. LEXIS 418 (1945).

"Single wrong" of false imprisonment is not made plural by alleging that it was made up of constituent parts: trespass, assault, and kidnapping. Wilson v. Bonner, 166 Ga. App. 9, 303 S.E.2d 134, 1983 Ga. App. LEXIS 2054 (1983).

Modification of support order. — Fact that a procedure to permit the modification of a Uniform Reciprocal Enforcement of Support Act (URESA) (O.C.G.A. § 19-11-40 et seq.) support order may not be in place is a matter which addresses itself to the legislature, not the courts. State v. Garrish, 197 Ga. App. 816, 399 S.E.2d 572, 1990 Ga. App. LEXIS 1479 (1990).

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Actions, § 53 et seq.

C.J.S.

1A C.J.S., Actions, § 6 et seq.

ALR.

Rule of municipal immunity from liability for torts pertaining to governmental functions as affected by constitutional guaranty of remedy for all injuries and wrongs, 57 A.L.R. 419.

Right of resident alien who is subject of an enemy country to prosecute suit during war, 143 A.L.R. 1517.

Suits and remedies against alien enemies, 155 A.L.R. 1451; 156 A.L.R. 1448; 157 A.L.R. 1449.

Exhaustion of remedies within labor union as condition of resort to civil courts by expelled or suspended member, 87 A.L.R.2d 1099.

State lotteries: actions by ticketholders against state or contractor for state, 40 A.L.R.4th 662.

Private contests and lotteries: entrants' rights and remedies, 64 A.L.R.4th 1021.

9-2-4. Pursuit of consistent or inconsistent remedies.

A plaintiff may pursue any number of consistent or inconsistent remedies against the same person or different persons until he shall obtain a satisfaction from some of them.

History.

Civil Code 1895, § 4945; Civil Code 1910, § 5522; Code 1933, § 3-114; Ga. L. 1967, p. 226, § 45.

History of Section.

This Code section is derived from the decision in Equitable Life Ins. Co. v. May, 82 Ga. 646, 9 S.E. 597 (1889).

Law reviews.

For article discussing origin and validity of Georgia statute concerning election of remedies, see 14 Ga. L. Rev. 239 (1980).

For article, "Res Judicata and Collateral Estoppel: New Defenses in Construction Litigation?," see 21 Ga. St. B.J. 108 (1985).

For annual survey on commercial transportation, see 73 Mercer L. Rev. 47 (2021).

JUDICIAL DECISIONS

Constitutionality, see Douglas County v. Abercrombie, 226 Ga. 39, 172 S.E.2d 419, 1970 Ga. LEXIS 422 (1970).

Purpose of 1967 amendment. — This section is addressed to satisfaction of different claims and its legislative history would seem to indicate that it was amended in 1967 to accommodate the pursuit of inconsistent remedies envisioned in the Civil Practice Act of 1966. Liberty Nat'l Bank & Trust Co. v. Diamond, 231 Ga. 321, 201 S.E.2d 400, 1973 Ga. LEXIS 688 (1973).

Right of action. — Homeowners lacked standing to appeal consent orders entered by the director of the Environmental Protection Division of the Department of Natural Resources until the director sought to enforce them, but the homeowners were authorized to sue those directly responsible for polluting their property, irrespective of their right of access to the courts; hence, the underlying intent of O.C.G.A. § 12-2-2(c)(3)(B) was to preclude such attacks on the director's exercise of administrative authority to determine the scope of remedial measures set forth in consent orders issued under the Georgia Hazardous Site Response Act, O.C.G.A. § 12-8-90 et seq. Couch v. Parker, 280 Ga. 580, 630 S.E.2d 364, 2006 Ga. LEXIS 239 (2006).

Effect of § 9-2-5 on this section. — While former Code 1933, § 3-114 (see now O.C.G.A. § 9-2-4) provided a general remedy for a plaintiff to obtain satisfaction by using consistent or inconsistent remedies against one or more defendants until a judgment was satisfied, former Code 1933, §§ 3-601 and 3-605 (see now O.C.G.A. § 9-2-5) provided a defendant with a specific defense against a plaintiff who came within its parameters and will prevail over the general terms of former Code 1933, § 3-114, if all of the conditions thereof were satisfied. Cooper v. Public Fin. Corp., 146 Ga. App. 250, 246 S.E.2d 684, 1978 Ga. App. LEXIS 2296 (1978).

This section does not apply to petition for declaratory judgment. Kiker v. Hefner, 119 Ga. App. 629, 168 S.E.2d 637, 1969 Ga. App. LEXIS 1192 (1969) (see O.C.G.A. § 9-2-4).

Former requirement of consistency of remedies is no longer of force in this state. Cox v. Travelers Ins. Co., 228 Ga. 498, 186 S.E.2d 748, 1972 Ga. LEXIS 816 (1972).

Doctrine of election of remedies (set forth in this section prior to 1967 amendment) is procedural and remedial in nature, and as against contention that a litigant has chosen a prior inconsistent remedy, the law in effect at the time the order is entered up must be applied. Douglas County v. Abercrombie, 119 Ga. App. 727, 168 S.E.2d 870, 1969 Ga. App. LEXIS 1222 (1969).

Pursuit of remedy to satisfaction controlling. — Inconsistency in the remedies sought is not the determinative fac-

tor in whether or not the bringing of a prior suit bars institution of a later one; whether or not a remedy has been pursued to satisfaction controls. Adams v. Cox, 152 Ga. App. 376, 262 S.E.2d 634, 1979 Ga. App. LEXIS 2932 (1979).

Joint liability not prevented. — O.C.G.A. § 9-2-4 prevents double recovery, not joint liability. Olden Camera & Lens Co. v. White, 179 Ga. App. 728, 347 S.E.2d 696, 1986 Ga. App. LEXIS 2014 (1986); Green v. Thompson, 208 Ga. App. 609, 431 S.E.2d 390, 1993 Ga. App. LEXIS 543 (1993), cert. denied, No. S93C1296, 1993 Ga. LEXIS 860 (Ga. Sept. 20, 1993).

Unsatisfied judgment against joint and several obligor no bar. — Judgment against one of two joint and several obligors, which has never been satisfied, is no bar to a suit against the other. W.T. Rawleigh Co. v. Burkhalter, 59 Ga. App. 514, 1 S.E.2d 609, 1939 Ga. App. LEXIS 341 (1939).

Effect of default judgment. — Merely obtaining a default judgment against one party does not constitute an election between two defendants who the plaintiff alleges are jointly and severally liable to it. Spalding Ford Lincoln-Mercury, Inc. v. Turner Broadcasting Sys., 202 Ga. App. 505, 415 S.E.2d 26, 1992 Ga. App. LEXIS 37 (1992).

Judgment against principal as barring subsequent action against another. — When the judgment to which defendants claim a benefit under res judicata was rendered against their principal, that judgment represents a final adjudication of the principal's vicarious liability for such damage as plaintiff incurred. Since that judgment has been satisfied, plaintiff cannot thereafter set up the same cause of action against another whom the plaintiff had the election of suing in the first place. Nannis Terpening & Assocs. v. Mark Smith Constr. Co., 171 Ga. App. 111, 318 S.E.2d 89, 1984 Ga. App. LEXIS 2115 (1984).

Full satisfaction bars further recovery. — Settlement in which plaintiff, a lender, agrees to finance part of the settlement and files a satisfaction of judgment to that effect, serves as a bar to pursuit of further recovery from another defendant. Saunders, Stuckey & Mullis, Inc. v. Citizens Bank & Trust Co., 265 Ga. 453, 458 S.E.2d 337.

Superior court did not err in reversing the decision of the Georgia Department of Revenue that a corporate officer was liable for a restaurant's sales and use taxes pursuant to O.C.G.A. § 48-2-52 because the release of and refund payment to the majority owner of the restaurant operated as a release of the officer; under O.C.G.A. § 13-1-13, by voluntarily paying the owner a settlement amount with full awareness of any potential joint claim it had against the officer, the Department forfeited any right the Department had to recoup from the officer the payment made to the owner. Ga. Dep't of Revenue v. Moore, 317 Ga. App. 31, 730 S.E.2d 671, 2012 Ga. App. LEXIS 684 (2012).

Suit against wrong person for collection of excess in rents pursuant to the former federal Housing and Rent Act of 1947, and a judgment therein, would not preclude plaintiffs from seeking a similar judgment against the real owner of the property. Williams v. Higgason, 205 Ga. 349, 53 S.E.2d 473, 1949 Ga. LEXIS 358 (1949).

Complaint seeking injunctive relief against county corporation is not subject to dismissal because of pendency of mandamus action in another county against the corporation and its president. Tallant v. Executive Equities, Inc., 230 Ga. 172, 195 S.E.2d 904, 1973 Ga. LEXIS 847 (1973).

Action for divorce and child support not inconsistent with abandonment action. — Mere pendency of the former action for divorce wherein wife sought support for the child from husband does not preclude, as a matter of law, the subsequent prosecution of an abandonment action to adjudicate the question of defendant-third party's obligation for support of the same child. Foster v. State, 157 Ga. App. 554, 278 S.E.2d 136, 1981 Ga. App. LEXIS 1909 (1981).

Damages for violation of settlement agreement. — When a settlement agreement is incorporated into a final decree of divorce, a suit seeking damages for the violation of its terms need not be initiated solely upon the decree, but an action ex contractu may be maintained due to a

breach of the settlement agreement. Gray v. Higgins, 205 Ga. App. 52, 421 S.E.2d 341, 1992 Ga. App. LEXIS 1067 (1992), overruled in part, Walker v. Estate of Mays, 279 Ga. 652, 619 S.E.2d 679, 2005 Ga. LEXIS 519 (2005), overruled in part as stated in Stone v. Stone, 295 Ga. App. 783, 673 S.E.2d 283, 2009 Ga. App. LEXIS 132 (2009).

Actions against joint tortfeasors. — It is not an admission to allege in different actions against joint tort-feasors that each defendant's negligence was the proximate cause of the incident as there may be more than one proximate cause. Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 256 S.E.2d 916, 1979 Ga. App. LEXIS 2166 (1979).

Denial of motion to dismiss not error when different claims against various defendants. — Denial of a motion to dismiss is not error although the opposing party has already obtained a judgment against the other defendants in the case where the defendants are not joint defendants, the claims against the various defendants being based on different theories and not alleging any form of joint liability. Ale-8-One of Am., Inc. v. Graphicolor Servs., Inc., 166 Ga. App. 506, 305 S.E.2d 14, 1983 Ga. App. LEXIS 2224 (1983).

Plaintiff's right to pursue different remedies ends when the plaintiff obtains full satisfaction from one source. McLendon Bros. v. Finch, 2 Ga. App. 421, 58 S.E. 690, 1907 Ga. App. LEXIS 410 (1907).

Pursuit of contradictory action following satisfaction under first suit. — Once a plaintiff has obtained satisfaction from one party one cannot pursue another party for the same damages under another theory completely contradictory and inconsistent with the contentions made in the first suit. Kelly v. Chrysler Corp., 129 Ga. App. 447, 199 S.E.2d 856, 1973 Ga. App. LEXIS 1028, 1973 Ga. App. LEXIS 1684, 1973 Ga. App. LEXIS 1693 (1973).

After a suit has been prosecuted to judgment, or a satisfaction obtained, plaintiff cannot bring a second action disproving facts relied upon in establishing the first. Gilmore v. Fulton-DeKalb Hosp. Auth., 132 Ga. App. 879, 209 S.E.2d 676, 1974 Ga. App. LEXIS 1858 (1974).

Presumption of full satisfaction arises from settlement with joint tortfeasor, but such a presumption does not obtain when both the acts and their consequences are separable. Gilmore v. Fulton-DeKalb Hosp. Auth., 132 Ga. App. 879, 209 S.E.2d 676, 1974 Ga. App. LEXIS 1858 (1974).

When separate and concurring acts of negligence cause a single injury either or both may be pursued until a satisfaction, settlement, release, or accord and satisfaction is obtained from some, but this will end the right of action against all. Gilmore v. Fulton-DeKalb Hosp. Auth., 132 Ga. App. 879, 209 S.E.2d 676, 1974 Ga. App. LEXIS 1858 (1974).

Two recoveries from same defendant prohibited. — Although a plaintiff may pursue any number of consistent or inconsistent remedies against the same person until a plaintiff shall obtain a satisfaction, the plaintiff may not proceed with two lawsuits and recover twice from the same defendant merely by denominating one action a tort and the other a breach of contract. Bell v. Sigal, 129 Ga. App. 249, 199 S.E.2d 355, 1973 Ga. App. LEXIS 963 (1973).

Election between theories of recovery prior to judgment. — While claimant or counterclaimant is not required to make an election between inconsistent remedies prior to the verdict, a party must make an election prior to the formulation and entry of judgment as every judgment must be certain and definite as to the amount thereof. UIV Corp. v. Oswald, 139 Ga. App. 697, 229 S.E.2d 512, 1976 Ga. App. LEXIS 1955 (1976) (action seeking recovery on tort and contract grounds for repossession and sale of collateral).

Since an election between inconsistent remedies must be made at some point, it is better, at least in the case of a verdict in a single lawsuit for inconsistent items of recovery, to require the election to be made prior to judgment. UIV Corp. v. Oswald, 139 Ga. App. 697, 229 S.E.2d 512, 1976 Ga. App. LEXIS 1955 (1976).

Application of an economic loss analysis by the trial court was proper in an action by an insured mortgagee against homeowner's insurer for the face amount of a policy after a fire. Owens v.

Georgia Underwriting Ass'n, 223 Ga. App. 29, 476 S.E.2d 810.

Summary judgment as to warranty claim did not preclude tort claim. — Grant of summary judgment on a breach of warranty claim did not preclude party from pursuing at trial the alternative theory of negligent construction as this course of action arises in tort and exists independently of any claim for breach of contract. Fussell v. Carl E. Jones Dev. Co., 207 Ga. App. 521, 428 S.E.2d 426, 1993 Ga. App. LEXIS 240 (1993).

Arbitration proceedings. — For discussion on applicability of O.C.G.A. § 9-2-4 to arbitration proceedings, see French v. Jinright & Ryan, 735 F.2d 433, 1984 U.S. App. LEXIS 20974 (11th Cir. 1984).

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Actions, § 24 et seq. 25 Am. Jur. 2d, Election of Remedies, § 7 et seq.

C.J.S.

1 C.J.S., Actions, §§ 47, 56, 79. 28A C.J.S., Election of Remedies or Rights or Theories of Recovery, § 1 et seq.

ALR.

Election of remedies by owner against public authority or corporation having power of eminent domain which unauthorizedly enters land without instituting valid eminent domain proceedings, 101 A.L.R. 373.

Doctrine of election of remedies as applicable where remedies are pursued against different persons, 116 A.L.R. 601.

Effect of action as an election of remedy or choice of substantive rights in case of fraud in sale of property, 123 A.L.R. 378.

Application for, or receipt of, unemployment compensation benefits as affecting claim for workmen's compensation, 96 A.L.R.2d 941.

9-2-5. Prosecution of two simultaneous actions for same cause against same party prohibited; election; pendency of former action as defense; exception.

(a) No plaintiff may prosecute two actions in the courts at the same time for the same cause of action and against the same party. If two such actions are commenced simultaneously, the defendant may require the plaintiff to elect which he will prosecute. If two such actions are commenced at different times, the pendency of the former shall be a good defense to the latter.

(b) The rule requiring a plaintiff to elect shall not apply to a prior attachment against property where the defendant is subsequently served personally nor to an attachment obtained during the pendency of an action. However, the judgment in the case against the person shall set out the fact of its identity with the proceedings against the property.

History.

Orig. Code 1863, §§ 2835, 2836; Code 1868, §§ 2843, 2844; Code 1873, §§ 2894, 2895; Code 1882, §§ 2894, 2895; Civil Code 1895, §§ 3737, 3739; Civil Code 1910, §§ 4331, 4333; Code 1933, §§ 3-601, 3-605; Ga. L. 1982, p. 3, § 9.

Cross references.

Pendency of former action good cause for abatement of latter on same cause, § 9-2-44.

Law reviews.

For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982).

For article, "Defending the Lawsuit: A First-Round Checklist," see 22 Ga. St. B.J. 24 (1985).

JUDICIAL DECISIONS

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General Consideration

Consideration with O.C.G.A. § 9-2-44. — O.C.G.A. §§ 9-2-5 and 9-2-44 are closely related in effect and are to be considered and applied together. Huff v. Valentine, 217 Ga. App. 310, 457 S.E.2d 249, 1995 Ga. App. LEXIS 451 (1995).

Lack of jurisdiction. — Because a dispossessory court never ruled upon or resolved a landlord's claims for past due rent and other damages, and because the dispossessory court lacked jurisdiction over the defaulting tenants, who were served by "nail and mail" service under O.C.G.A. § 44-7-51(a), the landlord's claims were not barred by the doctrine of res judicata under O.C.G.A. § 9-12-40 or subject to a plea of abatement under O.C.G.A. §§ 9-2-5(a) and 9-2-44(a). Bhindi Bros. v. Patel, 275 Ga. App. 143, 619 S.E.2d 814, 2005 Ga. App. LEXIS 908 (2005), cert. denied, No. S06C0064, 2006 Ga. LEXIS 45 (Ga. Jan. 17, 2006).

Dismissal with prejudice. — While a trial court could dismiss a neighbor's third complaint pursuant to O.C.G.A. §§ 9-2-5(a) and 9-2-44(a), the court was not at liberty to do so with prejudice. McLeod v. Clements, 310 Ga. App. 235, 712 S.E.2d 627, 2011 Ga. App. LEXIS 538 (2011).

Counterclaim erroneously dismissed when separate and distinct parties. — In litigation between two physicians and various entities the physicians control, the trial court erred in dismissing the counterclaim because despite a confusing similarity between the names of the various medical entities at issue, both sides agreed that the entity functioning as the plaintiff in the first lawsuit and the entities functioning as the plaintiffs in the counterclaim in the second lawsuit were, in fact, separate and distinct. Oskouei v. Orthopaedic & Spine Surgery of Atlanta, LLC, 340 Ga. App. 67, 796 S.E.2d 299, 2017 Ga. App. LEXIS 7 (2017).

Pendency of Former Action

Legislative intent. — Legislative declaration in O.C.G.A. § 9-2-5 is totally consistent with prevailing jurisprudential philosophy that a party is not entitled to prosecute a suit for the same cause of action in different courts, or in the same tribunal, at the same time. Clark v. Weaver, 159 Ga. App. 594, 284 S.E.2d 95, 1981 Ga. App. LEXIS 2714 (1981).

Provisions of this section are mandatory and they are plain and unmistakable. Jones v. Rich's, Inc., 81 Ga. App. 841, 60 S.E.2d 402, 1950 Ga. App. LEXIS 1011 (1950).

Protections against vexatious suits. — This section was intended to protect a party against vexatious suits on the same cause of action. Wilson v. Atlanta, K. & N. Ry., 115 Ga. 171, 41 S.E. 699, 1902 Ga. LEXIS 340 (1902).

Splitting causes of action does not cause injustice. — Rule against splitting causes of action embodied in this section, is neither harsh or inflexible, and its proper administration need never cause injustice or deny the plaintiff any part of the fair and full determination of the plaintiff's right. Georgia Ry. & Power Co. v. Endsley, 167 Ga. 439, 145 S.E. 851, 1928 Ga. LEXIS 167 (1928).

O.C.G.A. § 9-2-5 prohibits plaintiff from prosecuting two actions for same cause and against the same party, and, if the actions are commenced at different times, the pendency of the former shall be a good defense to the latter. Griffin v. Griffin, 248 Ga. 743, 285 S.E.2d 710, 1982 Ga. LEXIS 672 (1982).

When a limited liability company brought a tort action against a county industrial development authority after filing an exception to a special master's award in a condemnation proceeding, the trial court properly dismissed the tort action under O.C.G.A. §§ 9-2-5(a) and 9-12-40. In both the condemnation action

and the tort action, the company sought a monetary award on the ground that the condemnation rendered its contract a nullity and that the condemnation action was brought in bad faith. Coastal Water & Sewerage Co. v. Effingham County Indus. Dev. Auth., 288 Ga. App. 422, 654 S.E.2d 236, 2007 Ga. App. LEXIS 1215 (2007).

O.C.G.A. § 9-2-5 provides mechanism by which one viable action is determined. Clark v. Weaver, 159 Ga. App. 594, 284 S.E.2d 95, 1981 Ga. App. LEXIS 2714 (1981).

Applicability. — O.C.G.A. § 9-2-5 is part of the Civil Practice Act, O.C.G.A. T. 9, C. 11, and does not apply in criminal proceedings. Cox v. State, 203 Ga. App. 869, 418 S.E.2d 133, 1992 Ga. App. LEXIS 560 (1992).

Appellate court properly dismissed a second fraud and breach of contract action filed in a separate county, which was identical to one previously filed by the same plaintiff against the same defendants, under the prior pending litigation doctrine pursuant to O.C.G.A. § 9-2-5, and not under O.C.G.A. § 9-11-12(b)(6), which acted as a defense to the later filed action. Kirkland v. Tamplin, 283 Ga. App. 596, 642 S.E.2d 125, 2007 Ga. App. LEXIS 73 (2007), cert. denied, No. S07C0915, 2007 Ga. LEXIS 508 (Ga. June 25, 2007), cert. denied, 552 U.S. 1010, 128 S. Ct. 545, 169 L. Ed. 2d 373, 2007 U.S. LEXIS 12023 (2007).

First suit absolute defense to second suit. — If two suits are filed at different times each for the same cause and against the same party, the pendency of the first shall be a good defense to the latter. Drohan v. Carriage Carpet Mills, 175 Ga. App. 717, 334 S.E.2d 219, 1985 Ga. App. LEXIS 2148 (1985).

Plaintiffs' suit against three corporations was barred by O.C.G.A. §§ 9-2-5(a) and 9-2-44(a) as a prior suit involving the same parties and claims had been dismissed and an appeal of the dismissal was pending. That there were minor differences between the two complaints and that plaintiffs added new defendants was immaterial. Sadi Holdings, LLC v. Lib Props., Ltd, 293 Ga. App. 23, 666 S.E.2d 446, 2008 Ga. App. LEXIS 895 (2008).

"Renewal suit" filed by a limited liability company (LLC) and the company's manager against three corporations was properly dismissed under O.C.G.A. §§ 9-2-5(a) and 9-2-44(a) as the LLC and manager's prior and nearly identical suit against the corporation had been dismissed and an appeal was pending. However, the second dismissal should have been without prejudice under O.C.G.A. § 9-11-41(b) as the corporation's plea in abatement did not challenge the merits of that suit. Sadi Holdings, LLC v. Lib Props., Ltd, 293 Ga. App. 23, 666 S.E.2d 446, 2008 Ga. App. LEXIS 895 (2008).

Renewal action not barred although counterclaim from prior action still pending. — After a car buyer dismissed the buyer's fraud and breach of contract action against the seller while a counterclaim was pending and then attempted to refile the buyer's claims under the renewal statute, O.C.G.A. § 9-2-61, the trial court erred in dismissing the renewed action under O.C.G.A. §§ 9-2-5(a) and 9-2-44(a). Code Section 9-2-5(a) precluded simultaneous prosecution of the same claims, and the buyer was not prosecuting the same claims simultaneously, given that the buyer dismissed the buyer's claims in the first case. Brock v. C & M Motors, Inc., 337 Ga. App. 288, 787 S.E.2d 259, 2016 Ga. App. LEXIS 312 (2016).

Remedy for violation of subsection (a) of O.C.G.A. § 9-2-5 is in the nature of a shield by which an aggrieved defendant may protect oneself from defending duplicitous lawsuits. There is no additional remedy in the nature of a sword by which a defendant may prosecute an action for damages against a purported violator of the statute. Hose v. Jason Property Mgt. Co., 178 Ga. App. 661, 344 S.E.2d 483, 1986 Ga. App. LEXIS 1709 (1986).

When actions are commenced at different times, plaintiff has no election, and must proceed with the initially filed action, and such former action shall be a good defense to the latter. If, however, the actions are filed simultaneously none of the actions are either "former" or "latter," and the plaintiff must select the case the plaintiff will pursue and the others must be dismissed. O.C.G.A. § 9-2-5 allows the plaintiff to elect the case which the plaintiff will prosecute and not the one which the plaintiff will first prosecute.

Pendency of Former Action (Cont'd)

Clark v. Weaver, 159 Ga. App. 594, 284 S.E.2d 95, 1981 Ga. App. LEXIS 2714 (1981).

When actions in two counties involve the same plaintiffs, the same defendants, and the same cause of action, the fact that the Cobb County actions were brought separately by these same plaintiffs and were then combined in one action in Colquitt County is a difference without a distinction. Creel v. Welker & Assocs., 174 Ga. App. 877, 332 S.E.2d 5, 1985 Ga. App. LEXIS 1986 (1985).

Controlling statute over § 9-2-4. — Former Code 1933, §§ 3-601 and 3-605 (see now O.C.G.A. § 9-2-5) provided a defendant with a specific defense against a plaintiff who came within its parameters and would prevail over the general terms of former Code 1933, § 3-114 (see now O.C.G.A. § 9-2-4) if all of the conditions thereof were satisfied. Cooper v. Public Fin. Corp., 146 Ga. App. 250, 246 S.E.2d 684, 1978 Ga. App. LEXIS 2296 (1978).

Applicability to tort actions. — O.C.G.A. § 9-2-5 is made applicable to tort actions by former Civil Code 1895, § 3903 (see now O.C.G.A. § 51-11-5). Wilson v. Atlanta, K. & N. Ry., 115 Ga. 171, 41 S.E. 699, 1902 Ga. LEXIS 340 (1902).

Application to federal court. — This section does not apply to a suit pending in federal court, but when the federal court has acquired possession of the res or taken steps equivalent to the exercise of dominion over it, that court will acquire exclusive jurisdiction. Inter-Southern Life Ins. Co. v. McQuarie, 148 Ga. 233, 96 S.E. 424, 1918 Ga. LEXIS 273 (1918).

Pendency of a prior action in the federal court brought by a defendant in a negligence action in the state court did not bar the defendant's third-party complaint in the state case, even though it involved the same parties and same cause of action. Huff v. Valentine, 217 Ga. App. 310, 457 S.E.2d 249, 1995 Ga. App. LEXIS 451 (1995).

Plaintiff is not at liberty to split up a plaintiff's demand and prosecute it piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fails. Cooper v. Public Fin. Corp., 146 Ga. App. 250, 246 S.E.2d 684, 1978 Ga. App. LEXIS 2296 (1978).

Pendency of one proceeding is good defense to second proceeding. Terrell v. Griffith, 129 Ga. App. 675, 200 S.E.2d 485, 1973 Ga. App. LEXIS 1106 (1973).

Pendency of a former action is a good defense to a second action brought by the same plaintiff against the same defendant and involving the same cause of action as in the former suit, and a motion for summary judgment will lie to the second suit since it cannot be tried as long as the first suit is pending. Cherry v. Gilbert, 124 Ga. App. 847, 186 S.E.2d 319, 1971 Ga. App. LEXIS 1134 (1971).

From a single wrong only one cause of action can arise. Ellis v. Kite, 107 Ga. App. 237, 129 S.E.2d 547, 1963 Ga. App. LEXIS 791 (1963).

If there is substantial identity of wrong, which necessarily includes identity of the right violated, there is substantial identity of cause of action. Ellis v. Kite, 107 Ga. App. 237, 129 S.E.2d 547, 1963 Ga. App. LEXIS 791 (1963).

No plaintiff is entitled to prosecute two actions in the courts of this state at the same time, for the same cause, and against the same party; in such a case the defendant may require the plaintiff to elect which the plaintiff will prosecute, if commenced simultaneously, and the pendency of the former is a good defense to the latter, if commenced at different times. Baxter v. Crandall, 45 Ga. App. 125, 163 S.E. 526, 1932 Ga. App. LEXIS 198 (1932).

Plaintiff cannot pursue at the same time against the same defendant a cause of action based upon the same subject matter in two different courts. Jones v. Rich's, Inc., 81 Ga. App. 841, 60 S.E.2d 402, 1950 Ga. App. LEXIS 1011 (1950).

Dismissal of action. — Claims that were subject to dismissal because the claims were duplicative of prior pending actions and subject to dismissal under O.C.G.A. § 9-2-5 were not void; thus, voluntary dismissal without prejudice of such claims was a dismissal within the meaning of O.C.G.A. § 9-11-41. Zohoury v.

Zohouri, 218 Ga. App. 748, 463 S.E.2d 141, 1995 Ga. App. LEXIS 867 (1995), cert. denied, No. S96C0278, 1996 Ga. LEXIS 285 (Ga. Jan. 26, 1996).

Trial court did not err in dismissing an officer's claims against entities pursuant to the "prior action pending doctrine," O.C.G.A. § 9-2-5(a), because the officer previously filed a similar action in the same court that was transferred to another county; the claims in the two actions were similar and the same facts were pled in both actions. Odion v. Varon, 312 Ga. App. 242, 718 S.E.2d 23, 2011 Ga. App. LEXIS 851 (2011), cert. denied, No. S12C0399, 2012 Ga. LEXIS 561 (Ga. May 29, 2012).

If the first suit is a wholly abortive effort, which the defendant is not legally called upon to resist, the pendency of the first suit shall not abate second action. Jones v. Rich's, Inc., 81 Ga. App. 841, 60 S.E.2d 402, 1950 Ga. App. LEXIS 1011 (1950).

Common issues but possibility of different ones being raised. — Even though there was a common issue of liability in each of two actions brought by a party, where additional liability issues could be raised in one action, mandatory abatement or dismissal was not authorized. International Telecommunications Exch. Corp. v. MCI Telecommunications Corp., 214 Ga. App. 416, 448 S.E.2d 71, 1994 Ga. App. LEXIS 920 (1994).

Error to dismiss complaint when defendant not party to pending action. — As O.C.G.A. § 9-2-5 requires an identity of parties before the defense of prior pending action is viable, it was error for the trial court to apply the defense and dismiss the complaint since the defendant was not a party to the pending action when the suit was filed. P.H.L. Dev. Corp. v. Smith, 174 Ga. App. 328, 329 S.E.2d 545, 1985 Ga. App. LEXIS 1806 (1985); McLain Bldg. Materials, Inc. v. Hicks, 205 Ga. App. 767, 423 S.E.2d 681, 1992 Ga. App. LEXIS 1390 (1992).

Dismissal of action not justified. — Dismissal of an action by foreign corporations against a manufacturer on the basis of a prior pending action in the courts of another state was inappropriate in consideration of the provisions of O.C.G.A. §§ 9-2-5, 9-2-44, and 9-2-45. Flagg Energy Dev. Corp. v. GMC, 223 Ga. App. 259, 477 S.E.2d 402.

Status of second action. — Second action is not necessarily void ab initio where there is a prior pending action. Parsons, Brinckerhoff, Quade & Douglas, Inc. v. Johnson, 161 Ga. App. 634, 288 S.E.2d 320, 1982 Ga. App. LEXIS 1964 (1982).

Plea of pendency. — Since five years have not yet passed since last order was filed in prior action, the prior action is still pending when a plea of pendency is filed. That being so, the pleader is entitled to a judgment in the pleader's favor because the key event is not the entry of an order in the second action but the filing of the defense of pendency. Hammond v. State, 168 Ga. App. 508, 308 S.E.2d 701, 1983 Ga. App. LEXIS 2831 (1983).

Copy of pleading proof of former action. — Certified copy of the pleading in a former case offered into evidence at a hearing on a motion for summary judgment is sufficient proof of the pendency of the former action. Grant v. Wilkinson, 167 Ga. App. 83, 306 S.E.2d 63, 1983 Ga. App. LEXIS 2400 (1983).

Dismissal of former action for lack of jurisdiction. — Although this section prohibits a plaintiff from prosecuting two actions for the same cause and against the same party, when the former suit is dismissed for lack of jurisdiction, plaintiff is not prohibited from commencing another suit for the same cause against the same party in a court having jurisdiction to grant the relief sought. Harrison v. Speidel, 244 Ga. 643, 261 S.E.2d 577, 1979 Ga. LEXIS 1359 (1979).

Determination of jurisdiction. — Until the question of jurisdiction is determined by the court having power to pass thereon, no other court should interfere. Wilson v. Atlanta, K. & N. Ry., 115 Ga. 171, 41 S.E. 699, 1902 Ga. LEXIS 340 (1902).

No action "pending" without service. — Mere filing of petition, without proper service, will not constitute a pending suit. McClendon & Co. v. Hermando Phosphate Co., 100 Ga. 219, 28 S.E. 152, 1897 Ga. LEXIS 28 (1897); Kirby v. Johnson County Sav. Bank, 12 Ga. App. 157, 76 S.E. 996, 1913 Ga. App. LEXIS 477 (1913).

Pendency of Former Action (Cont'd)

Filing of petition without service does not operate to commence a suit and no suit is pending until the suit has been served. Cherry v. Gilbert, 124 Ga. App. 847, 186 S.E.2d 319, 1971 Ga. App. LEXIS 1134 (1971).

When a defendant files a counterclaim after the plaintiff voluntarily dismisses an action in which lawful service was never had, the counterclaim does not keep the first action pending so as to authorize abatement of another action under this section. Swanson v. Holloway, 128 Ga. App. 453, 197 S.E.2d 150, 1973 Ga. App. LEXIS 1509 (1973).

Because the Department of Transportation failed to show that service of process had been effectuated in an alleged prior pending personal injury suit filed in Brantley County, based on the same accident a driver sued upon in Wayne County, the Brantley County suit was not "pending," as that term was defined in O.C.G.A. § 9-2-5(a). Thus, the trial court erred in dismissing the driver's Wayne County suit. Watson v. Ga. DOT, 288 Ga. App. 40, 653 S.E.2d 763, 2007 Ga. App. LEXIS 1134 (2007).

Return of sheriff reciting service in another county was prima facie conclusive of the facts therein recited, and pendency of undetermined and undisposed of traverse did not operate to destroy the status of the action in the other county as a pending suit. Baxter v. Crandall, 45 Ga. App. 125, 163 S.E. 526, 1932 Ga. App. LEXIS 198 (1932).

All the parties must be the same in order for the pendency of the first suit to abate the second. Haisten v. Tanner-Brice Co., 211 Ga. 821, 89 S.E.2d 172, 1955 Ga. LEXIS 478 (1955).

Identity of parties must be same. — Parties in mandamus proceeding to compel trustees to pay a retirement and in certiorari proceeding to review finding of trustees are not the same. Aldredge v. Rosser, 210 Ga. 28, 77 S.E.2d 515, 1953 Ga. LEXIS 466 (1953).

There is no defense under this section when the plaintiffs in the first action are in nowise involved in the second, even though plaintiffs in the later action were in actuality plaintiffs in the first as intervenors. Haisten v. Tanner-Brice Co., 211 Ga. 821, 89 S.E.2d 172, 1955 Ga. LEXIS 478 (1955).

O.C.G.A. § 9-2-5 did not bar plaintiff's action against her former husband's corporation for damages to a warehouse because of the inclusion of a similar claim against the former husband in a contempt action. Miller v. Steelmaster Material Handling Corp., 223 Ga. App. 532, 478 S.E.2d 601.

Parties must occupy same status. — This section requires that the suits must be between the same parties based on the same cause of action, and not only must the parties be the same, but also they must occupy the same status in both suits. Tinsley v. Beeler, 134 Ga. App. 514, 215 S.E.2d 280, 1975 Ga. App. LEXIS 2060 (1975).

In order for O.C.G.A. § 9-2-5 to be applicable, the parties must occupy the same status in both suits. Bedingfield v. Bedingfield, 248 Ga. 91, 281 S.E.2d 554, 1981 Ga. LEXIS 917 (1981).

Dismissal of one party from an action based on a prior pending suit was not erroneous simply because all other parties to the two suits were not identical and because a party was a defendant in the first action and plaintiff in the second; the same party was plaintiff with respect to its counterclaim in the first action as well as its claim in the second action and, thus, the required identity of status was present. McLain Bldg. Materials, Inc. v. Hicks, 205 Ga. App. 767, 423 S.E.2d 681, 1992 Ga. App. LEXIS 1390 (1992).

Effect of joinder or substitution. — Trial court should have determined whether party could have been added as a party plaintiff after joinder or substitution was sought to 1995 suit; therefore, if trial court allowed addition of party in 1995 action, the party's 1997 action should have been dismissed as identical. Tri-County Inv. Group v. Southern States, Inc., 231 Ga. App. 632, 500 S.E.2d 22, 1998 Ga. App. LEXIS 416 (1998).

Dispossessory actions by landlord. — Dispossessory action filed by a landlord against a tenant which sought possession of the premises and payment of past due rent for April 1984 did not preclude a

second action seeking possession and payment of past due rent for May 1984; clearly, the two proceedings were not the same cause of action. Hose v. Jason Property Mgt. Co., 178 Ga. App. 661, 344 S.E.2d 483, 1986 Ga. App. LEXIS 1709 (1986).

Attack based on simultaneous pleadings. — Because an attack based on simultaneous pleadings does not go to the merits of the underlying claim, it is more appropriately asserted by a motion to dismiss than a motion for summary judgment. Liner v. North, 184 Ga. App. 74, 360 S.E.2d 637, 1987 Ga. App. LEXIS 2141 (1987).

Addition of totally new parties by amendment does not relate back to the original suit for purposes of determining whether a prior pending suit exists. A.H. Robins Co. v. Sullivan, 136 Ga. App. 533, 221 S.E.2d 697, 1975 Ga. App. LEXIS 1408 (1975).

Subsequent voluntary dismissal of the first suit does not preserve the second suit insofar as this section is concerned. A.H. Robins Co. v. Sullivan, 136 Ga. App. 533, 221 S.E.2d 697, 1975 Ga. App. LEXIS 1408 (1975).

Under this section, if two suits are filed at different times each for the same cause and against the same party, the pendency of the first shall be a good defense to the latter; the effect of the defense cannot be avoided even by a dismissal of the first suit. Steele v. Steele, 243 Ga. 522, 255 S.E.2d 43, 1979 Ga. LEXIS 973 (1979); Astin v. Callahan, 222 Ga. App. 226, 474 S.E.2d 81.

After pleading, plaintiff cannot elect which suit to pursue. — Under this section one may not elect to dismiss a first suit where two suits based on the same cause of action were filed at separate times, as once a plea raising the issue of pendency of another suit is filed it is too late for plaintiff to elect which proceeding the plaintiff chooses. Terrell v. Griffith, 129 Ga. App. 675, 200 S.E.2d 485, 1973 Ga. App. LEXIS 1106 (1973).

Effect of the plea or defense of a pending former suit cannot be avoided even by a dismissal of the first suit. McPeake v. Colley, 116 Ga. App. 320, 157 S.E.2d 562, 1967 Ga. App. LEXIS 798 (1967), overruled, Dawson v. McCart, 169 Ga. App. 434, 313 S.E.2d 135, 1984 Ga. App. LEXIS 1581 (1984).

Same defendant and same cause of action. — If pending a suit another be brought against the same defendant for the same cause of action, the pendency of the first suit may be pleaded in abatement of the second, and the plaintiff cannot defeat the plea under this section by dismissing the suit first brought. Singer v. Scott, 44 Ga. 659, 1872 Ga. LEXIS 402 (1872).

Dismissal of cross action filed in first suit would not avoid plea in abatement filed to second suit in another court. Jones v. Rich's, Inc., 81 Ga. App. 841, 60 S.E.2d 402, 1950 Ga. App. LEXIS 1011 (1950); Minniefield v. Sylvester, 193 Ga. App. 484, 388 S.E.2d 526, 1989 Ga. App. LEXIS 1522 (1989).

Shareholder's action to inspect corporate records brought in Cobb County was not barred by a prior action brought by the shareholder in Fulton County because the parties were not identical and the causes of action were not the same. The Cobb County suit sought only access to corporate records and attorney fees, while the Fulton County suit sought damages for breach of fiduciary duties, punitive damages, attorney fees, and the forced repurchase of the shareholder's shares. Advanced Automation, Inc. v. Fitzgerald, 312 Ga. App. 406, 718 S.E.2d 607, 2011 Ga. App. LEXIS 968 (2011).

Pendency of the related actions was good cause for abatement of the instant case because the related actions and the instant case both involved the landowner's alleged rights to title and possession of the same land, the landowner properly asserted the landowner's claims of wrongful foreclosure in the prior pending related actions, and a decision in the landowner's favor on the landowner's wrongful foreclosure claims in the related actions could estop the present dispossessory proceeding. Premium Funding Solutions, LLC v. Metro Atlanta Task Force for the Homeless, Inc., 333 Ga. App. 718, 776 S.E.2d 504, 2015 Ga. App. LEXIS 507 (2015).

Trial court erred by finding that two pending actions brought by a hospital against the Department of Community

Pendency of Former Action (Cont'd)

Health and a competing hospital involved the same cause of action under the prior pending action doctrine, O.C.G.A. §§ 9-2-5(a) and 9-2-44(a); although both cases relied on one similar argument, the hospital's petition for judicial review of the final agency decision raised additional issues that could not have been brought in the hospital's earlier declaratory judgment action. Doctors Hosp. of Augusta, LLC v. Dep't of Cmty. Health, 344 Ga. App. 583, 811 S.E.2d 64, 2018 Ga. App. LEXIS 69 (2018).

Motion for summary judgment on the ground of pendency. — Motion for summary judgment will lie on the ground of the pendency of a former original action, in a second action brought by the same plaintiff against the same defendant and involving the same cause of action as in the former action. Reeves Transp. Co. v. Gamble, 126 Ga. App. 165, 190 S.E.2d 98, 1972 Ga. App. LEXIS 1085 (1972); Stagl v. Assurance Co. of Am., 245 Ga. App. 8, 539 S.E.2d 173, 2000 Ga. App. LEXIS 779 (2000), cert. denied, No. S00C1873, 2000 Ga. LEXIS 921 (Ga. Nov. 30, 2000).

Motion for summary judgment will lie on the ground of the pendency of substantially the same cross-claim filed against the party in a former original action. Reeves Transp. Co. v. Gamble, 126 Ga. App. 165, 190 S.E.2d 98, 1972 Ga. App. LEXIS 1085 (1972).

Action to collect on note and foreclosure on personal property securing payment of the same note are different causes of action, and pendency of the former does not serve to abate the latter. Candler I-20 Properties v. Inn Keepers Supply Co., 137 Ga. App. 94, 222 S.E.2d 881, 1975 Ga. App. LEXIS 1211 (1975).

Prior pending wrongful foreclosure suit did not require dismissal of condemnation proceeding. — Prior pending wrongful foreclosure action did not require the abatement and dismissal of a bank's application for confirmation under O.C.G.A. § 44-14-161 because the confirmation proceeding did not involve the same cause of action as the wrongful foreclosure suit, but was instead a special statutory proceeding and not a complaint which initiated a civil action or suit. BBC Land & Dev., Inc. v. Bank of N. Ga., 294 Ga. App. 759, 670 S.E.2d 210, 2008 Ga. App. LEXIS 1304 (2008).

Condemnation proceeding distinct from inverse condemnation action. — Pendency of the county's condemnation proceeding provided no basis for dismissal of the property owner's inverse condemnation action because a claim for condemnation was distinct from a claim for inverse condemnation and the damages recoverable by a property owner for each cause of action was different; thus, the two cases were not for the same cause of action. Morgan County v. Gay, 352 Ga. App. 555, 834 S.E.2d 576, 2019 Ga. App. LEXIS 531 (2019), cert. denied, No. S20C0495, 2020 Ga. LEXIS 390 (Ga. May 4, 2020), cert. denied, No. S20C0331, 2020 Ga. LEXIS 380 (Ga. May 4, 2020).

Effect of pending mandamus action. — Complaint seeking injunctive relief against county corporation is not subject to dismissal because of the pendency of a mandamus action in another county against the corporation and its president. Tallant v. Executive Equities, Inc., 230 Ga. 172, 195 S.E.2d 904, 1973 Ga. LEXIS 847 (1973).

Both garnishment and contempt actions may be pursued simultaneously for the collection or satisfaction of the payments owed under a divorce judgment. Herring v. Herring, 138 Ga. App. 145, 225 S.E.2d 697, 1976 Ga. App. LEXIS 2086 (1976).

Suing on a note will not bar ejectment action on a deed given to secure the note. Dykes v. McVay, 67 Ga. 502, 1881 Ga. LEXIS 212 (1881).

Abatement of action based on subject of compulsory counterclaim. — Subsequent action by a parent for wrongful death of a child is abated by pending original action against the parent for damages arising from the same automobile accident as a wrongful death claim was a compulsory counterclaim in the original action. Harbin Lumber Co. v. Fowler, 137 Ga. App. 90, 222 S.E.2d 878, 1975 Ga. App. LEXIS 1210 (1975).

Dismissal of counterclaim in second action erroneously denied. — In a personal injury accident between two

drivers, the trial court erroneously denied the first driver's motion to dismiss a counterclaim asserted by the second driver because the second driver had a prior pending action against the first driver in another county, and the parties' status in both actions was identical. Moreover, given the first driver's assurances that the instant suit would be dismissed in favor of defending the second driver's claims in the prior pending action, the denial of the first driver's motion to dismiss the second driver's counterclaim was inconsistent with the purpose of O.C.G.A. § 9-2-5. Jenkins v. Crea, 289 Ga. App. 174, 656 S.E.2d 849, 2008 Ga. App. LEXIS 35 (2008).

Judgment granted upon failure to raise defense. — There was no merit in tenants' contention that despite having failed to raise the pendency of their landlord's prior dispossessory action as a defense to a subsequent dispossessory action, the subsequent action should nevertheless be barred. It was incumbent upon the tenants to answer and raise whatever defenses the tenants thought applicable. No answer having been filed, the trial court properly granted judgment by default. Dickens v. First Capital Income Properties, Ltd., 187 Ga. App. 607, 371 S.E.2d 130, 1988 Ga. App. LEXIS 840 (1988).

Action not barred because of insurance payments. — Plaintiff was not barred from prosecuting a loss of consortium action although the plaintiff had received and accepted payment from the defendant's insurance company for the same automobile collision because the payment previously received was not as a result of a lawsuit, but was received prior to the filing of any complaint. Therefore, it could not be said as a matter of law that the plaintiff impermissibly split the plaintiff's cause of action. Hayes v. McFarlane, 187 Ga. App. 90, 369 S.E.2d 286, 1988 Ga. App. LEXIS 579 (1988).

Action barred. — After a former employer asserted claims identical to ones that were compulsory counterclaims in earlier suits, the trial court erred in denying a plea in abatement to all but one of the former employees pursuant to O.C.G.A. §§ 9-2-5 and 9-2-44; the trial court did not abuse the court's O.C.G.A. § 9-5-8 discretion in staying two prior cases pursuant to O.C.G.A. §§ 9-5-1 and 9-5-3. Smith v. Tronitec, Inc., 277 Ga. 210, 586 S.E.2d 661, 2003 Ga. LEXIS 790 (2003).

Bank sued the bank's customer to recover for an overdraft; before filing the customer's counterclaim, the customer sued the bank in another county. As the customer raised the same claims in the customer's complaint and counterclaim, and as there was a logical relationship between the parties' claims, the customer's counterclaim was compulsory; therefore, the customer's suit against the bank was barred by O.C.G.A. § 9-2-5(a). Steve A. Martin Agency, Inc. v. PlantersFIRST Corp., 297 Ga. App. 780, 678 S.E.2d 186, 2009 Ga. App. LEXIS 540 (2009).

As a bank filed suit against the bank's customer before the latter filed suit against the former, and both suits involved the same cause of action, the customer's suit was properly dismissed under O.C.G.A. § 9-2-5(a). Though the bank did not serve the customer until the customer's suit was filed, the service on the customer related back to the date of filing, which established the date the bank's suit was commenced. Steve A. Martin Agency, Inc. v. PlantersFIRST Corp., 297 Ga. App. 780, 678 S.E.2d 186, 2009 Ga. App. LEXIS 540 (2009).

Attachments

Separate remedies. — Common-law action and attachment proceedings are considered by the law as separate and distinct remedies which a party may pursue concurrently and the satisfaction of one satisfies the other. Sheehan v. Ruben, 83 Ga. App. 336, 63 S.E.2d 605, 1951 Ga. App. LEXIS 864 (1951).

One may pursue a common-law action and a proceeding in attachment for the same debt, at the same time, against the same party. Sheehan v. Ruben, 83 Ga. App. 336, 63 S.E.2d 605, 1951 Ga. App. LEXIS 864 (1951).

Action in this state and attachment in another. — Under this section, an action in this state against the debtor and attachment in another state against the debtor's property may proceed at the same time for the same debt. Lightfoot v. Plant-

Attachments (Cont'd)

ers' Banking Co., 58 Ga. 136, 1877 Ga. LEXIS 29 (1877).

Judgment to credit defendant with attachment sale proceeds. — When holder of title-retention note given for purchase money of machinery files suit on note, defendant purchaser cannot set up in bar or in abatement that plaintiff had previously in same court instituted a purchase-money attachment; if judgment is rendered for plaintiff, court should mold the court's judgment to credit defendant with any sums realized from the sale of the property under attachment proceedings. Hayes v. International Harvester Co. of Am., 52 Ga. App. 328, 183 S.E. 197, 1935 Ga. App. LEXIS 160 (1935).

Attachments under former Civil Code 1910, § 5071 (see now O.C.G.A. § 18-3-4) were expressly excepted from the provisions of subsection (a) of former Code 1933, §§ 3-601 and 3-605 (see now O.C.G.A. § 9-2-5) by subsection (b). Johnson & Son v. Friedman-Shelby Shoe Co., 15 Ga. App. 561, 83 S.E. 969, 1914 Ga. App. LEXIS 329 (1914).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

9 Am. Jur. Pleading and Practice Forms, Election of Remedies, § 1.

17 Am. Jur. Pleading and Practice Forms, Lis Pendens, § 3.

C.J.S.

1 C.J.S., Abatement and Revival, § 17 et seq. 1A C.J.S., Actions, § 20.

ALR.

Lis pendens: protection during time allowed for appeal, writ of error, or motion for new trial, 10 A.L.R. 415.

Plea of pendency of former action as affecting right of pleader to avail himself of objections to the former action, 32 A.L.R. 1339.

Action or suit as abating mandamus proceeding or vice versa, 37 A.L.R. 1432.

Abatement by pendency of another action as affected by addition or omission of parties defendant in second suit, 44 A.L.R. 806.

Rule against splitting cause of action as applicable to acceptance of payment of less than all claims or items of claims, 87 A.L.R. 781.

Election of remedies by owner against public authority or corporation having power of eminent domain which unauthorizedly enters land without instituting valid eminent domain proceedings, 101 A.L.R. 373.

Doctrine of election of remedies as applicable where remedies are pursued against different persons, 116 A.L.R. 601.

Pendency of suit for cancellation, reformation, or rescission of a contract as abating subsequent action to enforce it or to recover damages for its breach, and vice versa, 118 A.L.R. 1240.

Stage of action at which effective notice of lis pendens may be filed, 130 A.L.R. 943.

Right of employee of public contractor to maintain action against latter based upon statutory obligation as to rate of wages or upon provisions in that regard in the contract between contractor and the public, 144 A.L.R. 1035.

Bank depositor's act in seeking restitution from third person to whom, or for benefit of whom, the bank has paid out the deposit, as election of remedy precluding action against bank, 144 A.L.R. 1440.

Conclusive election of remedies as predicated on commencement of action, or its prosecution short of judgment on the merits, 6 A.L.R.2d 10.

Duration of operation of lis pendens as dependent upon diligent prosecution of suit, 8 A.L.R.2d 986.

Pendency of prior action for absolute or limited divorce between same spouses in same jurisdiction as precluding subsequent action of like nature, 31 A.L.R.2d 442.

Abatement on ground of prior pending action in same jurisdiction as affected by loss by plaintiff in second action of advantage gained therein by attachment, garnishment, or like process, 40 A.L.R.2d 1111.

Right to secure new or successive notice of lis pendens in same or new action after loss or cancellation of original notice, 52 A.L.R.2d 1308.

Pleading of election of remedies, 99 A.L.R.2d 1315.

Appealability of order staying, or refusing to stay, action because of pendency of another action, 18 A.L.R.3d 400.

Judgment in death action as precluding subsequent personal injury action by potential beneficiary of death action, or vice versa, 94 A.L.R.3d 676.

9-2-6. Demand prior to action not necessary.

No demand shall be necessary before the commencement of an action, except in such cases as the law or the contract prescribes.

History.

Orig. Code 1863, § 3179; Code 1868, § 3190; Code 1873, § 3255; Code 1882, § 3255; Civil Code 1895, § 4935; Civil Code 1910, § 5512; Code 1933, § 3-106.

JUDICIAL DECISIONS

When demand is condition precedent. — As a general rule, a demand is a condition precedent to suit when the demand constitutes an essential element of the cause of action, as when there is no precedent debt or duty and the defendant cannot properly be said to be in default until a demand has been made; in such a case, plaintiff cannot wait and fix the liability merely by filing suit. Cheeves v. Ayers, 43 Ga. App. 454, 159 S.E. 299, 1931 Ga. App. LEXIS 421 (1931).

Filing of suit was not a sufficient demand or call. Cheeves v. Ayers, 43 Ga. App. 454, 159 S.E. 299, 1931 Ga. App. LEXIS 421 (1931).

In action for money had and received it is not necessary to allege a demand for and refusal of payment. Morgan v. Hutcheson, 61 Ga. App. 763, 7 S.E.2d 691, 1940 Ga. App. LEXIS 261 (1940).

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Actions, § 58.

C.J.S.

1A C.J.S., Actions, § 66.

ALR.

Commencement of action as compliance with or substitute for statutory notice as condition of action for injury to person or property, 101 A.L.R. 726.

Effect of failure before commencing action to obtain leave under statute providing that no action shall be brought upon a judgment without leave of court or judge, 160 A.L.R. 605.

9-2-7. Implied promise to pay for services or property.

Ordinarily, when one renders service or transfers property which is valuable to another, which the latter accepts, a promise is implied to pay the reasonable value thereof. However, this presumption does not usually arise in cases between very near relatives.

History.

Civil Code 1895, § 4936; Civil Code 1910, § 5513; Code 1933, § 3-107.

History of Section.

This Code section is derived from the decision in Hudson v. Hudson, 90 Ga. 581, 16 S. E. 349 (1892).

Law reviews.

For comment on Cooper v. Cooper, 59

Ga. App. 832, 2 S.E.2d 145 (1939), see 2 Ga. B.J. 41 (1939).

For comment advocating liberal construction of indefinite employment contract, in light of Gray v. Aiken, 205 Ga. 649, 54 S.E.2d 587 (1949), see 1 Mercer L. Rev. 304 (1950).

For article discussing quantum meruit actions by attorneys against clients, see 16 Ga. St. B.J. 150 (1980).

For note, the voluntary-payment doctrine in Georgia, see 16 Ga. L. Rev. 893 (1982).

JUDICIAL DECISIONS

Analysis

General Consideration
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Implied Promises Between Relatives
Money Had and Received
Application

General Consideration

To recover in quantum meruit, the plaintiff must show that compensation has not already been received by plaintiff for the reasonable value of the goods or services conferred on the defendant. Nelson & Hill, P.A. v. Wood, 245 Ga. App. 60, 537 S.E.2d 670, 2000 Ga. App. LEXIS 899 (2000).

Requirement of value. — Obligation under quantum meruit arose when work had value to the recipient; the estate beneficiary agreed to reimburse the tenant for improvements done to a house by the tenant, but the estate and not the beneficiary owned the house; the beneficiary did not receive a benefit worth the total value of the improvements, and judgment against the beneficiary for that total was improper. Langford v. Robinson, 272 Ga. App. 376, 612 S.E.2d 552, 2005 Ga. App. LEXIS 288 (2005), cert. denied, No. S05C1209, 2005 Ga. LEXIS 467 (Ga. June 30, 2005).

Quantum meruit may be sought for breach of written contract. — If there exists a written contract which is broken, one of the remedies for the breach is quantum meruit, that is, in treating the contract as rescinded. Gilbert v. Powell, 165 Ga. App. 504, 301 S.E.2d 683, 1983 Ga. App. LEXIS 1925 (1983).

Recovery under a quantum meruit theory. — Peanut company was entitled to payment from a cooperative bank under a quantum meruit theory because the bank directed the company to receive, process, and shell peanuts, and the company's efforts were valuable to the bank. Farm Credit of Northwest Fla., ACA v. Easom Peanut Co., 312 Ga. App. 374, 718 S.E.2d 590, 2011 Ga. App. LEXIS 817 (2011), cert. denied, No. S12C0444, 2012 Ga. LEXIS 315 (Ga. Mar. 19, 2012).

No benefit conferred. — Debtor failed to allege facts to show a valuable benefit conferred on a property owner through the debtor's settlement agreement with other entities and, thus, the debtor's claim for quantum meruit and unjust enrichment failed. Rohrig Invs., LP v. Knuckle P'ship, LLLP (In re Rohrig Invs., LP), 584 B.R. 382, 2018 Bankr. LEXIS 1004 (Bankr. N.D. Ga. 2018).

No error in instructions. — Trial court did not err in giving a charge based on O.C.G.A. § 9-2-7 since the issue of implied contract was before the jury. Kent v. Brown, 238 Ga. App. 607, 518 S.E.2d 737.

Implied Promises, Generally

Substance of this section is a fundamental principle in determining liability under implied contract. Delta Corp. v. Knight, 109 Ga. App. 3, 135 S.E.2d 56, 1964 Ga. App. LEXIS 777 (1964).

Express agreement denounced by law cannot be made legal and binding as implied contract, by merely praying for recovery on quantum meruit of portion of amount expressly agreed upon. Sapp v. Davids, 176 Ga. 265, 168 S.E. 62, 1933 Ga. LEXIS 58 (1933).

No recovery was permitted for a subcontractor in quantum meruit under O.C.G.A. § 9-2-7 as the express subcontract violated public policy and a subcontractor's lien under O.C.G.A. §§ 44-14-361.1 and 44-14-367 could not be filed. Although a subcontractor claimed to have been regularly connected to a Georgia-licensed electrician in order to comply with O.C.G.A. § 43-14-8(f), evidence indicated that the Georgia-licensed electrician simply applied for necessary project permits and did not inspect the electrical work performed or that the work complied with the applicable codes. If an express contract is found to be void as a violation of public policy, an implied contract will not be found to have existed for the same reason. JR Construction/Electric, LLC v. Ordner Constr. Co., 294 Ga. App. 453, 669 S.E.2d 224, 2008 Ga. App. LEXIS 1214 (2008).

Absent express contract for payment of services, implied contract may arise by which person to whom services are rendered shall pay for them, when from all the facts and circumstances it can reasonably be inferred that it is in the contemplation of the parties that the services are to be paid for. Fortner v. McCorkle, 78 Ga. App. 76, 50 S.E.2d 250, 1948 Ga. App. LEXIS 684 (1948).

Service performed with knowledge. — When one performs for another, with the other's knowledge, a useful service of a character that is usually charged for, and the latter expresses no dissent or avails oneself of the service, a promise to pay the reasonable value of the service is implied. Mitcham v. Singleton, 50 Ga. App. 457, 178 S.E. 465, 1935 Ga. App. LEXIS 173 (1935).

Presumption of promise to pay. — When one renders beneficial services for another the law ordinarily presumes a request and promise to pay what such services are reasonably worth, unless they services were rendered under circumstances which repel this presumption. Brightwell v. Oglethorpe Tel. Co., 47 Ga. App. 521, 171 S.E. 162, 1933 Ga. App. LEXIS 545 (1933).

When one renders services valuable to another which the latter accepts, a promise is implied to pay the reasonable value thereof, and an action of this type is one upon quantum meruit. First Nat'l Bank & Trust Co. v. McNatt, 141 Ga. App. 6, 232 S.E.2d 356, 1977 Ga. App. LEXIS 1731 (1977).

When duty to pay where person is without knowledge of services. — When one without knowledge neither authorizes, consents to, nor ratifies another's labor or permanent improvements to property, there is no duty imposed upon the one so benefited to make restitution. The reason is that in the absence of knowledge or authorization it would be unduly harsh to require the recipient's return of the value of goods and services when the goods or services cannot themselves be returned. Beavers v. Weatherly, 250 Ga. 546, 299 S.E.2d 730, 1983 Ga. LEXIS 581 (1983); Ginsberg v. Termotto, 175 Ga. App. 265, 333 S.E.2d 120, 1985 Ga. App. LEXIS 2075 (1985); Grady Tractor Co. v. First Nat'l Bank, 213 Ga. App. 663, 446 S.E.2d 228, 1994 Ga. App. LEXIS 701 (1994).

Presumption to pay is rebuttable. — Presumption of law that the person enjoying the benefit of services is bound to pay for the servicesis subject to rebuttal by proof either that the services were intended to be gratuitous or by particular circumstances from which the law would raise the counterpresumption that the services were not intended to be a charge against the party benefited thereby. Smith Dev., Inc. v. Flood, 198 Ga. App. 817, 403 S.E.2d 249, 1991 Ga. App. LEXIS 294 (1991).

Implication of a promise. — Quantum meruit lies ordinarily when one renders services valuable to another which the latter accepts, raising the implication of a promise to pay the reasonable value thereof. Griner v. Foskey, 158 Ga. App. 769, 282 S.E.2d 150, 1981 Ga. App. LEXIS 2412 (1981).

There can be no recovery on quantum meruit when action based on express contract. Stowers v. Hall, 159 Ga. App. 501, 283 S.E.2d 714, 1981 Ga. App. LEXIS 2668 (1981).

In a dispute between a concert booking agent and concert venue owners, the parties' contract covered services rendered by the agent in a given year regardless of

Implied Promises, Generally (Cont'd)

when the concerts took place; therefore, the agent's work on the 2013 season until the agreement was terminated in August 2012 was covered by the agreement and could not support a claim for quantum meruit under O.C.G.A. § 9-2-7. Lucas Entm't Grp., LLC v. Robert W. Woodruff Arts Ctr., Inc., 720 Fed. Appx. 512, 2017 U.S. App. LEXIS 24339 (11th Cir. 2017).

Express promise subsequent to rendition of services is evidence of an implied promise. Neal & Son v. Stanley, 17 Ga. App. 502, 87 S.E. 718, 1916 Ga. App. LEXIS 732 (1916).

No recovery can be had for services rendered voluntarily and with no expectation at the time of the rendition that they will be compensated. Brightwell v. Oglethorpe Tel. Co., 47 Ga. App. 621, 171 S.E. 162 (1933).

Recovery on quantum meruit may not be obtained when services are rendered with no anticipation that compensation is to be received. Pembroke Steel Co. v. Technical Sales Assocs., 138 Ga. App. 744, 227 S.E.2d 491, 1976 Ga. App. LEXIS 2305 (1976).

Services rendered for love and affection. — When a person renders valuable services to another, which the latter accepts, a contract to pay therefor is implied in law, unless from the facts and circumstances, including the nature of the services and relationship between the parties, it appears that the services were rendered out of consideration of love and affection or otherwise rendered gratuitously. Cooper v. Cooper, 59 Ga. App. 832, 2 S.E.2d 145, 1939 Ga. App. LEXIS 417 (1939).

In an action by decedent's estate to recover costs and other damages associated with building a house for the defendant in which the estate claimed that the decedent acted as general contractor and that the defendant wrongfully refused to pay for decedent's services, the defendant should have had the right to present evidence of a relationship with the decedent in order to support defendant's contention that the decedent provided the services gratuitously. Broughton v. Johnson, 247 Ga. App. 819, 545 S.E.2d 370, 2001 Ga. App. LEXIS 134 (2001).

Law will not imply promise to pay for services contrary to intention of parties. Brightwell v. Oglethorpe Tel. Co., 47 Ga. App. 621, 171 S.E. 162 (1933).

Criteria for determining if services were meant to be paid for. — In determining that in the contemplation of the parties personal services are to be paid for, the degree of relationship between the parties, the nature of the services, statements made by the person to whom the services are rendered of appreciation of the services and an intention to pay therefor (although not necessarily communicated to the person rendering the services), the fact that the person to whom the services are rendered is financially able to pay therefor, and other facts and circumstances concerning the performance of the services, may be considered as authorizing the inference that it is in the contemplation of the parties that the services are to be paid for. Humphries v. Miller, 66 Ga. App. 871, 19 S.E.2d 321, 1942 Ga. App. LEXIS 319 (1942).

In determining that in the contemplation of the parties, services are to be paid for, the degree of relationship between the parties, the nature of the services, including the fact that their performance is very disagreeable and obnoxious to the person performing them, that they are such as to indicate the relation of master and servant or employer and employee between the parties, and such that the person performing them would not naturally do so without compensation and would not perform them solely for love and affection, and statements made by the person to whom the services are rendered of appreciation of the services and an intention to pay therefor, although not necessarily communicated to the person rendering the services, and the fact that the person to whom the services are rendered is financially able to pay therefor, and other facts and circumstances concerning the performance of the services, may be considered as authorizing the inference that it is in the contemplation of the parties that the services are to be paid for. Fortner v. McCorkle, 78 Ga. App. 76, 50 S.E.2d 250, 1948 Ga. App. LEXIS 684 (1948); McRae v. Britton, 144 Ga. App. 340, 240 S.E.2d 904, 1977 Ga. App. LEXIS 2694 (1977).

Absent express agreement, key to determination of whether one rendering services valuable to another is to be compensated therefor is whether or not the services were gratuitously rendered, either by virtue of the presumption arising from the family relationship or as a matter of fact. Guyton v. Young, 84 Ga. App. 155, 65 S.E.2d 858, 1951 Ga. App. LEXIS 652 (1951).

Word "value" means value to the owner rather than the cost of producing the work to the workmen. Pembroke Steel Co. v. Technical Sales Assocs., 138 Ga. App. 744, 227 S.E.2d 491, 1976 Ga. App. LEXIS 2305 (1976).

When quantum meruit is an available remedy, the plaintiff seeks to recover the value of the work and materials furnished, but value must be defined as value to the owner, not the cost to the contractor of producing the result. Stowers v. Hall, 159 Ga. App. 501, 283 S.E.2d 714, 1981 Ga. App. LEXIS 2668 (1981).

"Reasonable value" defined. — "Reasonable value" which plaintiff is entitled to recover is not the value of plaintiff's labor but the value of the benefit resulting from such labor. City of Gainesville v. Edwards, 112 Ga. App. 672, 145 S.E.2d 715, 1965 Ga. App. LEXIS 815 (1965).

Value of services rendered in essence is exclusively matter for jury determination. Pembroke Steel Co. v. Technical Sales Assocs., 138 Ga. App. 744, 227 S.E.2d 491, 1976 Ga. App. LEXIS 2305 (1976); Bailey v. Fox, 144 Ga. App. 195, 240 S.E.2d 737, 1977 Ga. App. LEXIS 2632 (1977).

Jury determines value. — In action upon quantum meruit for value of professional services, question of what is reasonable is peculiarly within the province of the jury. Marshall v. Bahnsen, 1 Ga. App. 485, 57 S.E. 1006, 1907 Ga. App. LEXIS 4 (1907); Griner v. Foskey, 158 Ga. App. 769, 282 S.E.2d 150, 1981 Ga. App. LEXIS 2412 (1981).

Plaintiff must carry burden of proof of reasonable value of services rendered to and accepted by defendant to recover on a quantum meruit basis. Development Corp. v. Berndt, 131 Ga. App. 277, 205 S.E.2d 868, 1974 Ga. App. LEXIS 1402 (1974).

Insufficient evidence of value of services. — Trial court's post trial ruling which held that it applied an incorrect measure of damages in determining the amount of quantum meruit damages in a claim brought by a home builder and that there was insufficient evidence to determine the value of the improvements to buyers of a home was internally inconsistent, and a remand was necessary; proof of the reasonable value of services rendered to and accepted by a defendant was an element essential to recovery on a quantum meruit basis, and when there was no benefit to the recipient there was no recovery, so if the evidence was insufficient, the trial court should have ruled in favor of the buyers on the claim and not have allowed the claim to be relitigated. Diegert v. Cedarbrook Homes, Inc., 267 Ga. App. 264, 599 S.E.2d 211, 2004 Ga. App. LEXIS 556 (2004), cert. denied, No. S04C1575, 2004 Ga. LEXIS 692 (Ga. Sept. 7, 2004).

Performance of services in addition to those contracted for. — When certain work was necessary for proper performance of original contract but was not provided for in original plans and specifications, and defendant as well as general contractor not only authorized the additional work directly by named officers and agents, but knowingly received the benefits thereof, an implied promise to pay the reasonable value of this work is raised by operation of law. Conway v. Housing Auth., 102 Ga. App. 333, 116 S.E.2d 331, 1960 Ga. App. LEXIS 617 (1960).

When owner of property procures contractor engaged in improving the property to perform work in addition to that already agreed upon, the law will imply a promise on the part of the owner to pay the reasonable cost of such additional work. Kapplin v. Seiden, 109 Ga. App. 586, 137 S.E.2d 55, 1964 Ga. App. LEXIS 926 (1964).

When one contracts to render services to another and performs additional services which are not contemplated in the original agreement and which are accepted by the latter, a promise is implied to pay the reasonable value of the additional services and a recovery in quantum meruit is authorized. Smith v. Sharpe, 113 Ga. App. 838, 149 S.E.2d 830, 1966 Ga. App. LEXIS 1222 (1966).

Implied Promises, Generally (Cont'd)

Where plaintiff was not negligent in originally performing under construction contract, subsequent corrective work would not fall within original contract and plaintiff would be entitled to compensation for reasonable value of the work. City of Macon v. Blythe Bros., 125 Ga. App. 469, 188 S.E.2d 233, 1972 Ga. App. LEXIS 1371 (1972).

Even if there is an express contract, if services not contemplated by original agreement become necessary to achieve contractual objective and are rendered and accepted, the law implies and enforces performance of promise to pay for such extra services. Puritan Mills, Inc. v. Pickering Constr. Co., 152 Ga. App. 309, 262 S.E.2d 586, 1979 Ga. App. LEXIS 2908 (1979); Fruin-Colnon Corp. v. Air Door, Inc., 157 Ga. App. 804, 278 S.E.2d 708, 1981 Ga. App. LEXIS 2016 (1981).

Trial court did not err by charging the jury on quantum meruit because the allegations in the contractor's complaint were sufficient to raise a claim of quantum meruit where the contractor alleged that the contractor entered into a contract to supervise the construction of improvements to the homeowners' residence but that the homeowners ordered several additional improvements and further extensive renovations to be made to the residence; that the homeowners were fully aware of any and all changes to the estimates previously provided and that the homeowners approved the changes and agreed to any and all ensuing changes to the originally agreed-upon price; and that the contractor remained uncompensated for the reasonable value of the contractor's work. One Bluff Drive, LLC v. K. A. P., Inc., 330 Ga. App. 45, 766 S.E.2d 508, 2014 Ga. App. LEXIS 809 (2014).

Obligation of property owners to pay for municipal improvements. — Although special benefits may flow to property owners from municipal improvements, no special obligation arises on their part to pay therefor, except when the owners sue the city for consequential damages caused by construction of the improvement, in which case the city may set-off the enhanced value of the property against such claim. City of Hogansville v. Daniel, 52 Ga. App. 12, 182 S.E. 78, 1935 Ga. App. LEXIS 11 (1935).

Since there is no legal liability resting on abutting property owner to pay for public improvements or paving of street, the law will not raise an implied obligation or quasi-contract to pay the municipality for the increased value of the property, even though the municipality when making the improvements mistakenly believed it had authority to levy assessments against the property owner. City of Hogansville v. Daniel, 52 Ga. App. 12, 182 S.E. 78, 1935 Ga. App. LEXIS 11 (1935).

Consequential benefits arising because of public improvements will not give rise to cause of action per se in favor of the municipality or county making the improvements against an abutting property owner. City of Hogansville v. Daniel, 52 Ga. App. 12, 182 S.E. 78, 1935 Ga. App. LEXIS 11 (1935).

Promise insufficient to act as basis of action. — Legal theory of quantum meruit was inapplicable when no promise was made by the city to reconvey the property once the debtor had sufficient funds to pay cash in lieu of dedicating the recreation property, but rather at most, the city director of development promised that the director would recommend to the city council that it reconvey the property when the debtor offered the money. SMS Inv. Assocs. v. Peachtree City, 180 B.R. 694, 1995 Bankr. LEXIS 576 (Bankr. N.D. Ga. 1995).

Jury trial proper when plaintiff expected compensation. — When, although plaintiff claimed plaintiff expected that the compensation was to be in the form of an ownership interest in the business, it is abundantly clear from the plaintiff's affidavits and deposition that plaintiff expected compensation for the service the plaintiff performed and there is no evidence that plaintiff did not expect anything for the services, the issue of the plaintiff's entitlement to compensation under the theory of quantum meruit was properly retained for jury resolution by denying the defendant's motion for summary judgment. Ghee v. Kimsey, 179 Ga. App. 446, 346 S.E.2d 888, 1986 Ga. App. LEXIS 1935 (1986).

Broker's commission. — O.C.G.A. §§ 9-2-7 and 10-6-31 permit an action by a real estate broker who has located desired property and arranged for purchase thereof. Williamson v. Martin-Ozburn Realty Co., 19 Ga. App. 425, 91 S.E. 510, 1917 Ga. App. LEXIS 135 (1917); Washington v. Jordan, 28 Ga. App. 18, 109 S.E. 923, 1921 Ga. App. LEXIS 462 (1921).

When property placed in the hands of a broker for sale is subsequently sold by the owner, the broker is entitled to a commission if the broker was the procuring cause of the sale, even if the sale was actually consummated by the owner. Johnson v. Lipscomb-Weyman-Chapman Co., 46 Ga. App. 798, 169 S.E. 266, 1933 Ga. App. LEXIS 250 (1933); Erwin v. Wender, 78 Ga. App. 94, 50 S.E.2d 244, 1948 Ga. App. LEXIS 688 (1948).

When broker with whom property has been listed procures a prospective purchaser, and owner, with knowledge of this fact, intervenes or sells the property to customer or prospective purchaser procured by broker, inference is authorized that broker has earned a commission and can recover it from the owner. Mendenhall v. Adair Realty & Loan Co., 67 Ga. App. 154, 19 S.E.2d 740, 1942 Ga. App. LEXIS 347 (1942).

Petition alleging character and extent of services performed by plaintiff brokers, reasonable or ordinary charges for like services in same community, acceptance by defendant, and fact that such services were procuring cause of sale and culminated in defendant's purchase, though for a slightly larger sum than that which the defendant had authorized plaintiff to give for it, stated a cause of action for reasonable value of such services. Hendrix v. Crosby, 76 Ga. App. 191, 45 S.E.2d 448, 1947 Ga. App. LEXIS 402 (1947).

In order for a broker to earn a commission on account of the sale of property, the broker must either have sold it or been the procuring cause of the sale. Erwin v. Wender, 78 Ga. App. 94, 50 S.E.2d 244, 1948 Ga. App. LEXIS 688 (1948); Martin v. Hendrix, Waddell, Martin & Co., 140 Ga. App. 557, 231 S.E.2d 526, 1976 Ga. App. LEXIS 1560 (1976).

Action predicated upon an implied promise to pay the reasonable value of services would arise only if plaintiff-broker had rendered valuable services to defendant-corporation which the latter accepts. Williams v. Coca-Cola Co., 158 Ga. App. 139, 279 S.E.2d 261, 1981 Ga. App. LEXIS 2104 (1981).

O.C.G.A. § 9-2-7 did not require, in the context of a broker suing for services performed, the existence of an agency relationship. Coldwell Banker Com. Group, Inc. v. Nodvin, 598 F. Supp. 853, 1984 U.S. Dist. LEXIS 21483 (N.D. Ga. 1984), aff'd, 774 F.2d 1177, 1985 U.S. App. LEXIS 31529 (11th Cir. 1985).

Although in a suit for a broker's commission a realtor must show that the realtor either effected the sale of property or was the procuring cause of the sale, a realtor may recover in quantum meruit without showing the value of the services received by and of the benefit to the sued party. Futch v. Guthrie, 176 Ga. App. 672, 337 S.E.2d 384, 1985 Ga. App. LEXIS 2541 (1985), overruled in part, Amend v. 485 Props., 280 Ga. 327, 627 S.E.2d 565, 2006 Ga. LEXIS 167 (2006).

Mortgage broker who arranged for loans to a purchaser of property could not recover from the purchaser under a quantum meruit theory because a mortgage broker has no expectation of being compensated by the borrower. There was no implied promise on the part of the purchaser to pay a fee for the services of a mortgage broker since the standard practice is for a mortgage broker to look to the lender for payment. Vaswani v. Southern Mtg. & Fin. Servs. Corp., 196 Ga. App. 223, 395 S.E.2d 647, 1990 Ga. App. LEXIS 869 (1990).

Broker's quantum meruit claim for damages based on an amount equal to the commission calculated according to the standard agreement it sent to defendant presented prima facie proof of the value of its services, even though the jury rejected its contract claim. Ctr. Pointe Invs. v. Frank M. Darby Co., 249 Ga. App. 782, 549 S.E.2d 435, 2001 Ga. App. LEXIS 571 (2001), cert. denied, No. S01C1415, 2001 Ga. LEXIS 845 (Ga. Oct. 9, 2001).

Under Georgia law, procuring cause is a necessary element of a quantum meruit claim brought by a real estate broker; to the extent that Sharp-Boylston Co. v. Lun-

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deen, 145 Ga. App. 672 (1978) and its progeny hold otherwise, they are overruled. Amend v. 485 Props., 280 Ga. 327, 627 S.E.2d 565, 2006 Ga. LEXIS 167 (2006).

Award of quantum meruit recovery in favor of a broker in the broker's suit against a buyer was affirmed on appeal after: (1) the broker performed as an agent and rendered valuable services to the buyer in the form of locating certain goods and components and providing contacts; (2) the services were performed at the request of the buyer; (3) it would have been unjust for the buyer to accept the services without compensating the broker; (4) the broker had an expectation of compensation at the time the broker rendered the services; and (5) no contract of employment existed as the broker and the buyer did not have a meeting of the minds as to the essential terms of employment. Litsky v. G.I. Apparel, Inc., 156 Fed. Appx. 107, 2005 U.S. App. LEXIS 22150 (11th Cir. 2005), cert. denied, 547 U.S. 1164, 126 S. Ct. 2338, 164 L. Ed. 2d 841, 2006 U.S. LEXIS 4184 (2006).

Action on quantum meruit. — Suits on quantum meruit must proceed, if at all, under this section; suit on quantum meruit is therefore suit on an implied promise to pay for the value of services rendered. Sapp v. Davids, 176 Ga. 265, 168 S.E. 62, 1933 Ga. LEXIS 58 (1933).

Action brought to recover for reasonable value of services rendered another, which the latter accepts, is an action upon quantum meruit. Johnson v. Lipscomb-Weyman-Chapman Co., 46 Ga. App. 798, 169 S.E. 266, 1933 Ga. App. LEXIS 250 (1933).

When either there is no specific contract or the contract agreed to is repudiated by both parties, an action sounding in quantum meruit will lie for whatever work was done and accepted. Stowers v. Hall, 159 Ga. App. 501, 283 S.E.2d 714, 1981 Ga. App. LEXIS 2668 (1981).

Holding corporation was liable under theory of quantum meruit for its share of financial burden under an agreement entered into by its affiliate to pay a commission for arranging financing for a development project. Northwest Preferred, Ltd. v. Williams, 184 Ga. App. 145, 360 S.E.2d 910, 1987 Ga. App. LEXIS 2191 (1987).

In a contractor's quantum meruit action, a former high school baseball coach was erroneously denied a directed verdict, as the evidence showed that although the contractor rendered a valuable service to a school by building an indoor baseball hitting facility, when the school board, and not the coach, accepted those services to create an implied promise of payment, quantum meruit payment for construction of the facility could not lie against the coach; moreover, because there was no implied agreement requiring the coach to pay for the hitting facility, the contractor's argument that the coach was liable for having received a personal benefit from the construction of the hitting facility went to the question of unjust enrichment, and not quantum meruit. Brown v. Penland Constr. Co., 281 Ga. 625, 641 S.E.2d 522, 2007 Ga. LEXIS 34 (2007).

Implied obligation pursuant to O.C.G.A. § 9-2-7 may be pled in setoff to action brought by person who was benefited. Schofield's Sons Co. v. Duggan & Jones, 33 Ga. App. 238, 125 S.E. 789, 1924 Ga. App. LEXIS 826 (1924).

No expectation of payment from successor corporation. — When advertising services were performed by plaintiff for one corporation, but not for its successor corporation, plaintiff 's quantum meruit claim could not survive against the successors since the plaintiff could not possibly have held an expectation of compensation from them. The trial court did not err in granting summary judgment for the successor corporation on the quantum meruit claim. Artrac Corp. v. Austin Kelley Adv., Inc., 197 Ga. App. 772, 399 S.E.2d 529, 1990 Ga. App. LEXIS 1476 (1990).

Implied Promises Between Relatives

How presumption of gratuitous services between relatives rebutted. — Recovery for services between relatives might be had if express contract is shown or if surrounding circumstances indicate that it was the intention of both parties that compensation should be made and negative idea that services were performed merely because of natural sense of

duty, love, and affection arising out of a relationship. Westbrook v. Saylors, 56 Ga. App. 587, 193 S.E. 371, 1937 Ga. App. LEXIS 172 (1937).

When one renders personal services to a very near relative who is sick and helpless, such as nursing and personal care, a presumption that the services are to be paid for does not necessarily arise in the absence of an express contract between the parties for the payment of such services, there may arise an implied contract by which the person to whom the services are rendered shall pay the other for the services, when from all the facts and circumstances it can reasonably be inferred that it is in the contemplation of the parties that the services are to be paid for. Humphries v. Miller, 66 Ga. App. 871, 19 S.E.2d 321, 1942 Ga. App. LEXIS 319 (1942).

Among members of family, services of one in caring for another are presumed to have been gratuitously rendered, but this presumption may be rebutted by proof of an express promise by recipient of services to pay or, at least where adults are concerned, by proof of an implied promise to pay, taking into consideration the nature of the services and the facts and circumstances under which the services were rendered. Guyton v. Young, 84 Ga. App. 155, 65 S.E.2d 858, 1951 Ga. App. LEXIS 652 (1951); Henry v. Hemstreet, 86 Ga. App. 863, 72 S.E.2d 801, 1952 Ga. App. LEXIS 1082 (1952).

It is not necessary for near relative to prove an express contract in order to recover for services that ordinarily would be deemed gratuitous. Freeman v. Phillips, 135 Ga. App. 466, 218 S.E.2d 144, 1975 Ga. App. LEXIS 1700 (1975).

Intention of near relatives that services shall be compensated will govern. Phinazee v. Bunn, 123 Ga. 230, 51 S.E. 300, 1905 Ga. LEXIS 421 (1905).

In order to recover for services rendered to a near relative, the surrounding circumstances must plainly indicate that it was the intention of both parties that compensation should be made. Freeman v. Phillips, 135 Ga. App. 466, 218 S.E.2d 144, 1975 Ga. App. LEXIS 1700 (1975).

Question for jury. — When facts do not plainly demand inference that services between relatives were gratuitous, the particular facts of each case should be submitted to the jury under proper instructions as to the law. Freeman v. Phillips, 135 Ga. App. 466, 218 S.E.2d 144, 1975 Ga. App. LEXIS 1700 (1975).

Mere fact that services performed by near relative were necessary to the person for whom the services were performed and that performance of the services saved the sick relative and enhanced the value of the relative's estate were insufficient, without more, to authorize finding that it was in the contemplation of the parties that the services were to be paid for. Humphries v. Miller, 66 Ga. App. 871, 19 S.E.2d 321, 1942 Ga. App. LEXIS 319 (1942).

As between parents and adult child, when compensation is claimed by either against the other for services rendered, it must be determined from the particular circumstances, in absence of express contract, whether it can be reasonably inferred that pecuniary compensation was in view of parties when services were rendered. Cooper v. Van Horn, 61 Ga. App. 214, 6 S.E.2d 408, 1939 Ga. App. LEXIS 260 (1939).

Services rendered on behalf of parent by child, even after majority, are not a sufficient consideration to support a contract, unless the parent made an express promise to pay for such services or the surrounding circumstances plainly indicated that it was the intention of both parties that compensation should be made. Meads v. Williams, 55 Ga. App. 224, 189 S.E. 718, 1937 Ga. App. LEXIS 53 (1937).

When child renders services in the nature of nursing, waiting upon, and ministering to the wants and necessities of an infirm, diseased, and aged parent, there is a presumption that such services are rendered in filial duty and affection and not because of expected compensation in money or property, in the absence of any express agreement between the parties for compensation or any facts or circumstances indicating that it was intended and contemplated by both parent and child that payment should be made. Cooper v. Cooper, 59 Ga. App. 832, 2 S.E.2d 145, 1939 Ga. App. LEXIS 417 (1939) (for comment, see 2 Ga. B.J. 41 (1939)).

Implied Promises Between Relatives (Cont'd)

In order to sustain recovery by child for services in the nature of care and attention to old and infirm parent, it must affirmatively appear either that they were rendered under express contract that the child was to be paid for them, or surrounding circumstances plainly indicate that it was the intention of both parties that compensation should be made, and negative idea that the services were performed merely because of natural sense of duty, love, and affection arising out of relation. Fortner v. McCorkle, 78 Ga. App. 76, 50 S.E.2d 250, 1948 Ga. App. LEXIS 684 (1948).

In order to sustain a recovery by a child against a parent for services in the nature of care and attention such as are usually bestowed because of a natural sense of duty and affection arising out of the relationship, it must affirmatively appear that the services were performed under an express contract that the parent would pay for them, or the surrounding circumstances must plainly indicate that it was the intention of the parties that compensation should be paid. Freeman v. Collier, 204 Ga. 329, 50 S.E.2d 61, 1948 Ga. LEXIS 458 (1948).

When services are rendered by an adult child in attending to the business of the parent in the conduct of a hotel owned by the latter due to the parent's infirmity, and when the services have a value materially in excess of the support received from the parent and thereby tend to enhance the parent's estate, the jury could find from the evidence that, considering all the circumstances, both the parent and the child contemplated that the child should receive compensation for the services rendered. Freeman v. Collier, 204 Ga. 329, 50 S.E.2d 61, 1948 Ga. LEXIS 458 (1948).

Support of parent. — When child broke up child's home and lived with the child's parent upon express promise by the latter to will the child the parent's home place if the child would care for the parent during the parent's life, and the child fulfilled the child's agreement but the parent did not, action upon an implied promise will lie in the child's favor. Hudson v. Hudson, 87 Ga. 678, 13 S.E. 583, 1891 Ga. LEXIS 260 (1891).

Claim for offset against amount due on note on grounds that maker had cared for and supported payee, the maker's parent, for 35 months, was invalid, in that it failed to allege any express contract by the parent to pay for such services or any facts tending to show that the parent came under any legal obligation to pay for such services. Greenwood v. Greenwood, 44 Ga. App. 847, 163 S.E. 317, 1932 Ga. App. LEXIS 553 (1932).

In order for recovery by parent to be authorized against child for services and necessities, it must affirmatively appear by express contract that the child was to be paid for them or circumstances plainly indicate that it was intention of both the child and the parent that compensation should be made, and negative idea that services were performed and necessities furnished merely because of the natural sense of duty, love, and affection which arises out of relationship existing between the child and parent. Morris v. Bruce, 98 Ga. App. 821, 107 S.E.2d 262, 1959 Ga. App. LEXIS 987 (1959).

Care and burial of sister. — When there is no express contract or agreement and no facts or circumstances which would authorize an inference that the parties contemplated that services would be paid for, no reimbursement would be allowed for expenses incurred for care, supervision, and burial of the sister because presumption of implied promise to pay usually does not arise between very near relatives. Lovin v. Poss, 240 Ga. 848, 242 S.E.2d 609, 1978 Ga. LEXIS 848 (1978).

Services rendered to uncle. — In claim for services rendered, on a quantum meruit basis, when plaintiff and the plaintiff's family kept and cared for the intestate, plaintiff's uncle, for a period of approximately eight years with the understanding that they would be compensated for their services after the uncle's death in view of the age and physical infirmities of the intestate during the last four years of the uncle's life (claim for services prior thereto being barred by the statute of limitations), the evidence amply

authorized the finding that the uncle's lodging, board, washing of the uncle's wearing apparel and bedclothing, and nursing and caring for the uncle were worth $50.00 a month without interest. Westbrook v. Saylors, 56 Ga. App. 587, 193 S.E. 371, 1937 Ga. App. LEXIS 172 (1937).

It is for jury to say what circumstances are sufficient to support usual implication of promise to pay for the services, or to repel counterinference that their performance was prompted by affection and that they were rendered without expectation of payment therefor. Freeman v. Phillips, 135 Ga. App. 466, 218 S.E.2d 144, 1975 Ga. App. LEXIS 1700 (1975).

Advancement made to individual by brother of his dead wife, voluntarily and without a request from the husband, is inferably a gift, and as a matter of law no implied promise arose to repay the money advanced. But when the advancement is made at the request of the husband, either express or implied, an implied promise by the husband to repay is inferable. Lovett v. Allen, 34 Ga. App. 385, 129 S.E. 897, 1925 Ga. App. LEXIS 272 (1925).

Services rendered to spouse. — There was no evidence to support an award of damages in quantum meruit against a husband in a wife's action alleging that the husband's father breached an oral agreement to deed a parcel of property to the wife and the husband because there was no present benefit to the husband since the husband did not own the property or any interest in the property; there was no evidence that there was ever any expectation by either party that the wife would be compensated by the husband for the wife's contributions to their businesses while they were a married couple. Wallin v. Wallin, 316 Ga. App. 455, 729 S.E.2d 567, 2012 Ga. App. LEXIS 584 (2012).

Money Had and Received

For brief history of action for money had and received, see Jasper School Dist. v. Gormley, 184 Ga. 756, 193 S.E. 248, 1937 Ga. LEXIS 633 (1937).

Origin of action in common-law courts. — Action in assumpsit for money had and received is an action at law because of its origin as a mode of action in the common-law courts. Sheehan v. City Council, 71 Ga. App. 233, 30 S.E.2d 502, 1944 Ga. App. LEXIS 321 (1944).

Action for money had and received is founded upon equitable principle that no one ought unjustly to enrich oneself at the expense of another, and is maintainable in all cases where one has received money under such circumstances that in equity and good conscience one ought not to retain, and ex aequo et bono it belongs to another. King v. Forman, 71 Ga. App. 75, 30 S.E.2d 214, 1944 Ga. App. LEXIS 283 (1944); Sheehan v. City Council, 71 Ga. App. 233, 30 S.E.2d 502, 1944 Ga. App. LEXIS 321 (1944); Brackett v. Fulton Nat'l Bank, 80 Ga. App. 467, 56 S.E.2d 486, 1949 Ga. App. LEXIS 863 (1949).

Gist of action for money had and received lies in retention by defendant of money of plaintiff which, in equity and good conscience, the defendant has no right to retain. Manry v. Williams Mfg. Co., 45 Ga. App. 833, 166 S.E. 222, 1932 Ga. App. LEXIS 726 (1932).

Action of assumpsit for money had and received will not lie unless it is shown that the money or its equivalent was actually received by defendant or the defendant's agent. King v. Forman, 71 Ga. App. 75, 30 S.E.2d 214, 1944 Ga. App. LEXIS 283 (1944).

Return of negligent overpayment. — Fact that mistake in making excess payments occurs through some negligence of the complaining party does not avoid the duty of the party receiving the money or goods to return them unless the negligence amounts to a breach of some legal duty. Department of Pub. Health v. Perry, 123 Ga. App. 816, 182 S.E.2d 493, 1971 Ga. App. LEXIS 1399 (1971).

State has right to recover money paid out through mistake under the time-honored and well recognized principle that one may not retain money or goods which have come into one's hands through mistake and which one is not, in good conscience, entitled to retain. Department of Pub. Health v. Perry, 123 Ga. App. 816, 182 S.E.2d 493, 1971 Ga. App. LEXIS 1399 (1971).

Since a purported written contract was void for vagueness, plaintiff was

Money Had and Received (Cont'd)

entitled to recover the money deposited under the invalid agreement, that never ripened into a valid contract, on the basis of money had and received or unjust enrichment. Cochran v. Ogletree, 244 Ga. App. 537, 536 S.E.2d 194, 2000 Ga. App. LEXIS 772 (2000).

This section cannot operate as a partial assignment of contract in favor of a third person who has supplied part of the material contracted for. Meager v. Linder Lumber Co., 1 Ga. App. 426, 57 S.E. 1004, 1907 Ga. App. LEXIS 253 (1907).

No benefit of bargain from illegal contracts. — Although an agreement which an investor concluded with a person who was employed by a company that offered to sell stock to its employees during an initial public offering, wherein the employee offered to purchase stock in the employee's own name for the investor, was illegal, and the investor was not entitled to profits the investor lost because the employee did not buy the stock, the investor was only entitled to a return of money the investor gave the employee to buy the stock. McCondichie v. Groover, 261 Ga. App. 784, 584 S.E.2d 57, 2003 Ga. App. LEXIS 768 (2003).

Application

Right to equipment. — When there was proof that a city equipped a hotel's kitchen at a cost of $400,000, this evidence, and the absence of proof that the equipment was removed from the kitchen before a purchaser took possession of the premises, raised genuine issues of material fact as to the city's right to recover in quantum meruit for whatever equipment remained, and the trial court erred in granting the purchaser's motion for summary judgment. City of College Park v. Sheraton Savannah Corp., 235 Ga. App. 561, 509 S.E.2d 371.

Limited liability companies. — When a limited liability company member owned the property where a construction project was started, signed a personal guaranty for the work done under the contract that all parties anticipated was to have been signed, and attended meetings at which progress on the project was discussed, the member's claim that the member did not know that the builder was working on the member's property, despite the member having promised to pay, did not create a fact issue; thus, summary judgment against the member on the builder's quantum meruit claim was proper. Marett v. Brice Bldg. Co., 268 Ga. App. 778, 603 S.E.2d 40, 2004 Ga. App. LEXIS 935 (2004), cert. denied, No. S04C2073, 2004 Ga. LEXIS 1054 (Ga. Nov. 22, 2004).

Marine salvage. — Plaintiff may bring in an personam claim for quantum meruit in Georgia's state courts based on events that could also support a claim in federal admiralty court for marine salvage; while a salvage bounty cannot be awarded, the jury may consider the peril involved and the value of the property saved in determining the value of the service the boat owner received. Phillips v. Sea Tow/Sea Spill, 276 Ga. 352, 578 S.E.2d 846, 2003 Ga. LEXIS 288 (2003).

Real estate agents. — Real estate agent failed to establish the reasonable value of the agent's services in referring clients to the agent's former paramour, who was also a real estate agent, the agent could not recover referral fees under the theory of unjust enrichment once the parties romantic relationship ended. Folds v. Barber, 278 Ga. 37, 597 S.E.2d 409, 2004 Ga. LEXIS 466 (2004).

Plaintiff debtor-in-possession properly stated a claim for unjust enrichment because the plaintiff alleged that a debtor transferred a benefit to defendant (or that defendant took a benefit from the debtor) without a contract, compensation, or consideration, and that defendant, under equitable principles, ought to return that benefit to the debtor. MC Asset Recovery, LLC v. Southern Co., No. 1:06-CV-0417-BBM, 2006 U.S. Dist. LEXIS 97034 (N.D. Ga. Dec. 11, 2006).

Failed investments in sporting event parties. — Professional basketball player was not liable to inexperienced businessmen who invested and lost money by hosting sports event-related parties based on an oral agreement with two men claiming to act as the player's agents. The businessmen's claim for unjust enrich-

ment under O.C.G.A. § 9-2-7 was unsuccessful because there was no evidence that money was transferred into the player's accounts, and a failed investment was not a cognizable basis for relief in quantum meruit. J'Carpc, LLC v. Wilkins, 545 F. Supp. 2d 1330, 2008 U.S. Dist. LEXIS 15494 (N.D. Ga. 2008).

Attorney's fees. — Allegations that defendant hired plaintiff as attorney at law, that plaintiff performed certain enumerated services as such attorney, which services were accepted by defendant, that such services were of a stated reasonable value and defendant refused to pay therefor, and that, as a result of plaintiff's efforts and services which were accepted by defendant, it had become enriched in a stated sum, were sufficient to state a cause of action for quantum meruit and unjust enrichment. Sellers v. City of Summerville, 88 Ga. App. 109, 76 S.E.2d 99, 1953 Ga. App. LEXIS 1023 (1953).

Recovery of attorney's fees on quantum meruit basis was permitted only when no fee had been agreed upon, or when the attorney cannot render the balance of the agreed service due to any of the contingencies provided in former Code 1933, § 9-611 (see now O.C.G.A. § 15-19-11). Dickey v. Mingledorff, 110 Ga. App. 454, 138 S.E.2d 735, 1964 Ga. App. LEXIS 666 (1964).

When there is no special contract between the parties, the attorney may recover on quantum meruit for the reasonable value of the services rendered. Griner v. Foskey, 158 Ga. App. 769, 282 S.E.2d 150, 1981 Ga. App. LEXIS 2412 (1981).

In an action for attorney fees it does not follow, if there were more parties than one on a side, and the attorney was employed by only one, and the others had knowledge that the attorney was representing the whole case, and the services were for their benefit, and accepted by them, that to avoid liability it was their duty to have notified the attorney that they would not be liable. Griner v. Foskey, 158 Ga. App. 769, 282 S.E.2d 150, 1981 Ga. App. LEXIS 2412 (1981).

Even though an attorney was entitled to recover the reasonable value of the attorney's services under quantum meruit, it was error to grant the attorney summary judgment as to a sum certain because issues of material fact remained as to whether all of the services were of benefit and value to the client. Sosebee v. McCrimmon, 228 Ga. App. 705, 492 S.E.2d 584.

Insufficient evidence of representation to pay more for medical services. — Insurance company and the corporation were entitled to summary judgment on the burn center's quantum meruit claim because the burn center failed to substantiate how or why the medical services the center provided to the corporation's employee were beneficial or valuable to the corporation or the insurance company and the center never specifically identified what it was alleging the insurance company and the corporation received when the center provided medical services to the corporation's employee. Further, there was nothing in the language of Mississippi's Workers' Compensation Medical Fee Schedule, Miss. Code Ann. § 71-3-15, to indicate that the rate of reimbursement for out-of-state services was contingent upon whether a foreign state's medical fee schedule would apply in that foreign state, and so, to the extent the insurance company benefited from the discharge of a statutory obligation under Mississippi law, the undisputed evidence showed that it already paid the reasonable value for the burn center's services; therefore, there was no evidence in the record demonstrating that the insurance company or the corporation ever made any representation that they would be willing to pay anything more than what was required of them by Georgia or Mississippi workers' compensation law. Joseph M. Still Burn Ctrs., Inc. v. AmFed Nat'l Ins. Co., 702 F. Supp. 2d 1371, 2010 U.S. Dist. LEXIS 31299 (S.D. Ga. 2010).

Claim against state agency barred by sovereign immunity. — Computer contractor that had an unsigned copy of an agreement and an invoice for services rendered failed to show that the contractor had a signed agreement with a state agency for purposes of the state's waiver of immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(c). The contractor's claims for unjust enrichment were also barred by sovereign immunity. Ga. Dep't

Application (Cont'd)

of Cmty. Health v. Data Inquiry, LLC, 313 Ga. App. 683, 722 S.E.2d 403, 2012 Ga. App. LEXIS 50 (2012).

Ultra vires contract not enforceable under quantum meruit theory of recovery against city. — Appellate court erred by holding that an environmental engineering company could recover against a city on the company's quantum meruit claim because quantum meruit was not an available remedy against the city since the claim was based on a municipal contract that was ultra vires as the contract was never approved by city council. City of Baldwin v. Woodard & Curran, Inc., 293 Ga. 19, 743 S.E.2d 381, 2013 Ga. LEXIS 441 (2013).

Clear that services were requested or knowingly accepted. — Trial court erred by granting summary judgment to the defendants on the part owner's claim for quantum meruit and unjust enrichment because it was clear that the part owner provided services that benefitted the defendants and were either requested or knowingly accepted. Bedsole v. Action Outdoor Adver. JV, LLC, 325 Ga. App. 194, 750 S.E.2d 445, 2013 Ga. App. LEXIS 887 (2013), cert. denied, No. S14C0572, 2014 Ga. LEXIS 340 (Ga. Apr. 22, 2014).

Dismissal of the claim for quantum meruit was reversed because even if the stylists's wig designs lacked legal novelty, quantum meruit provided an avenue of recovery for the provision of the services rendered in designing and producing the wigs regardless of the novelty of the designs themselves. Davidson v. Maraj, 609 Fed. Appx. 994, 2015 U.S. App. LEXIS 6801 (11th Cir. 2015).

RESEARCH REFERENCES

Am. Jur. 2d.

17A Am. Jur. 2d, Contracts, § 360 et seq. 66 Am. Jur. 2d, Restitution and Implied Contracts, §§ 2 et seq., 36 et seq., 48.

Am. Jur. Pleading and Practice Forms.

21B Am. Jur. Pleading and Practice Forms, Restitution and Implied Contracts, § 2.

C.J.S.

17 C.J.S., Contracts, § 1 et seq.

ALR.

Action on implied contract arising out of fraud as within statutes of limitation applicable to fraud, 3 A.L.R. 1603.

Right of real estate broker to commissions where he was unable to procure an offer of the owner's price from one whom he interested, and who subsequently, without his intervention, purchased at that price, 9 A.L.R. 1194.

Liability of husband for services rendered by wife in carrying on his business, 23 A.L.R. 18.

Presumption as to gratuitous character of services of relative in caring for children of one not of same household, 24 A.L.R. 962.

Implied contract to reimburse one for expense of trip taken at request of relative, 24 A.L.R. 973.

Liability for or on account of services rendered under erroneous impression as to parentage induced by fraud or mistake, 33 A.L.R. 681.

Right to compensation for board furnished to relatives of wife, 36 A.L.R. 677.

Recovery by one who has breached contract for services providing for share in proceeds or profits as compensation, 40 A.L.R. 34; 57 A.L.R. 1037.

Liability of municipal corporation upon implied contract for use of property which it received under an invalid contract, 42 A.L.R. 632.

Implied contract or employment of real estate broker to procure customer, 43 A.L.R. 842; 49 A.L.R. 933.

Recovery on quantum meruit by one who breaches contract to serve or support another for life, 47 A.L.R. 1162.

Judgment in action for services of physician or surgeon as bar to action against him for malpractice, 49 A.L.R. 551.

Circumstances other than relationship of parties which repel interference of an agreement to pay for work performed at one's request, or with his acquiescence, 54 A.L.R. 548.

Right of purchaser of mortgaged chattels to allowance as against mortgagee on account of value added by former's services or expenditures, 55 A.L.R. 652.

Vendee's right to recover amount paid under executory contract for sale of land, 59 A.L.R. 189; 102 A.L.R. 852; 134 A.L.R. 1064.

Right of one who pays taxes for which another is bound, to subrogation to the right of the taxing power, 61 A.L.R. 587; 106 A.L.R. 1212.

Recovery back of public money paid by mistake, 63 A.L.R. 1346.

Right of subrogation of owner of undivided interest in real property who pays sole debt of the owner of another undivided interest therein, 64 A.L.R. 1299.

Absence from, or inability to attend, school or college as affecting liability for, or right to recover back payments on account of, tuition or board, 69 A.L.R. 714.

Payments made under unenforceable contract as applicable in reduction of amount recoverable on quantum meriut, 76 A.L.R. 1412.

Right of attorney to recover upon quantum meruit or implied contract for services rendered under champterous contract, 85 A.L.R. 1365.

Right of one who by mistake pays taxes to recover against person benefited by payment, 91 A.L.R. 389.

Nontort liability of third person who receives money or property in supposed performance of contract, to party to contract who was entitled thereto, 106 A.L.R. 322.

Decedent's agreement to devise, bequeath, or leave property as compensation for services, 106 A.L.R. 742.

What amounts to acceptance by owner of work done under contract for construction or repair of building which will support a recovery on quantum meruit, 107 A.L.R. 1411.

Liability of municipality or other governmental body on implied or quasi contracts for value of property or work, 110 A.L.R. 153; 154 A.L.R. 356.

Right of true owner to recover proceeds of sale or lease of real property made by another in the belief that he was the owner of the property, 133 A.L.R. 1443.

Principal's right to recover commissions paid by him or by third person to unfaithful agent or broker, 134 A.L.R. 1346.

Past services by relative or member of family as consideration for note or other executory obligation, 140 A.L.R. 491.

What amounts to waiver of termination of real estate broker's contract, 140 A.L.R. 1019.

Necessity and sufficiency of pleading defense of family relationship in action on implied contract for services rendered, 144 A.L.R. 864.

Real estate broker's right to compensation as affected by death of person employing him, 146 A.L.R. 828.

Seller's, bailor's, lessor's, or lender's knowledge of the other party's intention to put the property or money to an illegal use as defense to action for purchase price, rent, or loan, 166 A.L.R. 1353.

Recovery for services rendered by member of household or family other than spouse without express agreement for compensation, 7 A.L.R.2d 8; 92 A.L.R.3d 726; 94 A.L.R.3d 552.

Remedies during promisor's lifetime on contract to convey or will property at death in consideration of support or services, 7 A.L.R.2d 1166.

Performance of work previously contracted for as consideration for promise to pay greater or additional amount, 12 A.L.R.2d 78.

Measure of damages for fraudulently procuring services at lower rate or gratuitously, 24 A.L.R.2d 742.

Right of infant who repudiates contract for services to recover thereon or in quantum meruit, 35 A.L.R.2d 1302.

Compensation for improvements made or placed on premises of another by mistake, 57 A.L.R.2d 263.

Admissibility of evidence of value or extent of decedent's estate in action against estate for reasonable value of services furnished decedent, 65 A.L.R.2d 945.

What constitutes acceptance or ratification of, or acquiescence in, services rendered by attorney so as to raise implied promise to pay reasonable value thereof, 78 A.L.R.2d 318.

Recovery on quantum meruit where only express contract is pleaded, under Federal Rules of Civil Procedure 8 and 54 and similar state statutes or rules, 84 A.L.R.2d 1077.

Attorney's recovery in quantum meruit for legal services rendered under a contract which is illegal or void as against public policy, 100 A.L.R.2d 1378.

Person performing services as competent to testify as to their value, 5 A.L.R.3d 947.

Implied obligation not to use trade secrets or similar confidential information disclosed during unsuccessful negotiations for sale, license, or the like, 9 A.L.R.3d 665.

Price fixed in contract violating statute of frauds as evidence of value in action on quantum meruit, 21 A.L.R.3d 9.

Failure of artisan or construction contractor to comply with statute or regulation requiring a work permit or submission of plans as affecting his right to recover compensation from contractee, 26 A.L.R.3d 1395.

Liability of one requesting medical practitioner or hospital to furnish services to third party for cost of services, absent express undertaking to pay, 34 A.L.R.3d 176.

Judgment in action on express contract for labor or services as precluding, as a matter of res judicata, subsequent action on implied contract (quantum meruit) or vice versa, 35 A.L.R.3d 874.

Invasion of privacy by radio or television, 56 A.L.R.3d 386.

Amount of attorney's compensation in absence of contract or statute fixing amount, 57 A.L.R.3d 475; 59 A.L.R.3d 152; 17 A.L.R.5th 366.

Building and construction contracts: right of subcontractor who has dealt only with primary contractor to recover against property owner in quasi contract, 62 A.L.R.3d 288.

Enforceability of contract to make will in return for services, by one who continues performance after death of person originally undertaking to serve, 84 A.L.R.3d 930.

Enforceability of voluntary promise of additional corporation because of unforeseen difficulties in performance of existing contract, 85 A.L.R.3d 259.

Limitation to quantum meruit recovery, where attorney employed under contingent fee contract is discharged without cause, 92 A.L.R.3d 690.

Establishment of "family" relationship to raise presumption that services were rendered gratuitously, as between persons living in same household but not related by blood or affinity, 92 A.L.R.3d 726.

Recovery for services rendered by persons living in apparent relation of husband and wife without express agreement for compensation, 94 A.L.R.3d 552.

Unexplained gratuitous transfer of property from one relative to another as raising presumption of gift, 94 A.L.R.3d 608.

Absence from or inability to attend school or college as affecting liability for or right to recover payments for tuition or board, 20 A.L.R.4th 303.

Excessiveness or adequacy of attorneys' fees in matters involving real estate — modern cases, 10 A.L.R.5th 448.

Excessiveness or adequacy of attorney's fees in domestic relations, 17 A.L.R.5th 366.

Limitation to quantum meruit recovery, where attorney employed under contingent-fee contract is discharged without cause, 56 A.L.R.5th 1.

9-2-8. Private rights of action not created unless expressly stated.

(a) No private right of action shall arise from any Act enacted after July 1, 2010, unless such right is expressly provided therein.

(b) Nothing in subsection (a) of this Code section shall be construed to prevent the breach of any duty imposed by law from being used as the basis for a cause of action under any theory of recovery otherwise recognized by law, including, but not limited to, theories of recovery under the law of torts or contract or for breach of legal or private duties as set forth in Code Sections 51-1-6 and 51-1-8 or in Title 13.

History.
Code 1981, § 9-2-8, enacted by Ga. L. 2010, p. 745, § 2/SB 138.
Code Commission notes.
Pursuant to Code Section 28-9-5, in 2010, "after July 1, 2010," was substituted for "after the effective date of this Code section" in subsection (a).
Editor's notes.
Ga. L. 2010, p. 745, § 1/SB 138, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Transparency in Lawsuits Protection Act.'"
Law reviews.
For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

JUDICIAL DECISIONS

No private right of action for transmitting nude photos. — Trial court erred in awarding civil damages to a girlfriend under O.C.G.A. § 16-11-90, which criminalized the transmission of photography or video depicting nudity or sexually explicit conduct of an adult without his or her consent, because it was a criminal statute that did not provide for a private right of action; further, creation of such a right from the statute would violate the separation of powers clause, Ga. Const. 1983, Art. I, Sec. II, Para. III, and also O.C.G.A. § 9-2-8(a). Somerville v. White, 337 Ga. App. 414, 787 S.E.2d 350, 2016 Ga. App. LEXIS 343 (2016).

ARTICLE 2

PARTIES

Cross references.
Persons who may bring equitable actions, § 23-4-20.

9-2-20. Parties to actions on contracts; action by beneficiary.

(a) As a general rule, an action on a contract, whether the contract is expressed, implied, by parol, under seal, or of record, shall be brought in the name of the party in whom the legal interest in the contract is vested, and against the party who made it in person or by agent.

(b) The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on the contract.

History.
Orig. Code 1863, § 3181; Code 1868, § 3192; Code 1873, § 3257; Code 1882, § 3257; Civil Code 1895, § 4939; Civil Code 1910, § 5516; Code 1933, § 3-108; Ga. L. 1949, p. 455, § 1.
Law reviews.
For article discussing third party beneficiary contracts, see 4 Ga. B.J. 19 (1941).
For comment on Veruki v. Burke, 202 Ga. 844, 44 S.E.2d 906 (1947), see 10 Ga. B.J. 369 (1948).
For comment on Harris v. Joseph B. English Co., 83 Ga. App. 281, 63 S.E.2d 346 (1951), see 13 Ga. B.J. 462 (1951).
For article, "Multiple Party Accounts: Georgia Law Compared with the Uniform Probate Code," see 8 Ga. L. Rev. 739 (1974).
For note discussing transfer fees in home loan assumptions in reference to the Georgia usury laws, see 9 Ga. L. Rev. 454 (1975).
For annual survey on construction law, see 71 Mercer L. Rev. 57 (2019).

JUDICIAL DECISIONS

Analysis

General Consideration
Parties to Actions, Generally
Parties to Insurance
Third Party Beneficiaries
Complaint Allegations Sufficient

General Consideration

This section is a procedural statement of rule of substantive law that there must be privity of contract. Jordan Co. v. Adkins, 105 Ga. App. 157, 123 S.E.2d 731, 1961 Ga. App. LEXIS 583 (1961).

Construction of section with § 13-3-42. — Former Civil Code 1895, § 4939 (see now O.C.G.A. § 9-2-20) was a codification of the common law, and was frequently construed with former Civil Code 1895, §§ 3657, 3661, and 3664 (see now O.C.G.A. § 13-3-42) which permitted the promisee to maintain an action, although the promisee was a stranger to the consideration. Hawkins v. Central of Ga. Ry., 119 Ga. 159, 46 S.E. 82, 1903 Ga. LEXIS 73 (1903).

Joint sale of separately owned articles of personalty. — Two persons who separately owned articles of personalty and sold them jointly for a lump sum jointly owned the debt against the buyer for the purchase money and could bring a joint action against the debtor for its recovery. Mathis v. Shaw, 38 Ga. App. 783, 145 S.E. 465, 1928 Ga. App. LEXIS 453 (1928).

Trustee's right to bring suit. — Holder of legal title, as trustee, may sue even though the holder is not entitled to the beneficial interest. Wortsman v. Wade, 77 Ga. 651, 1886 Ga. LEXIS 378 (1886).

Parties to Actions, Generally

Who can bring action. — This state recognizes the English rule that generally the action on a contract must be brought in the name of the party in whom the legal interest in such contract is vested. O'Leary v. Costello, 169 Ga. 754, 151 S.E. 487, 1930 Ga. LEXIS 24 (1930).

Plaintiff having no right of action at all cannot recover either for the plaintiff's own benefit or for the use of anyone else. Tyler v. National Life & Accident Ins. Co., 48 Ga. App. 338, 172 S.E. 747, 1934 Ga. App. LEXIS 65 (1934).

Legal right in person to whom obligation due. — Ordinarily an action must be brought in the name of the person having the legal right to maintain it; and the legal right is in the person to whom, according to the terms of the written contract, its obligation is due. United States Epperson Underwriting Co. v. Jessup, 22 F.R.D. 336, 1958 U.S. Dist. LEXIS 4460 (M.D. Ga.), aff'd, U. S. Epperson Underwriting Co. v. Jessup, 260 F.2d 355, 1958 U.S. App. LEXIS 3090 (5th Cir. 1958).

Proper parties to bring an action on a contract are the parties who, in regard to the subject matter of the contract, have given consideration or exchanged mutual promises of performance. American Fletcher Mtg. Co. v. First Am. Inv. Corp., 463 F. Supp. 186, 1978 U.S. Dist. LEXIS 16837 (N.D. Ga. 1978).

Applying O.C.G.A. § 9-2-20, the action against the parent company could not survive because neither it nor its predecessor was a party to the insurance contract and the parent company's motion for summary judgment was granted. Worsham v. Provident Cos., 249 F. Supp. 2d 1325, 2003 U.S. Dist. LEXIS 9296 (N.D. Ga. 2003).

Defendant cannot be bound to agreement when not a party. — Grant of partial summary judgment to the defendant in a breach of contract action was affirmed because the facts in the record did not show with reasonable certainty what the parties intended to do in the agreement; thus, the agreement on all material terms was not made and the defendant was not a party to the nondisclosure agreement and could not be bound by the agreement's terms. Souza v.

Berberian, 342 Ga. App. 165, 802 S.E.2d 401, 2017 Ga. App. LEXIS 326 (2017).

Nursing home patient not benficiary of arbitration agreement between health care agent and facility. — Nursing home patient was not a third-party beneficiary of an arbitration agreement between the home and the patient's brother-in-law, who was the patient's agent for health care decisions, because, to the extent the patient obtained the benefits of dispute resolution outside the courts, the patient had repudiated this alleged benefit and did not seek to enforce the arbitration agreement, which was not required as a condition to admission to the home. Coleman v. United Health Servs. of Ga., 344 Ga. App. 682, 812 S.E.2d 24, 2018 Ga. App. LEXIS 122 (2018).

Non-party could not challenge validity of agreement, but could seek a declaration of rights. — In a dispute between a back-up buyer and the buyer and sellers of real property, the back-up buyer had standing under O.C.G.A. § 9-4-2 to seek a declaration of its rights, if any, to the disputed property, although it was not a party to the contracts between the buyer and the sellers; however, the back-up buyer did not have standing to challenge the signatures on those contracts pursuant to O.C.G.A. § 9-2-20. Del Lago Ventures, Inc. v. QuikTrip Corp., 330 Ga. App. 138, 764 S.E.2d 595, 2014 Ga. App. LEXIS 820 (2014).

Mortgagor lacked standing to assert the breach-of-contract claim because the mortgagor lacked standing to contest the validity of the transfer or assignment of the loan documents based on the pooling and servicing agreement (PSA) because the mortgagor conceded that the mortgagor was not a party to the PSA. Cornelius v. Bank of Am., NA, 585 Fed. Appx. 996, 2014 U.S. App. LEXIS 18396 (11th Cir. 2014).

Assignee as real party in interest. — In an action on an installment sales contract, when it appears from the contract itself that the original seller of the tobacco combine assigned all its rights, title, and interest in that contract to an assignee, the assignee is the real party in interest. Rigdon v. Walker Sales & Serv., Inc., 161 Ga. App. 459, 288 S.E.2d 711, 1982 Ga. App. LEXIS 3046 (1982).

Trial court erred in granting an assignee summary judgment in an action against a debtor to collect the amount owed on a credit card account agreement the debtor allegedly entered into with an assignor because the assignee failed to show that it was entitled to file suit to recover the outstanding debt against the debtor pursuant to O.C.G.A. § 9-11-17(a); the assignee relied on the affidavit of its agent and business records custodian of its credit card accounts to show that the assignor transferred to it all rights and interests to the debtor's account, but the affidavit failed to refer to or attach any written agreements that could complete the chain of assignment from the assignor to the assignee, and although the assignee contended that the debtor did not raise its failure to present a valid assignment in the trial court, the record reflected that that issue was squarely before the trial court because the assignee directly addressed the debtor's defense under § 9-11-17 in its motion for summary judgment, referring to the affidavit to show that it was the assignee. Wirth v. Cach, LLC, 300 Ga. App. 488, 685 S.E.2d 433, 2009 Ga. App. LEXIS 1200 (2009).

Promisee may sustain action, even though the promisee is a stranger to the consideration. Holmes v. Western Auto Supply Co., 220 Ga. 528, 140 S.E.2d 204, 1965 Ga. LEXIS 554 (1965).

Application to common-law bonds. — Actions on bonds executed by public officials but not required by law or statute (generally referred to as common-law bonds) at the time of creation are governed by the common-law rule in this section. National Sur. Co. v. Seymour, 177 Ga. 735, 171 S.E. 380, 1933 Ga. LEXIS 405 (1933).

Action by general or special owner. — Interest of plaintiff entitled to sue in contract under this section for injury to goods may be either that of general or special owner. Inman & Co. v. Seaboard Air Line Ry., 159 F. 960, 1908 U.S. App. LEXIS 5036 (C.C.D. Ga. 1908).

When plaintiffs have joint right of action on contract for reimbursement for services which the plaintiffs jointly promised to perform, the plaintiffs may bring an action listing all their names as

Parties to Actions, Generally (Cont'd)

plaintiffs. Boroughs, Dale & Griffin v. St. Elias E. Orthodox Church, 120 Ga. App. 434, 170 S.E.2d 865, 1969 Ga. App. LEXIS 807 (1969).

Agreement by wife to be financially responsible for husband's debts to a nursing home provided her with a legal interest in the contract executed between her husband and the home. Fisher v. Toombs County Nursing Home, 223 Ga. App. 842, 479 S.E.2d 180, 1996 Ga. App. LEXIS 1313 (1996).

Former husband lacked standing to assert claims arising from violations of security deed. — Because a former husband was never a party to a security deed and had no legal interest in the property at the time a bank and a law firm sent notices of the default and the acceleration, the former husband lacked standing to assert any claims arising from violations of the security deed; therefore, it was of no consequence even if the bank and law firm had failed to comply with the notice provisions in the security deed. Farris v. First Fin. Bank, 313 Ga. App. 460, 722 S.E.2d 89, 2011 Ga. App. LEXIS 1125 (2011).

Action by a corporation must be brought in its own corporate name, and not in the name of its trustees or directors. Kersey v. Grant, 177 Ga. 501, 170 S.E. 501, 1933 Ga. LEXIS 339 (1933).

Corporation lacked standing to pursue damages. — Trial court did not err in directing a verdict against a corporation and the corporation's owner as to their breach of contract and wrongful foreclosure claims because two of the owner's other companies suffered damages from the alleged misconduct, and those entities were not parties to the suit; the corporation lacked standing to pursue any damages belonging to the companies, and thus, the trial court properly determined that the corporation and owner were not entitled to recover damages belonging to the companies. The trial court properly determined that the corporation and the owner were not entitled to recover damages belonging to the companies. Canton Plaza, Inc. v. Regions Bank, Inc., 315 Ga. App. 303, 732 S.E.2d 449, 2012 Ga. App. LEXIS 368 (2012).

Action by removed member of LLC. — Party to an LLC operating agreement had standing to bring an action for the breach of contract even though the party had been removed as a member of the LLC under O.C.G.A. § 9-2-20(a). Kaufman Development Partners, L.P. v. Eichenblatt, 324 Ga. App. 71, 749 S.E.2d 374, 2013 Ga. App. LEXIS 797 (2013).

Corporation must show itself as party to lease. — In action to recover damages for breach of written lease, plaintiff corporation must show that it was a party to the contract sued upon, by written assignment from assignees of original lessee. Sorrento Italian Restaurant, Inc. v. Franco, 107 Ga. App. 301, 129 S.E.2d 822, 1963 Ga. App. LEXIS 818 (1963).

Homeowners' actions against loan servicers. — While the mortgagors alleged a transfer of the mortgagors' security deed violated a pooling and servicing agreement (PSA), and that the attorney transferring the security deed lacked authority, the mortgagors were not a party to the PSA or the challenged transfer, and thus did not have standing to contest the validity of the transfer under O.C.G.A. § 9-2-20(a). Edward v. BAC Home Loans Servicing, L.P., 534 Fed. Appx. 888, 2013 U.S. App. LEXIS 17054 (11th Cir. 2013).

Borrowers lacked standing to challenge assignment of security deed. — In a wrongful foreclosure action, the district court did not err in concluding that the borrowers lacked standing to challenge the assignment of the security deed because, even though the assignment allegedly contained a patent defect in attestation, they were not parties to the assignment and had demonstrated no other right to challenge it. Haynes v. McCalla Raymer LLC, 793 F.3d 1246, 2015 U.S. App. LEXIS 12025 (11th Cir. 2015).

Action by note holder. — Action cannot be maintained upon promissory note payable to the order of a named person which has not been endorsed or otherwise transferred, except in the name of the person to whom it is payable. Kohn v. Colonial Hill Co., 38 Ga. App. 286, 144 S.E. 33, 1928 Ga. App. LEXIS 195 (1928).

When a note is payable to a given person or order, the holder thereof, other than the payee, cannot sue thereon in the holder's own name, unless the paper has been endorsed or transferred to the holder in writing. Kersey v. Grant, 177 Ga. 501, 170 S.E. 501, 1933 Ga. LEXIS 339 (1933).

Right of agent to bring action. — Agent has a right of action in the agent's own name on a contract made with the agent in the agent's individual name, even though the agency is known; and in cases of an agency coupled with an interest, which is known to the party contracting with the agent, the agent may maintain an action on a contract in the agent's own name. Whitfield v. Boykin, 48 Ga. App. 141, 172 S.E. 82, 1933 Ga. App. LEXIS 499 (1933).

Agent of known principal, whose agency is not coupled with an interest known to the opposite party in such manner as to form an exception to the general rule, may not, in the agent's own name, bring an action for the recovery of the principal's money. Curry v. Roberson, 87 Ga. App. 785, 75 S.E.2d 282, 1953 Ga. App. LEXIS 857 (1953).

Only insured or assignee can maintain action on policy. — Generally, one other than the person to whom an insurance policy was issued cannot, in that person's own name, maintain an action thereon, unless the policy has been duly assigned to that person in writing. Insured Lloyds v. Bobo, 116 Ga. App. 89, 156 S.E.2d 518, 1967 Ga. App. LEXIS 711 (1967).

Action on a policy of insurance or on a written binder must be brought in the name of the holder of the legal title thereto. Insured Lloyds v. Bobo, 116 Ga. App. 89, 156 S.E.2d 518, 1967 Ga. App. LEXIS 711 (1967).

Trustee in a holding company's bankruptcy case did not have the right to bring a breach of contract claim against an insurer under a fidelity bond; although both the holding company and the company's subsidiary, a bank, were named as insureds, only the bank had the right to bring the claim under the terms of the bond because the bank's employees caused the alleged loss. Lubin v. Cincinnati Ins. Co., 677 F.3d 1039, 2012 U.S. App. LEXIS 2276 (11th Cir. 2012).

Fact that insurance policy did not specifically exclude benefits of coverage to all the world save the insured does not show intent that anyone could maintain an action under the policy. Insured Lloyds v. Bobo, 116 Ga. App. 89, 156 S.E.2d 518, 1967 Ga. App. LEXIS 711 (1967).

Action against insurer by injured party prohibited. — In absence of policy provisions to the contrary, one who suffers injury is not in privity of contract with insurer under liability insurance policy and cannot reach proceeds of the policy for payment of a claim by an action directly against insurer. Insured Lloyds v. Bobo, 116 Ga. App. 89, 156 S.E.2d 518, 1967 Ga. App. LEXIS 711 (1967); Lee v. Petty, 133 Ga. App. 201, 210 S.E.2d 383, 1974 Ga. App. LEXIS 1017 (1974); Gilbert v. Van Ord, 203 Ga. App. 660, 417 S.E.2d 390, 1992 Ga. App. LEXIS 594 (1992), cert. denied, No. S92C0946, 1992 Ga. LEXIS 464 (Ga. June 4, 1992).

Owner of automobile consigned for sale to insured dealer is not a beneficiary within the purview of this section, so as to entitle the owner to maintain an action against the insurer which issued the policy covering theft. First of Ga. Ins. Co. v. Augusta Ski Club, 118 Ga. App. 731, 165 S.E.2d 476, 1968 Ga. App. LEXIS 1511 (1968).

Interest in credit insurance policy in creditor, not debtor. — Legal and beneficial interest in credit insurance policy insuring certain debtors of creditor against contingency of death and permanent disability and agreeing to pay creditor balance of indebtedness in event of such contingencies is in creditor and debtor has no cause of action thereunder for insurer's failure to pay on disability claim by debtor. First of Ga. Ins. Co. v. Augusta Ski Club, 118 Ga. App. 731, 165 S.E.2d 476, 1968 Ga. App. LEXIS 1511 (1968).

Incidental benefit from insurance. — Absent statutory provision vesting right to maintain action, fact that one receives an incidental benefit from insurance, i.e., payment of balance of one's indebtedness upon the happening of specified events, does not alter fact that the right of action is not vested in that person.

Parties to Actions, Generally (Cont'd)

Insured Lloyds v. Bobo, 116 Ga. App. 89, 156 S.E.2d 518, 1967 Ga. App. LEXIS 711 (1967).

When plaintiff was not an insured under homeowner's policy but owned property, the loss of which was insured, the plaintiff had no right to sue insurer under the policy. First of Ga. Ins. Co. v. Augusta Ski Club, 118 Ga. App. 731, 165 S.E.2d 476, 1968 Ga. App. LEXIS 1511 (1968).

Action against insurer by injured party with judgment against insured. — Insurance policy which provides that any person who has secured a judgment against the insured shall thereafter be entitled to recover under the policy makes injured party who obtains a judgment against the insured a third-party beneficiary entitled to bring an action on the policy under this section. Davis v. National Indem. Co., 135 Ga. App. 793, 219 S.E.2d 32, 1975 Ga. App. LEXIS 1828 (1975).

In the absence of a provision in an insurance policy that any person who has secured a judgment against the insured shall thereafter be entitled to recover under the policy, there is no privity of contract between the insurer and the insured party under this section. Davis v. National Indem. Co., 135 Ga. App. 793, 219 S.E.2d 32, 1975 Ga. App. LEXIS 1828 (1975).

Borrower may not sue title insurer upon mortgage title policy issued to lender on the borrower's real estate loan. Sherrill v. Louisville Title Ins. Co., 134 Ga. App. 322, 214 S.E.2d 410, 1975 Ga. App. LEXIS 1999 (1975).

Parties contracting to divert charter granted for public purposes proper defendants. — Municipal authorities, street railroad company, and manufacturing company charged to have combined in diversion of charter granted for public purposes to private benefit and to have been parties to a contract for that purpose were properly joined as defendants. Mayor of Macon v. Harris, 73 Ga. 428, 1884 Ga. LEXIS 143 (1884).

Action against a corporation under joint venture theory. — In an insured's suit asserting claims for breach of contract under O.C.G.A. § 9-2-20 in connection with an insurer's denial of the insured's claim for proceeds of a long-term disability insurance policy, the parent corporation of the insurer, which administered the insurer's policies, was not liable under a joint venture theory because the insured's claims sounded in contract, not negligence. Adams v. UNUM Life Ins. Co. of Am., 508 F. Supp. 2d 1302, 2007 U.S. Dist. LEXIS 68725 (N.D. Ga. 2007).

Action against a corporation under an alter ego theory. — Insured could not pierce the corporate veil and hold the parent insurance company liable under an alter ego theory for a breach of the policy by the subsidiary because the insured did not show that the subsidiary had insufficient assets to satisfy the insured's claims, and the parent company was not a party to the policy issued by its subsidiary. Perry v. Unum Life Ins. Co. of Am., 353 F. Supp. 2d 1237, 2005 U.S. Dist. LEXIS 4623 (N.D. Ga. 2005).

In an insured's suit asserting claims for breach of contract under O.C.G.A. § 9-2-20 in connection with an insurer's denial of the insured's claim for proceeds of a long-term disability insurance policy, the parent corporation of the insurer was not liable under an alter ego theory; because the insurer was not insolvent and had funds sufficient to satisfy any judgment for the insured, the insurer's corporate veil could not be pierced so as to hold the parent liable, even if the insurer and the parent failed to maintain separate corporate existences. Adams v. UNUM Life Ins. Co. of Am., 508 F. Supp. 2d 1302, 2007 U.S. Dist. LEXIS 68725 (N.D. Ga. 2007).

Plaintiffs could not assert claim based on instruments to which plaintiffs were not parties or third-party beneficiaries. — Plaintiffs' claim that the defendant violated the "one satisfaction rule" by foreclosing on their home failed because the plaintiffs could not assert a claim against the defendant based on a purported insurance policy or settlement agreement as the plaintiffs were not parties to, or third-party beneficiaries of, those instruments. Fenello v. Bank of Am., N.A., No. 1:11-cv-4139-WSD, 2013 U.S. Dist. LEXIS 159925 (N.D. Ga. Nov. 8, 2013), aff'd, 577 Fed. Appx. 899, 2014 U.S. App. LEXIS 15424 (11th Cir. 2014).

In a case in which a pro se borrower argued that an assignment was invalid because it was executed after the creditor assigned the note and did not comply with the pooling and servicing agreement for the trust or state law, the borrower lacked standing since the borrower was not a party to the assignment. Morrison v. Bank of Am., N.A., No. 1:13-cv-1052-WSD, 2014 U.S. Dist. LEXIS 104426 (N.D. Ga. July 31, 2014).

Siblings who signed separate notes for mutual businesses. — Sibling who was not a party to or a third-party beneficiary of the other's residential mortgage, equity line of credit, or promissory note lacked standing to raise claims based on those transactions, although both the borrower and the sibling took out personal loans associated with their furniture businesses. Nelson v. Hamilton State Bank, 331 Ga. App. 419, 771 S.E.2d 113, 2015 Ga. App. LEXIS 168 (2015).

Trust that did not exist at time of transaction not a party. — Trial court did not err in granting summary judgment to the sellers as to the claims made by a trust against them because, when the sale and purchase of the house at issue was conducted, the trust did not even exist at the time the alleged misrepresentations or fraudulent concealments were made, thus, there was no evidence existing that the trust relied on the alleged misstatements. Stephen A. Wheat Trust v. Sparks, 325 Ga. App. 673, 754 S.E.2d 640, 2014 Ga. App. LEXIS 52 (2014).

Parties to Insurance

Insurance contract is no exception to the general rule of this section. Equitable Fire Ins. Co. v. Jefferson Std. Life Ins. Co., 26 Ga. App. 241, 105 S.E. 818, 1921 Ga. App. LEXIS 86 (1921) (see O.C.G.A. § 9-2-20).

Action on insurance policy must be brought in name of holder of legal title. Tyler v. National Life & Accident Ins. Co., 48 Ga. App. 338, 172 S.E. 747, 1934 Ga. App. LEXIS 65 (1934).

Duty of insurer is only to its insured and not to one who is not a party to the contract, even if the premiums on the policies were paid by that party. Gaines v. American Title Ins. Co., 136 Ga. App. 162, 220 S.E.2d 469, 1975 Ga. App. LEXIS 1283 (1975).

Third Party Beneficiaries

Exception to the general rule is third-party beneficiary theory, which allows the beneficiary of a contract between other parties to maintain an action against the promisor of a contract. American Fletcher Mtg. Co. v. First Am. Inv. Corp., 463 F. Supp. 186, 1978 U.S. Dist. LEXIS 16837 (N.D. Ga. 1978).

Third-party beneficiary contract is one in which a promisor engages to promisee to render some performance to a third person; it must clearly appear from the contract that it was intended for the benefit of the third party. Stewart v. Gainesville Glass Co., 131 Ga. App. 747, 206 S.E.2d 857, 1974 Ga. App. LEXIS 1542 (1974), aff'd, 233 Ga. 578, 212 S.E.2d 377, 1975 Ga. LEXIS 1377 (1975).

Underlying contract required before one can be third-party beneficiary. — Contractor was not a third-party beneficiary of the relationship between a county and the Environmental Protection Department because a Land Application System permit issued to the county was not a contract. Forsyth County v. Waterscape Servs., LLC, 303 Ga. App. 623, 694 S.E.2d 102, 2010 Ga. App. LEXIS 250 (2010), cert. denied, No. S10C1370, 2010 Ga. LEXIS 861 (Ga. Nov. 1, 2010).

Subsection (b) not to be given retroactive effect. — While Georgia Laws 1949, p. 455, amending this section, was apparently enacted to permit beneficiary under contract between other parties to recover, it could be given no retroactive effect, as to do so would violate the provisions of the United States and state Constitutions regarding impairing obligations of contracts by creating a right for one to recover under an existing contract when one previously had no such right and by subjecting a party to an existing contract to liability to a third person who previously had no right under the contract. Guest v. Stone, 206 Ga. 239, 56 S.E.2d 247, 1949 Ga. LEXIS 419 (1949).

In order for third party to have standing to enforce contract under this section it must clearly appear from the contract that it was intended for the

Third Party Beneficiaries (Cont'd)

third party's benefit; the mere fact that the third party would benefit from performance of the agreement is not alone sufficient. Backus v. Chilivis, 236 Ga. 500, 224 S.E.2d 370, 1976 Ga. LEXIS 917 (1976); Miree v. United States, 242 Ga. 126, 249 S.E.2d 573, 1978 Ga. LEXIS 1125 (1978); American Fletcher Mtg. Co. v. First Am. Inv. Corp., 463 F. Supp. 186, 1978 U.S. Dist. LEXIS 16837 (N.D. Ga. 1978); Jahannes v. Mitchell, 220 Ga. App. 102, 469 S.E.2d 255; Rowe Dev. Corp. v. Akin & Flanders, Inc., 240 Ga. App. 766, 525 S.E.2d 123.

Although as a general rule an action on a contract is brought by a party to it, the beneficiary of a contract made between other parties for the beneficiary's benefit may maintain an action against the promisor on the contract. Somers v. Avant, 244 Ga. 460, 261 S.E.2d 334, 1979 Ga. LEXIS 1288 (1979).

It must appear that both parties to the contract intended that the third person should be the beneficiary of the contract in order for the third party to have standing. Donalson v. Coca-Cola Co., 164 Ga. App. 712, 298 S.E.2d 25, 1982 Ga. App. LEXIS 2921 (1982).

Beneficiary of a contract made between parties for its benefit may maintain an action against the promisor on the contract, the only requirement being that the third party be an intended beneficiary. Therefore, plaintiff's status depends on the intention of the contracting parties to benefit it as a third party. Beckman Cotton Co. v. First Nat'l Bank, 666 F.2d 181, 1982 U.S. App. LEXIS 22396 (5th Cir. 1982).

In order for a third party to have standing to enforce a contract under subsection (b) of O.C.G.A. § 9-2-20, it must clearly appear from the contract that it was intended for his or her benefit. The mere fact that the third party would benefit from performance of the agreement is not alone sufficient. Culberson v. Fulton-DeKalb Hosp. Auth., 201 Ga. App. 347, 411 S.E.2d 75, 1991 Ga. App. LEXIS 1360 (1991), cert. denied, No. S92C0127, 1992 Ga. LEXIS 311 (Ga. Mar. 20, 1992), cert. denied, No. S92C0126, 1992 Ga. LEXIS 312 (Ga. Mar. 20, 1992).

In order for a non-party to have standing to enforce a contract as a third party beneficiary, it must clearly appear that one party to the contract promised another party to the contract to render some performance to the non-party to the contract; further, it must appear that both parties to the contract intended that the contract benefit the non-party. Vaughn, Coltrane & Assocs. v. Van Horn Constr., Inc., 254 Ga. App. 693, 563 S.E.2d 548, 2002 Ga. App. LEXIS 446 (2002).

Trial court properly granted summary judgment to an employer in an action by an injured employee, asserting that the employer breached its contract with a treating physician to provide professional liability insurance, as the employee, who was treated as a patient by the physician, was not a third-party beneficiary who was intended to have standing to bring such a claim under O.C.G.A. § 9-2-20(b). Crisp Reg'l Hosp., Inc. v. Oliver, 275 Ga. App. 578, 621 S.E.2d 554, 2005 Ga. App. LEXIS 1038 (2005), cert. denied, No. S06C0303, 2006 Ga. LEXIS 281 (Ga. Apr. 25, 2006).

In a class action filed by a group of uninsured patients arising out of a breach of a lease agreement, the patients failed to show a third-party beneficiary status, and thus, failed to prove standing to sue for a breach, despite the fact that the agreement was intended to promote the public health needs of the community and to continue the high quality and level of health care services, as the patients had no more standing than any other member of the public; moreover, the patients' reliance upon provisions of the agreement requiring the hospital to provide indigent and charity care was misplaced. Davis v. Phoebe Putney Health Sys., 280 Ga. App. 505, 634 S.E.2d 452, 2006 Ga. App. LEXIS 883 (2006).

Standing was lacking in foreclosure action. — District court properly dismissed the mortgagor's wrongful foreclosure claim against the assignee of the security deed because the mortgagor lacked standing to challenge the assignee's ability to foreclose on the mortgagor's property based on the assignments through which a third-party transferred the power of sale to the assignee as the mortgagor failed to allege that the mort-

gagor was a party to the assignments or that the mortgagor was an intended third-party beneficiary of the assignments at issue. Durham v. Aerial Funding, LLC, No. 21-13847, 2022 U.S. App. LEXIS 18231 (11th Cir. July 1, 2022).

Third party must be party to consideration. — Third party beneficiary may maintain action in the beneficiary's own name on contract between two other parties when such contract was made for the beneficiary's benefit, when the beneficiary was a party to the contract or in privity, where a trust was created for the beneficiary under the contract, or when the beneficiary's relation or status has been changed thereby. Waxelbaum v. Waxelbaum, 54 Ga. App. 823, 189 S.E. 283, 1936 Ga. App. LEXIS 768 (1936); First Nat'l Bank & Trust Co. v. Roberts, 187 Ga. 472, 1 S.E.2d 12, 1939 Ga. LEXIS 415 (1939); Sybilla v. Connally, 66 Ga. App. 678, 18 S.E.2d 783, 1942 Ga. App. LEXIS 274 (1942); Harris v. Joseph B. English Co., 83 Ga. App. 281, 63 S.E.2d 346, 1951 Ga. App. LEXIS 851 (1951) (for comment, see 13 Ga. B.J. 462 (1951)).

To maintain an action on a contract, third person must be a party to the consideration, or the contract must have been entered into for the third party's benefit, and the third party must have some legal or equitable interest in its performance. Whitley v. Bryant, 198 Ga. 328, 31 S.E.2d 701, 1944 Ga. LEXIS 410 (1944).

Enforcement by beneficiary supplying consideration. — Contract made by the mother, not only for the benefit of the child, but on behalf of the child meant that the child had a substantial interest in the result of the litigation. Savannah Bank & Trust Co. v. Wolff, 191 Ga. 111, 11 S.E.2d 766, 1940 Ga. LEXIS 617 (1940).

Action by third person with incidental benefit barred. — Requirement that action be brought "in the name of the party in whom the legal interest in such contract is vested" bars action by a third person who has merely an incidental benefit in its performance, but it does not preclude an action in the name of a third person who has a direct legal or equitable interest in the performance of the contract, and for whose benefit it was expressly undertaken. Whitley v. Bryant, 198 Ga. 328, 31 S.E.2d 701, 1944 Ga. LEXIS 410 (1944).

Subsection (b) of this section is limited in application to intended beneficiaries, as distinguished from incidental beneficiaries. Miree v. United States, 526 F.2d 679, 1976 U.S. App. LEXIS 11980 (5th Cir. 1976).

County residents who received water and sewer services under a franchise agreement between a city and the county lacked standing to bring suit against the city for damages for excess rates allegedly charged by the city to county customers under the franchise agreement and a settlement agreement between the city and county. Page v. City of Conyers, 231 Ga. App. 264, 499 S.E.2d 126.

Injured motorist and the motorist's spouse did not have standing to sue the contractors who widened a highway pursuant to a contract with the state highway department following the motorist's accident on the on-ramp to the highway because the motorist and the motorist's spouse were not third-party beneficiaries to the construction contract and the mere fact that they would benefit incidentally from the performance of the contract was not alone sufficient to give them standing to sue on the contract. Hubbard v. DOT, 256 Ga. App. 342, 568 S.E.2d 559, 2002 Ga. App. LEXIS 910 (2002), cert. denied, No. S02C1696, 2002 Ga. LEXIS 788 (Ga. Sept. 6, 2002).

Under O.C.G.A. § 9-2-20(b), a successor to a competing sponsor was not a third party beneficiary of an agreement between a race car owner and a promoter, but was merely an incidental beneficiary; thus, the successor lacked standing to challenge the promoter's interpretation of the agreement, and a preliminary injunction against the promoter was improper. AT&T Mobility, LLC v. NASCAR, Inc., 494 F.3d 1356, 2007 U.S. App. LEXIS 19182 (11th Cir. 2007).

Insured not intended third-party beneficiary. — In an insured's suit asserting claims for breach of contract under O.C.G.A. § 9-2-20 in connection with an insurer's denial of the insured's claim for proceeds of a long-term disability insurance policy, the insured's claim against the parent corporation of the insurer

Third Party Beneficiaries (Cont'd)

failed because the insured was not an intended third-party beneficiary of a contract whereby the parent provided administrative services for the insurer's policies. That the insured benefitted from the performance of that contract was inconsequential, as the contract required the parent to provide a wide variety of other services to the insurer, including auditing, cash management, and marketing services. Adams v. UNUM Life Ins. Co. of Am., 508 F. Supp. 2d 1302, 2007 U.S. Dist. LEXIS 68725 (N.D. Ga. 2007).

In construing supposed third-party beneficiary relationship, it is obligatory to determine intent of the parties to the contract. Continental Cas. Co. v. Continental Rent-A-Car of Ga., Inc., 349 F. Supp. 666, 1972 U.S. Dist. LEXIS 14485 (N.D. Ga.), aff'd, 468 F.2d 950 (5th Cir. 1972).

Under Georgia law, a third-party beneficiary can bring an action on a contract between other parties only if the promisor engages to the promisee to render some performance to a third person and both parties to the contract intend that the third person should be the beneficiary. American Fletcher Mtg. Co. v. First Am. Inv. Corp., 463 F. Supp. 186, 1978 U.S. Dist. LEXIS 16837 (N.D. Ga. 1978).

Inmate's contention that the terms of a contract between Stone Mountain Memorial Association and the Georgia Department of Corrections (DOC) requiring the Association to provide a safe workplace, safety gear and necessary protective clothing, were intended to benefit the inmates by providing for their safety while working pursuant to the contract, was rejected because, viewed as a whole, the contract showed that the inmates' safety remained the primary responsibility of the DOC, and the Association's promise was not an undertaking on behalf of the inmates; thus, the inmate was not an intended beneficiary of the contract pursuant to O.C.G.A. § 9-2-20. Gay v. Ga. Dep't of Corr., 270 Ga. App. 17, 606 S.E.2d 53, 2004 Ga. App. LEXIS 1333 (2004), cert. denied, No. S05C0402, 2005 Ga. LEXIS 88 (Ga. Jan. 24, 2005).

Third party status determined by construction of contract. — Rights of a third person to sue on a contract made for the third person's benefit depend on the terms of the agreement and are no greater than those granted by the contract, as intended by the parties thereto; to recover, a beneficiary must be brought within its terms. Deal v. Chemical Constr. Co., 99 Ga. App. 413, 108 S.E.2d 746, 1959 Ga. App. LEXIS 866 (1959).

Since recovery on third person beneficiary contract is a recovery on the contract itself, right of the beneficiary is no greater than if the contract were enforced between the nominal parties, the beneficiary being in no better position than the promisee. Deal v. Chemical Constr. Co., 99 Ga. App. 413, 108 S.E.2d 746, 1959 Ga. App. LEXIS 866 (1959).

Party's status as a third-party beneficiary depends upon the intention of the contracting parties to benefit the third party, which is determined by a construction of the contract as a whole. American Fletcher Mtg. Co. v. First Am. Inv. Corp., 463 F. Supp. 186, 1978 U.S. Dist. LEXIS 16837 (N.D. Ga. 1978).

Promisee did not have standing to sue the maker and assignee of the note for breach of those two parties' asset purchase agreement (APA) because the APA clearly stated that no other person had any right under the APA as a third party beneficiary or otherwise. Kaesemeyer v. Angiogenix, Inc., 278 Ga. App. 434, 629 S.E.2d 22, 2006 Ga. App. LEXIS 246 (2006), cert. denied, No. S06C1327, 2006 Ga. LEXIS 552 (Ga. July 13, 2006).

In a breach of contract action, the appellate court erred in concluding that a worker killed at a city airport construction site was an intended beneficiary of all of the contracts between the city and the contractors as the court did not properly consider the definition of the term "all participants" and did not consider the parties' contractual obligations separately. Archer W. Contrs., Ltd. v. Estate of Estate of Pitts, 292 Ga. 219, 735 S.E.2d 772, 2012 Ga. LEXIS 970 (2012).

In a premises liability action, the trial court properly granted summary judgment to the hotel franchisee where there was no genuine issue of material fact that no apparent agency existed between the hotel owner and the franchisee and the

franchise contract between the hotel and the franchisee showed no intent to benefit third persons such as hotel guests. Bright v. Sandstone Hospitality, LLC, 327 Ga. App. 157, 755 S.E.2d 899, 2014 Ga. App. LEXIS 288 (2014).

In an insurance dispute, the grant of summary judgment to the homeowner and house insurer was affirmed against the secondary insurer because the homeowner was specifically named on an endorsement as an additional insured on the secondary insurer's policy and that policy was a contract that clearly intended, on the contract's face, to benefit the homeowner as a third-party beneficiary. Southern Trust Insurance Company v. Cravey, 345 Ga. App. 697, 814 S.E.2d 802, 2018 Ga. App. LEXIS 268 (2018), cert. denied, No. S18C1319, 2018 Ga. LEXIS 820 (Ga. Dec. 10, 2018).

Intended third party beneficiary of a contract. — Intended third party beneficiary of a contract between the beneficiary's parents and the corporate operator of a treatment program was entitled to recover the reasonable value of services it failed to provide. Reaugh v. Inner Harbour Hosp., 214 Ga. App. 259, 447 S.E.2d 617, 1994 Ga. App. LEXIS 1437 (1994), cert. denied, No. S94C1817, 1994 Ga. LEXIS 1179 (Ga. Dec. 2, 1994).

County employee had standing to bring an action against the administrator of the county's health plan based on the administrator's alleged failure to exercise its implied duty of good faith and fair dealing in performing its obligations under the agreement with the county. Gardner & White Consulting Servs., Inc. v. Ray, 222 Ga. App. 464, 474 S.E.2d 663.

Licensee was properly granted partial summary judgment in the licensor's third-party beneficiary claim against the licensee because, after the licensee sold some of its assets to the subsidiary of the purchaser after entering into the license agreement with the licensor, and the purchaser refused to abide by the agreement, the licensor was not a third-party beneficiary under O.C.G.A. § 9-2-20(b) to the agreements. Marvel Enters. v. World Wrestling Fed'n Entm't, Inc., 271 Ga. App. 607, 610 S.E.2d 583, 2005 Ga. App. LEXIS 115 (2005).

Although the franchisees were transferees of a builder's warranty, they were not third beneficiaries under O.C.G.A. § 9-2-20(b); nevertheless, because there were material issues of fact as to whether all repairs were properly made and the franchisees brought suit within the six-year statute of limitation in O.C.G.A. § 9-3-24, the trial court erred in granting summary judgment to the contractor. Danjor, Inc. v. Corporate Constr., Inc., 272 Ga. App. 695, 613 S.E.2d 218, 2005 Ga. App. LEXIS 367 (2005).

Pursuant to O.C.G.A. § 9-2-20(b), an annuity company had standing to pursue a breach of contract action against two former employees of a financial company; although the former employees and the financial company entered into various nondisclosure and nonsolicitation agreements, the agreements specifically afforded protection to the annuity company. Variable Annuity Life Ins. Co. v. Joiner, 454 F. Supp. 2d 1297, 2006 U.S. Dist. LEXIS 62400 (S.D. Ga. 2006).

Employee's action to enjoin the enforcement of a non-compete clause in a contract between the employee's employer and the employee's desired physician, which was treated as a judgment on the pleadings on appeal, was properly dismissed on standing grounds as the employee was neither a party to the contract nor an intended beneficiary of the contract. Haldi v. Piedmont Nephrology Assocs., P.C., 283 Ga. App. 321, 641 S.E.2d 298, 2007 Ga. App. LEXIS 46 (2007), cert. denied, No. S07C0862, 2007 Ga. LEXIS 387 (Ga. May 14, 2007).

Insurer was not a third-party beneficiary entitled to enforce an arbitration clause of a loan agreement because the loan agreement did not show any intent to allow anyone other than the buyer, seller, and assignee of the seller and the lender to compel arbitration of disputes under the loan agreement. Lawson v. Life of the South Ins. Co., 648 F.3d 1166, 2011 U.S. App. LEXIS 16412 (11th Cir. 2011).

Trial court did not err in concluding that a landowner had standing to assert a breach of contract claim because on its face a site plan's location of a dock was intended to benefit the landowner's by protecting the landowner's ability to place

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a dock between one dock and another dock. Dillon v. Reid, 312 Ga. App. 34, 717 S.E.2d 542, 2011 Ga. App. LEXIS 882 (2011).

Contracts between public entity and others were for benefit of public. — City's water customers were not third party beneficiaries of the contracts between the city and the city's contractors who provided meter services under O.C.G.A. § 9-2-20(b) because those contracts were intended to benefit the public generally, not the customers specifically. City of Atlanta v. Benator, 310 Ga. App. 597, 714 S.E.2d 109, 2011 Ga. App. LEXIS 611 (2011), overruled in part, FDIC v. Loudermilk, 305 Ga. 558, 826 S.E.2d 116, 2019 Ga. LEXIS 186 (2019).

Members of distribution EMCs lacked privity to sue wholesale EMCs. — Suits by classes of former and current members of distribution electric membership corporations (EMCs) seeking to recover millions of dollars in patronage capital from two wholesale EMCs were dismissed because the members lacked privity with the wholesale EMCs, and there was no legal duty under O.C.G.A. § 46-3-340(c) or the EMCs' bylaws requiring distribution of the patronage capital to the members. Walker v. Oglethorpe Power Corp., 341 Ga. App. 647, 802 S.E.2d 643, 2017 Ga. App. LEXIS 261 (2017), overruled in part, Hanham v. Access Mgmt. Group L.P., 305 Ga. 414, 825 S.E.2d 217, 2019 Ga. LEXIS 137 (2019).

Minors as third-party beneficiaries have standing to sue upon contract made for their benefit. Norris v. Cady, 231 Ga. 19, 200 S.E.2d 102, 1973 Ga. LEXIS 576 (1973).

Action may be maintained by child to enforce contract to adopt and devise, in person or by next friend. Savannah Bank & Trust Co. v. Wolff, 191 Ga. 111, 11 S.E.2d 766, 1940 Ga. LEXIS 617 (1940).

Court-ordered obligation to support one's child is not a third-party beneficiary contract. Baird v. Herrmann, 181 Ga. App. 579, 353 S.E.2d 75, 1987 Ga. App. LEXIS 1485 (1987).

Contract to make will. — When contract to make a will was made by father with grandmother for benefit of plaintiff child, full performance of all the obligations undertaken by father resulted in perfect equitable title in the property in the plaintiff; therefore, whoever held the legal title to the property after the death of the grandmother necessarily held it in trust for the plaintiff who, although not a party to the original contract, was entitled to maintain an action for specific performance. Veruki v. Burke, 202 Ga. 844, 44 S.E.2d 906, 1947 Ga. LEXIS 541 (1947) (for comment, see 10 Ga. B.J. 369 (1948)).

Seller as beneficiary of letter of credit. — When a defendant bank sent a copy of the credit letter to plaintiff seller of cotton and in its own letter of credit procedures equated "beneficiary" with seller/exporter, this shows that the parties contemplated plaintiff as an intended beneficiary of the contract. The district court therefore correctly held that plaintiff had standing to sue as a third-party beneficiary. Beckman Cotton Co. v. First Nat'l Bank, 666 F.2d 181, 1982 U.S. App. LEXIS 22396 (5th Cir. 1982).

Materialmen have beneficial interest in contractor's bond and may bring an action on the bond in their own name rather than in the name of the nominal obligee. Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981 U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982).

If the general contractor's payment bond defines a claimant under the bond as one supplying material to a subcontractor, then a materialman of a subcontractor may sue on the bond for the subcontractor's nonpayment; if the bond expressly limits a right of action on the bond to the named obligees or is conditioned on the general contractor's payment of only materialmen having a direct relationship with the general contractor, then a materialman of a subcontractor may not sue on the payment bond; and if the bond is conditioned on the general contractor's payment of all persons furnishing labor and material under or for the contract, then, at a minimum, materialmen of the general contractor may maintain an action on the bond. Sims' Crane Serv., Inc. v. Reliance Ins. Co., 514 F. Supp. 1033, 1981

U.S. Dist. LEXIS 9561 (S.D. Ga. 1981), aff'd, 667 F.2d 30, 1982 U.S. App. LEXIS 22211 (11th Cir. 1982).

Action by materialman against obligors in bond for materials furnished is not subject to dismissal upon ground that it is not brought in name of obligee named in bond. Robinson Explosives, Inc. v. Dalon Contracting Co., 132 Ga. App. 849, 209 S.E.2d 264, 1974 Ga. App. LEXIS 1846 (1974).

Real estate broker bringing action for commission against closing agent is not prevented from recovery because the broker did not expressly approve or ratify contract providing for distribution of commission by defendant to broker. Guaranty Title Ins. Co. v. Wilson, 123 Ga. App. 3, 179 S.E.2d 280, 1970 Ga. App. LEXIS 706 (1970).

Restrictive covenant. — When a grantor sells property with a restriction benefiting the grantor's neighbors, the neighbor is a beneficiary who may enforce the restriction. Muldawer v. Stribling, 243 Ga. 673, 256 S.E.2d 357, 1979 Ga. LEXIS 1025 (1979).

Grantees under a deed containing restrictive covenants had standing to complain that a successor in title to a separate tract of land deeded by the same grantor had breached identical covenants. Jones v. Gaddy, 259 Ga. 356, 380 S.E.2d 706, 1989 Ga. LEXIS 554 (1989).

Debtors as beneficiaries under Home Affordable Modification Program. — Debtors lacked standing to sue a bank as third party beneficiaries since the debtors were merely incidental beneficiaries of, and did not have enforceable rights under the Home Affordable Modification Program and a service participation agreement. Salvador v. Bank of Am., N.A. (In re Salvador), 456 B.R. 610, 2011 Bankr. LEXIS 1772 (Bankr. M.D. Ga. 2011).

Denial of bank's motion to dismiss was reversed because homeowners were mere incidental beneficiaries who lacked standing to enforce the Home Affordable Modification Program (HAMP) Agreements. As such, the borrower did not have a private right of action to enforce HAMP against the bank. U. S. Bank, N.A. v. Phillips, 318 Ga. App. 819, 734 S.E.2d 799, 2012 Ga. App. LEXIS 1012 (2012).

Contract between state highway department and construction company by which company undertakes to provide for safety of the public during construction of project inures to the benefit of the public, and a member of the public injured as a result of company's negligence in failing to do so may sue the company directly. Lee v. Petty, 133 Ga. App. 201, 210 S.E.2d 383, 1974 Ga. App. LEXIS 1017 (1974).

Enforcement of purchaser's assumption agreement by holder of security deed. — Assignee of a mortgage may enforce it against the purchaser of the property who assumes payment. Reid v. Whisenant, 161 Ga. 503, 131 S.E. 904, 1926 Ga. LEXIS 291 (1926).

Under well-recognized exception to the general rule, where owner conveys tract of land as security for indebtedness and thereafter sells and conveys such land to purchaser by deed stipulating that purchaser agrees to assume and pay the indebtedness, the grantee in the security deed or the grantee's transferee may enforce the assumption agreement of the purchaser by a suit in equity. National Mtg. Corp. v. Bullard, 178 Ga. 451, 173 S.E. 401, 1934 Ga. LEXIS 74 (1934).

Creditor of vendor may enforce agreement. — When the purchaser of the assets of a firm agrees to pay their debts, a creditor of the firm can enforce this agreement for the creditor's benefit by a bill in equity to which the partners and purchasers are parties. Bell v. McGrady, 32 Ga. 257, 1861 Ga. LEXIS 170 (1861).

After married woman conveyed her separate estate absolutely to others in consideration of their agreement to pay her an annuity for life and all debts against her separate property, the agreement may in equity be enforced by her creditors. Reid v. Whisenant, 161 Ga. 503, 131 S.E. 904, 1926 Ga. LEXIS 291 (1926).

Whe vendor conveys property to purchaser in transaction whereby purchaser agrees to assume and pay debts of vendor, a creditor of the vendor may enforce assumption agreement in equity. O'Leary v. Costello, 169 Ga. 754, 151 S.E. 487, 1930 Ga. LEXIS 24 (1930); First Nat'l Bank v. Rountree, 173 Ga. 117, 159 S.E. 658, 1931 Ga. LEXIS 277 (1931); National Mtg.

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Corp. v. Bullard, 178 Ga. 451, 173 S.E. 401, 1934 Ga. LEXIS 74 (1934); Alexander v. Dinwiddie, 214 Ga. 441, 105 S.E.2d 451, 1958 Ga. LEXIS 454 (1958).

When vendor conveys property to vendee, who agrees, as partial or entire consideration, to pay debts of vendor, creditor of vendor may enforce assumption agreement against vendee by suit in equity with proper pleadings and parties. Gerson v. Haley, 114 Ga. App. 606, 152 S.E.2d 654, 1966 Ga. App. LEXIS 867 (1966).

Action against party assuming debt no longer in equity. — Suit upon a note against party assuming the indebtedness is not dismissible because it was brought in a court without equity jurisdiction. Jones v. Frances Wood Wilson Found., Inc., 119 Ga. App. 28, 165 S.E.2d 882, 1969 Ga. App. LEXIS 961 (1969).

Before the enactment of the 1949 amendment to this section, a suit in equity was required to assert a debt against the party assuming it, but now the action is not considered equitable. Rader v. H. Boyer Marx & Assocs., 142 Ga. App. 97, 235 S.E.2d 690, 1977 Ga. App. LEXIS 1492 (1977) (see now O.C.O.G. § 9-2-20).

Contractual provisions were insufficient to create an intended third-party beneficiary status in primary lender. — See American Fletcher Mtg. Co. v. First Am. Inv. Corp., 463 F. Supp. 186, 1978 U.S. Dist. LEXIS 16837 (N.D. Ga. 1978).

Fact that plaintiff may benefit by performance of subcontract does not make it a beneficiary of the subcontract as contemplated under this section, when the benefits provided did not originate on that contract but originated on the primary contract to which the plaintiff was a party. McWhirter Material Handling Co. v. Georgia Paper Stock Co., 118 Ga. App. 582, 164 S.E.2d 852, 1968 Ga. App. LEXIS 1465 (1968).

Mere fact that an owner might benefit from a subcontractor's performance of a contract provision is insufficient to entitle the owner to claim a right to secure the enforcement of that provision when the subcontract indicates that it is solely for the benefit of the contractor and subcontractor. Walls, Inc. v. Atlantic Realty Co., 186 Ga. App. 389, 367 S.E.2d 278, 1988 Ga. App. LEXIS 385 (1988).

Stock purchase agreement to protect purchasers from double liability. — Contractual provisions in a stock purchase agreement whereby purchasers of corporation's stock guaranteed their pro rata shares of the outstanding debts of the corporation did not create an enforceable promise to pay outstanding insurance premiums to an insurance company as a third-party beneficiary since the intention of the parties was to protect the purchasers from incurring double liability on the corporation's outstanding debts, as well as the purchase price. Continental Cas. Co. v. Continental Rent-A-Car of Ga., Inc., 349 F. Supp. 666, 1972 U.S. Dist. LEXIS 14485 (N.D. Ga.), aff'd, 468 F.2d 950 (5th Cir. 1972).

Contract between county and another party. — No plaintiff may maintain action as third-party beneficiary based upon alleged breach of contract between county and another party. Miree v. United States, 242 Ga. 126, 249 S.E.2d 573, 1978 Ga. LEXIS 1125 (1978).

No third-party beneficiaries to agreement. — Trial court did not err by finding that an inmate was not a third-party beneficiary to the contract between the county sheriff's office and a medical provider because under the express terms of the contract, there were no third-party beneficiaries to the agreement. Graham v. Cobb County, 316 Ga. App. 738, 730 S.E.2d 439, 2012 Ga. App. LEXIS 643 (2012).

State employee receiving benefits under state health plan. — State employee could not bring a breach of contract action against a managed healthcare company (MHC) that maintained a national PPO network of providers and the Georgia Department of Community Health (DCH) regarding a contract between DCH and the MHC under which the MHC managed a network of PPO network providers for DCH; the employee was not a third-party beneficiary of that contract. Mitchell v. Ga. Dept. of Cmty. Health, 281 Ga. App. 174, 635 S.E.2d 798, 2006 Ga. App. LEXIS 1024 (2006).

"Potential minority subcontractor" not third-party beneficiary. — Provi-

sion in contract between city and general contractor calling for minimum level of minority participation in the contract did not render company listed as a "potential minority subcontractor" in the bid a third-party beneficiary of the prime contract. Southeast Grading, Inc. v. City of Atlanta, 172 Ga. App. 798, 324 S.E.2d 776, 1984 Ga. App. LEXIS 2669 (1984).

Action against club by spouse of member. — Since it was clear that the spouse of a club member had no property rights in the club and could not be a third party beneficiary since the contract was not for the spouse's benefit, the spouse could not maintain an action against the club as the spouse lacked standing to do so. Bartley v. Augusta Country Club, Inc., 172 Ga. App. 289, 322 S.E.2d 749, 1984 Ga. App. LEXIS 2486 (1984).

In personal injury cases, an injured party may not recover as a third-party beneficiary for failure to perform a duty imposed by a contract unless it is apparent from the language of the agreement that the contracting parties intended to confer a direct benefit upon the plaintiff to protect the plaintiff from physical injury. Armor Elevator Co. v. Hinton, 213 Ga. App. 27, 443 S.E.2d 670, 1994 Ga. App. LEXIS 436 (1994).

On-call doctor not liable. — Patient could not rely on a contract between a doctor and a hospital to create a consensual relationship between the patient and the doctor since there was no evidence that the patient was an intended third party beneficiary of the contract with enforceable rights thereunder. Anderson v. Houser, 240 Ga. App. 613, 523 S.E.2d 342.

Municipal liability insurance contract. — Members of the public were not third party beneficiaries of municipal liability insurance contracts voluntarily acquired by a city without legislative mandate and did not have the right to bring an action to reform the contract. Googe v. Florida Int'l Indem. Co., 262 Ga. 546, 422 S.E.2d 552, 1992 Ga. LEXIS 951 (1992).

Attorney in title certification case has duty to third-party beneficiary which may be enforced under O.C.G.A. § 9-2-20. Kirby v. Chester, 174 Ga. App. 881, 331 S.E.2d 915, 1985 Ga. App. LEXIS 1988 (1985).

Attorney as third party beneficiary. — When an attorney sued a former client's ex-spouse to enforce a lien on the former client's former marital residence, which was titled in the ex-spouse's name, the attorney was an unnamed third-party beneficiary of the separation agreement between the ex-spouse and the former client as the agreement provided for the satisfaction of liens against the parties to the agreement, and the attorney was a member of a relatively small group of those with liens against those parties. Northen v. Tobin, 262 Ga. App. 339, 585 S.E.2d 681, 2003 Ga. App. LEXIS 916 (2003).

Dissolved corporations. — Insurance agency's motion for summary judgment was properly denied in declaratory judgment action since the agency did not assert that the agency had standing to sue as a third-party beneficiary of the insured's insurance policy under O.C.G.A. § 9-2-20(b). Ins. Agency of Glynn County, Inc. v. Atlanta Cas. Co., 255 Ga. App. 323, 565 S.E.2d 547, 2002 Ga. App. LEXIS 616 (2002), cert. denied, No. S02C1417, 2002 Ga. LEXIS 809 (Ga. Sept. 6, 2002).

Trial court erred in denying the seller's motion to dismiss the dissolved corporation's renewal action as that action was filed more than two years after the dissolved corporation was dissolved and applicable statutory law only gave the dissolved corporation two years from the time of dissolution to file suit, regardless of whether that suit was an original action or was a renewal action filed after the original action had been voluntarily dismissed. Deere & Co. v. JPS Dev., Inc., 264 Ga. App. 672, 592 S.E.2d 175, 2003 Ga. App. LEXIS 1553 (2003).

Bank did not have standing as third party beneficiary of agreement between borrower and borrower's debtor. — Under O.C.G.A. § 9-2-20(b), a bank was not a third party beneficiary of a guaranty agreement between the bank's borrower and a supplier, although the supplier agreed to deposit all funds owed to the borrower into the borrower's account at the bank. The agreement and

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letter between the borrower and the supplier did not show any intention that the bank be benefited. U.S. Foodservice, Inc. v. Bartow County Bank, 300 Ga. App. 519, 685 S.E.2d 777, 2009 Ga. App. LEXIS 1214 (2009).

Car owner not third party beneficiary in contract between mechanic and garage. — Car owner was not a third party beneficiary under O.C.G.A. § 9-2-20(b) of a repair contract between the owner's mechanic and a garage to which the mechanic took the car for additional advice and repairs regarding an overheating problem. Dominic v. Eurocar Classics, 310 Ga. App. 825, 714 S.E.2d 388, 2011 Ga. App. LEXIS 667 (2011).

Debtor has no standing to challenge assignment. — Lower court correctly determined that the debtors lacked standing to challenge the assignment of the security deed to a bank because the security deed afforded the debtors no right to dispute the assignment as they were not third-party beneficiaries of the assignment as a whole and were not intended to directly benefit from the transfer of the power of sale. Ames v. JP Morgan Chase Bank, N.A., 298 Ga. 732, 783 S.E.2d 614, 2016 Ga. LEXIS 210 (2016).

Debtor lacked standing to challenge the assignment of the debtor's security deed by the bank to the new loan servicer because the debtor was neither a party to the assignment nor a beneficiary. Cooley v. Ocwen Loan Servicing, LLC, 729 Fed. Appx. 677, 2018 U.S. App. LEXIS 5730 (11th Cir. 2018).

Failure to show third party beneficiary status. — Trial court did not err in granting a clinic's motion under O.C.G.A. § 9-11-12(b)(6) to dismiss for failure to state a claim as the patients' action failed to state a claim that the patients were entitled as third-party beneficiaries to sue for breach of the contract between the clinic and another medical provider to provide free dialysis treatment for one year after the clinic closed; the contract did not clearly show on the contract's face that the contract was intended for the benefit of the patients as required under O.C.G.A. § 9-2-20(b), and the contract plainly showed that there was no intent to confer third-party beneficiary status on existing clinic outpatients. Andrade v. Grady Mem'l Hosp. Corp., 308 Ga. App. 171, 707 S.E.2d 118, 2011 Ga. App. LEXIS 146 (2011).

Complaint Allegations Sufficient

Allegations in complaint sufficiently set out third party beneficiary right. — Trial court erred in granting the defendant's motion to dismiss the plaintiff's claim for breach of contract because the allegations that the defendant demanded and received from the plaintiff an additional $3,850 for license and trophy fees in connection with the purchase of the safari arguably showed the flow of consideration directly from the plaintiff to the defendant for goods and services that the defendant allegedly failed to provide thus creating a third party beneficiary right for the plaintiff. Wright v. Waterberg Big Game Hunting Lodge Otjahewita (Pty), Ltd., 330 Ga. App. 508, 767 S.E.2d 513, 2014 Ga. App. LEXIS 842 (2014).

RESEARCH REFERENCES

Am. Jur. 2d.

59 Am. Jur. 2d, Parties, § 1 et seq.

Am. Jur. Pleading and Practice Forms.

19 Am. Jur. Pleading and Practice Forms, Parties, § 3.

C.J.S.

67A C.J.S., Parties, §§ 8 et seq., 44 et seq., 66 et seq.

ALR.

Action on implied contract arising out of fraud as within statutes of limitation applicable to fraud, 3 A.L.R. 1603.

Enforceability by the purchaser of a business, of a covenant of a third person with his vendor not to engage in a similar business, 22 A.L.R. 754.

Loss of profits as elements of damages

for fraud of seller, as to quality of goods purchased for resale, 28 A.L.R. 354.

Right of beneficiary to enforce contract between third persons to provide for him by will, 33 A.L.R. 739; 73 A.L.R. 1395.

Right of third person to maintain action at law on sealed instrument, 47 A.L.R. 5; 170 A.L.R. 1299.

Actions at law between partners and partnerships, 58 A.L.R. 621; 168 A.L.R. 1088.

Liability of water company to private owner or insurer for breach of its contract with municipality to supply pressure for fire purposes, 62 A.L.R. 1205.

Right of third person to enforce contract between others for his benefit, 81 A.L.R. 1271; 148 A.L.R. 359.

Right of beneficiary to bring action under death statute where executor or administrator, who by the statute is the proper party to bring it, fails to do so, 101 A.L.R. 840.

Right of third person entitled to maintain an action at law on a contract between other parties, or to garnish indebtedness thereunder, to maintain a suit for its reformation, 112 A.L.R. 909.

Right of one who buys goods from or sells goods to department under a lease or license from proprietor of department store to hold the latter upon the contract, 123 A.L.R. 594.

Contract to induce promisee to enter into contractual or other relations with third person as enforceable by latter, his creditors or representatives, 129 A.L.R. 172.

Reconveyance to grantor of land previously conveyed by him in consideration of support of grantor and other persons by grantee, as affecting such other persons, 150 A.L.R. 412.

Suits and remedies against alien enemies, 152 A.L.R. 1451; 153 A.L.R. 1419; 155 A.L.R. 1451; 156 A.L.R. 1448; 157 A.L.R. 1449.

Rights and remedies of beneficiary after death of insured who had pledged policy to secure debt, 160 A.L.R. 1389.

Breach of assumed duty to inspect property as ground of liability for damage or injury to third person, 6 A.L.R.2d 284.

Trust beneficiaries as necessary parties to action relating to trust or its property, 9 A.L.R.2d 10.

Right of third person not named in bond or other contract conditioned for support of, or services to, another, to recover thereon, 11 A.L.R.2d 1010.

Suspension or expulsion from social club or similar society and the remedies therefor, 20 A.L.R.2d 344.

Suspension or expulsion from professional association and the remedies therefor, 20 A.L.R.2d 531.

Right of owner's employee, injured by subcontractor, to recover against general contractor for breach of contract between latter and owner requiring contractor and subcontractors to carry insurance, 22 A.L.R.2d 647.

Assignee's right to enforce lessor's covenant to renew or extend lease, 29 A.L.R.2d 837.

Tenant's capacity to sue independent contractor, as third-party beneficiary, for breach of contract between landlord and such contractor for repair or remodeling work, 46 A.L.R.2d 1210.

Power and standing of personal representative of deceased promisee to enforce a contract made for benefit of a third party, 76 A.L.R.2d 231.

Right of insurance agent to sue in his own name for unpaid premium, 90 A.L.R.2d 1291.

Mutual rescission of release of contract as affecting rights of third-party beneficiary, 97 A.L.R.2d 1262.

Right of child to enforce provisions for his benefit in parents' separation or property settlement agreement, 34 A.L.R.3d 1357.

Surveyor's liability for mistake in, or misrepresentation as to accuracy of, survey of real property, 35 A.L.R.3d 504.

Judgment in action on express contract for labor or services as precluding, as a matter of res judicata, subsequent action on implied contract (quantum meruit) or vice versa, 35 A.L.R.3d 874.

Attorney's liability, to one other than his immediate client, for consequences of negligence in carrying out legal duties, 45 A.L.R.3d 1181; 61 A.L.R.4th 464; 61 A.L.R.4th 615.

Discharge of debtor who makes payment by delivering checks payable to creditor to latter's agent, where agent forges creditor's signature and absconds with proceeds, 49 A.L.R.3d 843.

Similarity of ownership or control as basis for charging corporation acquiring assets of another with liability for former owner's debts, 49 A.L.R.3d 881.

Bailor's right of direct action against bailee's theft insurer for loss of bailed property, 64 A.L.R.3d 1207.

Right in absence of express statutory authorization, of one convicted of crime and imprisoned or paroled, to prosecute civil action, 74 A.L.R.3d 680.

Liability of security services company to injured employee as beneficiary of security services contract between company and employer, 75 A.L.R.4th 836.

Breach of assumed duty to inspect property as ground for liability to third party, 13 A.L.R.5th 289.

Enforceability of trial period plans (TPP) under the home affordable modification program (HAMP), 88 A.L.R. Fed. 2d 331.

9-2-21. Parties to actions for torts; notice to Department of Community Health for a party who has received medical assistance benefits.

(a) An action for a tort shall, in general, be brought in the name of the person whose legal right has been affected. In the case of an injury to property, a tort action shall be brought in the name of the person who was legally interested in the property at the time the injury thereto was committed or in the name of his assignee.

(b) An action for a tort shall be brought against the party committing the injury, either by himself, his servant, or an agent in his employ.

(c) If the person whose legal right has been affected has received medical assistance benefits pursuant to Chapter 4 of Title 49, prior to initiating recovery action, the representative or attorney who has actual knowledge of the receipt of said benefits shall notify the Department of Community Health of the claim. Mailing and deposit in a United States post office or public mail box of said notice addressed to the Department of Community Health with adequate postage affixed is adequate legal notice of the claim. Notice as provided in this subsection shall not be a condition precedent to the filing of any action for tort. Initiating recovery action shall include any communication with a party who may be liable or someone financially responsible for that liability with regard to recovery of a claim including but not limited to the filing of an action in court.

History.

Orig. Code 1863, § 3182; Code 1868, § 3193; Code 1873, § 3258; Code 1882, § 3258; Civil Code 1895, § 4940; Civil Code 1910, § 5517; Code 1933, § 3-109; Ga. L. 1993, p. 1080, § 1; Ga. L. 1999, p. 296, § 24.

Law reviews.

For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 20 (1993).

JUDICIAL DECISIONS

This section requires that civil actions be brought in name of real parties in interest, and does not touch upon the question of who may present an order

or pleading to the court on behalf of one of the parties. Dixie-Land Iron & Metal Co. v. Piedmont Iron & Metal Co., 235 Ga. 503, 220 S.E.2d 130, 1975 Ga. LEXIS 912 (1975).

In an action for damages to and to enjoin further damage to real property, the real party in interest is the person or persons who own, lease, or have a legal interest in the property. Equitable Life Assurance Soc'y v. Tinsley Mill Village, 249 Ga. 769, 294 S.E.2d 495, 1982 Ga. LEXIS 931 (1982).

Section 51-1-11 provides exception to this section. — Former Code 1933, § 105-106 (see now O.C.G.A. § 51-1-11), providing that if tort results from violation of a duty, itself the consequence of a contract, right of action was confined to parties and privies to that contract, except in cases where the party would have had a right of action for the injury done, independently of the contract, set forth an exception to former Code 1933, § 3-109, (see now O.C.G.A. § 9-2-21). Black v. Southern Ry., 48 Ga. App. 445, 173 S.E. 199, 1934 Ga. App. LEXIS 99 (1934).

Torts by servant. — Former Civil Code 1910, § 5517 (see now O.C.G.A. § 9-2-21) governed right of action under former Code 1933, § 105-108 (see now O.C.G.A. § 51-2-2) for torts by servant. Burch v. King, 14 Ga. App. 153, 80 S.E. 664, 1914 Ga. App. LEXIS 152 (1914).

Conditional vendor has right of action for damages to automobile. Louisville & N.R.R. v. Dickson, 158 Ga. 303, 123 S.E. 12, 1924 Ga. LEXIS 138 (1924); Ryals v. Seaboard Air-Line Ry., 32 Ga. App. 453, 123 S.E. 733, 1924 Ga. App. LEXIS 457 (1924).

Minor may maintain action for damages on account of any tort resulting in damages to the minor, whether or not the tortious act affects the minor's parent. Kite v. Brooks, 51 Ga. App. 531, 181 S.E. 107, 1935 Ga. App. LEXIS 395 (1935).

Action should be brought in minor's name. — As minor plaintiff in action for injuries caused by tortious conduct of defendant is real party in interest and next friend is merely an officer of the court who is to protect the rights of the minor, the action should properly be brought in the name of the minor, by the minor's next friend, but if the action is brought in the name of the next friend, the difference is of little consequence. Kite v. Brooks, 51 Ga. App. 531, 181 S.E. 107, 1935 Ga. App. LEXIS 395 (1935).

Action to recover property set apart to minor children which has been taken and converted by other persons should be brought in the name of such children, regardless of whether they sue by guardian or next friend or without representation. Pardue Medicine Co. v. Pardue, 194 Ga. 516, 22 S.E.2d 143, 1942 Ga. LEXIS 623 (1942).

Mentally incompetent plaintiff. — In an action for injuries by a mentally incompetent plaintiff, the statute of limitations did not continue indefinitely and started to run upon entry into the case of the plaintiff's mother's next friend. Price v. Department of Transp., 214 Ga. App. 85, 446 S.E.2d 749, 1994 Ga. App. LEXIS 777 (1994), cert. denied, No. S94C1741, 1994 Ga. LEXIS 1147 (Ga. Oct. 28, 1994).

This section permits tenant in common to bring action of trover. Jordan v. Thornton, 7 Ga. 517, 1849 Ga. LEXIS 173 (1849); Howard v. Snelling & Snelling, 28 Ga. 469, 1859 Ga. LEXIS 234 (1859).

Action by highway department for destruction of bridge. — The State Highway Department (now Department of Transportation), holding bridge in trust for public as part of system of roads under its jurisdiction could be considered a bailee, and was entitled to bring the action for the allegedly negligent destruction of the bridge. State Hwy. Dep't v. Florence, 73 Ga. App. 852, 38 S.E.2d 628, 1946 Ga. App. LEXIS 433 (1946).

To maintain action for the use of another, there must be a legal right of action in the party bringing the action. King v. Prince, 89 Ga. App. 588, 80 S.E.2d 222, 1954 Ga. App. LEXIS 520 (1954).

If automobile owner has been fully compensated for damage to the owner's automobile by payment by insurer of damages less deductible amount and by payment by other party to the collision of the deductible amount, the owner has no cause of action against the other party and may not maintain suit in the owner's name. King v. Prince, 89 Ga. App. 588, 80 S.E.2d 222, 1954 Ga. App. LEXIS 520 (1954).

Insurance company cannot maintain action for destruction of property covered in part by its policy in the absence of an assignment. Atlanta Cadillac Co. v. Manley, 29 Ga. App. 522, 116 S.E. 35, 1923 Ga. App. LEXIS 104 (1923).

Subsequent vendees having no legal or equitable interest in property at time alleged negligent act occurred are not parties to tort action. Barber v. Adams, 145 Ga. App. 627, 244 S.E.2d 149, 1978 Ga. App. LEXIS 2069 (1978).

Limited rights of subsequent owners. — Purchaser who paid seller's draft for price of cotton after it was burned in carrier's possession cannot sue the carrier. Delgado Mills v. Georgia R.R. & Banking Co., 144 Ga. 175, 86 S.E. 550, 1915 Ga. LEXIS 104 (1915); Pee Dee Mfg. Co. v. Georgia R.R. & Banking Co., 144 Ga. 176, 86 S.E. 551, 1915 Ga. LEXIS 105 (1915).

Complaint for damage to realty brought by owner against tenant was properly nonsuited (dismissed) since the plaintiff was neither the owner of the property nor the landlord during most of the period when the damages were inflicted and there was no evidence from which the jury might reasonably infer that any ascertainable part of the damage was inflicted after plaintiff became the landlord and partial owner. Martin v. Medlin, 83 Ga. App. 589, 64 S.E.2d 73, 1951 Ga. App. LEXIS 918 (1951).

Owner was not entitled to recover mesne profits for period prior to time the owner acquired title. Patellis v. Tanner, 199 Ga. 304, 34 S.E.2d 84, 1945 Ga. LEXIS 304 (1945).

Trover by one who had parted with title. — When the plaintiff parted with title to property prior to bringing trover action, nonsuit (involuntary dismissal) was proper. Dunlap-Huckabee Auto Co. v. Central Ga. Automotive Co., 31 Ga. App. 617, 122 S.E. 69, 1924 Ga. App. LEXIS 101 (1924).

Tortious agent and corporation for whom agent was acting when tort was committed could be sued in same action jointly. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119, 1932 Ga. App. LEXIS 80 (1932).

Tort action against wife and husband, her agent. — When husband, as agent of wife, took out a dispossessory warrant to evict a tenant, tenant may join both in subsequent tort action connected therewith. Smith v. Eubanks & Hill, 72 Ga. 280, 1884 Ga. LEXIS 256 (1884).

On proof of conspiracy, all the conspirators are liable for the damage done. Woodruff v. Hughes, 2 Ga. App. 361, 58 S.E. 551, 1907 Ga. App. LEXIS 368 (1907).

Parties in trover action cannot be substituted by amendment. Willis v. Burch, 116 Ga. 374, 42 S.E. 718, 1902 Ga. LEXIS 107 (1902).

Action improperly brought against county commissioners cannot be amended by making the county a party or by changing action into one against commissioners as individuals. Arnett v. Board of Comm'rs, 75 Ga. 782, 1885 Ga. LEXIS 229 (1885).

Venue of trover action against joint defendants. — Trover action alleging that named defendants have possession of described articles of personal property to which plaintiff claims title which they refuse to deliver to plaintiff charges defendants jointly with tortious act of conversion, and hence they may be sued together in county where any of them resides. Screven Oil Mill v. Crosby, 94 Ga. App. 238, 94 S.E.2d 146, 1956 Ga. App. LEXIS 514 (1956).

Tort action failed for lack of ownership interest. — State court, as a matter of law, properly entered summary judgment for amusement park owner for lack of an ownership interest in the property at the time of the alleged sexual molestation of a minor on the roller coaster as, under O.C.G.A. § 9-2-21(b), an action in tort had to be brought against the party committing the injury, either personally, by the party's servant, or an agent in the party's employ. Rice v. Six Flags Over Ga., LLC, 257 Ga. App. 864, 572 S.E.2d 322, 2002 Ga. App. LEXIS 1249 (2002), cert. denied, No. S03C0300, 2003 Ga. LEXIS 95 (Ga. Jan. 27, 2003).

Party without involvement in business not proper party. — In a personal injury case in which a hotel moved for summary judgment, it was not a proper party under O.C.G.A. § 9-2-21(b). The hotel demonstrated that the hotel did not own, manage, or otherwise have any par-

ticipation or involvement with the hotel in question. Vidal v. Otis Elevator Co., No. 1:11-CV-03518-RWS, 2012 U.S. Dist. LEXIS 56180 (N.D. Ga. Apr. 20, 2012).

RESEARCH REFERENCES

C.J.S.

67A C.J.S., Parties, §§ 8 et seq., 46 et seq., 61 et seq.

ALR.

Right of husband and wife to maintain joint action for wrongs directly affecting both arising from same act, 25 A.L.R. 743.

Jurisdiction of action at law for damages for tort concerning real property in another state or country, 42 A.L.R. 196; 30 A.L.R.2d 1219.

Liability of employer forbidding employees to trade or associate with another, 52 A.L.R. 1028.

Actions at law between partners and partnerships, 58 A.L.R. 621; 168 A.L.R. 1088.

Right under or in view of statute to join in tort action at law parties who are severally but not jointly liable to plaintiff, 94 A.L.R. 539.

Suits and remedies against alien enemies, 152 A.L.R. 1451; 153 A.L.R. 1419; 155 A.L.R. 1451; 156 A.L.R. 1448; 157 A.L.R. 1449.

Breach of assumed duty to inspect property as ground of liability for damage or injury to third person, 6 A.L.R.2d 284.

Conflict of laws as to right of injured person to maintain direct action against tort-feasor's automobile liability insurer, 16 A.L.R.2d 881.

What rights of action in tort in favor of a bankrupt vest in his trustee in bankruptcy under § 70(a) of the former Bankruptcy Act (11 U.S.C. § 110(a)), 66 A.L.R.2d 1217.

Liability of real estate broker for interference with contract between vendor and another real estate broker, 34 A.L.R.3d 720.

Surveyor's liability for mistake in, or misrepresentation as to accuracy of, survey of real property, 35 A.L.R.3d 504.

Death action by or in favor of parent against unemancipated child, 62 A.L.R.3d 1299.

Right in absence of express statutory authorization, of one convicted of crime and imprisoned or paroled, to prosecute civil action, 74 A.L.R.3d 680.

Statute of limitations: running of statute of limitations on products liability claim against manufacturer as affected by plaintiff's lack of knowledge of defect allegedly causing personal injury or disease, 91 A.L.R.3d 991.

Breach of assumed duty to inspect property as ground for liability to third party, 13 A.L.R.5th 289.

9-2-22. Joinder of defendants in action for deficiencies in construction.

In any action arising out of alleged deficiencies in the construction of improvements on real property, the party plaintiff may join in one action, as parties defendants, all parties who allegedly contributed in the construction of the improvements as well as all bonding companies who bonded the performance of the parties defendant.

History.

Code 1933, § 3-110.1, enacted by Ga. L. 1964, p. 140, § 1.

RESEARCH REFERENCES

Am. Jur. 2d.

59 Am. Jur. 2d, Parties, §§ 43 et seq., 108 et seq.

C.J.S.

1A C.J.S., Actions, §§ 135, 149, 151. 67A C.J.S., Parties, § 36 et seq.

ALR.
Purchase of mortgaged property by mortgagee as affecting liability on bond conditioned for improvement of property or other obligation collateral to mortgage and mortgage debt, 82 A.L.R. 762.

9-2-23. Separate action by tenant in common.

A tenant in common may bring an action separately for his own interest, and the judgment in such case shall affect only himself.

History.
Orig. Code 1863, § 3183; Code 1868, § 3194; Code 1873, § 3259; Code 1882, § 3259; Civil Code 1895, § 4941; Civil Code 1910, § 5518; Code 1933, § 3-111.

Cross references.
Tenancy in common generally, § 44-6-120 et seq.

JUDICIAL DECISIONS

In action ensuing from filing of distress warrant, it was immaterial whether premises were leased to defendant lessee by lessors separately or as a partnership, since in either event lessors would be tenants in common of the property and thus subject to the express provisions of this section. Wisteria Garden Restaurant, Inc. v. Tuntas Co., 114 Ga. App. 165, 150 S.E.2d 460, 1966 Ga. App. LEXIS 680 (1966).

Action by assignee of tenant in common. — Under agreement between two former partners, in course of dissolution of partnership and division of assets remaining after payment of all indebtedness, that claim for personalty against third party would be divided equally between them, partners thereafter became tenants in common, insofar as their claim for such personalty was concerned, and it was therefore permissible for assignee of claim of one of such cotenants to sue in trover for the recovery of one-half undivided share of such property without joining the other cotenant and without suing in the name of the dissolved partnership. Graham v. Raines, 83 Ga. App. 581, 64 S.E.2d 98, 1951 Ga. App. LEXIS 915 (1951).

Separate action by tenants in common. — Since deed grantor's action to set aside and cancel warranty deed that the deed grantor conveyed to the deed grantees was severable as to the deed grantor's interest in the property that the deed grantor held as a joint tenant with the deed grantor's spouse, the deed grantor could not toll the applicable statute of limitations for bringing the deed grantor's action as the deed grantor could not use the spouse's disability to toll the action that the deed grantor could have brought as to the deed grantor's own interest in the property. Pivic v. Pittard, 258 Ga. App. 675, 575 S.E.2d 4, 2002 Ga. App. LEXIS 1347 (2002), cert. denied, No. S03C0550, 2003 Ga. LEXIS 218 (Ga. Feb. 24, 2003).

RESEARCH REFERENCES

Am. Jur. 2d.
20 Am. Jur. 2d, Cotenancy and Joint Ownership, §§ 31 et seq., 40 et seq., 84 et seq.59 Am. Jur. 2d, Parties, § 127 et seq.
C.J.S.
67A C.J.S., Parties, § 36 et seq. 86 C.J.S., Tenancy in Common, § 150 et seq.

ALR.
Homestead right of cotenant as affecting partition, 140 A.L.R. 1170.
Capacity of cotenant to maintain suit to set aside conveyance of interest of another cotenant because of fraud, undue influence, or incompetency, 7 A.L.R.2d 1317.

9-2-24. Action by unincorporated association.

An action may be maintained by and in the name of any unincorporated organization or association.

History.
Ga. L. 1959, p. 44, § 1.
Cross references.
Applicability of Code section to professional associations, § 14-10-17.

JUDICIAL DECISIONS

Capacity to bring suit. — Unincorporated association of owners of property in a residential community had the capacity to bring an action against the operator of community recreational amenities and property owners' association; overruling Embassy Row Assoc. v. Rawlins, 162 Ga. App. 669, 292 S.E.2d 541 (1982). Fairfield Plantation Action Comm., Inc. v. Plantation Equity Group, Inc., 215 Ga. App. 746, 452 S.E.2d 147, 1994 Ga. App. LEXIS 1364 (1994).

OPINIONS OF THE ATTORNEY GENERAL

Business trust is an association, as opposed to a corporation. 1980 Op. Att'y Gen. No. 80-144.

RESEARCH REFERENCES

Am. Jur. 2d.
6 Am. Jur. 2d, Associations and Clubs, §§ 4 et seq., 31 et seq.
Am. Jur. Pleading and Practice Forms.
16 Am. Jur. Pleading and Practice Forms, Labor and Labor Relations, § 2.
C.J.S.
7 C.J.S., Associations, § 85 et seq. 67A C.J.S., Parties, § 235.
ALR.
Rights and remedies in respect of membership in, or establishment and maintenance of local post of, American Legion or other veterans' organization, 147 A.L.R. 590.

Right of labor union, or other organization for protection or promotion of interests of members, to challenge validity of statute or ordinance on behalf of members, 2 A.L.R.2d 917.

Joint venture's capacity to sue, 56 A.L.R.4th 1234.

9-2-25. Action against unincorporated association; service of process; venue; what property bound by judgment.

(a) Actions may be maintained against and in the name of any unincorporated organization or association for any cause of action for or upon which the plaintiff therein may maintain such an action against the members of the organization or association.

(b) Service of process in the action against the organization or association shall be had by service upon any officer or official member of such organization or association, or upon any officer or official member of any branch or local of the organization or association, provided that

any such organization or association may file with the Secretary of State a designated officer or agent upon whom service shall be had and his residence address within the state. If the designation is made and filed, service of process shall be had only on the officer or agent designated, if he can be found within the state.

(c) The organization or association shall be suable in any cause of action. The action may be maintained in any county where the organization or association does business or has in existence a branch or local organization.

(d) Where a judgment in such actions is rendered in favor of the plaintiff against the organizations or associations, the property of the organization or association shall be liable to the satisfaction of the judgment. No such judgment shall be enforced against the individual property of any member of an unincorporated association, unless the member has personally participated in the transaction for which the action was instituted and has been served with process as provided by law.

History.
Ga. L. 1959, p. 44, §§ 2-5.

Cross references.
Prosecution of actions against less than all copartners, § 9-2-26.

Applicability of Code section to professional associations, § 14-10-17.

JUDICIAL DECISIONS

This section is not unconstitutional as contrary to former Ga. Const. 1976, Art. VI, Sec. XIV, Para. VI (see now Ga. Const. 1983, Art. VI, Sec. II, Para. VI). Drake v. Chesser, 230 Ga. 148, 196 S.E.2d 137, 1973 Ga. LEXIS 841 (1973).

Purpose of this section is to avoid having to locate a group of individuals in order to file suit in the county where each resides, and to fix a venue in order to bring an action against the association as a whole. Drake v. Chesser, 230 Ga. 148, 196 S.E.2d 137, 1973 Ga. LEXIS 841 (1973).

Term "official member," as used in this section, means a person who is clothed with some official duty or status to perform for the association or organization, other than that imposed upon an officer and more than that imposed upon a person solely because a person is listed as a member on the official rolls of the association or organization. Sheet Metal Workers Int'l Ass'n v. Carter, 241 Ga. 220, 244 S.E.2d 860, 1978 Ga. LEXIS 991 (1978).

This section does not and cannot include a limited partnership. Farmers Hdwe. of Athens, Inc. v. L.A. Properties, Ltd., 136 Ga. App. 180, 220 S.E.2d 465, 1975 Ga. App. LEXIS 1287 (1975).

Unincorporated associations may sue and be sued. Rogers v. Lindsey St. Baptist Church, 104 Ga. App. 487, 121 S.E.2d 926, 1961 Ga. App. LEXIS 724 (1961).

Service absent designation of agent with Secretary of State. — When designated officer or agent upon whom service may be had has not been filed with Secretary of State, an unincorporated organization or association may be served by serving any officer or official member of any branch or local of the organization or association. American Fed'n of State, County & Mun. Employees v. Rowe, 121

Ga. App. 99, 172 S.E.2d 866, 1970 Ga. App. LEXIS 1123 (1970).

Valid service under this section sufficient. — If valid service was obtained under this section, use of any other method of service is immaterial. American Fed'n of State, County & Mun. Employees v. Rowe, 121 Ga. App. 99, 172 S.E.2d 866, 1970 Ga. App. LEXIS 1123 (1970).

Suits by members maintainable. — Member of an unincorporated association could sue that association. Piney Grove Baptist Church v. Goss, 255 Ga. App. 380, 565 S.E.2d 569, 2002 Ga. App. LEXIS 634 (2002), cert. denied, No. S02C1411, 2002 Ga. LEXIS 759 (Ga. Sept. 6, 2002).

Order voiding county's appeal and directing high school association to award baseball victory to another county was in error because the high school association breached its own appeal procedures when it allowed the county to file an untimely appeal without sufficient time for the other county to respond and failed to submit the appeal to the Appeal Board for presentation of evidence, as required in governing White Book. Ga. High Sch. Ass'n v. Charlton County Sch. Dist., 349 Ga. App. 309, 826 S.E.2d 172, 2019 Ga. App. LEXIS 158 (2019).

RESEARCH REFERENCES

Am. Jur. 2d.

77 Am. Jur. 2d, Venue, § 40 et seq.

C.J.S.

7 C.J.S., Associations, § 92 et seq. 67A C.J.S., Parties, § 48 et seq.

ALR.

Power to exact license fees or impose a penalty for benefit of private individual or corporation, 13 A.L.R. 828; 19 A.L.R. 205.

Responsibility of agricultural society for tort, 52 A.L.R. 1400.

Unincorporated association issuing insurance contract as subject to suit as entity in the name in which it contracts, 88 A.L.R. 164.

Right of one who makes agreement with an unincorporated association to avoid or defend against agreement because association has no legal existence, 121 A.L.R. 632.

Mandamus against unincorporated association or its officers, 137 A.L.R. 311.

Privilege against self-incrimination as available to member or officer of unincorporated association as regards its books or papers, 152 A.L.R. 1208.

Recovery by member from unincorporated association for injuries inflicted by tort of fellow member, 14 A.L.R.2d 473.

Power and capacity of members of unincorporated association, lodge, society, or club to convey, transfer, or encumber association property, 15 A.L.R.2d 1451.

Suability of individual members of unincorporated association as affected by statute or rule permitting association to be sued as an entity, 92 A.L.R.2d 499.

Liability of member of unincorporated association for tortious acts of association's nonmember agent or employee, 62 A.L.R.3d 1165.

9-2-26. Prosecution of action against less than all joint contractors or copartners.

When two or more joint contractors, joint and several contractors, or copartners are defendants in the same action and service is perfected on one or more of the contractors or copartners and the officer serving the writ or process returns that the rest are not to be found, the plaintiff may proceed to judgment and execution against the defendants served with process in the same manner as if they were the sole defendants. If any of the defendants die pending the action, his representative may be made a party and the case may proceed to judgment and execution as in other cases against the representatives of deceased persons.

History.
Laws 1820, Cobb's 1851 Digest, p. 485.; Code 1863, § 3263; Code 1868, § 3274; Code 1873, § 3350; Code 1882, § 3350; Civil Code 1895, § 5009; Civil Code 1910, § 5591; Code 1933, § 3-301.

JUDICIAL DECISIONS

This section changed the common law. Ross v. Executors of Everett, 12 Ga. 30, 1852 Ga. LEXIS 87 (1852); Raney v. McRae, 14 Ga. 589, 1854 Ga. LEXIS 141 (1854).

Under common law, a judgment was regarded as an entity which must stand or fall in toto, but in 1820 the legislature modified this rule with reference to actions against joint contractors; this statute was codified in this section. Crowe v. Fisher, 104 Ga. App. 725, 122 S.E.2d 755, 1961 Ga. App. LEXIS 782 (1961).

This section is an exception to general rule that a recovery against a joint obligor on a joint contract merges the cause of action. Almand v. Hathcock, 140 Ga. 26, 78 S.E. 345, 1913 Ga. LEXIS 13 (1913).

Dismissal of parties on joint contract was regulated by former Code 1863, §§ 3261, 3262, 3263 and 3264 (see now O.C.G.A. §§ 9-2-26, 9-2-27, and 9-13-59). Sanders v. Etcherson, 36 Ga. 404, 1867 Ga. LEXIS 55 (1867); Stanford & Golden v. Bradford, 45 Ga. 97, 1872 Ga. LEXIS 170 (1872); Lippincott & Co. v. Behre, 122 Ga. 543, 50 S.E. 467, 1905 Ga. LEXIS 255 (1905).

This section permits joint provisors in same county to be joined. Booher v. Worrill, 43 Ga. 587, 1871 Ga. LEXIS 299 (1871).

Joint contractor who has been served is bound by judgment. Kitchens v. Hutchins, 44 Ga. 620, 1872 Ga. LEXIS 384 (1872).

Joint executors are joint contractors. Wynn v. Booker, 26 Ga. 553, 1858 Ga. LEXIS 360 (1858).

Verdict against surety on promissory note may be had when principal was not found in the county. Vandiver v. Third Nat'l Bank, 15 Ga. App. 433, 83 S.E. 673, 1914 Ga. App. LEXIS 137 (1914).

Effect of judgment against partnership. — Judgment recovered in action against partnership binds both the partnership assets and the individual assets of the partners who were served; it need not be rendered expressly against the individual members who were served in order to bind their individual assets. Ragan v. Smith, 178 Ga. 774, 174 S.E. 622, 1934 Ga. LEXIS 180 (1934).

Liability of unserved partner is not merged. Ells v. Bone, 71 Ga. 466, 1883 Ga. LEXIS 199 (1883).

RESEARCH REFERENCES

Am. Jur. 2d.
59 Am. Jur. 2d, Parties, §§ 120 et seq., 144 et seq.

C.J.S.
67A C.J.S., Parties, §§ 49, 62 et seq., 71 et seq.

ALR.
Judgment against less than all parties to contract as bar to action against others, 1 A.L.R. 1601.

Actions at law between partners and partnerships, 21 A.L.R. 21.

Release of one of several joint or joint and several contract obligors as affecting liability of other obligors, 53 A.L.R. 1420.

Payment by one of two or more joint and several debtors as suspending or tolling limitation, 71 A.L.R. 375; 74 A.L.R.2d 1287.

Right to judgment, levy, or lien against individual in action under statute permitting persons associated in business under a common name to be sued in that name, 100 A.L.R. 997.

Validity of exception for specific kind of tort action in survival statute, 77 A.L.R.3d 1349.

9-2-27. Action against representative of joint obligor.

Where any person is in possession, in his own right or in any other capacity, of any note, bill, bond, or other obligation in writing, signed by two or more persons, and one or more of the persons whose names are so signed dies before the payment of the money or the compliance with the conditions of such bond or obligation in writing, the person holding the bill, bond, note, or other obligation in writing shall not be compelled to bring an action against the survivors alone, but may at his discretion bring an action against (1) the survivor or survivors, (2) the representative or representatives of the deceased person or persons, or (3) the survivor or survivors and the representative or representatives of the deceased person or persons in the same action. However, nothing contained in this Code section shall authorize the bringing of an action against the representative of any estate until six months after the probate of the will or the granting of letters of administration on the estate or estates. This Code section shall be so construed as to embrace debts against copartners as well as debts against joint or joint and several contractors.

History.

Laws 1818, Cobb's 1851 Digest, p. 483.; Ga. L. 1858, p. 86, § 1; Code 1863, §§ 3261, 3262; Code 1868, §§ 3272, 3273; Code 1873, §§ 3348, 3349; Code 1882, §§ 3348, 3349; Civil Code 1895, §§ 5014, 5015; Civil Code 1910, §§ 5596, 5597; Code 1933, § 3-305; Ga. L. 1981; p. 852, § 1; Ga. L. 1982, p. 3, § 9.

Editor's notes.

Ga. L. 1981, p. 852, § 1, amended this Code section so as to reduce the period of exemption from suit for representatives of joint obligors from 12 months to 6 months and to conform this Code section to Code Section 53-7-102, which was similarly amended by Ga. L. 1971, p. 433, § 2. Section 2 of this Act stated that the Act was not to be construed to imply that the 1971 Act that amended Code Section 53-7-102 did not impliedly repeal this Code section to the extent of any conflict.

Law reviews.

For survey article citing development in Georgia wills, trusts, and administration of estates law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 307 (1981).

For article, "Partner v. Partner: Actions at Law for Wrongdoing in a Partnership," see 9 Ga. St. U.L. Rev. 905 (1993).

JUDICIAL DECISIONS

This section is applicable to partnership debts. Rodgers v. Rushin, 30 Ga. 934, 1860 Ga. LEXIS 244 (1860); Garrard v. Dawson, 49 Ga. 434, 1873 Ga. LEXIS 395 (1873); Lively v. Ward & McCullough, 23 Ga. App. 805, 99 S.E. 632, 1919 Ga. App. LEXIS 367 (1919).

This section applies to action on sheriff's bond. Morrison v. Slaton, 148 Ga. 294, 96 S.E. 422, 1918 Ga. LEXIS 312 (1918); Cone v. American Sur. Co., 29 Ga. App. 676, 116 S.E. 648, 1923 Ga. App. LEXIS 160 (1923).

This section applies to action on bond of judge of probate court. State v. Henderson, 120 Ga. 780, 48 S.E. 334, 1904 Ga. LEXIS 706 (1904).

This section does not apply to action on open account. Anderson v. Pollard & Co., 62 Ga. 46, 1878 Ga. LEXIS 297 (1878).

Representative unlawfully in possession of property not shielded by section. — Provision that action against representative of estate may not be brought until 12 months (now six months)

after probate or grant of letters of administration applies to actions seeking recovery on some claim against the estate of the deceased; it affords no shield for one who, though the representative of a deceased person, wrongfully and illegally seizes and holds property that does not belong to the estate. Kinney v. Robinson, 181 Ga. 837, 184 S.E. 616, 1936 Ga. LEXIS 445 (1936).

When a surviving member of a partnership brought an action against the executor of the estate of a former partner, personally and in the member's representative capacity, alleging that the defendant had illegally assumed possession of partnership assets and that the assets were necessary to wind up the affairs of the partnership which was alleged to be indebted to plaintiff in an uncertain sum, and praying for a receiver, an accounting, and other relief, this section, providing that action against representative of estate may not be brought until 12 months (now six months) after the probate of the will or granting of letters of administration, had no application. Kinney v. Robinson, 181 Ga. 837, 184 S.E. 616, 1936 Ga. LEXIS 445 (1936).

Action against survivor, representative, or both. — Under this section, plaintiff is expressly authorized, at the plaintiff's discretion, to bring an action against the survivor, against the representative, or against both in the same action. Leonard v. Collier, 53 Ga. 387, 1874 Ga. LEXIS 492 (1874); Savannah Bank Trust Co. v. Purvis, 6 Ga. App. 275, 65 S.E. 35, 1909 Ga. App. LEXIS 259 (1909).

Defendant may be sued in same action in two characters, as executor of maker of promissory note and as individual endorser. Roark v. Turner, 29 Ga. 455, 1859 Ga. LEXIS 364 (1859).

Plaintiff was not bound to join representatives of deceased directors in action against the survivor. Hargroves v. Chambers, 30 Ga. 580, 1860 Ga. LEXIS 148 (1860).

Action brought against surviving partner and administrator of deceased partner, under this section, could not be discontinued as to the former. Pullen v. Whitfield, 55 Ga. 174, 1875 Ga. LEXIS 367 (1875); McNaught & Co. v. Bostick, 71 Ga. 782, 1883 Ga. LEXIS 274 (1883).

Administrator could not be joined after judgment. — After the plaintiff elected to proceed against survivors and took judgment against them, the plaintiff could not afterwards make the administrator of the deceased a party. Harrell v. Park, 32 Ga. 555, 1861 Ga. LEXIS 233 (1861).

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Abatement, Survival, and Revival § 51 et seq. 59 Am. Jur. 2d, Parties, § 310 et seq.

C.J.S.

1 C.J.S., Abatement and Revival, §§ 127, 128, 133. 67A C.J.S., Parties, §§ 71, 74.

ALR.

Actions at law between partners and partnerships, 21 A.L.R. 21.

Liability of surety as affected by running of limitation in favor of principal or cosurety, 122 A.L.R. 204.

Rendition of services, transfer of property, or similar benefits, other than money or obligation to pay money, as part payment tolling, or removing bar of, statute of limitations, 139 A.L.R. 1378.

Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 A.L.R.2d 500.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 A.L.R.2d 1080.

Fraud as extending statutory limitations period for contesting will or its probate, 48 A.L.R.4th 1094.

9-2-28. Effect of action by minor alone.

An action commenced and prosecuted by an infant alone shall not be

void. Although the action may be defective in wanting a guardian or next friend, the defect shall be amendable before verdict and cured by verdict.

History.

Orig. Code 1863, § 3187; Code 1868, § 3198; Code 1873, § 3263; Code 1882, § 3263; Civil Code 1895, § 4947; Civil Code 1910, § 5524; Code 1933, § 3-115; Ga. L. 1959, p. 79, § 1.

Cross references.

Age of legal majority, § 39-1-1.

Law reviews.

For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969).

JUDICIAL DECISIONS

Section procedural in nature. — This section deals with ability of infants to commence action with or without appointment of guardian or next friend; it is procedural in nature. Jones v. Hartford Accident & Indem. Co., 132 Ga. App. 130, 207 S.E.2d 613, 1974 Ga. App. LEXIS 1620 (1974).

There is no substantial difference between prochein ami (next friend) and guardian ad litem. Sharp v. Findley, 59 Ga. 722, 1877 Ga. LEXIS 380 (1877).

Next friend and guardian ad litem are officers of court. — Minor may be a petitioner by next friend, which is equivalent to being represented by a guardian ad litem, and in either event the next friend or guardian ad litem is an officer of the court for the special protection of the minor. Sanders v. Hinton, 171 Ga. 702, 156 S.E. 812, 1931 Ga. LEXIS 448 (1931).

There is no substantial difference between a prochein ami (next friend) and a guardian ad litem; the former denomination is usually applied when the representation is for an infant plaintiff and the latter when it is for an infant defendant, but in either case, the representative of the infant is regarded as an officer of the court. Gentle v. Georgia Power Co., 179 Ga. 853, 177 S.E. 690, 1934 Ga. LEXIS 423 (1934).

Infant's nearest relation should be next friend. Gentle v. Georgia Power Co., 179 Ga. 853, 177 S.E. 690, 1934 Ga. LEXIS 423 (1934).

Appointment of next friend is primarily for the court, but usually the infant in the infant's petition names the next friend and the court by allowing the action to proceed ratifies the appointment. Gentle v. Georgia Power Co., 179 Ga. 853, 177 S.E. 690, 1934 Ga. LEXIS 423 (1934).

Infant who prosecutes action is bound by verdict rendered even if no guardian ad litem was appointed. Evans v. Collier, 79 Ga. 319, 4 S.E. 266, 1887 Ga. LEXIS 219 (1887).

Applicability of section to irregular or void appointment. — If an irregular or void appointment is made, the rule of this section applies. White v. Rowland, 67 Ga. 546, 1881 Ga. LEXIS 223 (1881).

Substance of action determinative. — Action by father suing for the use of minor son is in substance an action by the son, and while the more regular form is for the minor to sue by next friend, it is the substance of the action and not its technical form that must determine its true character. Vale Royal Mfg. Co. v. Bradley, 8 Ga. App. 483, 70 S.E. 36, 1911 Ga. App. LEXIS 4 (1911).

Action does not abate when minor comes of age. — When action is brought by infant through next friend, and infant comes of age before the case is finally disposed of, the action does not abate; the action may proceed in the infant's name, and the next friend will no longer be a necessary party. Gentle v. Georgia Power Co., 179 Ga. 853, 177 S.E. 690, 1934 Ga. LEXIS 423 (1934).

Identity of action brought by next friend and action by minor on coming of age. — Action in the name of a minor by next friend is substantially an action

by the minor, and if the minor on arriving at majority dismisses such action, an action subsequently brought by the minor in the minor's own right is as to the party plaintiff substantially identical with the former action; when it is brought against the same defendant and upon the same cause of action, the suits will be treated as identical. Young v. Western & A.R.R., 43 Ga. App. 257, 158 S.E. 464, 1931 Ga. App. LEXIS 291 (1931).

Amendment of pleading to name guardian. — Name of guardian or next friend should be added by amendment to petition, in order to prevent a nonsuit (involuntary dismissal) after timely objection thereto. Vale Royal Mfg. Co. v. Bradley, 8 Ga. App. 483, 70 S.E. 36, 1911 Ga. App. LEXIS 4 (1911); Mathews v. Fields, 12 Ga. App. 225, 77 S.E. 11, 1913 Ga. App. LEXIS 507 (1913).

Petition brought by minor may be amended to proceed in the name of a person who is sui juris as next friend. Cook v. English, 85 Ga. App. 739, 70 S.E.2d 86, 1952 Ga. App. LEXIS 823 (1952).

Amendment in appellate court. — Since two minor appellants were not represented by a guardian ad litem or next friend at the time bill of exceptions was presented and certified (pursuant to former appellate procedure), the bill of exceptions was amendable in the Supreme Court by adding the names of an adult as next friend for such minors as a party appellant. Cannon v. Whiddon, 194 Ga. 417, 21 S.E.2d 850, 1942 Ga. LEXIS 592 (1942).

Failure to act through next friend cured by verdict. — Minor must bring an action through next friend, but when a minor acts personally and there is no objection to the minor's proceeding alone, the defect is cured by the verdict and the judgment is not void. Kite v. Brooks, 51 Ga. App. 531, 181 S.E. 107, 1935 Ga. App. LEXIS 395 (1935).

Failure to make infant a party not cured by verdict. — Proceeding by administrator praying for direction as to distribution of estate could not be treated as an action commenced and prosecuted by an infant alone, nor could failure to comply with statutory requirements as to properly making infant a party be taken as a defect cured by verdict. Brown v. Anderson, 186 Ga. 220, 197 S.E. 761, 1938 Ga. LEXIS 592 (1938).

Appointment of guardian on plaintiff's motion. — If infant fails or refuses to appear and move for appointment of guardian, court, at the instance of the plaintiff, will appoint one for the infant. Oliver v. McDuffie, 28 Ga. 522, 1859 Ga. LEXIS 248 (1859); Wood v. Haines, 72 Ga. 189, 1883 Ga. LEXIS 60 (1883).

Action not dismissible when brought by next friend rather than guardian. — Action in the name of minor by next friend is not subject to general demurrer (motion to dismiss) because the action was not brought by a guardian, even if the minor had a guardian at the time the action was filed. Pardue Medicine Co. v. Pardue, 194 Ga. 516, 22 S.E.2d 143, 1942 Ga. LEXIS 623 (1942).

Guardian ad litem unnecessary when next friend acts. — When infant plaintiff appears by next friend, formal order of court appointing guardian ad litem is not necessary to give the next friend standing therein. Ross v. Battle, 113 Ga. 742, 39 S.E. 287, 1901 Ga. LEXIS 371 (1901).

Unless minor's interests would not be protected. — When minor institutes litigation by next friend, there is no legal necessity to appoint guardian ad litem, unless it appears to the court that the next friend was not a suitable person or for some other reason the interests of the minor would not be properly protected. Sanders v. Hinton, 171 Ga. 702, 156 S.E. 812, 1931 Ga. LEXIS 448 (1931).

Tort action properly brought by guardian ad litem or next friend. — When an action is brought by a minor for a tort committed upon the minor, the proper method is for the petition to be brought in the name of the minor, by the minor's guardian ad litem or next friend. Coleman v. Dublin Coca-Cola Bottling Co., 47 Ga. App. 369, 170 S.E. 549, 1933 Ga. App. LEXIS 409 (1933).

Minors may intervene in action instituted by trustee acting for their benefit, without appointment of guardian ad

litem. Watson v. Equitable Mtg. Co., 132 Ga. 154, 63 S.E. 912, 1909 Ga. LEXIS 53 (1909).

Minor intervenor in foreclosure proceedings bound. — Minor who intervenes by filing counter-affidavit in foreclosure proceedings to subject minor's automobile to a lien for repairs was bound by verdict rendered. Royal v. Grant, 5 Ga. App. 643, 63 S.E. 708, 1909 Ga. App. LEXIS 94 (1909); Sams v. Covington Buggy Co., 10 Ga. App. 191, 73 S.E. 18, 1911 Ga. App. LEXIS 708 (1911).

Infant may maintain cross action or plea of recoupment in the infant's own name. Levy v. McPhail, 33 Ga. App. 784, 127 S.E. 793, 1925 Ga. App. LEXIS 719 (1925).

Divorce and alimony petition brought by minor wife. — Infant wife of sufficient age to enter into marriage contract may maintain action to dissolve marriage relation and for alimony. Bentley v. Bentley, 149 Ga. 707, 102 S.E. 21, 1920 Ga. LEXIS 381 (1920).

Action brought in name of administrator of mother's estate for use of children seeking recovery for wrongful death of father was in substance an action by the children, and a proper construction of the petition was that it was brought for the minors by their next friend, plaintiff administrator; hence, claim of defendant that plaintiff was not the proper plaintiff was without merit. Keenan Welding Supplies Co. v. Bronner, 100 Ga. App. 400, 111 S.E.2d 140, 1959 Ga. App. LEXIS 630 (1959).

Accounting proceeding properly maintained. — Action by guardian acting in behalf of minor by reason of disqualification of trustee who might otherwise have acted as testamentary guardian, seeking settlement of accounts with executrix, is properly maintained. Perdue v. McKenzie, 194 Ga. 356, 21 S.E.2d 705, 1942 Ga. LEXIS 587 (1942).

This section permits infant, on becoming of age, to drop trustee's name where latter died during pendency of action, and to provide a next friend for the minor party. Blalock v. Newhill, 78 Ga. 245, 1 S.E. 383, 1886 Ga. LEXIS 223 (1886).

While special guardian appointed in workers' compensation proceeding to receive compensation for use and benefit of minor claimant was not appointed until time of award, the special guardian's appointment at that time cured the defect and made such guardian a party to the case. Utica Mut. Ins. Co. v. Rolax, 87 Ga. App. 733, 75 S.E.2d 205, 1953 Ga. App. LEXIS 841 (1953).

Infant is bound by judgment in case brought through next friend, as though the infant were an adult, in the absence of gross laches, fraud, or collusion. Gentle v. Georgia Power Co., 179 Ga. 853, 177 S.E. 690, 1934 Ga. LEXIS 423 (1934).

Substitution of parent as party by amendment, unless, under this section, the parent has come into the action to prosecute infant's right rather than the parent's own right, is improper, but it will stand unless objected to in proper time. Ansley v. Jordan, 61 Ga. 482, 1878 Ga. LEXIS 163 (1878); Ross v. Battle, 113 Ga. 742, 39 S.E. 287, 1901 Ga. LEXIS 371 (1901).

RESEARCH REFERENCES

Am. Jur. 2d.

42 Am. Jur. 2d, Infants, § 38 et seq.

C.J.S.

43 C.J.S., Infants, § 398. 67A C.J.S., Parties, § 10.

ALR.

Right of next friend to compensation for services rendered to infant in the litigation, 9 A.L.R. 1537.

Right of ward to maintain action independent from his general guardian, on contracts or other obligations entered into by the guardian on ward's behalf, 102 A.L.R. 269.

9-2-29. Plaintiff in penal action.

If no special officer is authorized to be the plaintiff in a penal action,

the state, the Governor, the Attorney General, or a prosecuting attorney may be the plaintiff.

History.
Orig. Code 1863, § 3178; Code 1868, § 3189; Code 1873, § 3254; Code 1882, § 3254; Civil Code 1895, § 4933; Civil Code 1910, § 5510; Code 1933, § 3-103.

Cross references.
For corresponding provision relating to criminal procedure, § 17-1-2.

JUDICIAL DECISIONS

When informer may prosecute action. — Qui tam action cannot be brought and prosecuted in name of informer unless a right thus to sue is distinctly given by statute. O'Kelly v. Athens Mfg. Co., 36 Ga. 51, 1867 Ga. LEXIS 3 (1867).

Informer has no vested right to forfeiture. — Informer who commences a qui tam action under a penal statute does not acquire thereby a vested right to the forfeiture. Robison v. Beall, 26 Ga. 17, 1858 Ga. LEXIS 260 (1858); Hargroves v. Chambers, 30 Ga. 580, 1860 Ga. LEXIS 148 (1860).

RESEARCH REFERENCES

C.J.S.
1A C.J.S., Actions, §§ 1, 74 et seq., 83.
7A C.J.S., Attorney General, § 65 et seq.

9-2-30. Substitution of plaintiff's spouse or others in action on chose in action assigned as year's support.

When a party plaintiff dies during litigation concerning any chose in action and the chose in action is assigned to the surviving spouse, the surviving spouse and children, or the children only of the decedent as any part of a year's support, the surviving spouse personally or for the use of the surviving spouse and the children, or, in the event of children only, a next friend for the children may be made a party plaintiff upon the same terms and in the same manner that administrators are made parties plaintiff to actions in favor of their intestate, upon the submission by the person to the court of a certified copy of the assignment; and the action shall proceed in the name of the parties so made.

History.
Ga. L. 1878-79, p. 148, § 1; Code 1882, § 3424a; Civil Code 1895, § 5022; Civil Code 1910, § 5604; Code 1933, § 3-407.

JUDICIAL DECISIONS

Year's support may include any property right, equitable or legal, present or future interest, which the deceased owned at the time of death. Bennett v. Davis, 201 Ga. 58, 39 S.E.2d 3, 1946 Ga. LEXIS 429 (1946).

If a bond for title has been properly set apart, as a year's support to the widow and children of a decedent, an action cannot be maintained by the administrator to recover it. Winn v. Lunsford, 130 Ga. 436, 61 S.E. 9, 1908 Ga. LEXIS 303 (1908).

RESEARCH REFERENCES

C.J.S.
67A C.J.S., Parties, § 71 et seq.
ALR.
Right of next friend to compensation for services rendered to infant in the litigation, 9 A.L.R. 1537.

ARTICLE 3
ABATEMENT

Cross references.
Effect of death or resignation of public officer when action brought against officer in official capacity, § 9-11-25.

JUDICIAL DECISIONS

Abatement of action at common law is the entire overthrow or destruction of the action resulting from the fact that defendant pleads some matter that defeats the action, either for the time being or permanently; any further enforcement of the cause of action necessitates bringing a new action. Jones v. Doe, 143 Ga. App. 451, 238 S.E.2d 555, 1977 Ga. App. LEXIS 2360 (1977).

9-2-40. No abatement on death of party where cause survives.

No action shall abate by the death of either party, where the cause of action shall in any case survive to or against the legal representatives of the deceased party, either in the same or any other form of action.

History.
Laws 1799, Cobb's 1851 Digest, p. 472.; Code 1863, § 3371; Code 1868, § 3390; Code 1873, § 3438; Code 1882, § 3438; Civil Code 1895, § 5035; Civil Code 1910, § 5617; Code 1933, § 3-501.

JUDICIAL DECISIONS

Deceased person cannot be a party to legal proceedings. Eubank v. Barber-Colman Co., 115 Ga. App. 217, 154 S.E.2d 638, 1967 Ga. App. LEXIS 1067 (1967); Fuller v. Booth, 118 Ga. App. 685, 165 S.E.2d 318, 1968 Ga. App. LEXIS 1498 (1968).

Death of party suspends action until substitution of representative. — While death of a party does not abate pending action when cause of action survives, nevertheless the effect of the death is to suspend the action as to the decedent until someone is substituted for the decedent as a party to the proceedings. Eubank v. Barber-Colman Co., 115 Ga. App. 217, 154 S.E.2d 638, 1967 Ga. App. LEXIS 1067 (1967); Tarpley v. Hawkins, 144 Ga. App. 598, 241 S.E.2d 480, 1978 Ga. App. LEXIS 1700 (1978).

Only effect of death of party is to suspend action as to decedent until the decedent's legal representative is substituted as a party, assuming a pending action where the cause of action survives. Fuller v. Booth, 118 Ga. App. 685, 165 S.E.2d 318, 1968 Ga. App. LEXIS 1498 (1968).

Further proceedings void until such substitution. — Further proceedings in action suspended due to death of party are void as to the decedent until someone is properly substituted as a party. Eubank v. Barber-Colman Co., 115 Ga. App. 217, 154 S.E.2d 638, 1967 Ga. App. LEXIS 1067 (1967).

Effect of substitution of administrator. — In action by guardian to cancel deed executed by ward after appointment of guardian for the ward's person and property, when the ward died pending the

action, an amendment substituting administrator of the ward's estate as party plaintiff did not introduce a new party plaintiff nor change the cause of action. Chaffin v. Chaffin, 207 Ga. 36, 59 S.E.2d 911, 1950 Ga. LEXIS 377 (1950).

Substitution of personal representatives. — Substitution of personal representatives of decedent pursuant to O.C.G.A. § 9-11-25(a) in an action involving decedent's negligence claim against the defendant did not result in the addition of a new party or a new cause of action to the litigation. Pope v. GoodGame, 223 Ga. App. 672, 478 S.E.2d 636.

Administrator proper party to pursue civil rights claims. — In a declaratory judgment case and pursuant to O.C.G.A. §§ 9-2-40 and 9-2-41, an administrator had standing and was the proper party to pursue any surviving 42 U.S.C. §§ 1981 and 1988 civil rights claims on behalf of the decedent's estate. Am. Gen. Life & Accident Ins. Co. v. Ward, 509 F. Supp. 2d 1324, 2007 U.S. Dist. LEXIS 18420 (N.D. Ga. 2007).

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Abatement, Survival, and Revival, § 44 et seq.

Am. Jur. Pleading and Practice Forms.

1 Am. Jur. Pleading and Practice Forms, Abatement, Revival, and Stay, § 2.

C.J.S.

1 C.J.S., Abatement and Revival, § 114 et seq.

ALR.

Does right of grantor to maintain a suit in equity to set aside his conveyance for cause survive to his heir, 2 A.L.R. 431; 33 A.L.R. 51.

Survival of action or cause of action for wrongful death against representative of wrongdoer, 61 A.L.R. 830; 171 A.L.R. 1392.

Abatement of action which does not survive, by death of party pending appeal or writ of error, 62 A.L.R. 1048.

Survival of liability on joint obligation, 67 A.L.R. 608.

Survival against community of right of action for a tort of the deceased member of the community, 67 A.L.R. 1159.

Does a right of action on bond to recover for damages personal in their nature, and not affecting property rights, survive principal's death, 70 A.L.R. 122.

Survivability or assignability of action or cause of action in tort for damages for fraudulently procuring purchase or sale of property, 76 A.L.R. 403.

Survival of claim for usury against estate of usurer, 78 A.L.R. 451.

Survival upon death of wrongdoer of husband's or parent's action or right of action for consequential damages arising from injury to wife or minor child, 78 A.L.R. 593.

Survival of action or cause of action for personal injuries upon death of tort-feasor, 78 A.L.R. 600.

Relation between survivability of cause of action and abatability of pending action, 92 A.L.R. 956.

Death of tort-feasor before death of injured person as precluding action for death, 112 A.L.R. 343.

What actions or causes of action involve injury to the reputation within statutes relating to survival of causes of action or abatement of actions, 117 A.L.R. 574.

Revivor of suit for cancellation or suit for reinstatement of life insurance pending at death of insured, 125 A.L.R. 706.

Right of one to contest will as passing to his assignee, personal representative, heir or next of kin; revival of pending contest upon death of contestant, 129 A.L.R. 324.

Death of principal defendant as abating or dissolving garnishment or attachment, 131 A.L.R. 1146.

Abatement or survival, upon death of party, of action, or cause of action, based on libel or slander, 134 A.L.R. 717.

Effect of death of party to divorce or annulment suit before final decree, 158 A.L.R. 1205.

Conflict of laws as regards survival of cause of action and revival or pending action upon death of party, 42 A.L.R.2d 1170.

Capacity of local or foreign personal representative to maintain action for death under foreign statute providing for

action by personal representative, 52 A.L.R.2d 1016.

Abatement or survival of action for attorney's malpractice or negligence upon death of either party, 65 A.L.R.2d 1211.

Illness or death of party, counsel, or witness as excuse for failure to timely prosecute action, 80 A.L.R.2d 1399.

Assignability and survivability of cause of action created by civil rights statute, 88 A.L.R.2d 1153.

For whose benefit a survival action under the Federal Employers' Liability Act, or the Jones Act, may be prosecuted, 94 A.L.R.2d 910.

Survival of action or cause of action under civil damage acts, 94 A.L.R.2d 1140.

Death of putative father as precluding action for determination of paternity or for child support, 58 A.L.R.3d 188.

Validity of exception for specific kind of tort action in survival statute, 77 A.L.R.3d 1349.

Modern status: inheritability or descendability of right to contest will, 11 A.L.R.4th 907.

Claim for punitive damages in tort action as surviving death of tortfeasor or person wronged, 30 A.L.R.4th 707.

Abatement of state criminal case by accused's death pending appeal of conviction—modern cases, 80 A.L.R.4th 189.

9-2-41. Nonabatement of tort actions; survival of cause; no punitive damages against representative.

No action for a tort shall abate by the death of either party, where the wrongdoer received any benefit from the tort complained of; nor shall any action or cause of action for the recovery of damages for homicide, injury to the person, or injury to property abate by the death of either party. The cause of action, in case of the death of the plaintiff and in the event there is no right of survivorship in any other person, shall survive to the personal representative of the deceased plaintiff. In case of the death of the defendant, the cause of action shall survive against said defendant's personal representative. However, in the event of the death of the wrongdoer before an action has been brought against him, the personal representative of the wrongdoer in such capacity shall be subject to the action just as the wrongdoer himself would have been during his life, provided that there shall be no punitive damages against the personal representative.

History.

Orig. Code 1863, § 2909; Code 1868, § 2916; Code 1873, § 2967; Code 1882, § 2967; Ga. L. 1889, p. 73, § 1; Civil Code 1895, § 3825; Civil Code 1910, § 4421; Code 1933, § 3-505; Ga. L. 1935, p. 94, § 1; Ga. L. 1952, p. 224, § 1.

Law reviews.

For article advocating protection of property rights of deceased injured party by means of survival statute, prior to revision of this Code section in 1952, see 14 Ga. B.J. 40 (1951).

For article, "Actions for Wrongful Death in Georgia: Part One," see 19 Ga. B.J. 277 (1957).

For article, "Actions for Wrongful Death in Georgia: Part Two," see 19 Ga. B.J. 439 (1957).

For article, "Actions for Wrongful Death in Georgia: Part Two," Section Two, see 20 Ga. B.J. 152 (1957).

For comment on Barnwell v. Cordle, 438 F.2d 236 (5th Cir. 1971), refusing to apply doctrine of parental immunity to suit brought by minor against father's estate, see 8 Ga. St. B.J. 544 (1972).

For article, "The Discount Rate in Georgia Personal Injury and Wrongful Death Damage Calculations," see 13 Ga. St. U.L. Rev. 431 (1997).

For survey article on wills, trusts,

guardianships, and fiduciary administration, see 59 Mercer L. Rev. 447 (2007).

JUDICIAL DECISIONS

Constitutionality of 1952 amendment. — The 1952 Act amending this section does not violate Ga. Const. 1976, Art. III, Sec. VII, Paras. IV or XII (see now Ga. Const. 1983, Art. III, Sec. V, Para. III or IV). Complete Auto Transit, Inc. v. Floyd, 214 Ga. 232, 104 S.E.2d 208, 1958 Ga. LEXIS 381 (1958).

At common law, a cause of action for a personal tort abated on death of tort-feasor. Citizens' & S. Nat'l Bank v. Hendricks, 176 Ga. 692, 168 S.E. 313, 1933 Ga. LEXIS 255 (1933).

At common law, the axiom "actio personalis moritur cum persona" applied, and personal actions abated upon the death of either party, with certain exceptions. Posner v. Koplin, 94 Ga. App. 306, 94 S.E.2d 434, 1956 Ga. App. LEXIS 528 (1956).

This section was extended to rights of action in 1952. Posner v. Koplin, 94 Ga. App. 306, 94 S.E.2d 434, 1956 Ga. App. LEXIS 528 (1956).

Purpose of 1952 amendment, inserting words "or cause of action," was not to create a new cause of action but to provide for survival to administrator of causes of action that existed in the deceased before death; the legislature could have had no other purpose in mind. Complete Auto Transit, Inc. v. Floyd, 214 Ga. 232, 104 S.E.2d 208, 1958 Ga. LEXIS 381 (1958).

The 1952 amendment to this section, which added the words "or cause of action," while not creating any new cause of action, was clear in its intent that cause of action once accruing to a person would survive to the person's personal representative upon the death of such person, when there was no right of survivorship in any other person. West v. Mathews, 104 Ga. App. 57, 121 S.E.2d 41, 1961 Ga. App. LEXIS 604 (1961).

Impact of 1952 amendment. — The Act of 1952, Ga. L. 1952, p. 224, amending this section, made the provisions of the Act of 1889 applicable to causes of action or rights of action, as opposed to pending suits which alone were dealt with in that Act. Posner v. Koplin, 94 Ga. App. 306, 94 S.E.2d 434, 1956 Ga. App. LEXIS 528 (1956).

Effect of 1952 amendment is to preserve the cause of action of the deceased and to permit an action thereon by the deceased's administrator. Complete Auto Transit, Inc. v. Floyd, 214 Ga. 232, 104 S.E.2d 208, 1958 Ga. LEXIS 381 (1958).

The 1952 amendment to this section confers a new right, and is remedial only; it may not be given retrospective effect. Biddle v. Moore, 87 Ga. App. 524, 74 S.E.2d 552, 1953 Ga. App. LEXIS 787 (1953).

"Cause of action" and "action" distinguished. — Action is the judicial means of enforcing a right, and differs from a cause of action in that the latter is the right itself. Alexander v. Dean, 29 Ga. App. 722, 116 S.E. 643, 1923 Ga. App. LEXIS 175 (1923), aff'd, 157 Ga. 280, 121 S.E. 238, 1924 Ga. LEXIS 34 (1924); Citizens' & S. Nat'l Bank v. Hendricks, 176 Ga. 692, 168 S.E. 313, 1933 Ga. LEXIS 255 (1933).

This section prevents pending action for libel from abating. Johnson v. Bradstreet Co., 87 Ga. 79, 13 S.E. 250, 1891 Ga. LEXIS 97 (1891); Posner v. Koplin, 94 Ga. App. 306, 94 S.E.2d 434, 1956 Ga. App. LEXIS 528 (1956).

Fetal victim of a tort must be born alive in order to seek recovery from the alleged tortfeasor. Peters v. Hospital Auth., 265 Ga. 487, 458 S.E.2d 628, 1995 Ga. LEXIS 511 (1995).

Survival of cause for wrongful death of husband when wife dies. — When wife sues for wrongful death of husband, and during pendency of such action dies, the action survives in the first instance to the living children of the deceased, and if there are no living children, the action survives to the personal representative of the deceased plaintiff. Campbell v. Western & A.R.R., 57 Ga. App. 209, 194 S.E. 927, 1938 Ga. App. LEXIS 533 (1938).

When widow died before instituting action for wrongful death of husband, the

cause of action survived the death of the wife and became vested in the couple's children. Keenan Welding Supplies Co. v. Bronner, 100 Ga. App. 400, 111 S.E.2d 140, 1959 Ga. App. LEXIS 630 (1959).

Wrongful death actions distinguished. — O.C.G.A. § 9-2-41 is distinct from, and should not be confused with, O.C.G.A. § 51-4-1 et seq. (wrongful death), as the latter sections create a new cause of action in certain individuals for the value of the decedent's life, while O.C.G.A. § 9-2-41 permits survival of the tort claims which the deceased possessed the instant before death. Gilmere v. City of Atlanta, 737 F.2d 894, 1984 U.S. App. LEXIS 18103 (11th Cir. 1984).

Survivor's statutory claim for a decedent's wrongful death and an estate's common-law claim for the same decedent's pain and suffering are distinct causes of action. This does not mean, however, that double damages are recoverable for the same injury. Bibbs v. Toyota Motor Corp., 304 Ga. 68, 815 S.E.2d 850, 2018 Ga. LEXIS 443 (2018).

Standing of representatives. — Before determining whether the estates, representatives of the decedents, or direct heirs stated a valid cause of action under 28 U.S.C. § 1605A, the court had to first determine whether the estates had standing to pursue claims for emotional and mental anguish that the decedents suffered while still alive. The court permitted the claims of four of the servicemen's estates to proceed because: (1) pursuant to O.C.G.A. § 9-2-41, Georgia courts frequently entertained suits, without limitation, brought by estate representatives for personal injury suffered by the decedent while still alive; (2) N.Y. Est. Powers & Trusts Law § 11-3.2 ensured that all tort and contract actions that belonged to a decedent may now be maintained by the estate's personal representative; (3) Puerto Rico's law regarding causes of action by members of an estate permitted individual members to bring a cause of action for the decedent's pain and suffering; and (4) the survivability statute, S.C. Code Ann. § 15-5-90 had a wide ambit, and generally any cause of action which could have been brought by the deceased in the deceased's lifetime survived to the deceased's representative. Anderson v. Islamic Republic of Iran, 753 F. Supp. 2d 68, 2010 U.S. Dist. LEXIS 126457 (D.D.C. 2010).

Parent's right to bring a wrongful death action survives to parent's representative. — Existing right of action by a parent to recover for the homicide of a child will survive to the representative of the parent's estate regardless of whether the action was filed during the parent's lifetime. Caylor v. Potts, 183 Ga. App. 133, 358 S.E.2d 291, 1987 Ga. App. LEXIS 1910 (1987), overruled, Hosley v. Davidson, 211 Ga. App. 529, 439 S.E.2d 742, 1993 Ga. App. LEXIS 1554 (1993).

Representative of a parent's estate is not authorized to bring an action for wrongful death of the parent's minor child if there is a surviving parent or other person entitled to bring it. Hosley v. Davidson, 211 Ga. App. 529, 439 S.E.2d 742, 1993 Ga. App. LEXIS 1554 (1993), cert. denied, No. S94C0542, 1994 Ga. LEXIS 521 (Ga. Feb. 21, 1994).

Recovery, under former Civil Code 1910, § 4421 (see now O.C.G.A. § 9-2-41), by administrator for decedent's personal injuries was not bar to wrongful death action under former Civil Code 1910, §§ 4424 and 4425 (see now O.C.G.A. § 51-4-2), by decedent's wife and children. Spradlin v. Georgia Ry. & Elec. Co., 139 Ga. 575, 77 S.E. 799, 1913 Ga. LEXIS 514 (1913).

Suspension of action on death of plaintiff. — Upon death of wife suing for homicide of husband, action does not abate but is suspended; however, nothing further can properly be done in the action until the person or persons in whose favor the action survives is brought or voluntarily appears before the court by proper proceedings. Campbell v. Western & A.R.R., 57 Ga. App. 209, 194 S.E. 927, 1938 Ga. App. LEXIS 533 (1938).

Substitution of temporary administrator. — Upon death of parent suing for negligent homicide of child, temporary administrator upon the parent's estate may be made party plaintiff to the action. Roadway Express, Inc. v. Jackson, 77 Ga. App. 341, 48 S.E.2d 691, 1948 Ga. App. LEXIS 551 (1948), superseded by statute as stated in Caylor v. Potts, 183 Ga. App.

133, 358 S.E.2d 291, 1987 Ga. App. LEXIS 1910 (1987).

Action not viable prior to death. — Beneficiaries' claims against a former trustee failed because the cause of action was not viable against the former trustee before the former trustee's death. Nalley v. Langdale, 319 Ga. App. 354, 734 S.E.2d 908, 2012 Ga. App. LEXIS 1047 (2012), cert. denied, No. S13C0579, 2013 Ga. LEXIS 394 (Ga. Apr. 29, 2013), cert. denied, No. S13C0578, 2013 Ga. LEXIS 393 (Ga. Apr. 29, 2013).

If plaintiff could not have maintained action against decedent during lifetime, action cannot be maintained against decedent's personal representative. Wrinkle v. Rampley, 97 Ga. App. 453, 103 S.E.2d 435, 1958 Ga. App. LEXIS 798 (1958).

Action against husband for tort against wife or against father's estate for tort against mother. — In this state wife cannot recover of husband with whom she is living for injury caused by his negligent operation of an automobile, and fact that defendant husband is dead at time of action is immaterial, for reason that defendant's administrator is subject to suit just as wrongdoer himself would have been during his life; moreover, since wife could not bring action if alive, her children could not sue husband (their father) for her wrongful death. Harrell v. Gardner, 115 Ga. App. 171, 154 S.E.2d 265, 1967 Ga. App. LEXIS 1051 (1967).

Action against father's estate for tort to son. — Son injured in auto accident due to alleged negligence of father had a cause of action against father which the son was prevented from converting into a judgment while father lived because of doctrine of parental immunity, but upon father's death such immunity terminated and father's estate became subject to liability. Barnwell v. Cordle, 438 F.2d 236, 1971 U.S. App. LEXIS 12041 (5th Cir. 1971), (for comment, see 8 Ga. B.J. 544 (1972)).

Husband's actions distinguished. — Husband's action for wrongful death of wife is not part of same cause of action as his action as administrator under this section for wife's pain and suffering and her medical, hospital, and funeral expenses so as to raise the issue of res judicata. Forrester v. Southern Ry., 268 F. Supp. 194, 1967 U.S. Dist. LEXIS 8233 (N.D. Ga. 1967).

Nonabatement of action for railroad employers' liability. — Under former Code 1910, § 4421 (see now O.C.G.A. § 9-2-41), an action under former Civil Code 1910, §§ 4421 and 5617 (see now O.C.G.A. Art. 1, Ch. 7, T. 34), relating to employers' liability for railroad employees' injuries, will not abate. Central of Ga. Ry. v. Jones, 24 Ga. App. 532, 101 S.E. 710, 1919 Ga. App. LEXIS 902 (1919); Central of Ga. Ry. v. Jones, 152 Ga. 92, 108 S.E. 618, 1921 Ga. LEXIS 13 (1921).

Administrator proper party to pursue civil rights claims. — In a declaratory judgment case and pursuant to O.C.G.A. §§ 9-2-40 and 9-2-41, an administrator had standing and was the proper party to pursue any surviving 42 U.S.C. §§ 1981 and 1988 civil rights claims on behalf of the decedent's estate. Am. Gen. Life & Accident Ins. Co. v. Ward, 509 F. Supp. 2d 1324, 2007 U.S. Dist. LEXIS 18420 (N.D. Ga. 2007).

Administrator in a RICO action could maintain suit. — In a case in which the intended beneficiaries of two life insurance policies alleged violations of Georgia's Racketeer Influenced & Corrupt Organizations Act (RICO), O.C.G.A. § 16-4-1 et seq., the representative of the decedent's estate may be able to recover in a representative capacity for acts directed toward, or harm incurred by, the decedent. Under O.C.G.A. § 9-2-41, a tort action did not abate by the death of the injured party, but survived to the personal representative of the decedent. Am. Gen. Life & Accident Ins. Co. v. Ward, 509 F. Supp. 2d 1324, 2007 U.S. Dist. LEXIS 18420 (N.D. Ga. 2007).

OPINIONS OF THE ATTORNEY GENERAL

Survival of food stamp liability. — Liability provided for in Ga. L. 1965, p. 385, § 13 (see now O.C.G.A. § 49-4-15(b)), relating to fraudulent use, etc., of food stamps, survived death of recipient and constituted a claim against the recipi-

ent's estate, even if considered as a cause of action in tort rather than in contract, inasmuch as former Code 1933, § 3-505 (see now O.C.G.A. § 9-2-41) provided that a cause of action in tort shall survive death of tort-feasor when the tort-feasor received a benefit from the tort. 1965-66 Op. Att'y Gen. No. 66-250.

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Abatement, Survival, and Revival, §§ 38, 44 et seq., 65 et seq.

C.J.S.

1 C.J.S., Abatement and Revival, § 124 et seq.

ALR.

Does right of grantor to maintain a suit in equity to set aside his conveyance for cause survive to his heir, 2 A.L.R. 431; 33 A.L.R. 51.

Measure of damages in action for personal injuries commenced by the deceased in his lifetime and revived by his personal representative, 42 A.L.R. 187.

Abatement by pendency of another action as affected by addition or omission of parties defendant in second suit, 44 A.L.R. 806.

Survival of action or cause of action for wrongful death against representative of wrongdoer, 61 A.L.R. 830; 171 A.L.R. 1392.

Abatement of action which does not survive, by death of party pending appeal or writ of error, 62 A.L.R. 1048.

Recovery under common law or state death statute where cause of action under Federal Employers' Liability Acts fails for want of proof that deceased or injured person was an employee of defendant, 66 A.L.R. 429.

Survival against community of right of action for a tort of the deceased member of the community, 67 A.L.R. 1159.

Survival of cause of action for personal injury or death against tort-feasor killed in the same accident, 70 A.L.R. 1319.

Survivability or assignability of action or cause of action in tort for damages for fraudulently procuring purchase or sale of property, 76 A.L.R. 403.

Survival upon death of wrongdoer of husband's or parent's action or right of action for consequential damages arising from injury to wife or minor child, 78 A.L.R. 593.

Survival of action or cause of action for personal injuries upon death of tort-feasor, 78 A.L.R. 600.

Death of tort-feasor before death of injured person as precluding action for death, 112 A.L.R. 343.

Kind of verdict or judgment, or verdicts or judgments, where administrator or executor whose decedent was negligently killed brings an action which combines a cause of action for benefit of estate and another for statutory beneficiaries, 124 A.L.R. 621.

Revivor of suit for cancellation or suit for reinstatement of life insurance pending at death of insured, 125 A.L.R. 706.

Abatement or survival, upon death of party, of action, or cause of action, based on libel or slander, 134 A.L.R. 717.

Action against spouse or estate for causing death of other spouse, 28 A.L.R.2d 662.

Claim for negligently damaging or destroying personal property as surviving tort-feasor's death, 40 A.L.R.2d 533.

Statutory liability for physical injuries inflicted by animal as surviving defendant's death, 40 A.L.R.2d 543.

Conflict of laws as regards survival of cause of action and revival or pending action upon death of party, 42 A.L.R.2d 1170.

Medical malpractice action as abating upon death of either party, 50 A.L.R.2d 1445.

Abatement or survival of action for attorney's malpractice or negligence upon death of either party, 65 A.L.R.2d 1211.

Retroactive effect of statute changing manner and method of distribution of recovery or settlement for wrongful death, 66 A.L.R.2d 1444.

Illness or death of party, counsel, or witness as excuse for failure to timely prosecute action, 80 A.L.R.2d 1399.

Assignability and survivability of cause

of action created by civil rights statute, 88 A.L.R.2d 1153.

For whose benefit a survival action under the Federal Employers' Liability Act, or the Jones Act, may be prosecuted, 94 A.L.R.2d 910.

Survival of action or cause of action under civil damage acts, 94 A.L.R.2d 1140.

Libel by will, 21 A.L.R.3d 754.

Recovery, in action for benefit of decedent's estate in jurisdiction which has both wrongful death and survival statutes, of value of earnings decedent would have made after death, 76 A.L.R.3d 125.

Validity of exception for specific kind of tort action in survival statute, 77 A.L.R.3d 1349.

Claim for punitive damages in tort action as surviving death of tortfeasor or person wronged, 30 A.L.R.4th 707.

Defamation action as surviving plaintiff's death, under statute not specifically covering action, 42 A.L.R.4th 272.

9-2-42. Death of one or more codefendants; suggestion of record.

In all actions against two or more defendants, one or more of whom have died or may die pending the action, the plaintiff may suggest the death of record and proceed against the surviving defendants to the extent of their respective liabilities.

History.

Ga. L. 1859, p. 49, § 1; Code 1863, § 3377; Code 1868, § 3396; Code 1873, § 3444; Code 1882, § 3444; Civil Code 1895, § 5041; Civil Code 1910, § 5623; Code 1933, § 3-506.

Law reviews.

For article, "Actions for Wrongful Death in Georgia: Part One," see 19 Ga. B.J. 277 (1957).

For article, "Actions for Wrongful Death in Georgia: Part Two," see 19 Ga. B.J. 439 (1957).

For article, "Actions for Wrongful Death in Georgia: Part Two," section two, see 20 Ga. B.J. 152 (1957).

JUDICIAL DECISIONS

Plaintiff may suggest death and proceed against surviving defendants to the extent of their respective liabilities in actions against defendants, one or more of whom have died or may die pending the action. Rogers v. Chambers, 112 Ga. 258, 37 S.E. 429, 1900 Ga. LEXIS 122 (1900).

Entry on minutes may be made after judgment. Pearce v. E.M. Bruce & Co., 38 Ga. 444, 1868 Ga. LEXIS 108 (1868).

Application of section to actions against partnerships. — Section does not apply to action against two partners to obtain account for partnership acts, and when one of the partners dies, the personal representatives of the deceased must be made parties. Pearce v. E.M. Bruce & Co., 38 Ga. 444, 1868 Ga. LEXIS 108 (1868).

When action is pending against partnership and one of the partners dies, upon the partner's death being suggested of record, the case may proceed without further order against the other two partners as survivors. Telford v. Quillian, 45 Ga. App. 257, 164 S.E. 228, 1932 Ga. App. LEXIS 273 (1932).

Death of surety in action on bond after reference to auditor. — Under this section, death of one of defendant sureties after filing of action against principal and sureties on administrator's bond and after reference of case to auditor but before hearing by auditor does not abate action or deprive auditor of jurisdiction. Ellis v. Geer, 36 Ga. App. 519, 137 S.E. 290, 1927 Ga. App. LEXIS 124 (1927).

After sole defendant in action of ejectment dies and another defendant has been brought in and has pleaded to the merits, action may proceed as to the latter without making representative of

the former a party. Gardner v. Granniss, 57 Ga. 539, 1876 Ga. LEXIS 169 (1876).

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Abatement, Survival, and Revival, §§ 44 et seq., 65 et seq., 88 et seq.

C.J.S.

1 C.J.S., Abatement and Revival, § 124 et seq.

ALR.

Abatement by pendency of another action as affected by addition or omission of parties defendant in second suit, 44 A.L.R. 806.

Abatement of action which does not survive, by death of party pending appeal or writ of error, 62 A.L.R. 1048.

Death of tort-feasor before death of injured person as precluding action for death, 112 A.L.R. 343.

Death of principal defendant as abating or dissolving garnishment or attachment, 131 A.L.R. 1146.

Reversal upon appeal by, or grant of new trial to, one coparty defendant against whom judgment was rendered, as affecting judgment in favor of other coparty defendants, 166 A.L.R. 563.

Conflict of laws as regards survival of cause of action and revival or pending action upon death of party, 42 A.L.R.2d 1170.

Abatement or survival of action for attorney's malpractice or negligence upon death of either party, 65 A.L.R.2d 1211.

Assignability and survivability of cause of action created by civil rights statute, 88 A.L.R.2d 1153.

Survival of action or cause of action under civil damage acts, 94 A.L.R.2d 1140.

Validity of exception for specific kind of tort action in survival statute, 77 A.L.R.3d 1349.

9-2-43. No abatement where some defendants not liable.

An action against several persons shall not abate where it appears that some of the defendants are not liable but may proceed against those who are liable.

History.

Orig. Code 1863, § 3375; Code 1868, § 3394; Code 1873, § 3442; Code 1882, § 3442; Civil Code 1895, § 5039; Civil Code 1910, § 5621; Code 1933, § 3-504.

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When amendment to petition set forth alleged true relationship between the parties by striking one of the defendants and petition as amended still set out cause of action against other defendant, seeking to recover on same contract, not a new or different contract and not a new cause of action, action did not abate. City Council v. Diseker, 54 Ga. App. 801, 189 S.E. 601, 1936 Ga. App. LEXIS 761 (1936).

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Abatement, Survival, and Revival, §§ 22 et seq., 102.

C.J.S.

1 C.J.S., Abatement and Revival, §§ 106, 124 et seq. 27 C.J.S., Dismissal and Nonsuit, § 58 et seq.

ALR.

Abatement by pendency of another action as affected by addition or omission of parties defendant in second suit, 44 A.L.R. 806.

Release of one of two or more persons whose independent tortious acts combine

to produce an injury as releasing other or others, 134 A.L.R. 1225.

Grant of new trial, or reversal of judgment on appeal as to one joint tort-feasor, as requiring new trial or reversal as to other tort-feasor, 143 A.L.R. 7.

Reversal upon appeal by, or grant of new trial to, one coparty defendant against whom judgment was rendered, as affecting judgment in favor of other coparty defendants, 166 A.L.R. 563.

9-2-44. Effect of former recovery; pendency of former action.

(a) A former recovery or the pendency of a former action for the same cause of action between the same parties in the same or any other court having jurisdiction shall be a good cause of abatement. However, if the first action is so defective that no recovery can possibly be had, the pendency of a former action shall not abate the latter.

(b) Parol evidence shall be admissible to show that a matter apparently covered by the judgment was not passed upon by the court.

History.

Orig. Code 1863, §§ 2838, 2839, 3407; Code 1868, §§ 2846, 2847, 3426; Code 1873, §§ 2897, 2898, 3476; Code 1882, §§ 2897, 2898, 3476; Civil Code 1895, §§ 3741, 3743, 3476; Civil Code 1910, §§ 4335, 4337, 5678; Code 1933, §§ 3-607, 3-608; Ga. L. 1982, p. 3, § 9.

Cross references.

Pendency of former action defense to latter on same cause, § 9-2-5.

Law reviews.

For note, "Res Judicata in the Georgia Courts," see 11 Ga. L. Rev. 929 (1977).

For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982).

For article, "Defending the Lawsuit: A First-Round Checklist," see 22 Ga. St. B.J. 24 (1985).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

History of this section, see Hood v. Cooledge, 39 Ga. App. 476, 147 S.E. 426, 1929 Ga. App. LEXIS 368 (1929).

O.C.G.A. § 9-2-44 provides for abatement as matter of law whenever a former recovery or a pending suit for the same cause has been pleaded. Cale v. Cale, 160 Ga. App. 434, 287 S.E.2d 362, 1981 Ga. App. LEXIS 3145 (1981).

This section contemplates both actions that are reduced to judgment and pending actions. Stein Steel & Supply Co. v. Wilkins, 102 Ga. App. 389, 116 S.E.2d 507, 1960 Ga. App. LEXIS 630 (1960).

Status of second action. — Second action is not necessarily void ab initio when there is a prior pending action. Parsons, Brinckerhoff, Quade & Douglas, Inc. v. Johnson, 161 Ga. App. 634, 288 S.E.2d 320, 1982 Ga. App. LEXIS 1964 (1982).

"Renewal suit" filed by a limited liability company (LLC) and the company's manager against three corporations was properly dismissed under O.C.G.A. §§ 9-2-5(a) and 9-2-44(a) as the LLC and manager's prior and nearly identical suit

against the corporation had been dismissed and an appeal was pending. However, the second dismissal should have been without prejudice under O.C.G.A. § 9-11-41(b) as the corporation's plea in abatement did not challenge the merits of that suit. Sadi Holdings, LLC v. Lib Props., Ltd, 293 Ga. App. 23, 666 S.E.2d 446, 2008 Ga. App. LEXIS 895 (2008).

Renewal action not barred although counterclaim from prior action still pending. — After a car buyer dismissed the buyer's fraud and breach of contract action against the seller while a counterclaim was pending and then attempted to refile the buyer's claims under the renewal statute, O.C.G.A. § 9-2-61, the trial court erred in dismissing the renewed action under O.C.G.A. §§ 9-2-5(a) and 9-2-44(a). Code Section 9-2-5(a) precluded simultaneous prosecution of the same claims, and the buyer was not prosecuting the same claims simultaneously, given that the buyer dismissed the buyer's claims in the first case. Brock v. C & M Motors, Inc., 337 Ga. App. 288, 787 S.E.2d 259, 2016 Ga. App. LEXIS 312 (2016).

Third action dismissal. — While a trial court could dismiss a neighbor's third complaint pursuant to O.C.G.A. §§ 9-2-5(a) and 9-2-44(a), the court was not at liberty to do so with prejudice. McLeod v. Clements, 310 Ga. App. 235, 712 S.E.2d 627, 2011 Ga. App. LEXIS 538 (2011).

Consideration with § 9-2-5. — O.C.G.A. §§ 9-2-5 and 9-2-44 are closely related in effect and are to be considered and applied together. Huff v. Valentine, 217 Ga. App. 310, 457 S.E.2d 249, 1995 Ga. App. LEXIS 451 (1995).

Apparent conflict between former Civil Code 1910, §§ 4335, 4336, 4337, 5678, 5679 and 5943 (see O.C.G.A. §§ 9-2-44, 9-12-40, and 9-12-42) was readily reconciled by the fact that former Civil Code 1910, §§ 4335, 4337, 5678, and 5679 have special application to estoppels by judgment, while former Civil Code 1910, §§ 4336 and 5943 applied when a plea of res adjudicate was available. Camp v. Lindsay, 176 Ga. 438, 168 S.E. 284, 1933 Ga. LEXIS 94 (1933).

Law articulated by this section applies to torts. Owens v. Williams, 87 Ga. App. 238, 73 S.E.2d 512, 1952 Ga. App. LEXIS 657 (1952).

Lack of jurisdiction. — Because a dispossessory court never ruled upon or resolved a landlord's claims for past due rent and other damages, and because the dispossessory court lacked jurisdiction over the defaulting tenants, who were served by "nail and mail" service under O.C.G.A. § 44-7-51(a), the landlord's claims were not barred by the doctrine of res judicata under O.C.G.A. § 9-12-40 or subject to a plea of abatement under O.C.G.A. §§ 9-2-5(a) and 9-2-44(a). Bhindi Bros. v. Patel, 275 Ga. App. 143, 619 S.E.2d 814, 2005 Ga. App. LEXIS 908 (2005), cert. denied, No. S06C0064, 2006 Ga. LEXIS 45 (Ga. Jan. 17, 2006).

One of the prime objects of judicial procedure is to forever settle and end disputes between litigants, and courts never look with favor on unnecessary prolongation of litigation, and particularly disapprove of attempts to ignore or evade binding judgments. Lankford v. Holton, 196 Ga. 631, 27 S.E.2d 310, 1943 Ga. LEXIS 398 (1943).

Record must be introduced. — For plea or motion based on this section to avail, record in former action must be introduced in evidence. Watts v. Kundtz, 128 Ga. App. 797, 197 S.E.2d 859, 1973 Ga. App. LEXIS 1623 (1973).

As court cannot take judicial notice of prior pleadings. — When no evidence is introduced in support of plea or motion based on pendency or adjudication of previous action, the trial court cannot take judicial notice of a pleadings in previously instituted suit. Watts v. Kundtz, 128 Ga. App. 797, 197 S.E.2d 859, 1973 Ga. App. LEXIS 1623 (1973).

In claim interposed by third person to vehicle seized by state for illegally transporting spiritous liquors, acquittal of defendant in criminal proceeding for related penal offense was inadmissible. Duncan v. State, 149 Ga. 195, 99 S.E. 612, 1919 Ga. LEXIS 194 (1919).

Abatement was proper remedy. — When a former employer asserted claims identical to ones that were compulsory counterclaims in earlier suits, the trial court erred in denying a plea in abatement to all but one of the former employees pursuant to O.C.G.A. §§ 9-2-5 and 9-2-44; the trial court did not abuse the

General Consideration (Cont'd)

court's O.C.G.A. § 9-5-8 discretion in staying two prior cases pursuant to O.C.G.A. §§ 9-5-1 and 9-5-3. Smith v. Tronitec, Inc., 277 Ga. 210, 586 S.E.2d 661, 2003 Ga. LEXIS 790 (2003).

Abatement was not proper remedy. — Superior court erred in finding that the later-filed action, seeking an intruder warrant, had to be abated according to O.C.G.A. § 9-2-44 because, per the explicit language of O.C.G.A. § 44-11-32, the case on the intruder warrant could not have been brought in the magistrate court and, thus, the prior pending action doctrine did not apply. Brixmor/IA Northeast Plaza, LLC v. Sublet Atlanta Realty, LLC, 347 Ga. App. 223, 818 S.E.2d 681, 2018 Ga. App. LEXIS 493 (2018).

Former Recovery

This section must be construed in harmony with other sections to the effect that judgment of court of competent jurisdiction, if not absolutely void for some reason, shall be conclusive between same parties and their privies until it is reversed or set aside, and may not be impeached collaterally. Hadden v. Fuqua, 194 Ga. 621, 22 S.E.2d 377, 1942 Ga. LEXIS 637 (1942).

Questions settled by former final judgment cannot be litigated in other actions, directly or indirectly. Smith v. Robinson, 214 Ga. 835, 108 S.E.2d 317, 1959 Ga. LEXIS 365 (1959).

Subsequent suit forbidden against same parties on same issues. — Subsequent suit on different cause of action will be conclusive as to any matter actually in issue and determined by the court. Christian v. Penn, 7 Ga. 434, 1849 Ga. LEXIS 159 (1849); Price v. Carlton, 121 Ga. 12, 48 S.E. 721, 1904 Ga. LEXIS 2 (1904).

All questions between parties that are once and finally settled by solemn decree must be considered as an end to litigation; they cannot be relitigated in other actions, directly or indirectly. Lankford v. Holton, 196 Ga. 631, 27 S.E.2d 310, 1943 Ga. LEXIS 398 (1943).

Adjudication of same subject matter at issue in former action between same parties, by court of competent jurisdiction, puts an end to litigation. Buie v. Buie, 175 Ga. 27, 165 S.E. 15, 1932 Ga. LEXIS 180 (1932).

Former judgment is conclusive as to all facts which could have been ascertained and pled at original trial by use of proper diligence. Gladden v. Cobb, 80 Ga. 11, 6 S.E. 163, 1887 Ga. LEXIS 309 (1887); McHan v. McHan, 178 Ga. 730, 174 S.E. 336, 1934 Ga. LEXIS 157 (1934).

Involvement of same parties or their privies prerequisite. — Res judicata and estoppel by judgment can only be set up in a subsequent action between same parties or their privies. Harris v. Jacksonville Paper Co., 67 Ga. App. 759, 21 S.E.2d 537, 1942 Ga. App. LEXIS 514 (1942); Owens v. Williams, 87 Ga. App. 238, 73 S.E.2d 512, 1952 Ga. App. LEXIS 657 (1952).

Before judgment in former action will operate as a bar to subsequent action involving same subject matter, it must appear that former action was between the same parties or their privies. Russ Transp., Inc. v. Jones, 104 Ga. App. 612, 122 S.E.2d 282, 1961 Ga. App. LEXIS 751 (1961).

In order for doctrine of collateral estoppel (estoppel by judgment) to be applied, parties to the two actions must be identical, or "privity" must exist with former party so as to provide for mutuality of application of former action. Forrester v. Southern Ry., 268 F. Supp. 194, 1967 U.S. Dist. LEXIS 8233 (N.D. Ga. 1967).

Phrase "same parties" does not mean that all of the parties on the respective sides of litigation in two cases shall have been identical, but means that those who invoke defense of res judicata or estoppel of judgment and those against whom defense is invoked must be the same. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883, 1980 Ga. App. LEXIS 2573 (1980).

Real parties in interest or privies. — It is not required that all the parties on respective sides of litigation be identical, but is sufficient if those by and against whom the defense of res judicata or estoppel by judgment is invoked are real parties at interest or privies as to controversy in former case. National Life & Accident Ins. Co. v. Leo, 50 Ga. App. 473, 178 S.E. 322, 1934 Ga. App. LEXIS 580 (1934).

Who are privies. — Prerequisite of identity of parties includes privies, who are usually defined as all persons who are represented by parties and claim under them, the term "privity" denoting a mutual or successive relationship to the same rights of property, but not different rights in the same property. Life & Cas. Ins. Co. v. Webb, 112 Ga. App. 344, 145 S.E.2d 63, 1965 Ga. App. LEXIS 699 (1965).

Judgment is not conclusive as to third persons. Huggins v. State, 25 Ga. App. 38, 103 S.E. 32, 1920 Ga. App. LEXIS 584 (1920).

Judgment is not conclusive as to one who was not a party to proceeding in which it was rendered or one over whom court acquired no jurisdiction, even if the latter was named as party defendant. Colodny v. Krause, 141 Ga. App. 134, 232 S.E.2d 597, 1977 Ga. App. LEXIS 1797, cert. denied, 434 U.S. 892, 98 S. Ct. 267, 54 L. Ed. 2d 177, 1977 U.S. LEXIS 3559 (1977).

Service on parties. — Record of former adjudication founded on pleadings of which no service was made or waiver thereof had is not admissible in subsequent suit. Muller v. Rhuman, 62 Ga. 332, 1879 Ga. LEXIS 519 (1879).

When original petition showed total want of jurisdiction and there was no attempt to serve amended petition upon defendant and no appearance or waiver by the defendant, the defendant was not concluded by final verdict and judgment rendered. Smith v. Downing Co., 21 Ga. App. 741, 95 S.E. 19, 1918 Ga. App. LEXIS 505 (1918).

When substituted service of divorce action was accomplished by publication, mailing copy of process to nonresident defendant and having private individual hand copy to defendant, there was such total lack of personal service that defendant's rights could not be constitutionally adjudicated and res judicata could not operate. Daniel v. Daniel, 222 Ga. 861, 152 S.E.2d 873, 1967 Ga. LEXIS 390 (1967).

If former action is dismissed for lack of jurisdiction, plaintiff is not prohibited from commencing another suit for same cause against same party in court having jurisdiction to grant relief sought. Harrison v. Speidel, 244 Ga. 643, 261 S.E.2d 577, 1979 Ga. LEXIS 1359 (1979).

This section does not operate as a bar when a judgment is set aside. Taylor v. Smith, 4 Ga. 133, 1848 Ga. LEXIS 13 (1848).

An erroneous judgment, while it stands unvacated, is a bar to another proceeding. Crutchfield v. State, 24 Ga. 335, 1858 Ga. LEXIS 206 (1858); Allen v. Allen, 154 Ga. 581, 115 S.E. 17, 1922 Ga. LEXIS 427 (1922).

Identity of evidence in support of actions determinative. — To determine whether former recovery is bar to subsequent action, a good test is whether the same evidence will support both actions. Lynch v. Jackson, 31 Ga. 668, 1860 Ga. LEXIS 375 (1860).

Two causes of action involve same subject matter if same evidence would be necessary to sustain either of them. Jones v. Rich's, Inc., 81 Ga. App. 841, 60 S.E.2d 402, 1950 Ga. App. LEXIS 1011 (1950).

In order for former recovery to be pled in bar of subsequent action, two actions must be between same parties and on same cause of action, and test of identity of cause of action is whether same evidence will support both. Pekrol v. Collins, 122 Ga. App. 642, 178 S.E.2d 294, 1970 Ga. App. LEXIS 980 (1970).

Any conclusion which court or jury must evidently have arrived at in order to reach judgment or verdict rendered will be fully concluded under this section. Kelly & Jones Co. v. Moore, 128 Ga. 683, 58 S.E. 181, 1907 Ga. LEXIS 187 (1907).

Res judicata and estoppel by judgment distinguished. — While res judicata applies only as between same parties and upon same cause of action to matters which were actually in issue or which under rules of law could have been put in issue, estoppel by judgment applies as between same parties upon any cause of action to matters which were directly decided in former suit. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883, 1980 Ga. App. LEXIS 2573 (1980).

Under both res judicata and estoppel by judgment, in order for former decision to be conclusive it must have been based, not merely on purely techni-

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cal grounds, but at least in part on the merits, when under the pleadings they were or could have been involved. Sumner v. Sumner, 186 Ga. 390, 197 S.E. 833, 1938 Ga. LEXIS 608 (1938).

Requirements for res adjudicata. — To make a matter res adjudicata, there must be a concurrence: (1) of identity of the subject-matter; (2) of the cause of action; (3) of persons and parties; and (4) in the quality of the person against whom the claim is made. Stevens v. Stembridge, 104 Ga. 619, 31 S.E. 413, 1898 Ga. LEXIS 381 (1898); Price v. Carlton, 121 Ga. 12, 48 S.E. 721, 1904 Ga. LEXIS 2 (1904); Edwards v. Carlton, 98 Ga. App. 230, 105 S.E.2d 372, 1958 Ga. App. LEXIS 549 (1958).

In order for party to take advantage of doctrine of res judicata in subsequent action brought against that party after termination of first action, there are three prerequisites to which the situation must conform: (1) identity of the parties; (2) identity of the cause of action; and (3) adjudication by a court of competent jurisdiction. All of these elements must concur. Lewis v. Price, 104 Ga. App. 473, 122 S.E.2d 129, 1961 Ga. App. LEXIS 720 (1961); Life & Cas. Ins. Co. v. Webb, 112 Ga. App. 344, 145 S.E.2d 63, 1965 Ga. App. LEXIS 699 (1965); Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883, 1980 Ga. App. LEXIS 2573 (1980).

In order for doctrine of res judicata to apply, there must be identity of parties, identity of cause of action, and adjudication by court of competent jurisdiction. Dixie Home Bldrs., Inc. v. Waldrip, 146 Ga. App. 464, 246 S.E.2d 471, 1978 Ga. App. LEXIS 2408 (1978).

Prior judgment is res judicata only as to actions involving same cause of action. Georgia Power Project v. Georgia Power Co., 409 F. Supp. 332, 1975 U.S. Dist. LEXIS 15922 (N.D. Ga. 1975).

Requirement of same cause of action. — No judgment can be relied on in subsequent suit as res judicata of any issue in latter suit unless both suits are on same cause of action. Smith v. C.I.T. Corp., 69 Ga. App. 516, 26 S.E.2d 146, 1943 Ga. App. LEXIS 128 (1943).

Judgment or decree of court of competent jurisdiction upon the merits concludes parties and privies to litigation and constitutes bar to new action involving same cause of action either before same or any other tribunal. Smith v. C.I.T. Corp., 69 Ga. App. 516, 26 S.E.2d 146, 1943 Ga. App. LEXIS 128 (1943).

Causes of action in two suits must be identical in order for doctrine of res judicata to bar second action. Forrester v. Southern Ry., 268 F. Supp. 194, 1967 U.S. Dist. LEXIS 8233 (N.D. Ga. 1967).

Requirement that two cases be of "the same cause of action" is founded on doctrine that no one should be twice harassed for one and the same cause. Schoen v. Home Fed. Sav. & Loan Ass'n, 154 Ga. App. 68, 267 S.E.2d 466, 1980 Ga. App. LEXIS 2046 (1980).

New parties. — Plaintiffs' suit against three corporations was barred by O.C.G.A. §§ 9-2-5(a) and 9-2-44(a) as a prior suit involving the same parties and claims had been dismissed and an appeal of the dismissal was pending. That there were minor differences between the two complaints and that plaintiffs added new defendants was immaterial. Sadi Holdings, LLC v. Lib Props., Ltd, 293 Ga. App. 23, 666 S.E.2d 446, 2008 Ga. App. LEXIS 895 (2008).

Subject matter must be same. — Under this section, to make judgment in one action binding in another there must be not only identity of parties but also identity of subject matter. Brady v. Pryor, 69 Ga. 691, 1882 Ga. LEXIS 296 (1882).

What issues concluded by res adjudicata. — Under doctrine of res adjudicata, whenever there has been a judgment by court of competent jurisdiction in former litigation between same parties, based upon same cause of action as pending litigation, litigants are bound to the extent of all matters put in issue or which under the rules of law might have been put in issue by the pleadings in the previous litigation. Harvey v. Wright, 80 Ga. App. 232, 55 S.E.2d 835, 1949 Ga. App. LEXIS 812 (1949).

When issues presented by pleadings in pending action could have been inquired into and adjudicated in former action between same parties based upon same

cause of action, adjudication of former suit on merits is res judicata of all issues presented in the pending suit. Mize v. Mize, 80 Ga. App. 441, 56 S.E.2d 121, 1949 Ga. App. LEXIS 855 (1949).

Plea of res adjudicata is in the nature of an estoppel. Walden v. Walden, 128 Ga. 126, 57 S.E. 323, 1907 Ga. LEXIS 46 (1907).

Plea of res adjudicata is not a dilatory plea. Hill v. Cox, 151 Ga. 599, 107 S.E. 850, 1921 Ga. LEXIS 345 (1921).

Defense of res judicata must be sustained by proof clearly showing identity of parties and causes of action together with valid judgment. Uddyback v. George, 223 Ga. 311, 154 S.E.2d 577, 1967 Ga. LEXIS 509 (1967).

Estoppel by judgment defined. — Doctrine of estoppel by judgment has reference to previous litigation between same parties based upon a different cause of action, and applies only to such matters as were necessarily or actually adjudicated in the former litigation. Farmer v. Baird, 35 Ga. App. 208, 132 S.E. 260, 1926 Ga. App. LEXIS 640 (1926); Harvey v. Wright, 80 Ga. App. 232, 55 S.E.2d 835, 1949 Ga. App. LEXIS 812 (1949).

Doctrine of estoppel by judgment has reference to previous litigation between same parties, based upon different cause of action, and provides for estoppel by judgment only as to such matters within scope of previous pleadings as necessarily had to be adjudicated in order for previous judgment to be rendered, or as to such matters within scope of pleadings as might or might not have been adjudicated, but which are shown by aliunde proof to have been actually litigated and determined. Sumner v. Sumner, 186 Ga. 390, 197 S.E. 833, 1938 Ga. LEXIS 608 (1938).

Requirements for estoppel by judgment. — Traditional threshold requirements for application of doctrine of collateral estoppel (estoppel by judgment) are that: (1) the issue to be concluded must be identical to that involved in the prior action; (2) in the prior action the issue must have been "actually litigated;" and (3) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. If any one of these requirements is lacking, there is no collateral estoppel. Georgia Power Project v. Georgia Power Co., 409 F. Supp. 332, 1975 U.S. Dist. LEXIS 15922 (N.D. Ga. 1975).

Issue must be the same. — Estoppel by judgment occurs only when issue determined in prior proceeding is the same as that in subsequent proceeding. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883, 1980 Ga. App. LEXIS 2573 (1980).

Only ultimate questions concluded by estoppel by judgment. — Judgment or decree is an estoppel to parties thereto and their privies if it relates to same subject matter and decides same question; but if that question came collaterally before the court and was only incidentally considered, judgment or decree is not an estoppel. Evans v. Birge, 11 Ga. 265, 1852 Ga. LEXIS 37 (1852).

In order for relitigation of particular question to be estopped by former judgment, question must have been "necessary" to former judgment and have been one of the "ultimate" questions or facts in issue, as opposed to supporting evidentiary or "mediate" question. Forrester v. Southern Ry., 268 F. Supp. 194, 1967 U.S. Dist. LEXIS 8233 (N.D. Ga. 1967).

Estoppel by judgment on issues actually litigated and determined. — There is estoppel by judgment only as to such matters within scope of previous pleadings as necessarily had to be adjudicated in order for previous judgment to be rendered, or as to such matters within scope of those pleadings which are shown by aliunde proof to have been actually litigated and determined. Harvey v. Wright, 80 Ga. App. 232, 55 S.E.2d 835, 1949 Ga. App. LEXIS 812 (1949).

There is estoppel by judgment only as to such matters as were necessarily or actually adjudicated in former litigation. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883, 1980 Ga. App. LEXIS 2573 (1980).

Cause of action may differ. — Distinguishing feature of doctrine of collateral estoppel is that it precludes relitigation in a subsequent action of fact issues actually determined in prior suit, regardless of whether prior determination was based on same cause of action. Georgia Power

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Project v. Georgia Power Co., 409 F. Supp. 332, 1975 U.S. Dist. LEXIS 15922 (N.D. Ga. 1975).

Plaintiff is not permitted to split single cause of action so as to seek in successive litigation enforcement of first one remedy and then a second. Massey v. Stephens, 155 Ga. App. 243, 270 S.E.2d 796, 1980 Ga. App. LEXIS 2695 (1980).

Generally, single cause of action with several elements of damage admits of but one action, when there is an identity of subject matter and of parties. Massey v. Stephens, 155 Ga. App. 243, 270 S.E.2d 796, 1980 Ga. App. LEXIS 2695 (1980).

Parties will not be allowed to try same issue twice by multiplying their claims, regardless of fact that they may be able to introduce more evidence on second trial than they did so first. Johnson v. Lovelace, 61 Ga. 62, 1878 Ga. LEXIS 23 (1878).

In order to defeat plea of res judicata, plaintiff must allege that the plaintiff did not know all the facts when the former action was begun or why the plaintiff could not then have set them up. Perrin v. Richardson, 142 Ga. 394, 83 S.E. 102, 1914 Ga. LEXIS 721 (1914).

Amendments inadmissible to overturn judgments. — Effect of final judgment cannot be avoided by showing cause against it under guise of amendment to the pleadings; amendments are admissible to uphold judgments, but not to overturn them. Goldsmith v. Georgia R.R., 62 Ga. 542, 1879 Ga. LEXIS 566 (1879).

New defenses not available in seeking to set aside judgment. — When defendant is served, appears, and pleads in original suit and verdict and judgment are rendered against the defendant, the defendant cannot, upon motion to vacate judgment, urge matters of defense which could have been put in issue in original suit. Hardwick v. Hatfield, 30 Ga. App. 760, 119 S.E. 430, 1923 Ga. App. LEXIS 672 (1923).

Prior judgment cannot be avoided by slight differences in pleadings in second petition. Hill v. Cox, 151 Ga. 599, 107 S.E. 850, 1921 Ga. LEXIS 345 (1921); Standard Steel Works Co. v. Williams, 158 Ga. 434, 124 S.E. 21, 1924 Ga. LEXIS 174 (1924).

Allegations of different grounds of negligence irrelevant. — Judgment sustaining general demurrer (now motion to dismiss) to petition brought to recover damages caused by alleged negligence of defendant will bar second suit by same plaintiff against same defendant for same alleged cause of action, despite fact that grounds of negligence upon which second petition is based are different from those embraced in first suit. Owens v. Williams, 87 Ga. App. 238, 73 S.E.2d 512, 1952 Ga. App. LEXIS 657 (1952).

Additional relief sought in second petition for injunction will not defeat plea of res adjudicata. Gunn v. James, 120 Ga. 482, 48 S.E. 148, 1904 Ga. LEXIS 598 (1904); Coleman v. Fields, 142 Ga. 205, 82 S.E. 529, 1914 Ga. LEXIS 653 (1914).

Cause for wrongful death distinct from cause for pain and suffering. — Cause of action for wrongful death available to wife's survivors is a separate and distinct cause of action from that of wife for her pain and suffering, and prior recovery in behalf of husband and minor children for full value of life of wife does not constitute a bar to subsequent action by administrator of wife's estate to recover for her pain and suffering. Complete Auto Transit, Inc. v. Floyd, 214 Ga. 232, 104 S.E.2d 208, 1958 Ga. LEXIS 381 (1958).

Spouse's action for loss of consortium due to injuries to the spouse is part of single cause of action for personal injury and property damage when all elements of damage arise from single occurrence. Pekrol v. Collins, 122 Ga. App. 642, 178 S.E.2d 294, 1970 Ga. App. LEXIS 980 (1970).

Settlement of property damage as bar to personal injury action. — Single wrongful or negligent act which injures both one's person and property gives but a single cause of action, and settlement of property damages will, when pled, bar an action on account of injuries to the person when both items of damage are result of single occurrence. Pekrol v. Collins, 122 Ga. App. 642, 178 S.E.2d 294, 1970 Ga. App. LEXIS 980 (1970).

When a person sustains personal, physical and property damage from a

single wrongful or negligent act, the tort to the person and property constitutes a single cause of action which should be presented for determination in a single action, unless the defendant consents to the splitting of the cause of action. Pekrol v. Collins, 122 Ga. App. 642, 178 S.E.2d 294, 1970 Ga. App. LEXIS 980 (1970).

Judgment in former action for three installments of year's salary was good defense to second action for remaining months, as to all matters adjudicated. Kelly & Jones Co. v. Moore, 128 Ga. 683, 58 S.E. 181, 1907 Ga. LEXIS 187 (1907).

Plea to jurisdiction in action on running account which has been split and decided adversely to defendant cannot be urged in objection to second action on remainder of account. Johnson v. Klassett, 9 Ga. App. 733, 72 S.E. 174, 1911 Ga. App. LEXIS 312 (1911).

Conclusiveness of judgment affirmed by appellate court. — When judgment of lower court is affirmed generally by appellate court and another trial refused, such judgment is conclusive between the same parties and their privies as to all matters put in issue or which might have been put in issue in case wherein judgment was rendered. Hixon v. Callaway, 5 Ga. App. 415, 63 S.E. 518, 1909 Ga. App. LEXIS 4 (1909).

Stay operates as bar to further actions for the same indebtedness between the same parties, and order granting stay amounts to a judgment. Stein Steel & Supply Co. v. Wilkins, 102 Ga. App. 389, 116 S.E.2d 507, 1960 Ga. App. LEXIS 630 (1960).

Stay because of adjudication of bankruptcy of party, which is neither appealed and reversed nor set aside, has effect of judgment barring further proceedings by plaintiff in the case. Stein Steel & Supply Co. v. Wilkins, 102 Ga. App. 389, 116 S.E.2d 507, 1960 Ga. App. LEXIS 630 (1960).

Judgments of habeas corpus may be properly pled to subsequent actions. Perry v. McLendon, 62 Ga. 598, 1879 Ga. LEXIS 582 (1879), superseded by statute as stated in, McCleskey v. Zant, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517, 1991 U.S. LEXIS 2218 (1991).

Previous judgment overruling motion to set aside amounted to adjudication that original judgment could not be set aside for any reason which was or might have been assigned, and rendered a subsequent motion in arrest subject to application of res judicata. Farmer v. Baird, 35 Ga. App. 208, 132 S.E. 260, 1926 Ga. App. LEXIS 640 (1926).

Voluntary dismissal of truth-in-lending action. — Voluntary dismissal, with prejudice, of defendant bank in action for penalties under federal Truth-In-Lending Act, 15 U.S.C. § 1601 et seeq., merged plaintiffs' entire cause of action for nondisclosures under the Act and barred any subsequent action in this state against seller for the seller's joint liability for failure to make disclosures in the same transaction. Massey v. Stephens, 155 Ga. App. 243, 270 S.E.2d 796, 1980 Ga. App. LEXIS 2695 (1980).

Judgment adjudicating legal or equitable title to land will estop a later inconsistent action in ejectment among the same parties, a later dispossessory proceeding, or other suit touching right to entitlement between the parties. Schoen v. Home Fed. Sav. & Loan Ass'n, 154 Ga. App. 68, 267 S.E.2d 466, 1980 Ga. App. LEXIS 2046 (1980).

Dismissal of cross action on merits. — When court of competent jurisdiction in dismissing cross action, necessarily decides its merits, this decision may be pled in bar of subsequent action between same parties on same subject matter. Mize v. Mize, 80 Ga. App. 441, 56 S.E.2d 121, 1949 Ga. App. LEXIS 855 (1949).

Failure of third party to protect rights. — When third party who has knowledge of pendency of action and fails to protect the third party's rights, this section will operate as a bar. Latimer v. Irish-American Bank, 119 Ga. 887, 47 S.E. 322, 1904 Ga. LEXIS 394 (1904).

When predecessor in title of defendant was party to action, defendant is a privy in estate and is estopped by decree rendered in former action. Hopkins v. Martin, 153 Ga. 238, 112 S.E. 117, 1922 Ga. LEXIS 61 (1922).

Conclusiveness of judgment on party vouched into court. — When defendant in action of ejectment brought

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an action over against a warrantor of title and vouched the warrantor into court by giving notice of pendency of the action, judgment rendered therein would be conclusive upon party vouched. Taylor v. Allen, 131 Ga. 416, 62 S.E. 291, 1908 Ga. LEXIS 93 (1908).

Claimant who interposed claim by amendment in action is concluded by adverse judgment. Pollard v. King, 63 Ga. 224, 1879 Ga. LEXIS 174 (1879); Garlington v. Fletcher, 111 Ga. 861, 36 S.E. 920, 1900 Ga. LEXIS 843 (1900); McLendon v. Schumate, 128 Ga. 526, 57 S.E. 886, 1907 Ga. LEXIS 159 (1907); Exchange Nat'l Bank v. Covington, 160 Ga. 131, 127 S.E. 453, 1925 Ga. LEXIS 101 (1925).

Since in cases of attachment claim may be interposed either before or after judgment, when claimant, in response to levy of execution in attachment, filed claim to property in hands of garnishee, the claimant was not estopped by previous judgment in favor of plaintiff in attachment against garnishee on the issue tried, on traverse of the claimant's answer, to which such claimant was not a party, nor was the claimant bound merely by reason of fact that during trial of traverse to garnishee's answer, the claimant was physically present but took no part therein. Tarver v. Jones, 34 Ga. App. 716, 131 S.E. 102, 1925 Ga. App. LEXIS 512 (1925).

Merger of contract and decree for specific performance. — When party to contract seeks to enforce the contract by specific performance and obtains a decree thereon, the contract is merged into the decree; such contract and decree founded upon it will not be set aside at instance of party who took it, in absence of any allegation of fraud, accident, or mistake, or that insolvency had occurred since it was rendered. Cunningham v. Schley, 68 Ga. 105, 1881 Ga. LEXIS 323 (1881).

What breaches of contract covered in former action. — When in former action defendant pleaded breach of contract in setoff or recoupment against plaintiff, all breaches of contract up to commencement of former action and amount due complaining party were conclusively presumed to have been included in first action. Chappell v. F.A.D. Andrea, Inc., 47 Ga. App. 816, 171 S.E. 582, 1933 Ga. App. LEXIS 678 (1933).

There cannot be subsequent actions for breaches of contract which have already occurred prior to commencement of first suit on contract, even though they were not included in first suit. Chappell v. F.A.D. Andrea, Inc., 47 Ga. App. 816, 171 S.E. 582, 1933 Ga. App. LEXIS 678 (1933).

When state did not avail itself of right to recover principal and interest in former action, it is estopped from setting up claim for interest. Central Bank & Trust Corp. v. State, 139 Ga. 54, 76 S.E. 587, 1912 Ga. LEXIS 525 (1912).

All of series of notes affected by judgment on one or more. — When action is brought by payee of series of notes given for balance of purchase price of item on one or more of such notes and defendant pleads failure of consideration, verdict and judgment in the defendant's favor can be pled as res judicata to suit on other notes of the same series under this section. Puffer Mfg. Co. v. Rivers, 10 Ga. App. 154, 73 S.E. 20, 1911 Ga. App. LEXIS 694 (1911).

When subject matter of defense to promissory note has been passed upon by court of competent jurisdiction, such judgment, while in force, is conclusive. Freeman v. Bass, 34 Ga. 355, 1866 Ga. LEXIS 101 (1866).

Question concluded as to property involved in former litigation. — If a question could have been litigated in former controversy between same parties, judgment rendered in that case settles the question as to all property involved in that litigation; but to settle the question as to other property, it must appear that it was actually litigated, not only that it might have been. Sloan v. Price, 84 Ga. 171, 10 S.E. 601, 1889 Ga. LEXIS 214 (1889).

Judgment discharging administrator relieves the administrator from further liability to those interested in estate, unless such judgment is set aside either on motion in probate court or by equitable proceeding in superior court. Stanton v. Gailey, 72 Ga. App. 292, 33

S.E.2d 747, 1945 Ga. App. LEXIS 567 (1945).

Illegal use of architect's plan in constructing different houses. — When subject matter and cause of action of instant action was alleged use of plaintiff architect's plans in construction by defendant of two houses and subject matter of former action was alleged use of one plan in constructing other houses, there was no identity of subject matter or cause of action and trial court erred in sustaining plea of res judicata. Edwards v. Carlton, 98 Ga. App. 230, 105 S.E.2d 372, 1958 Ga. App. LEXIS 549 (1958).

Prior decree of cotenancy did not estop defendant from applying for partition as no such question was involved in original suit. Roberts v. Federal Land Bank, 180 Ga. 832, 181 S.E. 180, 1935 Ga. LEXIS 573 (1935).

Previous attachment not a bar. — When transferee and holder of title-retention note given for purchase money of machinery files action on note, defendant purchaser cannot set up in bar or in abatement that plaintiff had previously in same court instituted purchase money attachment and a levy had been made on the machinery; however, if judgment is rendered in plaintiff's favor, court should mold judgment so as to give defendant proper credit for any sums realized from sale of property by virtue of attachment proceedings. Hayes v. International Harvester Co. of Am., 52 Ga. App. 328, 183 S.E. 197, 1935 Ga. App. LEXIS 160 (1935).

Partition not binding on cotenants absent service. — Suit for partition is not a proceeding in rem, nor is final judgment binding by reason of this section on any of the cotenants who are not brought within jurisdiction of court by some service of process, actual or constructive. Childs v. Hayman, 72 Ga. 791, 1884 Ga. LEXIS 321 (1884).

Plaintiff was not estopped by judgment rendered in probate court in proceeding to which the plaintiff was not a party, despite fact that the plaintiff appeared as witness therein. McAfee v. Martin, 211 Ga. 14, 83 S.E.2d 605, 1954 Ga. LEXIS 467 (1954).

Subrogee not concluded. — One with right of subrogation accruing before bringing of action in which judgment was rendered is not a privy under this section so as to be concluded by judgment, especially when right of subrogation is claimed on an item of damage expressly excluded from that action. Seaboard Air-Line Ry. v. Insurance Co., 18 Ga. App. 341, 89 S.E. 438, 1916 Ga. App. LEXIS 351 (1916).

Jury question. — Under this section, issue made by plea of former recovery should be submitted to jury under proper instructions from court as to effect of adjudication pleaded in bar, but when record so pled shows that matter in controversy had been fully determined in former suit, court may dismiss the case on motion. Robinson v. Wilkins, 74 Ga. 47, 1884 Ga. LEXIS 354 (1884).

Pendency of Actions

This section prohibits plaintiff from prosecuting two actions in court for same cause and against same party and, if the actions are commenced at different times, pendency of the former shall be a good defense to the latter. Harrison v. Speidel, 244 Ga. 643, 261 S.E.2d 577, 1979 Ga. LEXIS 1359 (1979).

Pursuit in two different courts against same defendants on same issues prohibited. — Individual cannot pursue at the same time against same defendant cause of action based upon same subject matter in two different courts, and a plea in second suit of pendency of former suit will cause abatement of second action. Jones v. Rich's, Inc., 81 Ga. App. 841, 60 S.E.2d 402, 1950 Ga. App. LEXIS 1011 (1950).

Pendency of the related actions was good cause for abatement of the instant case because the related actions and the instant case both involved the landowner's alleged rights to title and possession of the same land, the landowner properly asserted the landowner's claims of wrongful foreclosure in the prior pending related actions, and a decision in the landowner's favor on the landowner's wrongful foreclosure claims in the related actions could estop the present dispossessory proceed-

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ing. Premium Funding Solutions, LLC v. Metro Atlanta Task Force for the Homeless, Inc., 333 Ga. App. 718, 776 S.E.2d 504, 2015 Ga. App. LEXIS 507 (2015).

Provided first action not defective. — Pendency of former suit for same cause of action, between same parties, in any court with jurisdiction, constitutes good cause of abatement, provided first action is not so defective as to prevent recovery therein. Moody v. Moody, 193 Ga. 699, 19 S.E.2d 504, 1942 Ga. LEXIS 450 (1942).

Pendency of former suit for same cause of action shall not abate second action if the first action is so defective that no recovery can possibly be had. Dobson v. Truscon Steel Co., 70 Ga. App. 574, 28 S.E.2d 870, 1944 Ga. App. LEXIS 49 (1944).

First action must be so defective upon its face that legal recovery cannot be had thereon in order to preclude abatement. Jones v. Rich's, Inc., 81 Ga. App. 841, 60 S.E.2d 402, 1950 Ga. App. LEXIS 1011 (1950).

If first action is wholly abortive effort which defendant is not legally called upon to resist, pendency of first suit shall not abate action subsequently filed. Jones v. Rich's, Inc., 81 Ga. App. 841, 60 S.E.2d 402, 1950 Ga. App. LEXIS 1011 (1950).

When it cannot be said that two proceedings arise out of same transaction or that allowing the present action to proceed to trial while the first case is pending on appeal is unnecessary, and consequently oppressive, a plea in abatement is without merit. Cheely v. State, 251 Ga. 685, 309 S.E.2d 128, 1983 Ga. LEXIS 958 (1983).

Common issues but possibility of different ones being raised. — Even though there was a common issue of liability in each of two actions brought by a party, when additional liability issues could be raised in one action, mandatory abatement or dismissal was not authorized. International Telecommunications Exch. Corp. v. MCI Telecommunications Corp., 214 Ga. App. 416, 448 S.E.2d 71, 1994 Ga. App. LEXIS 920 (1994).

Lack of jurisdiction. — Pendency of former action for same cause of action, between same parties, does not cause abatement of second action, if it appears on the face of the proceedings that first action was instituted in a court with no jurisdiction of the subject matter of the action; in such a case, the nonjurisdiction of that court may be determined by court in which second action was instituted. Cantrell v. Davis, 46 Ga. App. 710, 169 S.E. 39, 1933 Ga. App. LEXIS 206 (1933).

Identity of cause of action and of parties required. — In order for pendency of former action to be basis of plea in abatement to subsequent action, both must be for same cause of action and between same parties. Latex Filler & Chem. Co. v. Chapman, 139 Ga. App. 382, 228 S.E.2d 312, 1976 Ga. App. LEXIS 1818 (1976).

Trial court erred by finding that two pending actions brought by a hospital against the Department of Community Health and a competing hospital involved the same cause of action under the prior pending action doctrine, O.C.G.A. §§ 9-2-5(a) and 9-2-44(a); although both cases relied on one similar argument, the hospital's petition for judicial review of the final agency decision raised additional issues that could not have been brought in the hospital's earlier declaratory judgment action. Doctors Hosp. of Augusta, LLC v. Dep't of Cmty. Health, 344 Ga. App. 583, 811 S.E.2d 64, 2018 Ga. App. LEXIS 69 (2018).

Even when causes of action are legally disparate and rest in opposite parties, if they arise out of the same transaction and if the second action would resolve the same issues as the first pending action and would therefore be unnecessary and oppressive, the second action shall abate. Schoen v. Home Fed. Sav. & Loan Ass'n, 154 Ga. App. 68, 267 S.E.2d 466, 1980 Ga. App. LEXIS 2046 (1980).

Filing counter claim permitted. — When basis for wrongful death action brought by a parent arose out of same transaction (automobile collision) as pending original action brought against the parent, in which the parent counterclaimed for the parent's personal injuries and damages, wrongful death complaint would be dismissed without prejudice so that plaintiff could file counterclaim in

original action. Harbin Lumber Co. v. Fowler, 137 Ga. App. 90, 222 S.E.2d 878, 1975 Ga. App. LEXIS 1210 (1975).

Priority of pending actions is determined by dates of filing, if service has been effected; service or waiver is essential, but when made it relates back to date of filing, which establishes date action is commenced. Jackson v. Schulman, 142 Ga. App. 625, 237 S.E.2d 4, 1977 Ga. App. LEXIS 1426 (1977).

When defendant files counterclaim after plaintiff voluntarily dismisses action, counterclaim does not keep suit pending so as to authorize abatement of another suit. Swanson v. Holloway, 128 Ga. App. 453, 197 S.E.2d 151 (1973).

Garnishment and contempt actions may be pursued simultaneously for collection or satisfaction of payments owed under divorce judgment. Herring v. Herring, 138 Ga. App. 145, 225 S.E.2d 697, 1976 Ga. App. LEXIS 2086 (1976).

Pending divorce action no bar to interlocutory hearing. — Proof of pendency of action for divorce between parties does not operate to prevent judge on interlocutory hearing from making award of temporary alimony and custody of children pending litigation. Moody v. Moody, 193 Ga. 699, 19 S.E.2d 504, 1942 Ga. LEXIS 450 (1942).

Suit to collect on note and suit for foreclosure upon personal property securing payment of same note are different causes of action, and pendency of former does not serve to abate latter. Candler I-20 Properties v. Inn Keepers Supply Co., 137 Ga. App. 94, 222 S.E.2d 881, 1975 Ga. App. LEXIS 1211 (1975).

Prior pending wrongful foreclosure suit did not require dismissal of condemnation suit. — Prior pending wrongful foreclosure action did not require the abatement and dismissal of a bank's application for confirmation under O.C.G.A. § 44-14-161 because the confirmation proceeding did not involve the same cause of action as the wrongful foreclosure suit, but was instead a special statutory proceeding and not a complaint which initiated a civil action or suit. BBC Land & Dev., Inc. v. Bank of N. Ga., 294 Ga. App. 759, 670 S.E.2d 210, 2008 Ga. App. LEXIS 1304 (2008).

Owner's action for damages not a bar to condemnation proceedings. — Pendency of action for damages brought against two counties for wrongful taking and appropriation of right of way over plaintiffs' lands does not prevent subsequent proceeding brought by state to condemn the land for same purposes. Cook v. State Hwy. Bd., 162 Ga. 84, 132 S.E. 902, 1926 Ga. LEXIS 112 (1926).

Dismissal of action not justified. — Dismissal of an action by foreign corporations against a manufacturer on the basis of a prior pending action in the courts of another state was inappropriate in consideration of the provisions of O.C.G.A. §§ 9-2-5, 9-2-44, and 9-2-45. Flagg Energy Dev. Corp. v. GMC, 223 Ga. App. 259, 477 S.E.2d 402.

Parol Evidence

Application of subsection (b). — Subsection (b) of this section has no application to a proper case when a plea of res judicata is filed. Kennedy v. McCarthy, 73 Ga. 346, 1884 Ga. LEXIS 126 (1884).

Subsection (b) of this section governs those cases where a judgment is pled as an estoppel, and both parties are entitled to the benefit of this rule. Irvin v. Spratlin, 127 Ga. 240, 55 S.E. 1037, 1906 Ga. LEXIS 814 (1906).

Defendant may prove by parol evidence that court had no jurisdiction of former case. Dix v. Dix, 132 Ga. 630, 64 S.E. 790, 1909 Ga. LEXIS 374 (1909).

When record shows uncertainty whether same matters have been litigated in the former action or whether the judgment rendered is conclusive upon present issues, parol evidence is admissible. Mortgage Bond & Trust Co. v. Colonial Hill Co., 175 Ga. 150, 165 S.E. 25, 1932 Ga. LEXIS 210 (1932).

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Abatement, Survival, and Revival, § 6 et seq.

C.J.S.

1 C.J.S., Abatement and Revival, § 21.
32A C.J.S., Evidence, § 1396 et seq.

ALR.

Application of doctrine of res judicata to item of single cause of action omitted from issues through ignorance, mistake, or fraud, 2 A.L.R. 534; 142 A.L.R. 905.

Judgment against claim based on original form of indebtedness as res judicata as to claim based on new or substituted obligation, 4 A.L.R. 1173.

Statute requiring filing of formal notice of lis pendens in certain classes of cases as affecting common-law doctrine of lis pendens in other cases, 10 A.L.R. 306.

Lis pendens: protection during time allowed for appeal, writ of error, or motion for new trial, 10 A.L.R. 415.

Judgment on claim as bar to action to recover amount of payment which was not litigated in previous action, 13 A.L.R. 1151.

Plea of pendency of former action as affecting right of pleader to avail himself of objections to the former action, 32 A.L.R. 1339.

Judgment in action on commercial paper as affecting party to the paper who was not a party to the suit, 34 A.L.R. 152.

Action or suit as abating mandamus proceeding or vice versa, 37 A.L.R. 1432.

Judgment for rent for particular period as bar to action for rent for subsequent period, 42 A.L.R. 128.

Foreign judgment based upon or which fails to give effect to a judgment previously rendered at the forum or in a third jurisdiction, 44 A.L.R. 457; 53 A.L.R. 1146.

Abatement by pendency of another action as affected by addition or omission of parties defendant in second suit, 44 A.L.R. 806.

Judgment in action for death as a bar to an action for the same death in another jurisdiction or under another statute, 53 A.L.R. 1275.

Judgment in action or proceeding involving an installment of an assessment for a public improvement as res judicata as regards other installments of assessments, 74 A.L.R. 880.

Judgment in rem or quasi in rem upon constructive service against nonresident as res judicata as regards personal rights, 89 A.L.R. 1102.

Relation between survivability of cause of action and abatability of pending action, 92 A.L.R. 956.

Judgment as res judicata of usury notwithstanding question as to usury was not raised, 98 A.L.R. 1027.

Decree in suit by judgment creditor to set aside conveyance in fraud of creditors as bar to another suit for same purpose in respect of another conveyance, 108 A.L.R. 699.

Plea of abatement because of pendency of prior action as affected by termination of that action, 118 A.L.R. 1477.

Pleading waiver, estoppel, and res judicata, 120 A.L.R. 8.

Res judicata as regards decisions or awards under workmen's compensation acts, 122 A.L.R. 550.

Judgment in action by third person against insured as res judicata in favor of indemnity or liability insurer which was not a nominal party, 123 A.L.R. 708.

Conclusiveness, as to negligence or contributory negligence, of judgment in death action, in subsequent action between defendant in the death action and statutory beneficiary of that action, as affected by objection of lack of identity of parties, 125 A.L.R. 908.

Judgment in action by or against corporation as res judicata in action by or against stockholder or officer of corporation, 129 A.L.R. 1041.

Doctrine of res judicata in income tax cases, 130 A.L.R. 374; 140 A.L.R. 797.

Judgment in action growing out of accident as res judicata, as to negligence or contributory negligence, in later action growing out of same accident by or against one not a party to earlier action, 133 A.L.R. 181; 23 A.L.R.2d 710.

Necessity, as condition of effectiveness of express finding on a matter in issue to prevent relitigation of question in later case, that judgment in former action shall have rested thereon, 133 A.L.R. 840.

Ruling on creditor's claim in bankruptcy as res judicata in subsequent proceeding by trustee to recover voidable preference or transfer, 134 A.L.R. 1191; 165 A.L.R. 1413.

Judgment as res judicata or conclusive as to party's attorney who was not himself a party, 137 A.L.R. 586.

Decree in suit for separation as res judicata in subsequent suit for divorce or annulment, 138 A.L.R. 346; 90 A.L.R.2d 745.

Application of rule against splitting cause of action, or of doctrine of res judicata, to item of single cause of action omitted from issues through ignorance, mistake, or fraud, 142 A.L.R. 905.

Judgment as res judicata as to whether insured is "permanently disabled" within contemplation of insurance policy, 142 A.L.R. 1170.

Judgment in partition as res judicata, 144 A.L.R. 9.

Judgment in tax cases in respect of one period as res judicata in respect of another period, 150 A.L.R. 5; 162 A.L.R. 1204.

Privity between cotenants for purposes of doctrine of res judicata, 169 A.L.R. 179.

Judgment in suit for cancellation of restrictive covenant on ground of change in neighborhood as res judicata in suit for injunction against enforcement of covenant on that ground, and vice versa, 10 A.L.R.2d 357.

Extent to which principles of res judicata are applicable to judgments in actions for declaratory relief, 10 A.L.R.2d 782.

Judgment avoiding indemnity or liability policy for fraud as barring recovery from insurer by or on behalf of third person, 18 A.L.R.2d 891.

Decree granting or refusing injunction as res judicata in action for damages in relation to matter concerning which injunction was asked in first suit, 26 A.L.R.2d 446.

Pendency of prior action for absolute or limited divorce between same spouses in same jurisdiction as precluding subsequent action of like nature, 31 A.L.R.2d 442.

Divorce decree as res judicata in independent action involving property settlement agreement, 32 A.L.R.2d 1145.

Acquittal on homicide charge as bar to subsequent prosecution for assault and battery, or vice versa, 37 A.L.R.2d 1068.

Abatement on ground of prior pending action in same jurisdiction as affected by loss by plaintiff in second action of advantage gained therein by attachment, garnishment, or like process, 40 A.L.R.2d 1111.

Applicability of res judicata to decrees or judgments in adoption proceedings, 52 A.L.R.2d 406.

Dismissal of civil action for want of prosecution as res judicata, 54 A.L.R.2d 473.

Conviction from which appeal is pending as bar to another prosecution for same offense, 61 A.L.R.2d 1224.

Judgment determining question of coverage of automobile liability policy as between insurer and one claiming to be insured as res judicata in subsequent action by injured person against insurer, 69 A.L.R.2d 858.

Judgment in action by or against stockholder or corporate officer as res judicata in action by or against corporation, 81 A.L.R.2d 1323.

Res judicata as affected by limitation of jurisdiction of court which rendered judgment, 83 A.L.R.2d 977.

Raising res judicata by motion for summary judgment under Federal Rule 56 and similar state statutes or rules, 95 A.L.R.2d 648.

Conviction or acquittal in previous criminal case as bar to revocation or suspension of driver's license on same factual charges, 96 A.L.R.2d 612.

Circumstances under which court may abate a prior action and permit parties to proceed in subsequent action, 6 A.L.R.3d 468.

Modern status of doctrine of res judicata in criminal cases, 9 A.L.R.3d 203.

Judgment in spouse's action for personal injuries as binding, as regards loss of consortium and similar resulting damage, upon other spouse not a party to the action, 12 A.L.R.3d 933.

Appealability of order staying, or refusing to stay, action because of pendency of another action, 18 A.L.R.3d 400.

Judgment in action on express contract for labor or services as precluding, as a

matter of res judicata, subsequent action on implied contract (quantum meruit) or vice versa, 35 A.L.R.3d 874.

Decree allowing or denying specific performance of contract as precluding, as a matter of res judicata, subsequent action for money damages for breach, 38 A.L.R.3d 323.

Judgment against parents in action for loss of minor's services as precluding minor's action for personal injuries, 41 A.L.R.3d 536.

When does jeopardy attach in a nonjury trial?, 49 A.L.R.3d 1039.

Judgment in death action as precluding subsequent personal injury action by potential beneficiary of death action, or vice versa, 94 A.L.R.3d 676.

9-2-45. No abatement for pendency of action in another state.

The pendency of a prior action in another state shall not abate an action between the same parties for the same cause in this state.

History.

Civil Code 1895, § 3738; Civil Code 1910, § 4332; Code 1933, § 3-602.

History of Section.

This Code section is derived from the decision in Chattanooga, R. & C.R.R. v. Jackson, 86 Ga. 676, 13 S.E. 109 (1891).

JUDICIAL DECISIONS

Parties to affected actions. — This section applies when the second action is instituted by defendant in the first action, as well as when plaintiff in both actions is the same person. Ambursen Hydraulic Constr. Co. v. Northern Contracting Co., 140 Ga. 1, 78 S.E. 340, 1913 Ga. LEXIS 1 (1913).

Alimony action not precluded by pending out-of-state divorce action. — Under former Code 1933, § 30-213 (see now O.C.G.A. § 19-6-10), the legislature did not intend to preclude maintenance of alimony action when a divorce action was pending in another state. Ward v. Ward, 223 Ga. 868, 159 S.E.2d 81, 1968 Ga. LEXIS 995 (1968).

Texas divorce decree not affected by action pending in this state. — Mere fact that husband had a divorce action pending in court in this state when the husband procured a Texas divorce is not sufficient to rebut prima facie validity of the Texas decree, since whether or not there was an action pending in this state for the same cause was not a jurisdictional fact in the case in Texas. Meeks v. Meeks, 209 Ga. 588, 74 S.E.2d 861, 1953 Ga. LEXIS 340 (1953).

Dismissal of action not justified. — Dismissal of an action by foreign corporations against a manufacturer on the basis of a prior pending action in the courts of another state was inappropriate in consideration of the provisions of O.C.G.A. §§ 9-2-5, 9-2-44, and 9-2-45. Flagg Energy Dev. Corp. v. GMC, 223 Ga. App. 259, 477 S.E.2d 402.

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Abatement, Survival, and Revival, §§ 11, 18.

C.J.S.

1 C.J.S., Abatement and Revival, § 70 et seq.

ALR.

Statute requiring filing of formal notice of lis pendens in certain classes of cases as affecting common-law doctrine of lis pendens in other cases, 10 A.L.R. 306.

Action or suit as abating mandamus proceeding or vice versa, 37 A.L.R. 1432.

Abatement by pendency of another action as affected by addition or omission of parties defendant in second suit, 44 A.L.R. 806.

Res judicata as available in support of demurrer, 101 A.L.R. 1325.

Pendency of criminal prosecution as ground for continuance or postponement of civil action involving facts or transactions upon which prosecution is predicated, 123 A.L.R. 1453.

9-2-46. Institution of action on same cause in other state; setting case in this state; postponement limited.

(a) Whenever it is made to appear to the judge of any court that any party to a case pending in the court, after the case has been commenced, has instituted proceedings in any court of any other state involving the same controversy or cause of action, or in which the judgment which might be rendered in the other state might be pleadable in the case in this state as affecting the relief sought, it shall be the duty of the judge of the court in which the case is pending to set the case specially and ahead of all other business for trial as the first case at the next ensuing term of the court, except for other cases having precedence for the same reason.

(b) No case so assigned for trial shall be continued or postponed for more than 30 days for any cause whatsoever at the instance of the party who has instituted the case or proceedings in the foreign state. The case may be postponed from day to day for good cause for not exceeding 30 days at the instance of such party, but after being postponed for the 30 days it shall not be further postponed at his instance. If the term of court ends within the 30 days and the case has not been continued for the term, it shall stand for trial as the first case at the next ensuing term. This Code section shall not be applied so as to set any case for trial before proper times have elapsed for notice, the filing of defensive pleadings, and discovery. Proper time limits for discovery shall be in the discretion of the judge.

History.
Ga. L. 1922, p. 96, §§ 1, 2; Code 1933, §§ 3-603, 3-604.

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Texas divorce decree not affected by action pending in this state. — Mere fact that husband had a divorce action pending in court in this state when the husband procured a Texas divorce is not sufficient to rebut prima facie validity of the Texas decree, since whether or not there was an action pending in this state for the same cause was not a jurisdictional fact in the case in Texas. Meeks v. Meeks, 209 Ga. 588, 74 S.E.2d 861, 1953 Ga. LEXIS 340 (1953).

Preference for first-filed rule. — Fact that former employee lied to the former employer in order to file suit over non-competition agreement in Georgia first did not require a conclusion that the district court abused the court's discretion in entertaining the employee's first-filed declaratory judgment action under the

Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., especially since O.C.G.A. § 9-2-46(a) evidenced Georgia's favoritism for the first-filed rule. Manuel v. Convergys Corp., 430 F.3d 1132, 2005 U.S. App. LEXIS 24549 (11th Cir. 2005).

RESEARCH REFERENCES

Am. Jur. 2d.
1 Am. Jur. 2d, Abatement, Survival, and Revival, § 11. 20 Am. Jur. 2d, Courts, §§ 94, 100.

C.J.S.
1 C.J.S., Abatement and Revival, § 70 et seq. 17 C.J.S., Continuances, § 113. 21 C.J.S., Courts, § 142 et seq.

9-2-47. Precedence of first filed informer's action; abatement of others.

In the case of actions by informers to recover any fine, forfeiture, or penalty, the first filed in the clerk's office shall have precedence for the same cause of action and the latter filed actions shall abate.

History.
Orig. Code 1863, § 2837; Code 1868, § 2845; Code 1873, § 2896; Code 1882, § 2896; Civil Code 1895, § 3740; Civil Code 1910, § 4334; Code 1933, § 3-606.

Cross references.
Time limitations on bringing of actions by informers to recover fine, forfeiture, or penalty, § 9-3-28.

RESEARCH REFERENCES

Am. Jur. 2d.
1 Am. Jur. 2d, Abatement, Survival, and Revival, § 12 et seq.

C.J.S.
1 C.J.S., Abatement and Revival, §§ 24, 44 et seq.

ALR.
Statute requiring filing of formal notice of lis pendens in certain classes of cases as affecting common-law doctrine of lis pendens in other cases, 10 A.L.R. 306.

Action or suit as abating mandamus proceeding or vice versa, 37 A.L.R. 1432.

Abatement by pendency of another action as affected by addition or omission of parties defendant in second suit, 44 A.L.R. 806.

ARTICLE 4

DISMISSAL AND RENEWAL

9-2-60. Dismissal for want of prosecution; costs; recommencement within six months.

(a) For the purposes of this Code section, an order of continuance will be deemed an order and the word "proceedings" shall be held to include, but shall not be limited to, an appeal from an award of assessors or a special master in a condemnation proceeding.

(b) Any action or other proceeding filed in any of the courts of this state in which no written order is taken for a period of five years shall automatically stand dismissed with costs to be taxed against the party plaintiff.

(c) When an action is dismissed under this Code section, if the plaintiff recommences the action within six months following the dismissal then the renewed action shall stand upon the same footing, as to limitation, with the original action.

History.

Ga. L. 1953, Nov.-Dec. Sess., p. 342, §§ 1, 2; Ga. L. 1967, p. 557, § 1; Ga. L. 1984, p. 597, § 1.

Law reviews.

For article comparing sections of the Georgia Civil Practice Act (Ch. 11 of this title) with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967).

For article surveying Georgia cases in the area of trial practice and procedure from June 1977 through May 1978, see 30 Mercer L. Rev. 239 (1978).

For annual survey of trial practice and procedure, see 38 Mercer L. Rev. 383 (1986).

For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008).

JUDICIAL DECISIONS

Analysis

General Consideration
Timing
Writing Requirement
Effect of Dismissal

General Consideration

Constitutionality. — Automatic dismissal provision of O.C.G.A. § 9-2-60 is a reasonable procedural rule and does not violate due process. Georgia Dep't of Medical Assistance v. Columbia Convalescent Ctr., 265 Ga. 638, 458 S.E.2d 635, 1995 Ga. LEXIS 505 (1995), cert. denied, 516 U.S. 1046, 116 S. Ct. 706, 133 L. Ed. 2d 662, 1996 U.S. LEXIS 65 (1996).

This section is declaration of legislature that it is in the public interest to remove from court records litigation which has been inactive for a period of five years. Swint v. Smith, 219 Ga. 532, 134 S.E.2d 595, 1964 Ga. LEXIS 311 (1964); Berry v. Siskin, 128 Ga. App. 3, 195 S.E.2d 255, 1973 Ga. App. LEXIS 1360 (1973).

Legislative intent to reduce cluttered dockets. — This section was passed by the legislature in recognition of the fact that courts of this state had long been cluttered by a great number of cases which to all intents and purposes had been abandoned by both parties and in many cases settled without clearing the docket. Lewis v. Price, 104 Ga. App. 473, 122 S.E.2d 129, 1961 Ga. App. LEXIS 720 (1961).

Purpose of this section is to prevent cluttering of court records with unresolved and inactive litigation. Freeman v. Ehlers, 108 Ga. App. 640, 134 S.E.2d 530, 1963 Ga. App. LEXIS 729 (1963).

Rule nisi filed for the purpose of securing a continuance was a "rule" and not an "order" within the meaning of O.C.G.A. § 9-2-60. Beck v. Dean, 177 Ga. App. 144, 338 S.E.2d 693, 1985 Ga. App. LEXIS 2555 (1985).

This section serves dual purpose of preventing court records from becoming cluttered by unresolved and inactive litigation and protecting litigants from dilatory counsel. Lewis v. Price, 104 Ga. App. 473, 122 S.E.2d 129, 1961 Ga. App. LEXIS 720 (1961); Swint v. Smith, 219 Ga. 532, 134 S.E.2d 595, 1964 Ga. LEXIS 311 (1964); Berry v. Siskin, 128 Ga. App. 3, 195 S.E.2d 255, 1973 Ga. App. LEXIS 1360 (1973); Fulton County v. Corporation of Presiding Bishop, 133 Ga. App. 847, 212 S.E.2d 451, 1975 Ga. App. LEXIS 2311 (1975); Jefferson v. Ross, 250 Ga. 817, 301 S.E.2d 268, 1983 Ga. LEXIS 648 (1983).

Operation of O.C.G.A. § 9-2-60 cannot be waived by the parties. Department of Medical Assistance v. Columbia

General Consideration (Cont'd)

Convalescent Ctr., Inc., 203 Ga. App. 535, 417 S.E.2d 195, 1992 Ga. App. LEXIS 520 (1992), cert. denied, No. S92C0850, 1992 Ga. LEXIS 669 (Ga. July 16, 1992).

No power to reinstate dismissed proceeding. — Trial court does not have the power to reinstate a proceeding that, pursuant to subsection (b) of O.C.G.A. § 9-2-60, has been automatically dismissed by operation of law. Earp v. Kranats, 184 Ga. App. 316, 361 S.E.2d 217, 1987 Ga. App. LEXIS 2208 (1987).

Civil Practice Act did not repeal this section expressly or by implication. Fulton County v. Corporation of Presiding Bishop, 133 Ga. App. 847, 212 S.E.2d 451, 1975 Ga. App. LEXIS 2311 (1975).

Section inapplicable when default judgment entered. — This section was inapplicable to action in which for five years a default judgment was allowed to stand as such action was one in which an apparent final judgment had been entered, even though a later judgment was set aside for lack of service. Lewis v. Price, 104 Ga. App. 473, 122 S.E.2d 129, 1961 Ga. App. LEXIS 720 (1961).

Provisions of this section are mandatory. — See Bowen v. Morrison, 103 Ga. App. 632, 120 S.E.2d 57, 1961 Ga. App. LEXIS 1021 (1961); Freeman v. Ehlers, 108 Ga. App. 640, 134 S.E.2d 530, 1963 Ga. App. LEXIS 729 (1963); Norton v. Brady, 129 Ga. App. 753, 201 S.E.2d 188, 1973 Ga. App. LEXIS 1139 (1973).

O.C.G.A. § 9-2-60 provides for automatic dismissal when no written order is taken for a period of five years; this is mandatory and dismissal occurs by operation of law. Loftin v. Prudential Property & Cas. Ins. Co., 193 Ga. App. 514, 388 S.E.2d 525, 1989 Ga. App. LEXIS 1536 (1989).

O.C.G.A. § 9-2-60 only mandates that a written order be taken. Plaintiff need not initiate the process but only insure that an order is entered before five years elapse. Loftin v. Prudential Property & Cas. Ins. Co., 193 Ga. App. 514, 388 S.E.2d 525, 1989 Ga. App. LEXIS 1536 (1989).

Operation of this section cannot be waived by party litigant. Swint v. Smith, 219 Ga. 532, 134 S.E.2d 595, 1964 Ga. LEXIS 311 (1964).

Agreement between counsel to continue a case, entered in record prior to lapse of five years, was not sufficient to avoid mandatory dismissal provisions of Ga. L. 1966, p. 609, § 41 and Ga. L. 1967, p. 557, § 1 (see now O.C.G.A. §§ 9-11-41 and 9-2-60), as plaintiffs had the duty to obtain a written order of continuance from court and enter it in record. Harris v. Moody, 144 Ga. App. 656, 242 S.E.2d 321, 1978 Ga. App. LEXIS 1728 (1978).

Fact that one defendant died would not prevent dismissal. Swint v. Smith, 219 Ga. 532, 134 S.E.2d 595, 1964 Ga. LEXIS 311 (1964).

Granting leave of absence to counsel constituted "order." — Unopposed grant of a ten-day leave of absence to third-party defendant's counsel constituted an order within the meaning of O.C.G.A. § 9-2-60. Loftin v. Prudential Property & Cas. Ins. Co., 193 Ga. App. 514, 388 S.E.2d 525, 1989 Ga. App. LEXIS 1536 (1989).

Inactive list placement order within meaning of subsection (b). — It is not necessary for an order to advance or resolve a litigation matter for the order to fall within the meaning of subsection (b) of O.C.G.A. § 9-2-60, as an order granting a continuance or any order that would delay the resolution of the pending litigation will qualify. Tillett Bros. Constr. Co. v. DOT, 210 Ga. App. 84, 435 S.E.2d 241, 1993 Ga. App. LEXIS 1033 (1993), aff'd, 264 Ga. 219, 443 S.E.2d 610, 1994 Ga. LEXIS 432 (1994).

Order issued by the court in response to plaintiff's unopposed motion to stay discovery, signed by the trial judge and entered in the records of the court, placing an action on the "inactive list," was a written order within the meaning of subsection (b) of O.C.G.A. § 9-2-60. DOT v. Tillett Bros. Constr. Co., 264 Ga. 219, 443 S.E.2d 610, 1994 Ga. LEXIS 432 (1994), overruled in part, Zepp v. Brannen, 283 Ga. 395, 658 S.E.2d 567, 2008 Ga. LEXIS 4 (2008), overruled in part as stated in Pilz v. Thibodeau, 293 Ga. App. 532, 667 S.E.2d 622, 2008 Ga. App. LEXIS 947 (2008).

Effect of ex parte restraining order on operation of section. — Automatic dismissal by reason of this section would

not be affected or prevented by fact that when the case was originally filed the court granted an ex parte restraining order until further order of the court. Swint v. Smith, 219 Ga. 532, 134 S.E.2d 595, 1964 Ga. LEXIS 311 (1964).

Any action of court clerk in marking case dismissed is ministerial as dismissal is automatic on expiration of five years. Norton v. Brady, 129 Ga. App. 753, 201 S.E.2d 188, 1973 Ga. App. LEXIS 1139 (1973).

Role of clerk of court. — When an action is pending, with no written order taken therein for over five years, it is automatically dismissed by operation of law, and action of the clerk of court in entering order of dismissal thereon is a purely ministerial act. Freeman v. Ehlers, 108 Ga. App. 640, 134 S.E.2d 530, 1963 Ga. App. LEXIS 729 (1963).

Party asserting this section will not be estopped simply because it might seem unfair to allow that party to go to trial and only assert this section after the party has lost. Salter v. Chatham County, 136 Ga. App. 914, 222 S.E.2d 638, 1975 Ga. App. LEXIS 1529 (1975).

This section is not a statute of limitations as to cause of action or right to again bring a dismissed complaint. Harris v. United States Fid. & Guar. Co., 134 Ga. App. 739, 216 S.E.2d 127, 1975 Ga. App. LEXIS 2152 (1975).

Failure to reduce defendant's default to judgment. — Since the defendant failed to answer and was in default, but judgment was not entered for more than five years, the case stood as if a jury verdict had been returned and was not subject to dismissal under the five-year rule. Faircloth v. Cox Broadcasting Corp., 169 Ga. App. 914, 315 S.E.2d 434, 1984 Ga. App. LEXIS 1757 (1984).

Exception based on "manifest injustice." — Since the trial court's order revoking the grant of a continuance and dismissing a complaint was entered some three years after the entry of the order granting the continuance — although after the expiration of over five years from the last written order prior to the continuance order — it was obvious that "manifest injustice" would result if that order revoking the continuance was affirmed, even though the continuation order had been entered in the absence of a written motion and without notice. Simmerson v. Blanks, 183 Ga. App. 863, 360 S.E.2d 422, 1987 Ga. App. LEXIS 2105 (1987).

Waiver. — Operation of the mandatory dismissal provision of subsection (b) of O.C.G.A. § 9-2-60 cannot be waived by a party litigant. Bainbridge & Assocs. v. Johnson, 183 Ga. App. 784, 360 S.E.2d 273, 1987 Ga. App. LEXIS 2093 (1987).

Case properly dismissed. — Individual's case against an employee of a condominium association was automatically dismissed under the five-year rule of O.C.G.A. § 9-2-60(b), even though the individual had obtained a directed verdict on liability, had filed a motion for a leave of absence, and had secured a date for a hearing on damages. Ogundele v. Camelot Club Condo. Ass'n, 268 Ga. App. 400, 602 S.E.2d 138, 2004 Ga. App. LEXIS 854 (2004).

Trial court properly dismissed a party's counterclaim for failure to prosecute under O.C.G.A. §§ 9-2-60(b) and 9-11-41(e). It was undisputed that there had been no written order entered in the case for a period of over five years; even if there was evidence supporting the party's claim that the party had attempted to have the case placed on the trial calendar, the case the party relied upon had been reversed; and it had been held that the automatic dismissal statutes did not violate due process. Roberts v. Eayrs, 297 Ga. App. 821, 678 S.E.2d 535, 2009 Ga. App. LEXIS 548 (2009).

Because no written order was entered in the parents' wrongful death action for five years, pursuant to O.C.G.A. § 9-2-60(b), the action was dismissed by operation of law; therefore, the trial court's memorialization of the automatic dismissal resulting from that fact was not erroneous. Cornelius v. Morris Brown College, 299 Ga. App. 83, 681 S.E.2d 730, 2009 Ga. App. LEXIS 840 (2009), cert. denied, No. S09C1942, 2009 Ga. LEXIS 611 (Ga. Oct. 5, 2009).

Trial court did not err in dismissing a condemnation case for lack of prosecution pursuant to O.C.G.A. § 9-2-60(b) because the last qualifying order entered in the case was the certificate of immediate re-

General Consideration (Cont'd)

view signed by the trial court and entered on the trial court's records on April 7, 2004, which was two months before the owner filed the owner's motion under Ga. Unif. Super. Ct. R. 7.1 to have the matter placed on the trial court's next available pretrial calendar to address the notice of appeal challenging the amount of compensation. If the owner wished to further litigate the owner's claims, the owner had ample time to obtain a trial court order that would have allowed that, but the owner failed to do so. Windsor v. City of Atlanta, 287 Ga. 334, 695 S.E.2d 576, 2010 Ga. LEXIS 403 (2010).

Dismissal erroneously granted. — Trial court erroneously dismissed a litigant's petition for a writ of mandamus, and erroneously relied on dicta, in finding that orders setting a pre-trial conference in the underlying medical malpractice action were merely "housekeeping or administrative orders" that did not suspend the running of the five-year period under O.C.G.A. §§ 9-2-60(b) and 9-11-41(e). Instead, such orders tolled the running of the five-year rule if it was in writing, signed by the trial judge, and properly entered in the records of the trial court. Zepp v. Brannen, 283 Ga. 395, 658 S.E.2d 567, 2008 Ga. LEXIS 4 (2008).

Trial court erred by dismissing a father's contempt action because the final consent order had not been entered within the five-year rule under O.C.G.A. § 9-2-60(b) because the legitimation, custody, and support matter had been resolved by consent and all that remained was entry of the order; thus, the case presented an exception to the five-year rule. Ga. Dep't of Human Servs. v. Patton, 322 Ga. App. 333, 744 S.E.2d 854, 2013 Ga. App. LEXIS 508 (2013).

Civil renewal provisions apply in habeas corpus proceedings. — O.C.G.A. § 9-14-42(c) was not a statute of repose and not an absolute bar to the refiling of a habeas corpus petition, and therefore, was not in conflict with the provisions of O.C.G.A. §§ 9-2-60(b) and (c) and 9-11-41(e), which allowed for the renewal of civil actions after dismissal. Therefore, the habeas court's dismissal of a petition as untimely was reversed. Phagan v. State, 287 Ga. 856, 700 S.E.2d 589, 2010 Ga. LEXIS 645 (2010).

Timing

Intention of legislature in enacting 1967 version of this section was to make five-year bar binding upon all court proceedings, not limited to suits and specifically including condemnations. Fulton County v. Corporation of Presiding Bishop, 133 Ga. App. 847, 212 S.E.2d 451, 1975 Ga. App. LEXIS 2311 (1975).

Impact of 1967 amendment. — Legislature passed the 1967 version of this section to correct the situation created by case law holding that the five-year bar did not apply to appeal pending in superior court from award of assessors in condemnation proceeding so as to include condemnation proceedings within the five-year rule. Berry v. Siskin, 128 Ga. App. 3, 195 S.E.2d 255, 1973 Ga. App. LEXIS 1360 (1973).

Action refiled more than six months after automatic dismissal was untimely. — Injured party's lawsuit against a business was automatically dismissed for want of prosecution, pursuant to O.C.G.A. § 9-11-41(e), five years after the lawsuit was filed, not on the date the trial court entered an order confirming the fact that the lawsuit was dismissed. Therefore, the trial court properly granted the business's motion for summary judgment after the injured party refiled a lawsuit because the injured party refiled that lawsuit more than six months after the lawsuit was automatically dismissed. Brown v. Kroger Co., 278 Ga. 65, 597 S.E.2d 382, 2004 Ga. LEXIS 454 (2004).

As the plaintiff failed to show that any action in the original suit filed, within the meanings of O.C.G.A. §§ 9-2-60 and 9-11-41(e), occurred to bar dismissal of the suit, and failed to timely file a renewal action, the renewal action was properly dismissed. Nelson v. Haugabrook, 282 Ga. App. 399, 638 S.E.2d 840, 2006 Ga. App. LEXIS 1404 (2006).

Five-year rule was intended to prevent long delays before trial, not to

facilitate such delays. Jefferson v. Ross, 250 Ga. 817, 301 S.E.2d 268, 1983 Ga. LEXIS 648 (1983).

Statutory five-year period does not run during time case in federal court. — Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41) was neither in conflict with nor contradictory to Ga. L. 1967, p. 557, § 1 (see now O.C.G.A. § 9-2-60); the statutes reasonably stand together by recognizing that Ga. L. 1967, p. 557, § 1 expanded coverage of the five-year nonaction bar. Fulton County v. Corporation of Presiding Bishop, 133 Ga. App. 847, 212 S.E.2d 451, 1975 Ga. App. LEXIS 2311 (1975).

Although dismissal for want of prosecution is automatic on expiration of five years, the statutory five-year period does not run during the time the case is in federal court. When an action in a state court is removed to a federal district court, the jurisdiction of the state court is suspended until the case is remanded to the state court, at which time the case resumes the status it occupied at the time of the removal. Southern Bell Tel. & Tel. Co. v. Perry, 168 Ga. App. 387, 308 S.E.2d 848, 1983 Ga. App. LEXIS 2784 (1983); Strauss Fuchs Org., Inc. v. LaFitte Invs., Ltd., 177 Ga. App. 891, 341 S.E.2d 873, 1986 Ga. App. LEXIS 2478 (1986).

Five-year period of Ga. L. 1953, Nov.-Dec. Sess., p. 342, §§ 1 and 2 (see now O.C.G.A. § 9-2-60) is not a limitation within meaning of former Code 1933, §§ 3-803, 3-804, and 3-806 (see now O.C.G.A. §§ 9-3-92, 9-3-93, and 9-3-95). Swint v. Smith, 219 Ga. 532, 134 S.E.2d 595, 1964 Ga. LEXIS 311 (1964).

Applicability of § 9-11-6(a). — Ga. L. 1967, p. 557, § 1 (see now O.C.G.A. § 9-2-60) was an applicable statute under the time computation provision of Ga. L. 1967, p. 226, §§ 5 and 6 (see now O.C.G.A. § 9-11-6), and not a statute of limitations. Georgia Power Co. v. Whitmire, 146 Ga. App. 29, 245 S.E.2d 324, 1978 Ga. App. LEXIS 2190 (1978).

Computation of five-year period. — Orders are not complete until filed or recorded, and five-year period is computed from filing date. Georgia Power Co. v. Whitmire, 146 Ga. App. 29, 245 S.E.2d 324, 1978 Ga. App. LEXIS 2190 (1978).

Five-year period of subsection (b) of O.C.G.A. § 9-2-60 begins to run on the date the complaint is filed, and not on the date defendant's answer is filed. International Longshoremen's Ass'n v. Saunders, 182 Ga. App. 301, 355 S.E.2d 461, 1987 Ga. App. LEXIS 1678 (1987).

Trial court correctly determined that a products liability case had been dismissed by operation of law pursuant to O.C.G.A. § 9-2-60(b) because an order granting the plaintiffs' attorney a leave of absence was improvidently entered in violation of the automatic stay in bankruptcy and was void, and the record affirmatively showed that the case was inactive for a period of five years when the bankruptcy stay was not in place. Jinks v. Eastman Enters., 317 Ga. App. 489, 731 S.E.2d 378, 2012 Ga. App. LEXIS 745 (2012), overruled in part, O'Dell v. Mahoney, 324 Ga. App. 360, 750 S.E.2d 689, 2013 Ga. App. LEXIS 848 (2013).

Dismissal is automatic on expiration of five-year period and cannot be waived by a party litigant. Maroska v. Williams, 146 Ga. App. 130, 245 S.E.2d 470, 1978 Ga. App. LEXIS 2223 (1978).

Dismissal of a survivor's wrongful death suit was proper and automatic, when five years had passed after the most recent court order, and no further action was documented thereafter. Tate v. Ga. DOT, 261 Ga. App. 192, 582 S.E.2d 162, 2003 Ga. App. LEXIS 582 (2003).

Five ad valorem tax appeals were properly dismissed because more than five years had passed since entry of the last order in each of the cases, and the clear language of this provision stated that automatic dismissal applied to "any action or other proceeding," which included appeals from property assessment valuations. Pace Burt, Inc. v. Dougherty County Bd. of Tax Assessors, 305 Ga. App. 111, 699 S.E.2d 34, 2010 Ga. App. LEXIS 526 (2010), cert. denied, No. S10C1855, 2011 Ga. LEXIS 55 (Ga. Jan. 13, 2011).

Trial court did not err in dismissing the action under the five-year rule, O.C.G.A. §§ 9-2-60(b) and 9-11-41(e), because no written order had been taken in the case for a period of five years and an order authorizing an attorney to withdraw during the five-year period did not toll the

Timing (Cont'd)

time because the order was void since the order was entered in violation of a bankruptcy stay. Miller v. Lomax, 333 Ga. App. 402, 773 S.E.2d 475, 2015 Ga. App. LEXIS 390 (2015), cert. denied, No. S15C1838, 2016 Ga. LEXIS 19 (Ga. Jan. 11, 2016).

Statute of limitations not tolled. — When a Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. action is dismissed for the absence of a written order for a period of five years, the statute of limitations applicable to such actions is not tolled during that five year period. Smith v. Seaboard Sys. R.R., 179 Ga. App. 822, 348 S.E.2d 97, 1986 Ga. App. LEXIS 2669 (1986).

Right to refile within six months. — Under former Code 1933, § 3-808 (see now O.C.G.A. § 9-2-61), plaintiff may refile an action within six months following automatic dismissal mandated by Ga. L. 1967, p. 557, § 1 or Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-2-60 or O.C.G.A. § 9-11-41) when the original action was not barred by the statute of limitations. Berry v. Siskin, 128 Ga. App. 3, 195 S.E.2d 255, 1973 Ga. App. LEXIS 1360 (1973).

When five years have not yet passed since last order was filed in prior action, the prior action is still pending when a plea of pendency is filed. That being so, the pleader is entitled to a judgment in the pleader's favor because the key event is not the entry of an order in the second action but the filing of the defense of pendency. Hammond v. State, 168 Ga. App. 508, 308 S.E.2d 701, 1983 Ga. App. LEXIS 2831 (1983).

Court may enter judgment on jury verdict at any time. — Court of record, in the exercise of its inherent power, has continuing jurisdiction to enter judgment on a jury verdict at any time. Jefferson v. Ross, 250 Ga. 817, 301 S.E.2d 268, 1983 Ga. LEXIS 648 (1983) (overruling Maroska v. Williams, 146 Ga. App. 130, 245 S.E.2d 470, 1978 Ga. App. LEXIS 2223 (1978)).

Effect of settlement during five-year period. — Automatic dismissal requirement of O.C.G.A. § 9-2-60 when no action is taken for a period of five years requires dismissal of a motion to compel settlement, made more than five years after a written order was taken on the case, even though a settlement has been reached during the five years. Stephens v. Stovall & Co., 184 Ga. App. 78, 360 S.E.2d 638, 1987 Ga. App. LEXIS 2126 (1987).

Writing Requirement

In order to avoid automatic dismissal, an order must be written, signed by the trial judge, and properly entered in the records of the trial court by filing it with the clerk. Scott v. DeKalb County Hosp. Auth., 168 Ga. App. 548, 309 S.E.2d 635, 1983 Ga. App. LEXIS 2844 (1983).

In order to break the running of the five-year dormancy period, the order has to be in writing, signed, and entered. Loftin v. Prudential Property & Cas. Ins. Co., 193 Ga. App. 514, 388 S.E.2d 525, 1989 Ga. App. LEXIS 1536 (1989).

Duty to obtain written continuance or order. — Legislature placed the duty squarely upon plaintiff to obtain a written order of continuance from the court and have the order entered in the record in order to avoid mandatory provisions of this section. Dupriest v. Reese, 104 Ga. App. 805, 123 S.E.2d 161, 1961 Ga. App. LEXIS 807 (1961).

This section places upon plaintiff who wishes to avoid automatic dismissal of the plaintiff's case by operation of law a duty to obtain a written order of continuance or other written order at some time during a five-year period and to make sure that order is entered in the record. Swint v. Smith, 219 Ga. 532, 134 S.E.2d 595, 1964 Ga. LEXIS 311 (1964); Norton v. Brady, 129 Ga. App. 753, 201 S.E.2d 188, 1973 Ga. App. LEXIS 1139 (1973); J.F. Barton Contracting Co. v. Southern Ry., 191 Ga. App. 13, 380 S.E.2d 724, 1989 Ga. App. LEXIS 471 (1989).

Order must be properly entered in records of court to toll five-year period. — As a jury selection notice sent by the trial court to the parties was not stamped by the clerk of court's office as "filed," and there was nothing else in the record to show that the notice was properly entered in the records of the court, the jury selection notice did not meet the requirements for a written order that

tolled the five-year dismissal period of O.C.G.A. § 9-2-60(b). Therefore, the trial court erred in denying the defendants' motion to dismiss. Pilz v. Thibodeau, 293 Ga. App. 532, 667 S.E.2d 622, 2008 Ga. App. LEXIS 947 (2008).

Continuance must be reduced to writing and entered in record in order to avoid mandatory provisions of this section. Bowen v. Morrison, 103 Ga. App. 632, 120 S.E.2d 57, 1961 Ga. App. LEXIS 1021 (1961); Johnson v. McCauley, 123 Ga. App. 393, 181 S.E.2d 111, 1971 Ga. App. LEXIS 1238 (1971); Georgia Power Co. v. Whitmire, 146 Ga. App. 29, 245 S.E.2d 324, 1978 Ga. App. LEXIS 2190 (1978); Maroska v. Williams, 146 Ga. App. 130, 245 S.E.2d 470, 1978 Ga. App. LEXIS 2223 (1978).

Unsigned entries in a docket sheet indicating continuances did not satisfy the requirements of subsection (b) of O.C.G.A. § 9-2-60 and were not sufficient to preclude dismissal for want of prosecution. Republic Claims Serv. Co. v. Hoyal, 264 Ga. 127, 441 S.E.2d 755, 1994 Ga. LEXIS 285 (1994).

It was the duty of a decedent's spouse to obtain a written order from the probate court granting the spouse's petition for year's support. Because the spouse failed to do so, the entire case, not just a caveat to the petition filed by the decedent's child, was automatically dismissed as a matter of law pursuant to O.C.G.A. § 9-2-60(b) five years after the last written order was filed on the spouse's petition. Clark v. Clark, 293 Ga. App. 309, 667 S.E.2d 103, 2008 Ga. App. LEXIS 884 (2008).

Appellate court order was not a "written order" signed by the trial court within the meaning of subsection (b) of O.C.G.A. § 9-2-60. Kachwalla v. Byrne, 198 Ga. App. 454, 402 S.E.2d 74, 1991 Ga. App. LEXIS 163 (1991).

Effect of Dismissal

Section makes dismissal rule applicable to all proceedings. — Ga. L 1967, p. 557, § 1 (see now O.C.G.A. § 9-2-60) was supplementary to Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41(e)) in making the five-year dismissal rule applicable to all proceedings in all courts. Fulton County v. Corporation of Presiding Bishop, 133 Ga. App. 847, 212 S.E.2d 451, 1975 Ga. App. LEXIS 2311 (1975).

Notices of attorney's leaves of absences insufficient to avoid application of statute. — Pursuant to O.C.G.A. §§ 9-2-60(b) and 9-11-41(e), because an individual's negligence suit sat dormant when the trial court failed to enter any orders for eight years, the suit was automatically dismissed for want of prosecution, and the individual could not overcome application of those statutes as notices of leaves of absence filed by the individual's attorney were insufficient to avoid application. Ward v. Swartz, 285 Ga. App. 788, 648 S.E.2d 114, 2007 Ga. App. LEXIS 645 (2007).

Proceedings after dismissal hereunder null. — After automatic dismissal under this section, the case is no longer pending, and any further action, even trial and verdict, is a mere nullity. Salter v. Chatham County, 136 Ga. App. 914, 222 S.E.2d 638, 1975 Ga. App. LEXIS 1529 (1975).

When case stands automatically dismissed it is completely lifeless for all purposes from date of dismissal, so that if not removed motion to strike it from the docket will lie; date on which automatic dismissal occurs rather than date on which it was physically stricken is controlling. Fulton County v. Corporation of Presiding Bishop, 133 Ga. App. 847, 212 S.E.2d 451, 1975 Ga. App. LEXIS 2311 (1975).

Dismissal under this section is not dismissal deciding merits of the case so as to bar another action upon the same cause of action. Covil v. Stansell, 113 Ga. App. 179, 147 S.E.2d 479, 1966 Ga. App. LEXIS 1006 (1966); Frank Maddox Realty & Mtg., Inc. v. First Nat'l Bank, 196 Ga. App. 114, 395 S.E.2d 326, 1990 Ga. App. LEXIS 816 (1990).

Dismissal under this section is not res judicata so as to conclude, adversely to plaintiff, the cause of action itself. City of Chamblee v. Village of N. Atlanta, 217 Ga. 517, 123 S.E.2d 663, 1962 Ga. LEXIS 311 (1962); Frank Maddox Realty & Mtg., Inc. v. First Nat'l Bank, 196 Ga. App. 114, 395 S.E.2d 326, 1990 Ga. App. LEXIS 816 (1990).

Effect of Dismissal (Cont'd)

Party may refile after dismissal pursuant to this section, provided the cause of action is not then barred by some statutory limitation or by laches. City of Chamblee v. Village of N. Atlanta, 217 Ga. 517, 123 S.E.2d 663, 1962 Ga. LEXIS 311 (1962).

OPINIONS OF THE ATTORNEY GENERAL

Intent of legislature in passing 1967 version of this section was to expand scope of original provisions. 1970 Op. Att'y Gen. No. 70-138.

This section controls in appeal of condemnation proceedings. — Civil Practice Act (Ch. 11 of this title) is controlling in declaration of method of condemnation, and this section is controlling in appeal from award of assessors or special master. 1970 Op. Att'y Gen. No. 70-138.

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Actions, § 3. 24 Am. Jur. 2d, Dismissal, Discontinuance, and Nonsuit, §§ 62 et seq., 66 et seq., 72 et seq., 78 et seq.

C.J.S.

27 C.J.S., Dismissal and Nonsuit, § 72 et seq.

ALR.

Construction and application of statutory requirement or rule of court that action should be brought to trial within specified time, 112 A.L.R. 1158.

Effect of nonsuit, dismissal, or discontinuance of action on previous orders, 11 A.L.R.2d 1407.

Reviving, renewing, or extending judgment by order entered after expiration of statutory limitation period on motion made or proceeding commenced within such period, 52 A.L.R.2d 672.

Illness or death of party, counsel, or witness as excuse for failure to timely prosecute action, 80 A.L.R.2d 1399.

Dismissal of appeal or writ of error for want of prosecution as bar to subsequent appeal, 96 A.L.R.2d 312.

Time when voluntary nonsuit or dismissal may be taken as of right under statute so authorizing at any time before "trial," "commencement of trial," "trial of facts," or the like, 1 A.L.R.3d 711.

What constitutes bringing an action to trial or other activity in case sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time, 32 A.L.R.4th 840.

9-2-61. Renewal of case after dismissal.

(a) When any case has been commenced in either a state or federal court within the applicable statute of limitations and the plaintiff discontinues or dismisses the same, it may be recommenced in a court of this state or in a federal court either within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later, subject to the requirement of payment of costs in the original action as required by subsection (d) of Code Section 9-11-41; provided, however, if the dismissal or discontinuance occurs after the expiration of the applicable period of limitation, this privilege of renewal shall be exercised only once.

(b) This Code section shall not apply to contracts for the sale of goods covered by Article 2 of Title 11.

(c) The provisions of subsection (a) of this Code section granting a privilege of renewal shall apply if an action is discontinued or dismissed without prejudice for lack of subject matter jurisdiction in either a court of this state or a federal court in this state.

History.

Laws 1847, Cobb's 1851 Digest, p. 569.; Ga. L. 1855-56, p. 233, § 33; Code 1863, § 2873; Code 1868, § 2881; Code 1873, § 2932; Code 1882, § 2932; Civil Code 1895, § 3786; Civil Code 1910, § 4381; Code 1933, § 3-808; Ga. L. 1962, p. 156, § 1; Ga. L. 1967, p. 226, § 39; Ga. L. 1985, p. 1446, § 1; Ga. L. 1989, p. 419, § 1; Ga. L. 1990, p. 876, § 1; Ga. L. 1998, p. 862, § 1.

Cross references.

Dismissal of actions and recommencement within six months, § 9-11-41.

Editor's notes.

Ga. L. 1998, p. 862, § 4, not codified by the General Assembly, provides that the 1998 amendment was applicable to cases pending on April 10, 1998, or cases dismissed or discontinued after April 10, 1998.

Law reviews.

For article, "The 1967 Amendments to the Georgia Civil Practice Act and the Appellate Procedure Act," see 3 Ga. St. B.J. 383 (1967).

For article surveying judicial developments in Georgia's trial practice and procedure laws, see 31 Mercer L. Rev. 249 (1979).

For review of 1998 legislation relating to civil practice, see 15 Ga. St. U.L. Rev. 1 (1998).

For annual survey article discussing trial practice and procedure, see 51 Mercer L. Rev. 487 (1999).

For survey article on trial practice and procedure for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 439 (2003).

For annual survey of appellate practice and procedure, see 57 Mercer L. Rev. 35 (2005).

For annual survey of insurance law, see 58 Mercer L. Rev. 181 (2006).

For article, "What is Reasonable Service?," see 12 Ga. St. B.J. 22 (2007).

For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009).

For annual survey on trial practice and procedure, see 64 Mercer L. Rev. 305 (2012).

For survey article on local government law, see 67 Mercer L. Rev. 147 (2015).

For annual survey on trial practice and procedure, see 67 Mercer L. Rev. 257 (2015).

For annual survey on zoning and land use law, see 69 Mercer L. Rev. 371 (2017).

JUDICIAL DECISIONS

Analysis

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General Consideration

As to history of this section, see Clark v. Newsome, 180 Ga. 97, 178 S.E. 386, 1935 Ga. LEXIS 186 (1935).

Attack on constitutionality not raised at trial. — When a car accident victim voluntarily dismissed the victim's first action and then filed another action based on the same facts in a different court, which action was then dismissed due to the limitations bar, the trial court's later dismissal of the victim's second renewed complaint was proper as the victim had failed to raise a challenge to the constitutionality of O.C.G.A. § 9-2-61 in the trial court and, therefore, it was not reviewable on appeal; as the constitutionality issue was the only one raised on appeal, the trial court's dismissal of the

General Consideration (Cont'd)

action was held to be proper. Watson v. Frnka, 266 Ga. App. 64, 596 S.E.2d 187, 2004 Ga. App. LEXIS 222 (2004).

This section is remedial and should be liberally construed. Cox v. Berry, 13 Ga. 306, 1853 Ga. LEXIS 84 (1853); Atlanta, K. & N. Ry. v. Wilson, 119 Ga. 781, 47 S.E. 366, 1904 Ga. LEXIS 360 (1904); Lamb v. Howard, 150 Ga. 12, 102 S.E. 436, 1920 Ga. LEXIS 5 (1920); Southern Ry. v. Pruitt, 121 Ga. App. 530, 174 S.E.2d 249, 1970 Ga. App. LEXIS 1271 (1970).

This section, being remedial in nature, is to be liberally construed so as to preserve the right to renew a cause of action set out in the previous action wherever same has been disposed of on any ground other than one affecting the merits. United States Cas. Co. v. AMOCO, 104 Ga. App. 209, 121 S.E.2d 328, 1961 Ga. App. LEXIS 642 (1961); Hiley v. McGoogan, 177 Ga. App. 809, 341 S.E.2d 461, 1986 Ga. App. LEXIS 1549 (1986).

This is a remedial statute and is to be liberally construed when the first action is disposed of on grounds not affecting merits of the case. Keramidas v. Department of Human Resources, 147 Ga. App. 820, 250 S.E.2d 560, 1978 Ga. App. LEXIS 2962 (1978).

Construction with federal statute. — Georgia Court of Appeals has adopted the grace period approach and construed 28 U.S.C. § 1367(d) as allowing state law claims that would otherwise be time-barred to be refiled in state court, if the claims are refiled no later than 30 days after federal court dismissal. Gottschalk v. Woods, 329 Ga. App. 730, 766 S.E.2d 130, 2014 Ga. App. LEXIS 778 (2014).

Construction with O.C.G.A. § 9-11-9.1. — On the statute's face, O.C.G.A. § 9-11-9.1(f) requires a motion to dismiss to be filed in addition to the first responsive pleading to foreclose the possibility of renewal under O.C.G.A. § 9-2-61. Mission Health of Georgia, LLC v. Bagnuolo, 339 Ga. App. 23, 793 S.E.2d 98, 2016 Ga. App. LEXIS 574 (2016).

Section inapplicable. — Because a personal injury plaintiff failed to file an action against an uninsured/underinsured motorist insurer within the applicable statutory period, and the action was not subject to renewal, as the magistrate court determined that service was made by an unauthorized person, thus rendering the original action void, and, therefore, the insurer was entitled to dismissal. Lewis v. Waller, 282 Ga. App. 8, 637 S.E.2d 505, 2006 Ga. App. LEXIS 1288 (2006).

O.C.G.A. § 9-2-61(a) not used to bar statute of repose. — When O.C.G.A. § 9-2-61(a) allows a dismissed action to be renewed after expiration of the applicable statute of limitation, it says nothing about a statute of repose and may not be used to avoid the bar of the statute of repose. Siler v. Block, 204 Ga. App. 672, 420 S.E.2d 306, 1992 Ga. App. LEXIS 975 (1992), aff'd, 263 Ga. 257, 429 S.E.2d 523, 1993 Ga. LEXIS 398 (1993).

This section is designed to save causes from the statute of limitations, and applies only to cases which are otherwise barred by the statute of limitations. Moore v. Tootle, 134 Ga. App. 232, 214 S.E.2d 184, 1975 Ga. App. LEXIS 1971 (1975).

This section is meant to save case from the statute of limitations when it attaches a pending action. Brooks v. Douglas, 154 Ga. App. 54, 267 S.E.2d 495, 1980 Ga. App. LEXIS 2040 (1980).

As long as the original suit is filed within the limitation period and the action is properly renewed pursuant to the requirement of O.C.G.A. § 9-2-61(a), the renewed action will not be barred by the statute of limitation. Chinn v. Maxwell, 170 Ga. App. 85, 316 S.E.2d 546, 1984 Ga. App. LEXIS 1810 (1984).

Fact that the original suit is dismissed prior to the expiration of the statute of limitations but the renewed action is not instituted until after the expiration of the limitation period does not bar application of O.C.G.A. § 9-2-61(a). Chinn v. Maxwell, 170 Ga. App. 85, 316 S.E.2d 546, 1984 Ga. App. LEXIS 1810 (1984).

Since original action was pending in court for over two years before being voluntarily dismissed by the plaintiff and then refiled the same day of plaintiff's own volition, these actions could not prevent plaintiff from raising the one-year bar of removal against defendant's notice of removal absent a finding of bad faith or

deception. Hattaway v. Engelhard Corp., 998 F. Supp. 1479, 1998 U.S. Dist. LEXIS 3273 (M.D. Ga. 1998).

Relation back only if diligence present. — Service that is perfected after the statute of limitations has run and more than five days after the complaint was filed will relate back to the date of filing only if the plaintiff diligently attempted to perfect service. Morris v. Haren, 52 F.3d 947, 1995 U.S. App. LEXIS 11941 (11th Cir. 1995).

Limitation period is not tolled when plaintiff failed to dismiss first complaint prior to filing second complaint. — Appellant's failure to ensure that the appellant's first complaint was dismissed prior to the filing of the second complaint deprives the appellant of the protection from the statute of limitation afforded by the renewal statute. Jones v. Cargill, Inc., 191 Ga. App. 843, 383 S.E.2d 206, 1989 Ga. App. LEXIS 804 (1989).

When a suit has been filed within the statute of limitations and dismissed after the statute has attached, a party may dismiss, pay all costs, and recommence the action by a new filing of the suit; however, the pending action must have been a valid action that was subject to renewal. Sylvester v. DOT, 252 Ga. App. 31, 555 S.E.2d 740, 2001 Ga. App. LEXIS 1183 (2001).

Renewal not permitted after plaintiff failed to exercise diligence to locate defendant in original action. — In a tort action arising from a motor vehicle accident, the plaintiff could not bring a renewal action following a voluntary dismissal, when the plaintiff served the defendant by publication only in the original action and thereafter failed to exercise diligence to locate the defendant. Durland v. Colotl, 359 Ga. App. 170, 855 S.E.2d 83, 2021 Ga. App. LEXIS 114 (2021).

Section does not limit rebringing case if statute has not run. — This section has application only when bar of the statute of limitations would otherwise apply, and does not attempt to limit time in which plaintiff may rebring the plaintiff's case if the statute of limitations on the action has not run. Alewine v. State, 103 Ga. App. 120, 118 S.E.2d 499, 1961 Ga. App. LEXIS 879 (1961).

There is no limitation as to the number of times an action may be brought and dismissed so long as the statute of limitations does not attach. Brooks v. Douglas, 154 Ga. App. 54, 267 S.E.2d 495, 1980 Ga. App. LEXIS 2040 (1980).

Right of renewal comes into play only if case would otherwise be barred by the statute of limitations. Rakestraw v. Berenson, 153 Ga. App. 513, 266 S.E.2d 249, 1980 Ga. App. LEXIS 1875 (1980).

This section does not apply when the original action was not barred by the statute of limitations. Hackney v. Asbury & Co., 124 Ga. 678, 52 S.E. 886, 1906 Ga. LEXIS 584 (1906); Powell v. Fidelity & Deposit Co., 48 Ga. App. 529, 173 S.E. 196, 1934 Ga. App. LEXIS 119 (1934); Whalen v. Certain-Teed Prods. Corp., 108 Ga. App. 686, 134 S.E.2d 528, 1963 Ga. App. LEXIS 745 (1963).

This section is applicable only to save a case from the statute of limitations when it attaches a pending action. Williford v. State, 56 Ga. App. 840, 194 S.E. 384, 1937 Ga. App. LEXIS 247 (1937).

This section is not applicable unless, due to dismissal, the bar of the statute of limitations has attached or may attach; and it is to relieve this bar that allowance of six months time in which to renew the action is given. Bowman v. Ware, 133 Ga. App. 799, 213 S.E.2d 58, 1975 Ga. App. LEXIS 2290 (1975).

Original action must not have been barred. — Plaintiff who has had an action dismissed other than on the merits may refile within six months if the original action was not barred by the statute of limitations. Covil v. Stansell, 113 Ga. App. 179, 147 S.E.2d 479, 1966 Ga. App. LEXIS 1006 (1966); Schaffer v. City of Atlanta, 151 Ga. App. 1, 258 S.E.2d 674, 1979 Ga. App. LEXIS 2411 (1979), rev'd on other grounds, 245 Ga. 164, 264 S.E.2d 6, 1980 Ga. LEXIS 727 (1980).

Under former Code 1933, § 3-808 (see O.C.G.A. § 9-2-61), plaintiff may refile an action within six months following the automatic dismissal mandated by Ga. L. 1967, p. 557, § 1 or Ga. L. 1966, p. 608, § 41 (see O.C.G.A. § 9-2-60 or O.C.G.A. § 9-11-41) if the original action was not barred by the statute of limitations. Berry

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v. Siskin, 128 Ga. App. 3, 195 S.E.2d 255, 1973 Ga. App. LEXIS 1360 (1973).

First action dismissed with prejudice. — After the trial court dismissed the first action with prejudice, it could not be properly refiled under O.C.G.A. § 9-2-61. Black v. Knight, 231 Ga. App. 820, 499 S.E.2d 69, 1998 Ga. App. LEXIS 29 (1998).

Although a patient and a husband had an expert affidavit, they failed to file it with their complaint against a doctor and a professional corporation alleging ordinary and professional negligence, and the trial court's grant of the motion to dismiss for failure to comply with O.C.G.A. § 9-11-9.1 was with prejudice, as it was on the merits; as the patient and the husband conceded that they could not seek to amend the complaint by adding the affidavit, and they had failed to voluntarily dismiss their action prior to the trial court having ruled on the motion, the patient and the husband could not seek to renew under O.C.G.A. § 9-2-61. Bardo v. Liss, 273 Ga. App. 103, 614 S.E.2d 101, 2005 Ga. App. LEXIS 363 (2005), cert. denied, No. S05C1425, 2005 Ga. LEXIS 579 (Ga. Sept. 19, 2005).

Only one opportunity to renew action. — Since plaintiff refiled a complaint outside the statute of limitations after the plaintiff's first suit was dismissed for lack of jurisdiction, the plaintiff exercised the plaintiff's one and only opportunity to validly renew the action under O.C.G.A. § 9-2-61. White v. KFC Nat'l Mgt. Co., 229 Ga. App. 73, 493 S.E.2d 244.

Right to renew a previously dismissed action after the statute of limitation has expired is governed by O.C.G.A. § 9-2-61, subject to the requirement of payment of costs in the original action as required by O.C.G.A. § 9-11-41(d); provided, however, if the dismissal or discontinuance occurs after the expiration of the applicable period of limitation, this privilege of renewal shall be exercised only once. Belcher v. Folsom, 258 Ga. App. 191, 573 S.E.2d 447, 2002 Ga. App. LEXIS 1392 (2002).

Trial court's dismissal of injured party's renewed complaint was proper because, even though dismissal under O.C.G.A. § 50-21-26(a)(4) was without prejudice, the injured party had renewed the action once and could not, under O.C.G.A. § 9-2-61(a), do so again. Baskin v. Ga. Dep't of Corr., 272 Ga. App. 355, 612 S.E.2d 565, 2005 Ga. App. LEXIS 292 (2005).

In order to show right to renew action within six months after dismissal of prior action on same cause of action, it is necessary for the renewal petition to show affirmatively that the former petition was not a void action, that it was such a valid action as may be renewed under this section, that it is based upon substantially the same cause of action, and that it is not a renewal of a previous action which was dismissed on its merits so that dismissal would act as a bar to rebringing of the petition. Morrison v. Bowen, 106 Ga. App. 464, 127 S.E.2d 194, 1962 Ga. App. LEXIS 732 (1962); Hudnall v. Kelly, 388 F. Supp. 1352, 1975 U.S. Dist. LEXIS 13976 (N.D. Ga. 1975).

Trial court did not err in directing verdict for defendants on trover claim because the statute of limitations had ran where plaintiff failed to place in record, by offer of proof or otherwise, evidence that the plaintiff had filed the instant case within six months after dismissal without prejudice of prior action brought within the statute of limitations. Duckworth v. Collier, 164 Ga. App. 139, 296 S.E.2d 640, 1982 Ga. App. LEXIS 2737 (1982).

Amended renewal complaint sufficient. — While the plaintiffs' renewal complaint referenced the original action by name and case number, it did not provide any other information about the prior suit, that suit's validity, or the claims alleged and, thus, as originally filed, the renewal complaint did not establish the plaintiff's right to renew. However, the trial court erred in granting the insurer's motion to dismiss because the plaintiffs filed an amendment to their timely renewal complaint, alleging the facts necessary for renewal and submitted evidence supporting those allegations. Strickland v. Geico General Insurance Company, 358 Ga. App. 158, 854 S.E.2d 348, 2021 Ga. App. LEXIS 25 (2021).

Renewal action improperly dismissed under abatement statutes. — After a car buyer dismissed the buyer's fraud and breach of contract action

against the seller while a counterclaim was pending and then attempted to refile the buyer's claims under the renewal statute, O.C.G.A. § 9-2-61, the trial court erred in dismissing the renewed action under O.C.G.A. §§ 9-2-5(a) and 9-2-44(a). Code Section 9-2-5(a) precluded simultaneous prosecution of the same claims, and the buyer was not prosecuting the same claims simultaneously, given that the buyer dismissed the buyer's claims in the first case. Brock v. C & M Motors, Inc., 337 Ga. App. 288, 787 S.E.2d 259, 2016 Ga. App. LEXIS 312 (2016).

Renewal precluded if requisite expert affidavit was not filed in prior action. — Pursuant to O.C.G.A. § 9-11-9.1, the renewal provision in O.C.G.A. § 9-2-61(a) did not save a second medical malpractice suit that was filed by plaintiffs, patient and wife, after the statute of limitation but within six months of their voluntary dismissal of a timely first malpractice suit because: (1) plaintiffs failed to attach an O.C.G.A. § 9-11-9.1 expert affidavit to the first complaint and dismissed the first action without giving defendants, doctor and employer, a chance to seek dismissal on that ground; (2) the required affidavit was not executed until after the time for filing such an affidavit in the first action had expired; and (3) defendants raised the affidavit issue in a motion to dismiss contemporaneous with their initial responsive pleadings in the second action. Griffin v. Carson, 255 Ga. App. 373, 566 S.E.2d 36, 2002 Ga. App. LEXIS 632 (2002).

Trial court did not err in dismissing with prejudice a patient's medical malpractice action on the ground that the patient failed to attach the required affidavits under O.C.G.A. § 9-11-9.1, because O.C.G.A. §§ 9-2-61(a) and 9-11-9.1 did not allow amendments of complaints in order to attach affidavits; dismissals for failure to attach such affidavits were dismissals for failure to state a claim and were, therefore, on the merits and with prejudice. Roberson v. Northrup, 302 Ga. App. 405, 691 S.E.2d 547, 2010 Ga. App. LEXIS 144 (2010).

Suit which is voluntarily dismissed after the statutory period of limitation has passed may be refiled in the correct county. Hornsby v. Hancock, 165 Ga. App. 543, 301 S.E.2d 900, 1983 Ga. App. LEXIS 1940 (1983), superseded by statute as stated in Chandler v. Opensided MRI of Atlanta, LLC, 299 Ga. App. 145, 682 S.E.2d 165, 2009 Ga. App. LEXIS 846 (2009).

Dismissal by court on ground not adjudicating merits counts as voluntary dismissal for purposes of this section. Douglas v. Kelley, 116 Ga. App. 670, 158 S.E.2d 441, 1967 Ga. App. LEXIS 923 (1967).

Application of O.C.G.A. § 9-11-41. — Dismissal under Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41(e)) was not on the merits and a case may be refiled within six months of such dismissal under former Code 1933, § 3-808 (see now O.C.G.A. § 9-2-61). Calloway v. Harms, 135 Ga. App. 54, 217 S.E.2d 184, 1975 Ga. App. LEXIS 1555 (1975).

Dismissal under Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41(e)) did not operate as dismissal on the merits pursuant to Ga. L. 1966, p. 609, § 41 (see now O.C.G.A. § 9-11-41(b)), and after such dismissal the plaintiff has six months to refile the complaint pursuant to former Code 1933, § 3-808 (see now O.C.G.A. § 9-2-61). Allstate Ins. Co. v. Dobbs, 134 Ga. App. 225, 213 S.E.2d 915, 1975 Ga. App. LEXIS 1968 (1975).

This section is not applicable when decision on merits terminates action. Harp v. Smith, 155 Ga. App. 393, 271 S.E.2d 38, 1980 Ga. App. LEXIS 2596 (1980).

Service on uninsured motorist carrier. — When insured brought suit against a driver for negligence, but did not serve the insured's excess uninsured motorist (UM) carrier under O.C.G.A. § 33-7-11 until after renewing the suit under O.C.G.A. § 9-2-61, it was error to grant summary judgment to the excess carrier on ground that service was untimely; purpose of § 33-7-11(d) is to provide notice to a UM carrier, not to obtain personal jurisdiction over it or to make it a party defendant, and service on a UM carrier was permissible at any time within which valid service could be made on the defendant. Hayward v. Retention Alternatives, Ltd., 291 Ga. App. 232, 661 S.E.2d 862,

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2008 Ga. App. LEXIS 455 (2008), aff'd, 285 Ga. 437, 678 S.E.2d 877, 2009 Ga. LEXIS 287 (2009).

Uninsured motorist (UM) insurer was timely served in an insured's renewal action, and summary judgment for the insurer was error because service on a UM carrier under O.C.G.A. § 33-7-11 was valid and timely within any time allowed for valid service on the tortfeasor in the case, even if such valid service was after the expiration of the statute of limitation; nothing in the 1998 amendment to § 33-7-11 reflected a legislative decision to overrule any of the judicial decisions holding such service valid. Although the insured had voluntarily dismissed the initial suit, the insured timely renewed the action pursuant to O.C.G.A. § 9-2-61, and served the insurer with the renewed complaint. Retention Alternatives, Ltd. v. Hayward, 285 Ga. 437, 678 S.E.2d 877, 2009 Ga. LEXIS 287 (2009).

Refiled suit barred by statute of repose. — Executrix's medical malpractice claim against a doctor was properly dismissed as, even if the action was refiled in accordance with O.C.G.A. § 9-2-61, the suit was barred by the statute of repose under O.C.G.A. § 9-3-71(b) as the suit was filed seven years after the patient's death. Adams v. Griffis, 275 Ga. App. 364, 620 S.E.2d 575, 2005 Ga. App. LEXIS 873 (2005).

Failure to file a required affidavit contemporaneously with the complaint did not render the complaint void ab initio, but merely made the action voidable insofar as the application of O.C.G.A. § 9-2-61 was concerned. Patterson v. Douglas Women's Center, 258 Ga. 803, 374 S.E.2d 737, 1989 Ga. LEXIS 88 (1989).

Intention of legislature was that this section should apply only to state courts, for in the Act of 1847 it uses the words "courts of this State," meaning, in the court's opinion, courts created by the Constitution and laws of this state. Henson v. Columbus Bank & Trust Co., 144 Ga. App. 80, 240 S.E.2d 284, 1977 Ga. App. LEXIS 2592 (1977).

Claims dismissed under section. — Because the children of a decedent refiled their complaint against the operators of a nursing home more than five years after the death of their mother or the alleged wrongful acts occurred, their claims were subject to dismissal under the statute of repose of O.C.G.A. § 9-3-71(b). Carr v. Kindred Healthcare Operating, Inc., 293 Ga. App. 80, 666 S.E.2d 401, 2008 Ga. App. LEXIS 784 (2008).

Trial court did not err in dismissing a passenger's O.C.G.A. § 9-2-61 renewal action entirely as being void ab initio and in denying the passenger's request to substitute parties under O.C.G.A. § 9-11-25 because the passenger's renewed complaint was filed after the driver's death, and the passenger never attempted to substitute a new defendant before a hearing on a motion to dismiss. Cox v. Progressive Bayside Ins. Co., 316 Ga. App. 50, 728 S.E.2d 726, 2012 Ga. App. LEXIS 480 (2012).

Renewal can only be exercised once. — In a wrongful death action, a trial court properly granted summary judgment to two defending prison workers because the estate administrator for the deceased inmate had already exercised the right to one renewal of the action outside the statute of limitation authorized by O.C.G.A. § 9-2-61(a) and could not invoke the statute again to save the time-barred third complaint after a federal court declined to exercise pendent jurisdiction over the state claims. Stokes v. Hill, 324 Ga. App. 256, 749 S.E.2d 819, 2013 Ga. App. LEXIS 824 (2013).

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Renewal allowable to meet service requirements of O.C.G.A. § 50-21-35. — Trial court erred in dismissing an injured party's personal injury action against a state agency because, under the current precedent, failure to meet the notice requirements of O.C.G.A. § 50-21-35 did not automatically require a dismissal, and the injured party's act of refiling the complaint under the renewal statute, O.C.G.A. § 9-2-61, was allowable under the circumstances. Shiver v. DOT, 277 Ga. App. 616, 627 S.E.2d 204, 2006 Ga. App. LEXIS 172 (2006).

No reference to venue. — Venue of renewed action may be laid in any court having jurisdiction. Cox v. Strickland, 120

Ga. 104, 47 S.E. 912, 1904 Ga. LEXIS 456 (1904).

When venue is improperly laid in the first action, this section does not require that the action shall be renewed in the same court or county, for this section is but a codification of the Act of 1847 which allowed plaintiff to renew in any court having jurisdiction thereof in this state. Chance v. Planters Rural Tel. Coop., 219 Ga. 1, 131 S.E.2d 541, 1963 Ga. LEXIS 350 (1963).

This section, in granting the right to renew within six months, forms an exception to the statute of limitations, and has no reference to the subject of venue; new action may be brought in any court having jurisdiction thereof in this state. Keramidas v. Department of Human Resources, 147 Ga. App. 820, 250 S.E.2d 560, 1978 Ga. App. LEXIS 2962 (1978).

Jurisdiction of parties and subject matter required. — In order for this section to prevent operation of the statute of limitations, the first action must have been one in which the court had jurisdiction of the parties and subject matter. Hudnall v. Kelly, 388 F. Supp. 1352, 1975 U.S. Dist. LEXIS 13976 (N.D. Ga. 1975).

Trial court properly dismissed a plaintiff's renewal action regarding a personal injury suit because the plaintiff's original action was void in that the trial court had orally dismissed that suit for insufficiency of service and a lack of personal jurisdiction, and the renewal statute only applied to actions that were valid prior to dismissal. Stephens v. Shields, 271 Ga. App. 141, 608 S.E.2d 736, 2004 Ga. App. LEXIS 1641 (2004).

Service in first action essential. — In order to make the second action stand upon the same footing as to limitation as the original case, it is essential that service was had in the first action; mere filing, without service, will not be sufficient. McClendon & Co. v. Hermando Phosphate Co., 100 Ga. 219, 28 S.E. 152, 1897 Ga. LEXIS 28 (1897); Haas v. Blake, 148 Ga. App. 366, 251 S.E.2d 386, 1978 Ga. App. LEXIS 3157 (1978).

Mere filing of petition will not of itself operate to toll the statute of limitations, for service is also a vital ingredient. Chance v. Planters Rural Tel. Coop., 219 Ga. 1, 131 S.E.2d 541, 1963 Ga. LEXIS 350 (1963).

When action is filed but there is no service, the first action is void and will not serve to toll the statute of limitations. Douglas v. Kelley, 116 Ga. App. 670, 158 S.E.2d 441, 1967 Ga. App. LEXIS 923 (1967).

In order for the filing of the complaint to qualify under O.C.G.A. § 9-2-61 as a valid renewal of a previously dismissed action, the proceedings which plaintiff dismissed must have constituted a "valid action." The mere filing of plaintiff's first complaint, without service on defendant, does not, however, constitute a "valid" action. Acree v. Knab, 180 Ga. App. 174, 348 S.E.2d 716, 1986 Ga. App. LEXIS 2121 (1986).

Because the defendant was never served with the original DeKalb County complaint, the renewal provision contained in O.C.G.A. § 9-2-61 was inapplicable and plaintiff's Henry County action, filed more than two years after the incident and some eight months after the first suit, was barred by the applicable statute of limitation. Wilkins v. Butler, 187 Ga. App. 84, 369 S.E.2d 267, 1988 Ga. App. LEXIS 596 (1988).

In order for a case to qualify as a renewal action, the earlier filing must have been a valid action, with proper service on the defendant. Ludi v. Van Metre, 221 Ga. App. 479, 471 S.E.2d 913.

When an original action was filed prior to the running of the statute of limitation and proper service was not perfected on defendants until after the expiration thereof, O.C.G.A. § 9-2-61 remained available to the plaintiff because the plaintiff voluntarily dismissed the original action before the trial court ruled on the reasonableness of the service therein. This decision overrules Brooks v. Young, 220 Ga. App. 47, 467 S.E.2d 230 (1996), to the extent it holds that there can be no valid service of an original action outside the statute of limitation. Allen v. Kahn, 231 Ga. App. 438, 499 S.E.2d 164.

Since the defendant was not served in the first suit, that suit was void and incapable of being renewed under subsection (a) of O.C.G.A. § 9-2-61; neither defendant's appearance in the first suit by filing

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an answer and raising the defense of lack of service, nor the defendant's participation in discovery prior to plaintiff's dismissal was a waiver of the service defect. Sparrow v. Che, 232 Ga. App. 184, 501 S.E.2d 553; Parker v. Jester, 244 Ga. App. 494, 535 S.E.2d 814, 2000 Ga. App. LEXIS 731 (2000).

Since proper service was never made on the corporations in the original action, the privilege of renewal did not apply with respect to them. Kidd v. First Commerce Bank, 264 Ga. App. 536, 591 S.E.2d 369, 2003 Ga. App. LEXIS 1392 (2003).

Because sufficient evidence was presented that supported the trial court's ruling that service of process in a personal injury plaintiff's original suit was ineffectual, that suit was void, making dismissal of the personal injury plaintiff's renewal claim proper. Cooper v. Lewis, 288 Ga. App. 750, 655 S.E.2d 344, 2007 Ga. App. LEXIS 1288 (2007).

Because the plaintiff did not serve the defendant in the original automobile collision suit prior to dismissal, the plaintiff could not utilize the renewal statute to avoid the statute of limitation bar to a second suit. The trial court correctly ruled that the case could not be renewed outside the statute of limitation because the action was not made valid through service before it was dismissed. McWilliams v. Parker, 362 Ga. App. 147, 867 S.E.2d 151, 2021 Ga. App. LEXIS 577 (2021).

Service waived by defendant. — This section does not apply to void actions, including actions in which the petition has been filed but not served upon the defendant, but want of service will not void the action if service has been waived by the defendant. Cutliffe v. Pryse, 187 Ga. 51, 200 S.E. 124, 1938 Ga. LEXIS 760 (1938).

Delay in service in original action. — Inasmuch as diligence in perfecting service of process in an action properly refiled under subsection (a) of O.C.G.A. § 9-2-61 must be measured from time of filing the renewed suit, any delay in service in a valid first action is not available as an affirmative defense in the renewal action. Hobbs v. Arthur, 264 Ga. 359, 444 S.E.2d 322, 1994 Ga. LEXIS 468 (1994); Urrea v. Flythe, 215 Ga. App. 212, 450 S.E.2d 266, 1994 Ga. App. LEXIS 1178 (1994).

Court of appeals correctly reversed a trial court's grant of summary judgment to a driver and a corporation based on a second driver's lack of diligence in serving a complaint in the driver's voluntarily dismissed original action because inasmuch as diligence in perfecting service of process in an action properly refiled under O.C.G.A. § 9-2-61(a) had to be measured from the time of filing the renewed suit, any delay in service in a valid first action was not available as an affirmative defense in the renewal action. The first driver and corporation essentially sought the rewriting of an unambiguous statute, but their arguments were properly directed to the General Assembly because when the General Assembly wished to put a firm deadline on filing lawsuits, the legislature knew how to enact a statute of repose instead of a statute of limitation. Robinson v. Boyd, 288 Ga. 53, 701 S.E.2d 165, 2010 Ga. LEXIS 772 (2010).

Service in second action essential. — Mere refiling of an action after dismissal for improper service on defendants did not operate to toll the running of the relevant statute when the plaintiffs did not exercise reasonable diligence to see that the defendant was properly served in the present action. Cambridge Mut. Fire Ins. Co. v. City of Claxton, 96 F.R.D. 175, 1982 U.S. Dist. LEXIS 16012 (S.D. Ga. 1982), aff'd, 720 F.2d 1230, 1983 U.S. App. LEXIS 14793 (11th Cir. 1983).

After the plaintiff voluntarily dismissed the action without prejudice and filed another complaint for damages, and the plaintiff did not perfect service by having the second complaint personally served on the defendant, the plaintiff failed to comply with the procedural prerequisites for renewal of the dismissed action. Atkinson v. Holt, 213 Ga. App. 427, 444 S.E.2d 838, 1994 Ga. App. LEXIS 599 (1994), cert. denied, No. S94C1437, 1994 Ga. LEXIS 999 (Ga. Sept. 22, 1994).

Diligence in perfecting service of process in an action properly refiled under subsection (a) of O.C.G.A. § 9-2-61 must be measured from the time of filing the renewed suit. Heard v. Hart, 241 Ga.

App. 441, 526 S.E.2d 908, 1999 Ga. App. LEXIS 1651 (1999), overruled in part, Giles v. State Farm Mut. Ins. Co., 330 Ga. App. 314, 765 S.E.2d 413, 2014 Ga. App. LEXIS 717 (2014).

Finding was proper that plaintiff was not diligent in serving defendant who was not served until approximately three months after a renewed action was filed because plaintiff's attorney provided the sheriff with an erroneous address, despite the fact that the attorney had the correct address. Heard v. Hart, 241 Ga. App. 441, 526 S.E.2d 908, 1999 Ga. App. LEXIS 1651 (1999), overruled in part, Giles v. State Farm Mut. Ins. Co., 330 Ga. App. 314, 765 S.E.2d 413, 2014 Ga. App. LEXIS 717 (2014).

Because the plaintiff offered no explanation for the delays in attempting to locate and serve the defendant, whether the delays show that the plaintiff was guilty of laches in failing to exercise diligence in perfecting service was a matter within the trial court's discretion. Davis v. Bushnell, 245 Ga. App. 221, 537 S.E.2d 477, 2000 Ga. App. LEXIS 921 (2000).

Effect of service beyond limitation period. — Inordinate and unexplained delay on the part of plaintiff in obtaining personal service on defendant, particularly after being placed on due notice of the deficiency in the plaintiff's original service, constituted failure to exercise due diligence, so as to preclude the relation back of subsequent perfected service to the original filing of the complaint. Bailey v. Hall, 199 Ga. App. 602, 405 S.E.2d 579, 1991 Ga. App. LEXIS 548 (1991).

When service had been perfected, albeit belatedly, the original action was merely voidable and not void. Service thus related back to the date of filing, thereby preventing the suit from being barred by the statute of limitation. Therefore, by voluntarily dismissing plaintiff's valid suit, plaintiff acquired the right to file a renewal action within six months pursuant to O.C.G.A. § 9-2-61. Fine v. Higgins Foundry & Supply Co., 201 Ga. App. 275, 410 S.E.2d 821, 1991 Ga. App. LEXIS 1331 (1991).

Plaintiff dismissed original action against defendant after the expiration of the applicable statute of limitation, then filed a renewal action against defendant pursuant to O.C.G.A. § 9-2-61; defendant raised the defense of insufficient service in defendant's answer to the original action and moved for dismissal of the renewal action on the basis that defendant was not properly served in the original action. The trial court correctly concluded the original action was void for lack of proper service on defendant, and correctly dismissed the renewal action because a void action could not be renewed pursuant to O.C.G.A. § 9-2-61. Campbell v. Coats, 254 Ga. App. 57, 561 S.E.2d 195, 2002 Ga. App. LEXIS 257 (2002), cert. denied, No. S02C0981, 2002 Ga. LEXIS 509 (Ga. June 10, 2002).

Owners' personal injury and property damages action against a manufacturer, which concerned a fire in January 30, 2000, was barred by the two- and four-year statutes of limitations because the owners failed to timely perfect service, as required by O.C.G.A. § 9-11-4(c), until February 23, 2004, which was more than five days after the owners filed a renewed complaint under O.C.G.A. § 9-2-61(a) on October 28, 2003. Johnson v. Am. Meter Co., 412 F. Supp. 2d 1260, 2004 U.S. Dist. LEXIS 29142 (N.D. Ga. 2004).

Plaintiff was allowed to reinstate an original 42 U.S.C. § 1983 complaint under Fed. R. Civ. P. 60(b) because of excusable neglect due to the fact that the renewal statute of O.C.G.A. § 9-2-61 was inapplicable to reinstate a second action barred by the limitations period of O.C.G.A. § 9-3-33, adequate grounds for relief were demonstrated, and no prejudice was shown. Highsmith v. Thomas, No. CV506-99, No. CV507-04, 2007 U.S. Dist. LEXIS 28964 (S.D. Ga. Apr. 18, 2007).

Dismissal of action without prejudice granted. — In a diversity action, even though the plaintiffs failed to show good cause for their failure to serve the defendants within the 120 day service period under Fed. R. Civ. P. 4(m) and failed to diligently servethe defendants after the expiration of the statute of limitations as required under O.C.G.A. § 9-11-4, the action was dismissed without prejudice because of the refiling opportu-

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nities accorded under O.C.G.A. § 9-2-61. Lau v. Klinger, 46 F. Supp. 2d 1377, 1999 U.S. Dist. LEXIS 5955 (S.D. Ga. 1999).

Affirmative defenses raised in renewal actions. — Since an action renewed pursuant to subsection (a) of O.C.G.A. § 9-2-61 is an action de novo, as a general rule a defendant is not estopped from raising a proper defense in the renewal action solely because that defense was not raised in the original action. Fine v. Higgins Foundry & Supply Co., 201 Ga. App. 275, 410 S.E.2d 821, 1991 Ga. App. LEXIS 1331 (1991).

Affirmative defenses raised in a renewal action were not proper defenses when the delayed service in the first action was not repeated and the defendant was served promptly in the renewal action. Fine v. Higgins Foundry & Supply Co., 201 Ga. App. 275, 410 S.E.2d 821, 1991 Ga. App. LEXIS 1331 (1991).

Mere sustaining of plea to jurisdiction adjudicating that the court has no jurisdiction over the defendant, without setting aside of service, does not render the action itself void for lack of service, and when the plaintiff elects to rebring the action within six months in a court having jurisdiction of both subject matter and the person, this section applies. Pryse v. Cutliffe, 57 Ga. App. 548, 195 S.E. 913, 1938 Ga. App. LEXIS 333, aff'd, 187 Ga. 51, 200 S.E. 124, 1938 Ga. LEXIS 760 (1938); Douglas v. Kelley, 116 Ga. App. 670, 158 S.E.2d 441, 1967 Ga. App. LEXIS 923 (1967); Weddington v. Kumar, 149 Ga. App. 857, 256 S.E.2d 141, 1979 Ga. App. LEXIS 2058 (1979).

If, after waiver of service by defendant by filing a plea to the jurisdiction on the ground of nonresidence in the county, plaintiff dismisses the action, and within six months from dismissal institutes an action against the defendant on the same cause in another county, admitted in the plea to the jurisdiction to be defendant's residence, this section will apply, and the latter action will not be barred by the statute of limitations. Cutliffe v. Pryse, 187 Ga. 51, 200 S.E. 124, 1938 Ga. LEXIS 760 (1938).

If, after waiver of service by defendant by virtue of filing of a plea to the jurisdiction without objecting to service or want of service, plaintiff dismisses the plaintiff's action in one county and within six months from dismissal institutes an action against defendant on the same cause of action in the proper county, this section will apply and the latter action will not be barred by the statute of limitations. Chance v. Planters Rural Tel. Coop., 219 Ga. 1, 131 S.E.2d 541, 1963 Ga. LEXIS 350 (1963).

Lack of personal jurisdiction. — This section applies when an action brought within the time prescribed by the statute of limitations, in a court having jurisdiction of the subject matter, is dismissed solely for want of jurisdiction of the person. Phillips v. Central of Ga. Ry., 20 Ga. App. 668, 93 S.E. 309, 1917 Ga. App. LEXIS 1026 (1917), aff'd, 148 Ga. 90, 95 S.E. 994, 1918 Ga. LEXIS 201 (1918).

If plaintiff begins action in court of this state having subject matter jurisdiction, and after bar of the statute has attached the action is dismissed for lack of jurisdiction of the person, such action may be renewed within six months in another court of this state having jurisdiction of the person and subject matter. United States Cas. Co. v. AMOCO, 104 Ga. App. 209, 121 S.E.2d 328, 1961 Ga. App. LEXIS 642 (1961); Keramidas v. Department of Human Resources, 147 Ga. App. 820, 250 S.E.2d 560, 1978 Ga. App. LEXIS 2962 (1978).

If defendant traverses service and files plea to the jurisdiction subject to traverse, the defendant may thereby establish not only that the court has no jurisdiction of the defendant's person but that the petition, not having been properly served upon the defendant, is absolutely void, and in such case plaintiff is not entitled to rely upon the first action after its dismissal as a basis of renewal. Douglas v. Kelley, 116 Ga. App. 670, 158 S.E.2d 441, 1967 Ga. App. LEXIS 923 (1967).

Identity of cause of action and of parties required. — To be renewed under this section, case must be the same as to cause of action and parties. Cox v. East Tenn. & Ga. R.R., 68 Ga. 446, 1882 Ga. LEXIS 28 (1882).

To be a good "renewal" of an original action so as to suspend running of the

statute of limitations, the new petition must be substantially the same both as to the cause of action and as to essential parties. Sheldon & Co. v. Emory Univ., 184 Ga. 440, 191 S.E. 497, 1937 Ga. LEXIS 548 (1937).

If cause of action is the same in both cases, the same party or the party's legal representative may renew the second action against a person from whom relief was prayed in the first action. McCoy Enters. v. Vaughn, 154 Ga. App. 471, 268 S.E.2d 764, 1980 Ga. App. LEXIS 2232 (1980).

Trial court's denial of summary judgment to a hotel limited liability corporation (LLC) in a personal injury action by an injured patron was error as the action was originally brought against a different entity, the patron attempted to add the LLC and then dismissed that action and brought a new action after expiration of the limitations period under O.C.G.A. § 9-3-33 against the LLC based on the renewal statute pursuant to O.C.G.A. § 9-2-61, but the patron never sought or obtained court permission to add the LLC as a party, as required by O.C.G.A. §§ 9-11-15(a) and 9-11-21; as the amendment to add the LLC was more than a correction of a misnomer because the two named defendants were separate entities, O.C.G.A. § 9-11-10(a) was inapplicable and leave of court was required in order to add the LLC. Valdosta Hotel Props., LLC v. White, 278 Ga. App. 206, 628 S.E.2d 642, 2006 Ga. App. LEXIS 289 (2006), cert. denied, No. S06C1296, 2006 Ga. LEXIS 425 (Ga. June 12, 2006).

Assertion of new claim in renewal action was improper. — Plaintiff's renewal action against the mother of a driver in a traffic accident was time-barred because it asserted a claim under the family purpose doctrine, but the original action against the mother only asserted a negligence claim against the mother and did not make a family purpose doctrine allegation; to be a good "renewal" so as to suspend the running of the statute of limitations under O.C.G.A. § 9-2-61, the new petition had to have been substantially the same both as to the cause of action and as to the essential parties. Thus, the statute of limitations was not suspended under § 9-2-61. Safi-Rafiq v. Balasubramaniam, 298 Ga. App. 274, 679 S.E.2d 822, 2009 Ga. App. LEXIS 647 (2009), cert. denied, No. S09C1708, 2009 Ga. LEXIS 564 (Ga. Sept. 8, 2009).

Appellant could not file the instant action as a renewal of the breach-of-contract counterclaim that the appellant asserted in the prior litigation because the appellant could not add claims for breach of fiduciary duty, conversion, and unjust enrichment as the claims were not substantially the same as the appellant's counterclaim for breach of contract in the prior action. Hartman v. The PIP-Group, LLC, 349 Ga. App. 233, 825 S.E.2d 601, 2019 Ga. App. LEXIS 148 (2019), cert. denied, No. S19C0979, 2019 Ga. LEXIS 775 (Ga. Nov. 4, 2019).

Payment of costs in the dismissed suit is a precondition to the filing of a second suit. Little v. Walker, 250 Ga. 854, 301 S.E.2d 639, 1983 Ga. LEXIS 659 (1983); Shaw v. Lee, 187 Ga. App. 689, 371 S.E.2d 187, 1988 Ga. App. LEXIS 810 (1988); Urrea v. Flythe, 215 Ga. App. 212, 450 S.E.2d 266, 1994 Ga. App. LEXIS 1178 (1994). (See now the 1989 amendment, which added the payment of costs provision in subsection (a)).

Arrestee whose suit against a law enforcement officer under 42 U.S.C. § 1983 was barred by the statute of limitations could not rely on Georgia's renewal statute, O.C.G.A. § 9-2-61, to avoid the statute of limitations because the arresstee failed to pay the unpaid costs of the arrestee's timely original action as required. The cost-payment requirement applied both to voluntary and involuntary dismissals under O.C.G.A. § 9-11-41. Hancock v. Cape, 875 F.3d 1079, 2017 U.S. App. LEXIS 23182 (11th Cir. 2017).

Payment of costs from federal court. — Payment of costs in a dismissed action is a jurisdictional matter which cannot be waived. Combel v. Wickey, 174 Ga. App. 758, 332 S.E.2d 18, 1985 Ga. App. LEXIS 1950 (1985).

Requirement may be relaxed if the plaintiff shows a good faith effort to ascertain and pay the costs. Butler v. Bolton Rd. Partners, 222 Ga. App. 791, 476 S.E.2d 265.

Appellate court found that a plaintiff can file a renewal action in a Georgia

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court under O.C.G.A. § 9-2-61 within six months following the dismissal of claims in a prior federal action without first paying the litigation expenses submitted by a defendant in a bill of costs to the federal district court. Prison Health Servs. v. Mitchell, 256 Ga. App. 537, 568 S.E.2d 741, 2002 Ga. App. LEXIS 830 (2002).

Payment of costs of original action is condition precedent to right to renew action. McLanahan v. Keith, 140 Ga. App. 171, 230 S.E.2d 57, 1976 Ga. App. LEXIS 1385 (1976), aff'd, 239 Ga. 94, 236 S.E.2d 52, 1977 Ga. LEXIS 824 (1977); Little v. Walker, 250 Ga. 854, 301 S.E.2d 639, 1983 Ga. LEXIS 659 (1983); Shaw v. Lee, 187 Ga. App. 689, 371 S.E.2d 187, 1988 Ga. App. LEXIS 810 (1988); (See now the 1989 amendment, which added the payment of costs provision in subsection (a)).

When costs of the prior dismissed action have not been paid, statute of limitations applies to the renewal case even if it has been filed within six months of dismissal. Grier v. Wade Ford, Inc., 135 Ga. App. 821, 219 S.E.2d 43, 1975 Ga. App. LEXIS 1839 (1975).

Failure to attach ante litem notice. — Plaintiff's tort action against the Georgia Ports Authority complied with the statute of limitations and ante litem notice statute, O.C.G.A. §§ 50-21-26(a)(4) and 50-21-27(c), and the plaintiff's second action was proper under the renewal statute, O.C.G.A. § 9-2-61, but was dismissed for failure to attach the ante litem notice timely. The plaintiff's third action was improper because dismissal of the first action occurred outside the statute of limitations, so only one renewal was authorized. Burroughs v. Georgia Ports Authority, 339 Ga. App. 294, 793 S.E.2d 538, 2016 Ga. App. LEXIS 682 (2016), cert. denied, No. S17C0617, 2017 Ga. LEXIS 416 (Ga. May 15, 2017).

Applicable procedural rules. — Renewal action is governed by those procedural rules which are in effect at the time that it is filed. Archie v. Scott, 190 Ga. App. 145, 378 S.E.2d 182, 1989 Ga. App. LEXIS 118 (1989).

Substitution for "John Doe" defendant. — After the plaintiff voluntarily dismissed an action against a defendant designated as "John Doe" and later discovered the defendant's true name and renewed the action, designating the defendant by the defendant's true name, the defendants were in substance identical, and the renewal action could claim the benefit of the tolling of the statute of limitation. Milburn v. Nationwide Ins. Co., 228 Ga. App. 398, 491 S.E.2d 848.

Action appealed from magistrate court. — O.C.G.A. § 9-11-41(a), the voluntary dismissal statute, could be exercised by either party in a de novo appeal filed in superior court following the entry of a judgment in themagistrate court, regardless of which party appealed. Once a landlord filed the landlord's voluntary dismissal, the landlord was also entitled to file a renewal action pursuant to O.C.G.A. § 9-2-61(a). Jessup v. Ray, 311 Ga. App. 523, 716 S.E.2d 583, 2011 Ga. App. LEXIS 782 (2011).

Timing

Meaning of "whichever is later." — Plain meaning of the phrase "whichever is later" in O.C.G.A. § 9-2-61 refers to the later date of two dates: (1) the end of the statute of limitations; or (2) six months after the date of discontinuance or dismissal; the discontinuance of a case precedes the filing of the written dismissal and the six month period begins to run on the earlier date of discontinuance. Morris v. Haren, 52 F.3d 947, 1995 U.S. App. LEXIS 11941 (11th Cir. 1995).

Date from which renewal period runs. — Six-month period for refiling an action that was dismissed in federal court in the state court, absent a stay, began to run from the date the United States Court of Appeals affirmed the dismissal, not the date of the United States Supreme Court's denial of a subsequent petition for certiorari. Owens v. Hewell, 222 Ga. App. 563, 474 S.E.2d 740.

Six-month period for filing a renewal action was triggered on the date a dismissal order was filed, even though the order contained an incorrect signature date which was later corrected by the filing of an amended order. Kimball v. KGB Transport, 241 Ga. App. 511, 527 S.E.2d 233, 1999 Ga. App. LEXIS 1660

(1999), cert. denied, No. S00C0669, 2000 Ga. LEXIS 413 (Ga. May 5, 2000).

Computation method. — Method of computation of time in O.C.G.A. § 1-3-1(d)(3) applies to the filing of renewal actions under O.C.G.A. § 9-2-61(a). Parsons v. Capital Alliance Fin., LLC, 325 Ga. App. 884, 756 S.E.2d 14, 2014 Ga. App. LEXIS 96 (2014).

Written notice of dismissal required to begin six-month period. — Even though plaintiff's counsel informed the court of plaintiff's intent to dismiss the case, signed a voluntary dismissal that day, and served it on defense counsel by mail, no voluntary dismissal occurred until the plaintiff actually filed a written notice thereof, and the six-month renewal period did not begin until that date. Carter v. Digby, 244 Ga. App. 217, 535 S.E.2d 273, 2000 Ga. App. LEXIS 669 (2000).

Renewal permitted when delay was due to computer problem. — Trial court erred in dismissing the patient's complaint because, following a computer problem causing an 8-day delay, the complaint was stamped filed on the last day of the six-month renewal period. Choice v. Fla. Men's Med. Clinic, 342 Ga. App. 157, 802 S.E.2d 405, 2017 Ga. App. LEXIS 323 (2017).

Renewal permitted within six months. — Superior court did not err when the court concluded that the 2019 petition was a valid renewal of the property owner's original action under O.C.G.A. § 9-2-61 because the superior court dismissed the first action without prejudice for lack of jurisdiction based on the property owner combining multiple appeals into one certiorari petition and, therefore, the dismissal of the first action did not operate as an adjudication on the merits and the property owner was able to renew the owner's action within six months of the dismissal without prejudice, which the owner did. Forsyth County v. Mommies Props. LLC Four Cases, 359 Ga. App. 175, 855 S.E.2d 126, 2021 Ga. App. LEXIS 145 (2021).

Time ran from court order terminating the action. — Plaintiff's renewal action brought under the renewal statute, O.C.G.A. § 9-2-61(a), was timely because the six-month period was calculated not from the time the plaintiff dismissed some of the defendants, but from the date of the trial court's order granting the voluntary dismissal without prejudice as to all but one of the defendants. Had the plaintiff dismissed all the defendants, no court order would have been required, and the voluntary dismissal would have been effective. Gresham v. Harris, 329 Ga. App. 465, 765 S.E.2d 400, 2014 Ga. App. LEXIS 711 (2014), cert. denied, No. S15C0475, 2015 Ga. LEXIS 74 (Ga. Jan. 20, 2015).

Applicable statutes of limitation are not tolled during the pendency of a lawsuit. — Effect of O.C.G.A. § 9-2-61 is merely to treat a properly renewed action (i.e., an action renewed within six months of dismissal of the previous action) as standing upon the same footing, as to limitation, with the original case. Stevens v. FAA's Florist, Inc., 169 Ga. App. 189, 311 S.E.2d 856, 1983 Ga. App. LEXIS 3020 (1983).

Timely written notice. — When a negligence action against a county employee, in which the county had provided a defense, was dismissed, a renewal suit filed under O.C.G.A. § 9-2-61 was an action de novo and timely written notice was required to obligate the county to defend. Cleveland v. Skandalakis, 268 Ga. 133, 485 S.E.2d 777.

Failure to serve complaint before renewal period expired. — Trial court did not err in granting summary judgment to the insurer because the insured served the insured's complaint on the insurer a month after the six-month renewal period expired and the insured had made no prior attempts to perfect service. King v. Peeples, 328 Ga. App. 814, 762 S.E.2d 817, 2014 Ga. App. LEXIS 579 (2014).

Mere passage of time as grounds for dismissal. — Complaint should not have been dismissed when, although service was not perfected until 13 days after the complaint was filed, which was 11 days after the expiration of the six-month grace period of the renewal statute, the trial judge made no finding of laches, lack of diligence or any factor other than mere lapse of time, nor would the facts have supported such a finding. Bennett v. Matt

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Gay Chevrolet Oldsmobile, Inc., 200 Ga. App. 348, 408 S.E.2d 111, 1991 Ga. App. LEXIS 1019 (1991).

Statute of limitations not tolled for defendant's new counterclaims. — Defendant who previously merely interposed defenses to the original action may not for the first time seek to recover damages by counterclaim, third-party complaint, or cross-claim when the statute of limitations for the recovery of such damages has run. Champion v. Wells, 139 Ga. App. 759, 229 S.E.2d 479, 1976 Ga. App. LEXIS 1977 (1976).

Appeal was timely and proper. — When an action is nonsuited (involuntarily dismissed) and plaintiff files a timely appeal from that judgment which is affirmed by the appellate court, plaintiff may, within six months of the date of affirmance, recommence action upon complying with the conditions imposed by this section; but when the plaintiff's appeal is dismissed by the appellate court for failure to meet statutory requirements, a new action must be recommenced within six months of the judgment of nonsuit (dismissal). Carmack v. Oglethorpe Co., 117 Ga. App. 664, 161 S.E.2d 357, 1968 Ga. App. LEXIS 1191 (1968).

Trial court erred by denying a debtor's refiling of an appeal as untimely because the six-month period for filing the debtor's renewal action under O.C.G.A. § 9-2-61(a) began the day after the debtor dismissed the original superior court action, and ran until December 6, 2012, based on the method of calculation under O.C.G.A. § 1-3-1(d)(3), thus, the refiling of the action on December 6 was timely. Parsons v. Capital Alliance Fin., LLC, 325 Ga. App. 884, 756 S.E.2d 14, 2014 Ga. App. LEXIS 96 (2014).

Action was time barred. — Trial court did not err by finding that a parent's wrongful death claim, pursuant to O.C.G.A. § 9-2-61(a) and (c), was time-barred because the parent was not a party to the original action filed in federal court except as the representative of the son's estate; in the state court case, the estate lacked standing to bring the wrongful death claim, and the parent's claims in the parent's individual capacity were barred by the applicable two-year statute of limitations because the parent could not benefit from the renewal statute since the parent, individually, was not a party to the first action. Gish v. Thomas, 302 Ga. App. 854, 691 S.E.2d 900, 2010 Ga. App. LEXIS 254 (2010).

Resident's third automobile personal injury lawsuit against a former resident was properly dismissed because service of the resident's second lawsuit was not perfected in accordance with the Georgia Long-Arm Statute, O.C.G.A. § 9-10-91, and the period of limitations in O.C.G.A. § 9-3-33 ran before the third lawsuit (allegedly as a renewal of the second lawsuit under O.C.G.A. § 9-2-61) was filed. Coles v. Reese, 316 Ga. App. 545, 730 S.E.2d 33, 2012 Ga. App. LEXIS 605 (2012).

Trial court properly dismissed the plaintiff's claims on the ground that the claims were time-barred because the claims were untimely, whether viewed under Georgia's renewal statute O.C.G.A. § 9-2-61(a), or under the tolling provision of 28 U.S.C. § 1367(d), because under Georgia's renewal statute, the plaintiff was required to file the renewal action within six months of the federal appellate court's affirmance of the district court's dismissal of the first lawsuit. Gottschalk v. Woods, 329 Ga. App. 730, 766 S.E.2d 130, 2014 Ga. App. LEXIS 778 (2014).

Dismissal of the complaint based on the contractual time-limitation provision in the insurance policy was proper because there was no evidence that the insurer waived enforcement of that provision, or that there was a jury question, as once mediation ended and the parties failed to reach a settlement, the insured had approximately seven months in which to file suit before the two-year limitation period expired, but the insured failed to do so. Premier Eye Care Assocs. v. Mag Mut. Ins. Co., 355 Ga. App. 620, 844 S.E.2d 282, 2020 Ga. App. LEXIS 364 (2020), cert. denied, No. S20C1452, 2021 Ga. LEXIS 372 (Ga. May 17, 2021).

Application

Section not applicable to action brought after running of original statute of limitation. — After the plaintiff filed and dismissed a suit for wrongful

expulsion, a suit based on the same claim brought three years later was barred by the one-year statute of limitation in O.C.G.A. § 14-3-621, and the renewal provision of O.C.G.A. § 9-2-61 did not apply to allow refiling of the suit. Atlanta Country Club, Inc. v. Smith, 217 Ga. App. 515, 458 S.E.2d 136, 1995 Ga. App. LEXIS 498 (1995), cert. denied, No. S95C1493, 1995 Ga. LEXIS 1052 (Ga. Sept. 25, 1995).

Trial court properly dismissed the second of two personal injury lawsuits, with prejudice, as such did not act as a renewal action, given evidence that the first suit, though timely filed, was void because service was never perfected; moreover, dismissal was properly entered with prejudice as res judicata barred the litigant from filing a subsequent lawsuit on a claim that was already held as time-barred. Towe v. Connors, 284 Ga. App. 320, 644 S.E.2d 176, 2007 Ga. App. LEXIS 294 (2007).

In an employment discrimination case dismissed without prejudice because the former employee had not effected service within 120 days, a district court's dismissal of the Discrimination in Employment Act of 1967 (ADEA), Title VII of the Civil Rights Act of 1964 (Title VII), and American with Disabilities Act (ADA) claims in the former employee's second complaint was affirmed. The former employee's argument that the second complaint was timely renewed pursuant to O.C.G.A. § 9-2-61 was without merit since the ADEA, Title VII, and the ADA each a had 90-day statutory limitation period in which to file suit, and the former employee had not satisfied those statutory limitation periods. Miller v. Georgia, 223 Fed. Appx. 842, 2007 U.S. App. LEXIS 6218 (11th Cir. 2007).

Insurance policy limitations period not bar to renewal action. — In a suit by a shopping center owner/mortgagee against an insurer and banks seeking damages after the insurer paid the mortgagor insurance proceeds for damages to the premises, because the owner's original action was timely filed within the two-year limitation period in the insurance policy, and the renewal case was filed within six months after the first case was dismissed, the insurance policy time limit did not provide a time-bar to any claims properly brought in the renewal action. Auto-Owners Ins. Co. v. Hale Haven Props., 346 Ga. App. 39, 815 S.E.2d 574, 2018 Ga. App. LEXIS 330 (2018), cert. denied, No. S18C1418, 2019 Ga. LEXIS 88 (Ga. Jan. 22, 2019), cert. denied, No. S18C1423, 2019 Ga. LEXIS 75 (Ga. Jan. 22, 2019).

Statute of limitations for serving an uninsured motorist carrier is the same as that for serving the defendant tortfeasor, even though the defendant does not qualify as uninsured until after the applicable limitations period has run; thus, an insured's service on an uninsured motorist carrier of an original action was not necessary in order to allow for service in a properly filed renewal action after the running of the limitations period. Stout v. Cincinnati Ins. Co., 269 Ga. 611, 502 S.E.2d 226.

Section inapplicable under federal Employer's Liability Act. — See Parham v. Norfolk S.R.R., 206 Ga. App. 772, 426 S.E.2d 597, 1992 Ga. App. LEXIS 1804 (1992).

Individuals with Disabilities Education Act. — Tolling provision of O.C.G.A. § 9-2-61 does not apply to an appeal of an educational agency's final administrative decision under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. Cory D., by & Through Diane D. v. Burke County Sch. Dist., 285 F.3d 1294, 2002 U.S. App. LEXIS 4300 (11th Cir. 2002).

Failure to exercise due diligence. — As the evidence presented failed to support a finding that plaintiff acted with due diligence in serving the defendant with a renewed damages complaint filed pursuant to O.C.G.A. § 9-2-61(a), or that the defendant tried to evade service, and although problems with service existed, the plaintiff presented few facts regarding the efforts made to complete service, the action was properly dismissed on service of process grounds. Fusco v. Tomlin, 285 Ga. App. 819, 648 S.E.2d 137, 2007 Ga. App. LEXIS 656 (2007).

Consolidated personal injury renewal actions filed by a parent and child were properly resolved against them based on their failure to use diligence in serving a

Application (Cont'd)

driver as no efforts were made to locate the driver even after the driver filed lack of service defenses. At that point the greatest diligence in serving the driver was required because the statute of limitations had run. Dickson v. Amick, 291 Ga. App. 557, 662 S.E.2d 333, 2008 Ga. App. LEXIS 571 (2008), overruled in part, Giles v. State Farm Mut. Ins. Co., 330 Ga. App. 314, 765 S.E.2d 413, 2014 Ga. App. LEXIS 717 (2014).

Filing in new county in railroad accident case. — Since action was not barred by the statute of limitations where it was originally venued in a county in which the railroad accident in question occurred, and subsequently was voluntarily dismissed by the plaintiff over three years later, with the plaintiff refiling the suit within three months in the county in which the defendant railroad company's registered agent was located. Southern Ry. v. Lawson, 174 Ga. App. 101, 329 S.E.2d 288, 1985 Ga. App. LEXIS 1757 (1985).

Renewal not permitted. — Because the customer's second voluntary dismissal constituted an adjudication on the merits under O.C.G.A. § 9-11-41(a)(3), the customer was barred by the res judicata effect of that provision from exercising the privilege of renewing the complaint, and the trial court erred in ruling that the third complaint was a valid renewal action. Cracker Barrel Old Country Store, Inc. v. Robinson, 341 Ga. App. 285, 800 S.E.2d 372, 2017 Ga. App. LEXIS 183 (2017).

Trial court did not err by dismissing the plaintiff's personal injury lawsuit on statute-of-limitation grounds because the first lawsuit did not name the same defendant and the two lawsuits named entirely different instrumentalities of the state; thus, the instant lawsuit was not a valid renewal action. Aaron v. Jekyll Island-State Park Authority, 348 Ga. App. 332, 822 S.E.2d 829, 2019 Ga. App. LEXIS 1 (2019).

Personal injury claim against a driver that was filed as a renewal action under O.C.G.A. § 9-2-61(a) was subject to summary judgment based on the statute of limitations, O.C.G.A. § 9-3-33; because the plaintiffs did not perfect service on the driver in the prior suit, and the statute had run, the plaintiffs could not renew the suit. The statute was not tolled under O.C.G.A. § 9-3-99 because the time for prosecuting the driver for following too closely had expired, and there had been no prosecution. Jenkins v. Keown, 351 Ga. App. 428, 830 S.E.2d 498, 2019 Ga. App. LEXIS 407 (2019).

Because the plaintiffs never served the defendants in their original personal injury actions, the trial court correctly ruled that the cases could not be renewed outside the statute of limitation because the actions were not made valid through service before they were dismissed and the trial court properly dismissed the plaintiffs' renewal actions. Alston v. Owners Ins. Co., 361 Ga. App. 146, 863 S.E.2d 397, 2021 Ga. App. LEXIS 446 (2021).

Renewal action not against same defendants. — Second action alleging negligence and medical malpractice arising from care while the plaintiff was incarcerated was not a valid renewal because the plaintiff failed to assert the state law tort claims against the same defendants as in the first action in federal court and the plaintiff failed to perfect service of process against the state agencies in the first action as required by the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq. Green v. Ga. Dep't of Corr., 365 Ga. App. 592, 879 S.E.2d 679, 2022 Ga. App. LEXIS 474 (2022).

Renewal proper over personal service issue. — Trial court properly denied the city's motion to dismiss the landowner's renewed petition for writ of certiorari because the case was capable of renewal under O.C.G.A. § 9-2-61(a) as the trial court had properly determined that the lack of personal service as to the zoning board of appeals did not render the petition void and, thus, a bar to renewal. City of Dunwoody v. Discovery Practice Management, Inc., 338 Ga. App. 135, 789 S.E.2d 386, 2016 Ga. App. LEXIS 441 (2016).

Renewal action properly dismissed. — While plaintiff spouse of deceased patient was allowed to recommence a medical malpractice action under O.C.G.A. § 9-2-61 since it was filed within six

months of dismissal of plaintiff's earlier timely filed suit, the applicable statutes of limitation had clearly run when the renewal action was filed, and, therefore, the extension provided by O.C.G.A. § 9-11-9.1, which applied only when the complaint was filed within 10 days of the expiration of the limitations period, was not available; a trial court properly found that the spouse could not invoke the 45-day extension of O.C.G.A. § 9-11-9.1 and properly dismissed the spouse's renewal action on the basis of a failure to file an expert affidavit. Fisher v. Coffee Reg'l Med. Ctr., Inc., 268 Ga. App. 657, 602 S.E.2d 135, 2004 Ga. App. LEXIS 781 (2004), cert. denied, No. S04C2044, 2004 Ga. LEXIS 977 (Ga. Oct. 25, 2004).

In a case in which a former employee's second complaint was not filed within the 90-day limitations period set forth in 29 U.S.C. § 626(e) and 42 U.S.C. § 2000e-5(f)(1) after the employee received a right-to-sue notice from the Equal Employment Opportunity Commission, dismissal of the former employee's second complaint alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., was affirmed because Georgia's renewal statute, O.C.G.A. § 9-2-61(a), was inapplicable. Roberts v. Georgia, 228 Fed. Appx. 851, 2007 U.S. App. LEXIS 8005 (11th Cir. 2007).

In an employment discrimination case in which a former employee's initial complaint was dismissed without prejudice because the former employee had not effected service within 120 days, a district court's dismissal of the former employee's 42 U.S.C. §§ 1983 and 1985 claims in a second complaint was affirmed because the claims were not timely under O.C.G.A. § 9-3-33, the Georgia statute borrowed for 42 U.S.C. §§ 1983 and 1985 claims. Since the former employee's initial complaint had been dismissed by court order granting defendants' motions, the former employee's initial suit was void and incapable of renewal under O.C.G.A. § 9-2-61. Miller v. Georgia, 223 Fed. Appx. 842, 2007 U.S. App. LEXIS 6218 (11th Cir. 2007).

Passenger's personal injury action against a driver renewed pursuant to O.C.G.A. § 9-2-61(a) was dismissed for failure to perfect service of process against the driver due to lack of diligence. Although the passenger attempted to serve the driver for several months, the passenger then allowed 72 days to elapse before making another attempt. The court rejected the passenger's contention that O.C.G.A. § 33-7-11(e), providing for personal service after service of publication while allowing litigation against an uninsured motorist carrier to proceed, allowed for an additional 12 months after service by publication. Williams v. Patterson, 306 Ga. App. 624, 703 S.E.2d 74, 2010 Ga. App. LEXIS 999 (2010).

Motion to dismiss must be filed with answer or renewal action not barred. — Trial court did not err in denying the appellants' motion to dismiss because in order to bar the appellees from filing a renewal action, O.C.G.A. § 9-11-9.1(c) required the appellants to file a motion to dismiss at the same time the appellants filed the appellants' answer to the original complaint and only raising the matter as a defense in the answer was insufficient to preclude the appellees from renewing the appellees action pursuant to O.C.G.A. § 9-2-61. Mission Health of Georgia, LLC v. Bagnuolo, 339 Ga. App. 23, 793 S.E.2d 98, 2016 Ga. App. LEXIS 574 (2016).

Application for entry of judgment on arbitration award. — Second application for entry of judgment on an arbitration award was not time-barred, even though not filed within the limitations period, because it was entitled to renewal under O.C.G.A. § 9-2-61. Hardin Constr. Group v. Fuller Enter., Inc., 233 Ga. App. 717, 505 S.E.2d 755.

Failure to timely renew challenge to arbitration award barred subsequent suit. — Final arbitration award, which did not address the owners' breach of contract and fraud claims against a builder, barred a subsequent suit as the owners failed to timely renew their motion to vacate the award under O.C.G.A. § 9-2-61(a) after it was dismissed from a foreclosure action and the breach of contract and fraud claims had been submitted for arbitration. Witherington v. Adkins, 271 Ga. App. 837, 610 S.E.2d 561, 2005 Ga.

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App. LEXIS 98 (2005), cert. denied, No. S05C1105, 2005 Ga. LEXIS 488 (Ga. June 30, 2005).

Arbitration not proceeding that could be renewed. — Trial court should have dismissed an employee's tort claims against a supervisor because an arbitration between them and their employer was not a proceeding that could be renewed under O.C.G.A. § 9-2-61(a), and the claims were untimely under O.C.G.A. § 9-3-33 since the claims were not filed within six months of the dismissal or discontinuation of the employee's earlier federal action. Green v. Flanagan, 317 Ga. App. 152, 730 S.E.2d 161, 2012 Ga. App. LEXIS 634 (2012), cert. denied, No. S12C1993, 2013 Ga. LEXIS 282 (Ga. Mar. 18, 2013).

Right to arbitrate could be asserted in renewal action. — Renewal suit filed pursuant to O.C.G.A. § 9-2-61(a) was a de novo action and, therefore, the defendant's conduct in actively litigating and engaging in discovery for over a year in the original action had no bearing on the question of whether the defendant had waived the right to arbitration in the recommenced action. SunTrust Bank v. Lilliston, 302 Ga. 840, 809 S.E.2d 819, 2018 Ga. LEXIS 50 (2018).

Third complaint barred when prior actions voluntarily dismissed. — Third complaint for damages arising out of an automobile collision was barred when both prior actions were voluntarily dismissed after the natural expiration of the applicable limitations period. Worley v. Pierce, 211 Ga. App. 863, 440 S.E.2d 749, 1994 Ga. App. LEXIS 96 (1994).

Two voluntary dismissals barred third action despite additional plaintiffs. — Trial court correctly dismissed a shipyard owner's third civil action arising from the same set of facts under the two-dismissal rule of O.C.G.A. § 9-11-41(a)(1) and (a)(3) and the res judicata rule of O.C.G.A. § 9-12-40 because, although the first and second actions were not based upon the same claims, each of the three actions was based on the apparently complex initial financing for, and subsequent failure of, the shipyard. Global Ship Sys., LLC v. RiverHawk Group, LLC, 334 Ga. App. 860, 780 S.E.2d 697, 2015 Ga. App. LEXIS 735 (2015), cert. denied, No. S16C0508, 2016 Ga. LEXIS 231 (Ga. Mar. 7, 2016).

Third complaint was first renewal action. — Vehicle passenger's third complaint, filed after the passenger had voluntarily dismissed the passenger's first two complaints, was the passenger's first renewal action and was authorized under O.C.G.A. § 9-2-61(a). The second complaint, which was filed while the first complaint was pending and during the limitations period, was not a renewal of a dismissed action, but a duplicate action. Shy v. Faniel, 292 Ga. App. 253, 663 S.E.2d 841, 2008 Ga. App. LEXIS 734 (2008).

Trial court erred when the court granted a nonresident's motion to dismiss a driver's third complaint because the dismissal of the driver's second federal complaint was involuntary under O.C.G.A. § 9-11-41(a)(2), rather than voluntary under § 9-11-41(a)(1), and could not operate as an adjudication on the merits under § 9-11-41(a)(3); even though the driver requested the dismissal of the federal action, the dismissal itself was by an order of the federal court for a failure of the court's own jurisdiction. Crawford v. Kingston, 316 Ga. App. 313, 728 S.E.2d 904, 2012 Ga. App. LEXIS 545 (2012).

Trial court erred when the court granted a nonresident's motion to dismiss a driver's third complaint because the complaint was not barred by O.C.G.A. § 9-2-61 since the driver never served the nonresident with the second federal complaint, and thus, it was void and could not amount to a renewal of the first complaint; the third complaint was intended as a renewal of the first complaint, which was voluntarily dismissed after the expiration of the applicable period of limitation, and the federal dismissal was not only involuntary but also dismissed without prejudice for lack of subject matter jurisdiction. Crawford v. Kingston, 316 Ga. App. 313, 728 S.E.2d 904, 2012 Ga. App. LEXIS 545 (2012).

Application of section to all dismissals not on merits. — Law contained in this section must be construed in con-

formity with specific legislative enactments from which it was taken; and when thus interpreted it applies to involuntary as well as voluntary dismissals, when the merits are not adjudicated. Clark v. Newsome, 50 Ga. App. 591, 178 S.E. 386, 179 S.E. 143, 1935 Ga. App. LEXIS 228 (1935).

Fact that one is involuntarily dismissed rather than voluntarily dismissing one's action is of no consequence so long as grounds for dismissal do not go to the merits of the case. Chance v. Planters Rural Tel. Coop., 219 Ga. 1, 131 S.E.2d 541, 1963 Ga. LEXIS 350 (1963).

This section applies to involuntary as well as voluntary dismissals, so long as the grounds for dismissal do not adjudicate the merits. Bowman v. Ware, 133 Ga. App. 799, 213 S.E.2d 58, 1975 Ga. App. LEXIS 2290 (1975); Moore v. Tootle, 134 Ga. App. 232, 214 S.E.2d 184, 1975 Ga. App. LEXIS 1971 (1975); Brooks v. Douglas, 154 Ga. App. 54, 267 S.E.2d 495, 1980 Ga. App. LEXIS 2040 (1980); Fowler v. Aetna Cas. & Sur. Co., 159 Ga. App. 190, 283 S.E.2d 69, 1981 Ga. App. LEXIS 2542 (1981).

O.C.G.A. § 9-2-61 applies to involuntary as well as voluntary dismissals, when the merits are not adjudicated. Swartzel v. Garner, 193 Ga. App. 267, 387 S.E.2d 359, 1989 Ga. App. LEXIS 1376 (1989).

Section inapplicable when original appeal of adverse judgment voluntarily withdrawn. — Because a lender's O.C.G.A. § 9-11-41(a)(1)(A) notice to withdraw an appeal after sustaining an adverse judgment on the merits did not toll the time in which the lender was required to file a transcript on appeal, the renewal statute, O.C.G.A. § 9-2-61, did not apply; thus, the appeal was properly dismissed pursuant to O.C.G.A. § 5-6-48(c). Schreck v. Standridge, 273 Ga. App. 58, 614 S.E.2d 185, 2005 Ga. App. LEXIS 408 (2005).

When less than all of plaintiff's claims are added or dropped, the additions and deletions are not dismissals and renewals governed by O.C.G.A. § 9-11-41(a) and subsection (a) of O.C.G.A. § 9-2-61, but simply amendments governed by the liberal amendment rules of O.C.G.A. § 9-11-15(a) and (c). Young v. Rider, 208 Ga. App. 147, 430 S.E.2d 117, 1993 Ga. App. LEXIS 406 (1993).

Void actions cannot be renewed. — If the first action is void, it will not serve to extend the period within which to bring action for six months if the statute of limitations otherwise runs in the meantime. Douglas v. Kelley, 116 Ga. App. 670, 158 S.E.2d 441, 1967 Ga. App. LEXIS 923 (1967).

Void action will not authorize renewal action by plaintiff under this section. Birmingham Fire Ins. Co. v. Commercial Transp., Inc., 224 Ga. 203, 160 S.E.2d 898, 1968 Ga. LEXIS 713 (1968).

This statute only applies to voidable suits and not to those wholly void; a void judgment is an absolute nullity and does not prevent running of the statute of limitations. Baldwin v. Happy Herman's, Inc., 122 Ga. App. 520, 177 S.E.2d 814, 1970 Ga. App. LEXIS 928 (1970).

This renewal statute does not apply to void actions. Murray v. Taylor, 131 Ga. App. 697, 206 S.E.2d 643, 1974 Ga. App. LEXIS 1524 (1974).

Since a federal court did not have jurisdiction of the subject matter, the whole proceeding was void, and it follows that O.C.G.A. § 9-2-61 did not apply, with the result that plaintiff's contractual claim was barred by the one-year limitation provision in the insurance policy. Collins v. West Am. Ins. Co., 186 Ga. App. 851, 368 S.E.2d 772, 1988 Ga. App. LEXIS 484 (1988), superseded by statute as stated in Warehouseboy Trading, Inc. v. Gew Fitness, LLC, 316 Ga. App. 242, 729 S.E.2d 449, 2012 Ga. App. LEXIS 528 (2012).

Since the plaintiffs never perfected service in the original suit, such suit was void and incapable of renewal. Garcia v. Virden, 236 Ga. App. 539, 512 S.E.2d 664.

In an attempted renewal action, the original suit is void if service was never perfected since the filing of a complaint without perfecting service does not constitute a pending suit. Clark v. Dennis, 240 Ga. App. 512, 522 S.E.2d 737.

Renewal statute did not apply because a prior federal action was void, rather than voidable, since: (1) the action was not commenced within the applicable statute of limitation as service was not timely

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perfected; and (2) the action was not dismissed voluntarily at the plaintiff's behest. Tate v. Coastal Utils., Inc., 247 Ga. App. 738, 545 S.E.2d 124, 2001 Ga. App. LEXIS 101 (2001), cert. denied, No. S01C0801, 2001 Ga. LEXIS 549 (Ga. June 25, 2001), cert. denied, No. S01C0800, 2001 Ga. LEXIS 550 (Ga. June 25, 2001).

When the trial court's dismissal in the original action was based upon the court's finding that the plaintiff had not acted diligently in perfecting service on the defendant, that determination rendered the original action void; accordingly, the renewal statute did not apply and the trial court properly dismissed the plaintiff's second complaint. King v. Wal-Mart Stores, Inc., 250 Ga. App. 103, 550 S.E.2d 673, 2001 Ga. App. LEXIS 690 (2001), cert. denied, No. S01C1516, 2001 Ga. LEXIS 951 (Ga. Nov. 30, 2001).

Georgia's tolling provision for "renewal actions" under O.C.G.A. § 9-2-61(a) did not apply since the first 42 U.S.C. § 1983 action was void because service was never perfected on defendants. Wilson v. Hamilton, 135 Fed. Appx. 213, 2005 U.S. App. LEXIS 8530 (11th Cir. 2005).

Since service was never perfected in the plaintiff's original false imprisonment and false arrest suit, that suit was void, and thus the renewal provisions of O.C.G.A. § 9-2-61(a) did not protect the second suit from the bar of the statute of limitation since the second suit was not a renewal suit. McClendon v. Kroger Co., 279 Ga. App. 417, 631 S.E.2d 461, 2006 Ga. App. LEXIS 595 (2006).

In a personal injury suit arising from the slip and fall by the injured party, because the trial court dismissed the injured party's first action as void for failure to perfect service, the second action could not amount to a renewal action under O.C.G.A. § 9-2-61(a); further, given that the second complaint disclosed on its face that the action was time-barred, it was correctly dismissed pursuant to O.C.G.A. § 9-3-33. Baxley v. Baldwin, 287 Ga. App. 245, 651 S.E.2d 172, 2007 Ga. App. LEXIS 923 (2007).

In a case in which a former employee's first complaint was authorized to be dismissed pursuant to Fed. R. Civ. P. 4(m), dismissal of the former employee's second complaint alleging violations of, inter alia, 42 U.S.C. §§ 1983 and 1985 was affirmed because Georgia's renewal statute was inapplicable. The first complaint was void for purposes of O.C.G.A. § 9-2-61(a). Roberts v. Georgia, 228 Fed. Appx. 851, 2007 U.S. App. LEXIS 8005 (11th Cir. 2007).

Because dismissal of a medical malpractice suit for failure to comply with the expert affidavit requirements rendered the suit void and incapable of being renewed under O.C.G.A. § 9-2-61, and the two-year limitation period in O.C.G.A. § 9-3-71(a) had expired, the suit was properly dismissed. Hendrix v. Fulton DeKalb Hosp. Auth., 330 Ga. App. 833, 769 S.E.2d 575, 2015 Ga. App. LEXIS 69 (2015).

Third complaint not an attempt at renewing void action. — In filing a third complaint after voluntarily dismissing two previous complaints, a vehicle passenger was not trying to renew a void action. The third complaint explicitly stated that the complaint was intended as a renewal of the first suit, in which service had been perfected, and not of the second suit, in which service had not been perfected. Shy v. Faniel, 292 Ga. App. 253, 663 S.E.2d 841, 2008 Ga. App. LEXIS 734 (2008).

Since the complaint was not served on defendant prior to dismissal, the first action was not valid and, therefore, the renewal provision of O.C.G.A. § 9-2-61 was not available to allow the plaintiff to avoid the statute of limitations bar to the plaintiff's second suit. Hudson v. Mehaffey, 239 Ga. App. 705, 521 S.E.2d 838.

Because an insured who brought a personal injury suit against an alleged tortfeasor had never personally served the alleged tortfeasor when the original action was filed, the action was not valid prior to dismissal and thus was not subject to renewal under O.C.G.A. § 9-2-61. Accordingly, the present action was time-barred under O.C.G.A. § 9-3-33. Williams v. Hunter, 291 Ga. App. 731, 662 S.E.2d 810, 2008 Ga. App. LEXIS 625 (2008).

O.C.G.A. § 9-2-61 does not apply if the original suit was void. Fine v. Hig-

gins Foundry & Supply Co., 201 Ga. App. 275, 410 S.E.2d 821, 1991 Ga. App. LEXIS 1331 (1991).

Section applies only when action dismissed was valid. Southern Flour & Grain Co. v. Simmons, 49 Ga. App. 517, 176 S.E. 121, 1934 Ga. App. LEXIS 460 (1934).

No valid suit for renewal. — Because a declaratory judgment action filed by parents against underwriters was dismissed for lack of standing, a nonamendable defect, there was no valid suit to be renewed under O.C.G.A. § 9-2-61. Mikell v. Certain Underwriters at Lloyds, London, 288 Ga. App. 430, 654 S.E.2d 227, 2007 Ga. App. LEXIS 1217 (2007).

Applies only when valid action pending. — This section has reference to tolling of the statute of limitations and applies only when there has been a valid pending action. Brinson v. Kramer, 72 Ga. App. 63, 33 S.E.2d 41, 1945 Ga. App. LEXIS 497 (1945); Sosebee v. Steiner, 128 Ga. App. 814, 198 S.E.2d 325, 1973 Ga. App. LEXIS 1629 (1973).

O.C.G.A. § 9-2-61 applies only if the original action is a valid suit. Fowler v. Aetna Cas. & Sur. Co., 159 Ga. App. 190, 283 S.E.2d 69, 1981 Ga. App. LEXIS 2542 (1981); Hornsby v. Hancock, 165 Ga. App. 543, 301 S.E.2d 900, 1983 Ga. App. LEXIS 1940 (1983), superseded by statute as stated in Chandler v. Opensided MRI of Atlanta, LLC, 299 Ga. App. 145, 682 S.E.2d 165, 2009 Ga. App. LEXIS 846 (2009).

O.C.G.A. § 9-2-61 is available only when the original action was a "valid suit"; if a complaint is dismissed for a defect that is nonamendable, there is no "valid suit" to be renewed. Foskey v. Foster, 199 Ga. App. 205, 404 S.E.2d 303, 1991 Ga. App. LEXIS 406 (1991), overruled in part, Chandler v. Opensided MRI of Atlanta, LLC, 299 Ga. App. 145, 682 S.E.2d 165, 2009 Ga. App. LEXIS 846 (2009).

In order for the filing of a complaint to qualify as a valid renewal of a previously dismissed action, the proceedings which were dismissed must have constituted a "valid action." Pursuant to this, it is essential that the declaration filed in the first instance should have been served personally upon the defendant or otherwise in accordance with O.C.G.A. § 9-11-4(d)(7). Service upon the defendant's parent at the parent's residence is not "service" within the meaning of § 9-11-4(d)(7). Osborne v. Hughes, 200 Ga. App. 558, 409 S.E.2d 58, 1991 Ga. App. LEXIS 1067 (1991), cert. denied, No. S91C1488, 1991 Ga. LEXIS 581 (Ga. Sept. 6, 1991).

Renewal statute is inapplicable if the original complaint did not constitute a "valid action" before dismissal. Scott v. Muscogee County, 949 F.2d 1122, 1992 U.S. App. LEXIS 58 (11th Cir. 1992).

Since the plaintiff filed an original action when the defendant was a minor, but did not serve the defendant's parents as required by O.C.G.A. § 9-11-4, the plaintiff's first suit was void and no valid action existed which was renewable under O.C.G.A. § 9-2-61. Brooks v. Young, 220 Ga. App. 47, 467 S.E.2d 230.

Voidable actions are renewable. — This section will apply to actions that are voidable, but not wholly void. Cutliffe v. Pryse, 187 Ga. 51, 200 S.E. 124, 1938 Ga. LEXIS 760 (1938).

Privilege of dismissal and renewal under this section does not apply to void cases, but does apply to allow renewal when the previous action was merely voidable. United States Cas. Co. v. AMOCO, 104 Ga. App. 209, 121 S.E.2d 328, 1961 Ga. App. LEXIS 642 (1961); Keramidas v. Department of Human Resources, 147 Ga. App. 820, 250 S.E.2d 560, 1978 Ga. App. LEXIS 2962 (1978); Patterson v. Douglas Women's Center, 258 Ga. 803, 374 S.E.2d 737, 1989 Ga. LEXIS 88 (1989).

Even though an uninsured motorist insurer could have raised the statute of limitations in an action by the insured, but the insured voluntarily dismissed the case before the insurer had an opportunity to do so, the case was merely voidable until the trial court ruled on the defense, and, thus, a renewal action by the insured was proper. Reid v. United States Fid. & Guar. Co., 223 Ga. App. 204, 477 S.E.2d 369, 1996 Ga. App. LEXIS 1102 (1996), aff'd, 268 Ga. 432, 491 S.E.2d 50, 1997 Ga. LEXIS 634 (1997).

Suit in which an uninsured motorist carrier was served after the running of the statute of limitations was subject to dis-

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missal and renewal under O.C.G.A. § 9-2-61. United States Fid. & Guar. Co. v. Reid, 268 Ga. 432, 491 S.E.2d 50.

Insured's filing of a "John Doe" action with service on the insured's uninsured motorist insurance carrier constituted a valid, pending action which was voidable rather than void, and which was capable of being renewed under O.C.G.A. § 9-2-61. Milburn v. Nationwide Ins. Co., 228 Ga. App. 398, 491 S.E.2d 848.

While a trial court was authorized to dismiss a complaint for failure to state a claim when a lawsuit was filed after the expiration of the statute of limitation, until such time as the court ruled on the asserted affirmative defense of the expiration of the statute of limitation, the action was voidable, not void. Hedquist v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 272 Ga. 209, 528 S.E.2d 508, 2000 Ga. LEXIS 252 (2000).

Absent any judicial determination that dismissal was required for lack of an approved bond, the petitioners were entitled to voluntarily dismiss their first request for certiorari, filed pursuant to O.C.G.A. § 5-4-1, relying on renewal statute codified at O.C.G.A. § 9-2-61(a), and file a second request after the 30-day limitation period had expired; moreover, the first petition was a valid action which was merely voidable and not void. Buckler v. DeKalb County, 290 Ga. App. 190, 659 S.E.2d 398, 2008 Ga. App. LEXIS 275 (2008), cert. denied, No. S08C1179, 2008 Ga. LEXIS 676 (Ga. Sept. 8, 2008).

Based on O.C.G.A. § 9-11-9.1 and the renewal statute of O.C.G.A. § 9-2-61, the failure to file the required expert affidavit contemporaneously with a medical malpractice complaint does not render the complaint void ab initio but merely voidable and that the complaint can be renewed. Chandler v. Opensided MRI of Atlanta, LLC, 299 Ga. App. 145, 682 S.E.2d 165, 2009 Ga. App. LEXIS 846 (2009), aff'd, 287 Ga. 406, 696 S.E.2d 640, 2010 Ga. LEXIS 508 (2010).

Section inapplicable to reposed actions. — O.C.G.A. § 9-2-61 does not apply to actions effectively reposed under O.C.G.A. § 9-3-71(b). Wright v. Robinson, 262 Ga. 844, 426 S.E.2d 870, 1993 Ga. LEXIS 312 (1993); Burns v. Radiology Assocs., 214 Ga. App. 76, 446 S.E.2d 788, 1994 Ga. App. LEXIS 774 (1994); Hanflik v. Ratchford, 848 F. Supp. 1539, 1994 U.S. Dist. LEXIS 4980 (N.D. Ga. 1994), aff'd, 56 F.3d 1391, 1995 U.S. App. LEXIS 14382 (11th Cir. 1995); Thompson v. Long, 225 Ga. App. 719, 484 S.E.2d 666.

Action on contract is not renewal of action of trover. Southern Express Co. v. Sinclair, 135 Ga. 155, 68 S.E. 1113, 1910 Ga. LEXIS 454 (1910).

Section not available to add new parties. — Interaction of O.C.G.A. § 9-2-61 with the amendment provisions of O.C.G.A. § 9-11-15(c) does not permit the addition of a new party to a second lawsuit which is filed within the six-month renewal period but outside the statute of limitations. Wagner v. Casey, 169 Ga. App. 500, 313 S.E.2d 756, 1984 Ga. App. LEXIS 1608 (1984); Patterson v. Rosser Fabrap Int'l, Inc., 190 Ga. App. 657, 379 S.E.2d 787, 1989 Ga. App. LEXIS 369 (1989); Allstate Ins. Co. v. Baldwin, 244 Ga. App. 664, 536 S.E.2d 558, 2000 Ga. App. LEXIS 827 (2000).

Georgia renewal statute, O.C.G.A. § 9-2-61, could not have been used to suspend the running of the statute of limitation as to defendants different from those originally sued; the trial court did not err in dismissing a premises liability complaint when the injured person originally sued an incorrect defendant, then later sued the store owner after the statute of limitations had expired, then, after that case was dismissed, again sued the original incorrect defendant, and finally amended the complaint to include the store owner. Brown v. J. H. Harvey Co., 268 Ga. App. 322, 601 S.E.2d 808, 2004 Ga. App. LEXIS 909 (2004).

Statute not applicable if claims plaintiff filed in first lawsuit were dismissed on merits. — Court of appeals affirmed a district court's judgment dismissing an action which an arrestee filed, pursuant to 42 U.S.C. § 1983, against a police officer and others because the action was filed more than two years after the arrestee was allegedly injured while being arrested, and the claim was untimely under O.C.G.A. § 9-3-33. The

court rejected the arrestee's claims that the arrestee's lawsuit was timely under Georgia's renewal statute, O.C.G.A. § 9-2-61(a), and Fed. R. Civ. P. 15(c) based on the filing of an earlier lawsuit against the same police officer and defendants who were not named in this second lawsuit less than two years after the arrestee was arrested because the claims in the original lawsuit were dismissed on the merits. Oduok v. Phillips, 154 Fed. Appx. 878, 2005 U.S. App. LEXIS 24958 (11th Cir. 2005), cert. denied, 549 U.S. 849, 127 S. Ct. 114, 166 L. Ed. 2d 84, 2006 U.S. LEXIS 6633 (2006).

Section not available to add new claim. — Since the original action, alleging only negligence, was dismissed without prejudice and the plaintiff amended the complaint in an action refiled under O.C.G.A.§ 9-2-61 to add a claim of nuisance, that claim was barred by the statute of limitation. Alfred v. Right Stuff Food Stores, Inc., 241 Ga. App. 338, 525 S.E.2d 717.

Employee could not amend a complaint to state a cause of action for intentional infliction of emotional distress against an employer upon renewal of the complaint under O.C.G.A. § 9-2-61(a) as the renewed causes of action had to state substantially the same causes of action as the prior ones in order to avoid the statute of limitations bar; such a claim was not evident in the employee's prior complaint. Travis Pruitt & Assocs., P.C. v. Hooper, 277 Ga. App. 1, 625 S.E.2d 445, 2005 Ga. App. LEXIS 1332 (2005), cert. denied, No. S06C0806, 2006 Ga. LEXIS 545 (Ga. July 13, 2006).

Section not available against different defendants. — Action against a different defendant is not a renewal. Floyd & Lee v. Boyd, 16 Ga. App. 43, 84 S.E. 494, 1915 Ga. App. LEXIS 497 (1915).

This section may not be used to suspend running of the statute of limitations as to defendants different from those originally sued. Cornwell v. Williams Bros. Lumber Co., 139 Ga. App. 773, 229 S.E.2d 551, 1976 Ga. App. LEXIS 1983 (1976).

Renewal action could not be brought against the executrix of an estate to evade the statute of limitation bar since neither the deceased nor the estate had been named as a party defendant in the original action. Reedy v. Fischer, 193 Ga. App. 684, 388 S.E.2d 759, 1989 Ga. App. LEXIS 1591 (1989); Sletto v. Hospital Auth., 239 Ga. App. 203, 521 S.E.2d 199.

Joinder of all original defendants not always required. — Renewed action brought under this section must be on the same cause of action and against the same essential parties, but need not necessarily be brought against all defendants who were parties in the dismissed action, unless all were necessary parties to the first action. Burks v. Wheeler, 92 Ga. App. 478, 88 S.E.2d 793, 1955 Ga. App. LEXIS 612 (1955); Thornhill v. Bullock, 118 Ga. App. 186, 162 S.E.2d 886, 1968 Ga. App. LEXIS 1348 (1968), overruled, McMichael v. Georgia Power Co., 133 Ga. App. 593, 211 S.E.2d 632, 1974 Ga. App. LEXIS 1145 (1974), superseded by statute as stated in Marchman & Sons, Inc. v. Nelson, 251 Ga. 475, 306 S.E.2d 290, 1983 Ga. LEXIS 834 (1983).

In determining whether defendant in first action is necessary party in second, it must be determined whether or not a right of contribution actually existed, but whether in the event the plaintiff recovered against defendants, a right of contribution would then exist. Chapman v. Lamar-Rankin Drug Co., 64 Ga. App. 493, 13 S.E.2d 734, 1941 Ga. App. LEXIS 463 (1941), overruled in part, Burks v. Wheeler, 92 Ga. App. 478, 88 S.E.2d 793, 1955 Ga. App. LEXIS 612 (1955).

Actions against joint tort-feasors. — When liability of defendants is joint and several, with no right of contribution, as in libel, second action against all defendants to the first is within this section. Cox v. Strickland, 120 Ga. 104, 47 S.E. 912, 1904 Ga. LEXIS 456 (1904).

When action was brought in a certain county against the county and an individual residing in a different county as alleged joint tort-feasors, and was dismissed as to the county because it did not state a cause of action and as to the individual because in absence of the county as codefendant the court had no jurisdiction of the codefendant, this section would permit the plaintiff to renew the action against the individual defen-

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dant within six months from dismissal as to such defendant. Clark v. Newsome, 50 Ga. App. 591, 178 S.E. 386, 179 S.E. 143, 1935 Ga. App. LEXIS 228 (1935).

When the plaintiff in the first action elected to sue the defendants jointly, such that defendants would be entitled to contribution, a subsequent action against only one of such defendants would not prevent bar of the statute of limitations from attaching to the cause of action. Chapman v. Lamar-Rankin Drug Co., 64 Ga. App. 493, 13 S.E.2d 734, 1941 Ga. App. LEXIS 463 (1941), overruled in part, Burks v. Wheeler, 92 Ga. App. 478, 88 S.E.2d 793, 1955 Ga. App. LEXIS 612 (1955).

When action was brought against joint tort-feasors, each of whom was jointly suable but severally liable, it was not necessary in renewed action brought under this section that all defendants be parties, even when the original action was timely brought before the statute of limitations had run but the parties were stricken in renewing action after the statutory period had expired. Burks v. Wheeler, 92 Ga. App. 478, 88 S.E.2d 793, 1955 Ga. App. LEXIS 612 (1955).

Application to third-party complaints. — O.C.G.A. § 9-2-61 applied to allow a defendant who filed and then dismissed a third-party complaint to renew the defendant's case after dismissal without prejudice. Bertone v. Wilkinson, 213 Ga. App. 255, 444 S.E.2d 576, 1994 Ga. App. LEXIS 526 (1994).

Renewal action was not timely, since the third-party complaint in the prior related action had only stated claims for contribution and indemnification and did not put the defendant on notice of a claim for personal injuries within the applicable statute of limitation. Bertone v. Wilkinson, 213 Ga. App. 255, 444 S.E.2d 576, 1994 Ga. App. LEXIS 526 (1994).

Defendant in capacity as individual and as deputy. — Renewal action against a party not named in the original complaint cannot be maintained. O.C.G.A. § 9-2-61 may not be used to suspend the running of the statute of limitation as to defendants different from those originally sued. Accordingly, plaintiff's action against defendant in a capacity as deputy sheriff was barred by the statute of limitations since the original action was against defendant personally. Soley v. Dodson, 256 Ga. App. 770, 569 S.E.2d 870, 2002 Ga. App. LEXIS 887 (2002), cert. denied, No. S02C1861, 2002 Ga. LEXIS 951 (Ga. Oct. 16, 2002).

Defendant in trustee capacity substantially different from defendant as individual. — Since the original petition was brought against the defendant in an alleged representative trustee capacity and against trust property, a second action brought within six months after dismissal of the first, against the defendant only in an individual capacity, praying only for general judgment against it, is not a renewal such as will toll the statute of limitations, since it involves a substantially different defendant and shows no exception to the general rule as to the requirement of identity of parties in order to suspend the statute of limitations. Sheldon & Co. v. Emory Univ., 184 Ga. 440, 191 S.E. 497, 1937 Ga. LEXIS 548 (1937).

Renewal against company formed from merger with previous defendant. — Since, while the case was pending, a company was merged with another and ceased to exist as a separate entity, renewal of an action against the company resulting from the merger was permissible. Atlantic Coast Line R.R. v. Knapp, 139 Ga. 422, 77 S.E. 568, 1913 Ga. LEXIS 452 (1913).

Sole shareholder not named in first suit. — Refiling of a case under O.C.G.A. § 9-2-61 did not toll the statute of limitations against the sole shareholder of a corporation since the first suit named only the corporation as a defendant, whereas the second suit added the shareholder as a defendant for the first time. Heyde v. Xtraman, Inc., 199 Ga. App. 303, 404 S.E.2d 607, 1991 Ga. App. LEXIS 431 (1991), cert. denied, No. S91C0985, 1991 Ga. LEXIS 770 (Ga. May 15, 1991).

Action against partner following dismissal of action against partnership. — When one sues a partnership and the action is nonsuited (involuntarily dismissed), one cannot recommence action

against one of the partners individually. Ford v. Clark, 75 Ga. 612, 1885 Ga. LEXIS 188 (1885).

When action against a partnership has been nonsuited (involuntarily dismissed) and another action instituted against an individual whom it was alleged belonged to or was a member of a partnership firm formerly sued, the bar of the statute of limitations will not be prevented from attaching to a cause of action under this section. Southern Flour & Grain Co. v. Simmons, 49 Ga. App. 517, 176 S.E. 121, 1934 Ga. App. LEXIS 460 (1934).

Amendment to action brought by CEO and investment company against corporation related back. — Trial court did not err in refusing to dismiss, as time barred, a complaint brought by a CEO and an investment company against a corporation because, although originally filed as a declaratory judgment action, the CEO and the investment company filed an amendment seeking indemnification and a money judgment; since there had been no entry of a pretrial order, the amendment-expressly stating that no declaratory judgment was being sought-related back to the date the original complaint was filed in state court and the complaint was not a nullity. Thus, the claim was timely under the renewal statute, O.C.G.A. § 9-2-61(a). McKesson Corp. v. Green, 299 Ga. App. 91, 683 S.E.2d 336, 2009 Ga. App. LEXIS 841 (2009), cert. denied, No. S09C1940, 2009 Ga. LEXIS 650 (Ga. Oct. 19, 2009), cert. denied, No. S09C1934, 2009 Ga. LEXIS 653 (Ga. Oct. 19, 2009).

Renewal following voluntary dismissal of medical malpractice action was not required to have been accomplished within two years of the date of injury. Floyd v. Piedmont Hosp., 213 Ga. App. 749, 445 S.E.2d 844, 1994 Ga. App. LEXIS 714 (1994).

Renewal action against administrator or representative of deceased defendant in action voluntarily dismissed by plaintiff may take advantage of tolling of the statute of limitations for six months under this section. Wofford v. Central Mut. Ins. Co., 242 Ga. 338, 249 S.E.2d 21, 1978 Ga. LEXIS 1199 (1978).

Action against additional personal representatives. — When action instituted against an estate having more than one personal representative was abated for nonjoinder of some of the representatives, this section applies to a second action against the estate with all the representatives joined as defendants. Greenfield v. Farrell Heating & Plumbing Co., 17 Ga. App. 637, 87 S.E. 912, 1916 Ga. App. LEXIS 823 (1916).

Renewal action by plaintiff's administrator is same as renewal by plaintiff. Wofford v. Central Mut. Ins. Co., 242 Ga. 338, 249 S.E.2d 21, 1978 Ga. LEXIS 1199 (1978).

Action renewed or recommenced by representative of deceased plaintiff is brought by the same plaintiff, in contemplation of this section, just as when action is instituted by successive trustees, since the cause of action and cestui que trust are the same. Moody v. Threlkeld, 13 Ga. 55, 1853 Ga. LEXIS 50 (1853).

Failure to serve subsequent defendants. — Injured prison inmate's failure to serve subsequent defendants in original federal court case for alleged civil rights violations precluded the inmate from using the saving provision of subsection (a) of O.C.G.A. § 9-2-61, since in order to bring a dismissed action within its scope, so as to make the action stand upon the same footing as to limitation as the original case, it is essential that the declaration filed in the first instance should have been served upon the defendant. Wimberly v. Department of Cors., 210 Ga. App. 57, 435 S.E.2d 67, 1993 Ga. App. LEXIS 1067 (1993).

Equitable estoppel not relevant when failure to serve. — Court of appeals correctly reversed a trial court's grant of summary judgment to a driver and a corporation, which was based on a second driver's lack of diligence in serving the second driver's personal injury complaint in the second driver's voluntarily dismissed original action because that driver was not equitably estopped from proceeding with the driver's renewal action; the first driver and corporation did not allege an affirmative act of deception, and to the extent that the second driver had a duty to speak to them, it was to inform them of the lawsuit, but that duty was defined by the Georgia Code, which included the renewal statute, O.C.G.A.

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§ 9-2-61. Robinson v. Boyd, 288 Ga. 53, 701 S.E.2d 165, 2010 Ga. LEXIS 772 (2010).

Action on nonnegotiable instrument by different plaintiff. — When a new action on a nonnegotiable instrument is commenced by another and different plaintiff, pendency and dismissal of the former action will not avoid bar of the statute. Moss v. Keesler, 60 Ga. 44, 1878 Ga. LEXIS 368 (1878).

Rule requiring substantial identity of essential parties is not violated if a party in the later case is the successor trustee or other representative of an original party who occupied the same position as plaintiff or defendant, or if the first action was dismissed for nonjoinder of one of the representatives of the estate, who is added as party to the second action, or if the first action is brought against two defendants, dismissed as to both, and renewed as to only one; or if the difference is merely as to nominal or unnecessary parties. Sheldon & Co. v. Emory Univ., 184 Ga. 440, 191 S.E. 497, 1937 Ga. LEXIS 548 (1937).

Same cause of action required. — When petition seeks to renew a former action within six months of its dismissal, which would otherwise be barred by statute of limitations, but for this section, it must appear from the renewal petition that the new action is substantially the same cause of action as that of the former action. Barber v. City of Rome, 39 Ga. App. 225, 146 S.E. 856, 1929 Ga. App. LEXIS 268 (1929).

Based on O.C.G.A. § 9-2-61, an arrestee's excessive force claim against a sheriff's major in the major's individual capacity was revived after a voluntary dismissal but assuming that the complaint alleged actual malice under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d), as to the major's conduct, the tort claim had to be brought against the state under O.C.G.A. § 50-21-25(b); however, the state did not waive the state's sovereign immunity under O.C.G.A. § 50-21-23(b) for such claim to be brought in federal court. Jude v. Morrison, 534 F. Supp. 2d 1365, 2008 U.S. Dist. LEXIS 55756 (N.D. Ga. 2008).

Assertion of same claims. — Trial court did not err by concluding that the claims in a renewed action were sufficiently similar to the original claims against a corporation's executive officer (CEO) so that the statute of limitation was tolled under the renewal statute, O.C.G.A. § 9-2-61(a), because in both complaints the plaintiffs claimed the same allegations against the CEO. Cushing v. Cohen, 323 Ga. App. 497, 746 S.E.2d 898, 2013 Ga. App. LEXIS 678 (2013), cert. denied, No. S13C1810, 2013 Ga. LEXIS 936 (Ga. Nov. 4, 2013), cert. denied, No. S13C1715, 2013 Ga. LEXIS 941 (Ga. Nov. 4, 2013).

Second action does not have to be a literal copy of the one dismissed. Cox v. Strickland, 120 Ga. 104, 47 S.E. 912, 1904 Ga. LEXIS 456 (1904).

This section is a remedial statute and is to be liberally construed; hence, while the second action must be substantially the same cause of action, it does not have to be a literal copy of the one which was dismissed. Cox v. Strickland, 120 Ga. 104, 47 S.E. 912, 1904 Ga. LEXIS 456 (1904); Guest v. Atlantic Coast Line R.R., 37 Ga. App. 102, 139 S.E. 97, 1927 Ga. App. LEXIS 494 (1927).

Additional allegations and defenses on renewal. — On renewal, plaintiff may allege additional facts or contentions, and defendant likewise may interpose such defensive pleadings as the defendant may deem best. Robinson v. Attapulgus Clay Co., 55 Ga. App. 141, 189 S.E. 555, 1937 Ga. App. LEXIS 1 (1937).

New facts, contentions and defenses may be alleged in renewed action. — Plaintiff, on renewal, may allege additional facts or contentions, and the defendant likewise can interpose such defensive pleadings as the defendant may deem best. Hornsby v. Hancock, 165 Ga. App. 543, 301 S.E.2d 900, 1983 Ga. App. LEXIS 1940 (1983), superseded by statute as stated in Chandler v. Opensided MRI of Atlanta, LLC, 299 Ga. App. 145, 682 S.E.2d 165, 2009 Ga. App. LEXIS 846 (2009).

Suit which has been dismissed and renewed, even in the same court, may be defended on renewal on the grounds of venue though no such defense was raised

in the original action. Hornsby v. Hancock, 165 Ga. App. 543, 301 S.E.2d 900, 1983 Ga. App. LEXIS 1940 (1983), superseded by statute as stated in Chandler v. Opensided MRI of Atlanta, LLC, 299 Ga. App. 145, 682 S.E.2d 165, 2009 Ga. App. LEXIS 846 (2009).

New claims not permitted if expired by statute of limitations. — Even though the patient and husband's renewal action was timely filed because it was filed within six months after the dismissal of the original action, the trial court should have granted the psychologist and clinic's motion for judgment on the pleadings as to the patient and husband's sexual assault, battery, and loss of consortium claims raised in the refiled action since those claims were not raised in the original complaint and the statute of limitations on the claims had expired by the time those claims were filed in the refiled action. Blier v. Greene, 263 Ga. App. 35, 587 S.E.2d 190, 2003 Ga. App. LEXIS 1009 (2003), cert. denied, No. S04C0114, 2004 Ga. LEXIS 102 (Ga. Jan. 20, 2004), cert. denied, No. S04C0106, 2004 Ga. LEXIS 103 (Ga. Jan. 20, 2004).

Use of admissions made in original action. — Plain language of O.C.G.A. § 9-11-36(b) confines the use of admissions made pursuant to such discovery tool to the action in which they are made and forbids their use in a subsequent or other action, including a renewal action under O.C.G.A. § 9-2-61. Mumford v. Davis, 206 Ga. App. 148, 424 S.E.2d 306, 1992 Ga. App. LEXIS 1400 (1992), cert. denied, No. S93C0273, 1993 Ga. LEXIS 157 (Ga. Feb. 5, 1993).

This section does not prevent defendant from filing such proceedings as the defendant deems best as against recommenced action. Robinson v. Attapulgus Clay Co., 55 Ga. App. 141, 189 S.E. 555, 1937 Ga. App. LEXIS 1 (1937).

Right of counterclaimant to renew. — Since a counterclaimant is the plaintiff in the counterclaiment's own right in asserting a counterclaim, O.C.G.A. § 9-2-61 gives a counterclaimant the right of renewal within six months of the discontinuing or dismissing of the case. Cale v. Jones, 176 Ga. App. 865, 338 S.E.2d 68, 1985 Ga. App. LEXIS 2427 (1985).

Defendant who voluntarily dismissed without prejudice a compulsory counterclaim could not renew it as an original action under O.C.G.A. § 9-2-61 after the plaintiff had voluntarily dismissed with prejudice the main claim without objection by the defendant because renewal of the counterclaim was barred by res judicata. Robinson v. Stokes, 229 Ga. App. 25, 493 S.E.2d 5.

This section applies when case is dismissed for want of prosecution. Rountree v. Key, 71 Ga. 214, 1883 Ga. LEXIS 163 (1883).

Action against municipality may be renewed when petition in the first action failed to comply with the formalities of former Civil Code 1910, § 910 (see now O.C.G.A. § 36-33-5). City of Tallapoosa v. Brock, 28 Ga. App. 384, 111 S.E. 88, 1922 Ga. App. LEXIS 534 (1922).

This section applies to all ordinary actions, including ejectment actions. Moss v. Keesler, 60 Ga. 44, 1878 Ga. LEXIS 368 (1878).

O.C.G.A. § 9-2-61 applies to appeals and certiorari from lower courts and if a certiorari petition is involuntarily dismissed for failure to prosecute, it may be renewed within six months. Genins v. City of Atlanta, 203 Ga. App. 269, 416 S.E.2d 838, 1992 Ga. App. LEXIS 495 (1992).

This section applies to certiorari proceedings. Brown v. Seals, 17 Ga. App. 4, 86 S.E. 277, 1915 Ga. App. LEXIS 237 (1915); Brackett v. Sebastian, 18 Ga. App. 525, 89 S.E. 1102, 1916 Ga. App. LEXIS 1092 (1916).

When valid certiorari has been dismissed, it may be renewed within six months under this section. Gragg Lumber Co. v. Collins, 37 Ga. App. 76, 139 S.E. 84, 1927 Ga. App. LEXIS 467 (1927); Wood v. Fairfax Loan & Inv. Co., 50 Ga. App. 123, 177 S.E. 260, 1934 Ga. App. LEXIS 650 (1934).

Petition for certiorari which is void for any reason cannot be renewed. Talley v. Commercial Credit Co., 173 Ga. 828, 161 S.E. 832, 1931 Ga. LEXIS 420 (1931).

When certiorari was dismissed because of want of compliance with former Civil Code 1910, § 4365 (see now O.C.G.A. § 5-4-6), petition for certiorari and writ of

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certiorari were invalid; hence, there was no case which could be recommenced within six months as provided in former Civil Code 1910, § 4381 (see now O.C.G.A. § 9-2-61). Butters Mfg. Co. v. Sims, 47 Ga. App. 648, 171 S.E. 162, 1933 Ga. App. LEXIS 589 (1933).

Void certiorari cannot be renewed. Fairfax Loan & Inv. Co. v. Turner, 49 Ga. App. 300, 175 S.E. 267, 1934 Ga. App. LEXIS 371 (1934); Wood v. Fairfax Loan & Inv. Co., 50 Ga. App. 123, 177 S.E. 260, 1934 Ga. App. LEXIS 650 (1934).

Application for certiorari following dismissal for lack of service. — Failure to serve the officer whose decision it is sought to review may cause a dismissal, but such dismissal does not bar a second application for certiorari when it is made to appear that such a fact is the sole reason for the dismissal and that it is not a decision on the merits. City of Atlanta v. Saunders, 159 Ga. App. 566, 284 S.E.2d 77, 1981 Ga. App. LEXIS 2696 (1981).

Refiling of state claim in state court after dismissal in federal court. — Georgia law allows plaintiffs to refile their state claims in a state court upon a voluntary dismissal of the claims in a federal court. Hubbard v. Stewart, 651 F. Supp. 294, 1987 U.S. Dist. LEXIS 158 (M.D. Ga. 1987).

Plaintiffs may renew their state law claims in state court within six months of the dismissal of their claims by a federal district court, when the merits of the pendent state law claims were not reached by the federal court. O'Neal v. DeKalb County, 667 F. Supp. 853, 1987 U.S. Dist. LEXIS 7177 (N.D. Ga. 1987), aff'd, 850 F.2d 653, 1988 U.S. App. LEXIS 9980 (11th Cir. 1988).

Section applicable in federal court when action originally in state court. — In certain circumstances, O.C.G.A. § 9-2-61 is to be applied in a United States District Court the same as it is applied in the courts of the state. Where plaintiffs voluntarily dismissed a state court action and recommenced within six months in federal court, the renewed case stands upon the same footing, as to limitation, with the original case. The statute of limitations has therefore not expired. Lamb v. United States, 526 F. Supp. 1117, 1981 U.S. Dist. LEXIS 9953 (M.D. Ga. 1981).

Section inapplicable in federal court actions. — When the original action was commenced in state court and removed to federal court, when it was dismissed, the action could not be renewed in the state court. Cox v. East Tenn. & Ga. R.R., 68 Ga. 446, 1882 Ga. LEXIS 28 (1882); Webb v. Southern Cotton Oil Co., 131 Ga. 682, 63 S.E. 135, 1908 Ga. LEXIS 178 (1908).

Action dismissed in federal court cannot be renewed in state courts. Constitution Publishing Co. v. DeLaughter, 95 Ga. 17, 21 S.E. 1000, 1894 Ga. LEXIS 432 (1894).

Action brought in state court, properly removed by the defendant to federal court having concurrent jurisdiction, and there dismissed on the plaintiff's motion, cannot, under this section, be renewed in state court within six months of such dismissal, so as to avoid the bar of the statute of limitations. Ivester v. Southern Ry., 61 Ga. App. 364, 6 S.E.2d 214, 1939 Ga. App. LEXIS 298 (1939).

Statute of limitations for an action for the same cause which has previously been filed in federal district court and there dismissed is not tolled by this section, which is not applicable to suits commenced in federal courts. Nevels v. Detroiter Mobile Homes, 124 Ga. App. 112, 183 S.E.2d 77, 1971 Ga. App. LEXIS 832 (1971).

This section is not applicable when the original action was filed in federal court but is applicable only to actions originally filed in state courts of Georgia. Hudnall v. Kelly, 388 F. Supp. 1352, 1975 U.S. Dist. LEXIS 13976 (N.D. Ga. 1975).

While choice of forums is the litigant's, this section will be no protection if the litigant chooses the federal forum. Henson v. Columbus Bank & Trust Co., 144 Ga. App. 80, 240 S.E.2d 284, 1977 Ga. App. LEXIS 2592 (1977).

This section does not apply to actions first commenced in federal court. Henson v. Columbus Bank & Trust Co., 144 Ga. App. 80, 240 S.E.2d 284, 1977 Ga. App. LEXIS 2592 (1977); Laine v. Wright, 586 F.2d 607, 1978 U.S. App. LEXIS 6988 (5th Cir. 1978).

Words "court of this state" in this section mean "courts created by the constitution and laws of this state"; accordingly, this section does not apply to actions brought in federal court sitting in this state. Diversified Mtg. Investors v. Georgia-Carolina Indus. Park Venture, 463 F. Supp. 538, 1978 U.S. Dist. LEXIS 7174 (N.D. Ga. 1978).

This rule does not apply where the original filing is in federal court. Blaustein v. Harrison, 160 Ga. App. 256, 286 S.E.2d 758, 1981 Ga. App. LEXIS 2967 (1981).

Rule that O.C.G.A. § 9-2-61 does not apply when the original filing is in federal court is not unconstitutional as it is based upon United States Supreme Court precedent. Blaustein v. Harrison, 160 Ga. App. 256, 286 S.E.2d 758, 1981 Ga. App. LEXIS 2967 (1981).

Since the employee's discrimination suit against the employer was based on Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq., the court rejected the employee's contention that state law, not federal law, governed the voluntary dismissal of the employee's complaint and that O.C.G.A. § 9-2-61(a) afforded the employee a second chance to file the employee's original complaint as long as the employer received notice of the lawsuit. The suit was filed pursuant to Title VII, a federal law that contained a statute of limitations. Weldon v. Elec. Data Sys. Corp., 138 Fed. Appx. 136, 2005 U.S. App. LEXIS 7961 (11th Cir. 2005).

Actions filed in other jurisdictions. — This section is inapplicable when the case was originally filed in a jurisdiction other than Georgia. Sherrill v. U.S. Fid. & Guar. Co., 108 Ga. App. 591, 133 S.E.2d 896, 1963 Ga. App. LEXIS 715 (1963).

O.C.G.A. § 9-2-61 is inapplicable to Federal Employers' Liability Act (45 U.S.C. § 51 et seq.) actions. Smith v. Seaboard Sys. R.R., 179 Ga. App. 822, 348 S.E.2d 97, 1986 Ga. App. LEXIS 2669 (1986).

Section inapplicable to collection of Interstate Commerce Act demurrage charges. — O.C.G.A. § 9-2-61 cannot operate to save a cause of action for collection of demurrage charges filed pursuant to the Interstate Commerce Act, 49 U.S.C. § 101 et seq. J.F. Barton Contracting Co. v. Southern Ry., 191 Ga. App. 13, 380 S.E.2d 724, 1989 Ga. App. LEXIS 471 (1989).

This section has no application under the Workers' Compensation Act. Southern Cotton Oil Co. v. McLain, 49 Ga. App. 177, 174 S.E. 726, 1934 Ga. App. LEXIS 317 (1934); Hicks v. Standard Accident Ins. Co., 52 Ga. App. 828, 184 S.E. 808, 1936 Ga. App. LEXIS 263 (1936); Gordy v. Callaway Mills Co., 111 Ga. App. 798, 143 S.E.2d 401, 1965 Ga. App. LEXIS 1104 (1965).

Former Civil Code 1910, § 4381 (see now O.C.G.A. § 9-2-61) did not apply to actions to foreclose a materialman's lien on real estate under former Civil Code 1910, § 3353 (see now O.C.G.A. § 44-14-361.1). Chamblee Lumber Co. v. Crichton, 136 Ga. 391, 71 S.E. 673, 1911 Ga. LEXIS 554 (1911).

O.C.G.A. § 9-2-61 does not apply to claims before the State Board of Workers' Compensation. Fowler v. Aetna Cas. & Sur. Co., 159 Ga. App. 190, 283 S.E.2d 69, 1981 Ga. App. LEXIS 2542 (1981).

This section does not apply to foreclosure of lien on sawmill. Walker v. Burt, 57 Ga. 20, 1876 Ga. LEXIS 6 (1876).

This section has no application to disbarment proceeding. Williford v. State, 56 Ga. App. 840, 194 S.E. 384, 1937 Ga. App. LEXIS 247 (1937).

Section inapplicable where limitation created by contract. — When a party to an insurance policy agrees to sue within one year, or not at all, this section does not apply to an action on the policy. Melson v. Phoenix Ins. Co., 97 Ga. 722, 25 S.E. 189, 1895 Ga. LEXIS 563 (1895).

When an action was barred by a limitation in a contract with a carrier, this section did not apply. Leigh Ellis & Co. v. Payne, 274 F. 443, 1921 U.S. Dist. LEXIS 1169 (D. Ga.), aff'd, 276 F. 400, 1921 U.S. App. LEXIS 2101 (5th Cir. 1921).

The Georgia "savings" statute, subsection (a) of O.C.G.A. § 9-2-61, does not operate to save a renewed action from a contractual limitations period, such as that in an insurance policy. Stenger Indus., Inc. v. International Ins. Co., 74 B.R.

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1017, 1987 U.S. Dist. LEXIS 9634 (N.D. Ga. 1987).

Filing third suit following dismissal of second suit for failing to pay costs of original suit. — If a O.C.G.A. § 9-11-41(b) dismissal for failure to make payment of costs in the original suit prior to filing of a second suit occurs within the period of the statute of limitations, there is nothing to prevent the plaintiff from paying costs in both dismissed suits and filing a third suit so long as the first dismissal did not act as an adjudication on the merits. Little v. Walker, 250 Ga. 854, 301 S.E.2d 639, 1983 Ga. LEXIS 659 (1983).

Dismissal of action for failure to pay previous fees and costs. — When the consumer's products liability action was dismissed without prejudice under Fed. R. Civ. P. 41(a)(2), the dismissal order indicated that the manufacturer was entitled to fees and costs; when the consumer refiled the action, the district court abused the court's discretion by dismissing the action because the consumer had not paid fees and costs. The prior voluntary dismissal order indicated only that the manufacturer was entitled to the manufacturer's attorney's fees and costs and that the next court should resolve the fee/cost petition; the consumer was not prohibited from refiling the action under O.C.G.A. § 9-2-61. Parrish v. Ford Motor Co., 299 Fed. Appx. 856, 2008 U.S. App. LEXIS 22712 (11th Cir. 2008).

Validity of renewal action in issue. — Trial court's partial grant of summary judgment on statute of limitations defense to plaintiff's slander claim was reversed since there remained a genuine issue of material fact as to whether the plaintiff's action was a valid renewal action under O.C.G.A. § 9-2-61. Elder v. Cardoso, 205 Ga. App. 144, 421 S.E.2d 753, 1992 Ga. App. LEXIS 1091 (1992).

Mistaken information from clerk that no costs due. — Costs which must be paid pursuant to O.C.G.A. § 9-11-41, as a precondition to the filing of a new suit, do not include costs unknown to the plaintiff after a good faith inquiry since the attorney was mistakenly informed by the clerk of the trial court that no costs were due on a previous action. But any unpaid costs in a previous action which are unknown after a good faith inquiry but discovered after the filing of a new action must be paid within a reasonable time in order to preserve jurisdiction. Daugherty v. Norville Indus., Inc., 174 Ga. App. 89, 329 S.E.2d 202, 1985 Ga. App. LEXIS 1754 (1985).

Action renewed pursuant to subsection (a) of O.C.G.A. § 9-2-61 is an action de novo, and a defendant is not estopped from raising a proper defense (such as insufficiency of service) in a renewal action simply because the defense was not raised in the original action. Adams v. Gluckman, 183 Ga. App. 666, 359 S.E.2d 710, 1987 Ga. App. LEXIS 2062 (1987).

Renewed case in effect de novo. — When a case is renewed, recommenced, or brought over under this section, it is in effect de novo, except that the statute of limitations does not run. Bishop v. Greene, 62 Ga. App. 126, 8 S.E.2d 448, 1940 Ga. App. LEXIS 612 (1940).

Since the claimant dismissed the lawsuit against the insured and refiled an identical suit under O.C.G.A. § 9-2-61, the insured's tardy forwarding of the suit papers in the first action was cured by the dismissal and the insurer was not relieved of its obligation to defend the second suit or of its potential liability thereunder. Granite State Ins. Co. v. Nord Bitumi U.S., Inc., 262 Ga. 502, 422 S.E.2d 191, 1992 Ga. LEXIS 921 (1992).

Renewed lawsuit under O.C.G.A. § 9-2-61(a) is an action de novo; therefore, the procedural requirements of filing a new complaint and perfecting service must be met anew, and diligence in perfecting service in a renewal action must be measured from the time of filing the renewed suit. Magsalin v. Chace, 255 Ga. App. 146, 564 S.E.2d 554, 2002 Ga. App. LEXIS 537 (2002).

Renewal action not established. — Driver did not make the requisite showing in the driver's renewed complaint, nor did the record contain any evidence that the driver's complaint met the test for renewal, and, although both actions were apparently filed in the same court, there

was no indication that the driver requested that the trial court take judicial notice of the record in the driver's original case; therefore, the appellate court concluded that the driver did not meet the burden of showing that the trial court erred in concluding that the driver's second action was barred by the statute of limitations. Belcher v. Folsom, 258 Ga. App. 191, 573 S.E.2d 447, 2002 Ga. App. LEXIS 1392 (2002).

Section applied and permitted renewal when affidavit was mistakenly omitted. — When all parties agreed that a patient's expert affidavit was available when the patient's first medical malpractice complaint was filed but was mistakenly omitted, O.C.G.A. § 9-11-9.1 applied and permitted renewal; the trial court erred in granting summary judgment in favor of a doctor and an institute in the patient's malpractice case. Rector v. O'Day, 268 Ga. App. 864, 603 S.E.2d 337, 2004 Ga. App. LEXIS 1035 (2004), cert. denied, No. S04C2090, 2004 Ga. LEXIS 1053 (Ga. Nov. 22, 2004).

Trial court erred by dismissing a couple's renewed negligence complaint for failing to file an expert affidavit with the couple's original complaint as required by O.C.G.A. § 9-11-9.1(a) because the record failed to contain sufficient findings showing whether any professional negligence was involved with regard to the wife falling from a testing table as it was merely speculative whether the technician had to assess the wife's medical condition in order to decide whether she could get down from a raised table since it could have been that no professional judgment was required. The trial court additionally erred by dismissing the couple's renewed complaint because the defending medical entities waived their objection to the renewal by failing to file a separate motion to dismiss contemporaneously with their answer to the couple's original action. Chandler v. Opensided MRI of Atlanta, LLC, 299 Ga. App. 145, 682 S.E.2d 165, 2009 Ga. App. LEXIS 846 (2009), aff'd, 287 Ga. 406, 696 S.E.2d 640, 2010 Ga. LEXIS 508 (2010).

Motion for attorney fees cannot be renewed. — Because a defendant timely filed a motion for attorney fees under O.C.G.A. § 9-15-14 but later withdrew it, the trial court erred in ruling that the motion could be renewed under O.C.G.A. § 9-2-61(a); as the "renewed motion" was filed more than 45 days after entry of summary judgment, the trial court erred in granting the neighbor attorney fees. Condon v. Vickery, 270 Ga. App. 322, 606 S.E.2d 336, 2004 Ga. App. LEXIS 1414 (2004).

Georgia Prison Litigation Reform Act. — Discretionary application requirement of Georgia Prison Litigation Reform Act, O.C.G.A. § 42-12-8, was inapplicable to an injured party's renewed personal injury suit because the injured party was not a prisoner when the de novo action was filed. Baskin v. Ga. Dep't of Corr., 272 Ga. App. 355, 612 S.E.2d 565, 2005 Ga. App. LEXIS 292 (2005).

Executor's renewal action. — In the absence of an explicit order in an executor's renewal action, O.C.G.A. § 9-2-61(a), requiring the executor to identify the executor's expert witnesses by a date certain, the executor's failure to do so did not warrant the extreme sanction of dismissal under O.C.G.A. § 9-11-41(b), (c). Porter v. WellStar Health Sys., 299 Ga. App. 481, 683 S.E.2d 35, 2009 Ga. App. LEXIS 833 (2009), cert. denied, No. S09C2031, 2010 Ga. LEXIS 80 (Ga. Jan. 25, 2010).

Untimely service of process in first action not a defense in renewal action. — Because defendants were timely served in a renewal action brought under O.C.G.A. § 9-2-61(a), the defendants could not assert as a defense the fact that the defendants were served five years after the initial action, which had been dismissed following service of defendants. The equitable doctrine of laches, O.C.G.A. § 9-3-3, did not apply in a personal injury action because the action was a legal action. Boyd v. Robinson, 299 Ga. App. 795, 683 S.E.2d 862, 2009 Ga. App. LEXIS 977 (2009), aff'd, 288 Ga. 53, 701 S.E.2d 165, 2010 Ga. LEXIS 772 (2010).

Renewal proper. — Because a health care provider simply raised a patient's failure to comply with O.C.G.A. § 9-11-9.1(a) as a defense in the provider's answer rather than in a contemporaneous motion to dismiss, as required by § 9-11-9.1(c), the patient was not precluded from

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renewing a negligence action pursuant to O.C.G.A. § 9-2-61. Opensided MRI of Atlanta, LLC v. Chandler, 287 Ga. 406, 696 S.E.2d 640, 2010 Ga. LEXIS 508 (2010).

RESEARCH REFERENCES

Am. Jur. 2d.

24 Am. Jur. 2d, Dismissal, Discontinuance, and Nonsuit, § 97 et seq. 51 Am. Jur. 2d, Limitation of Actions, § 253 et seq.

ALR.

Defective pleading as within proviso or saving clause permitted new action after failure of previous action notwithstanding general limitation period has run, 77 A.L.R. 495.

Period within which new action may be commenced after nonsuit or judgment not on merits, 83 A.L.R. 478.

What amounts to a nonsuit within contemplation of statute extending time for new action in case of nonsuit, 86 A.L.R. 1048.

Time for filing petition for removal of action from state to federal court as affected by extension of time for pleading, 108 A.L.R. 966.

Reinstatement, after expiration of term, of case which has been voluntarily withdrawn, dismissed, or nonsuited, 111 A.L.R. 767.

Nolle prosequi or discontinuance of prosecution in one court and instituting new prosecution in another court of coordinate jurisdiction, 117 A.L.R. 423.

Character or kind of action or proceeding within operation of statute which permits new action after expiration of period of limitation, upon failure of previous action commenced within the period, 120 A.L.R. 376; 79 A.L.R.2d 1309.

Statutes permitting new action after failure of original action commenced within period of limitations as applied in cases where original action fails for reasons relating to the writ or process or the service thereof, 142 A.L.R. 1184.

Original notice of lis pendens as effective upon renewal of litigation after dismissal, reversal, or nonsuit, reserving right to begin another proceeding, 164 A.L.R. 515.

Statute permitting new action, after failure of original action timely commenced, as applicable where original action was filed in another state, 55 A.L.R.2d 1038.

Determination of beginning of period allowed by statute for commencement of new action after failure, otherwise than on the merits, or action timely begun, 79 A.L.R.2d 1270.

Voluntary dismissal or nonsuit as within provision of statute extending time for new action in case of dismissal or failure of original action otherwise than upon the merits, 79 A.L.R.2d 1290.

Time when voluntary nonsuit or dismissal may be taken as of right under statute so authorizing at any time before "trial," "commencement of trial," "trial of the facts," or the like, 1 A.L.R.3d 711.

Statute permitting new action after failure of original action commenced within period of limitation, as applicable in cases where original action failed for lack of jurisdiction, 6 A.L.R.3d 1043.

Applicability, as affected by change in parties, of statute permitting commencement of new action within specified time after failure of prior action not on merits, 13 A.L.R.3d 848.

Effect of statute permitting new action to be brought within specified period after failure of original action other than on the merits to limit period of limitations, 13 A.L.R.3d 979.

Attorneys at law: delay in prosecution of disciplinary proceeding as defense or mitigating circumstance, 93 A.L.R.3d 1057.

Application of relation back doctrine permitting change in party after statute of limitations has run in state court action — motor vehicle accident or injury cases: individual drivers, parents, owners or lessors, and passengers, 97 A.L.R.6th 375.

Application of relation-back doctrine permitting change in party after statute of limitations has run in state court action — motor vehicle accident or injury cases: corporations, municipalities, insurers, and employers, 98 A.L.R.6th 93.

Application of relation-back doctrine permitting change in party after statute of

limitations has run in state court action — motor vehicle accident or injury cases: estates, and other or unspecified parties, 99 A.L.R.6th 1.

Construction and application of two-dismissal rule under federal law, 10 A.L.R. Fed.3d 4.

9-2-62. Retraxit and dismissal or discontinuance distinguished.

A retraxit differs from a dismissal or discontinuance in that a retraxit is the open, public, and voluntary renunciation by the plaintiff in open court of his action or cause of action. It is positive and conclusive of the plaintiff's right of action. Where a retraxit is entered by the plaintiff and a judgment is entered thereon by the defendant, the plaintiff's right of action shall be forever gone. A dismissal or discontinuance is negative, and the plaintiff may recommence his action on the payment of costs.

History.

Orig. Code 1863, §§ 3378, 3379; Code 1868, §§ 3397, 3398; Code 1873, §§ 3445, 3446; Code 1882, §§ 3445, 3446; Civil Code 1895, §§ 5042, 5043; Civil Code 1910, §§ 5624, 5625; Code 1933, §§ 3-507, 3-508; Ga. L. 1967, p. 226, § 38.

Law reviews.

For article, "The 1967 Amendments to the Georgia Civil Practice Act and the Appellate Procedure Act," see 3 Ga. St. B.J. 383 (1967).

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Analysis

General Consideration
Retraxit
Dismissal or Discontinuance

General Consideration

Intent of section. — Evident intent of this section is to prevent harassing renewal of action which plaintiff has, after calling upon defendant to appear in court and defend it, elected to dismiss for some reason, good or otherwise. Kraft v. Forest Park Realty & Ins. Co., 111 Ga. App. 621, 142 S.E.2d 402, 1965 Ga. App. LEXIS 1044 (1965).

Construction of section with O.C.G.A. §§ 9-15-3 and 9-15-11. — Former Civil Code 1910, §§ 5624 and 5625 (see now O.C.G.A. § 9-2-62) must be construed in conjunction with former Civil Code 1910, § 5991 (see O.C.G.A. § 9-15-3), prohibiting officers of court from demanding costs in any civil case until judgment, except in cases of nonresident plaintiffs and attorneys, and in conjunction with former Civil Code 1910, § 5992 (see now O.C.G.A. § 9-15-11), relating to inclusion of costs in judgment against party dismissing, etc. Dickson v. Hutchinson, 173 Ga. 644, 161 S.E. 139, 1931 Ga. LEXIS 374 (1931).

Payment of costs or showing of inability. — Under former Civil Code 1895, §§ 5042 and 5043 and Ga. L. 1901, p. 80, § 1 (see now O.C.G.A. §§ 9-2-62 and 9-2-63), plaintiff must pay costs or file affidavit showing the plaintiff's inability to do so. Wright v. Jett, 120 Ga. 995, 48 S.E. 345, 1904 Ga. LEXIS 772 (1904); White v. Bryant, 136 Ga. 423, 71 S.E. 677, 1911 Ga. LEXIS 564 (1911); Williams v. Holland, 9 Ga. App. 494, 71 S.E. 760, 1911 Ga. App. LEXIS 201 (1911); Collins v. Burkhalter, 144 Ga. 695, 87 S.E. 888, 1916 Ga. LEXIS 85 (1916); Morgan v. Hutcheson, 32 Ga.

General Consideration (Cont'd)

App. 501, 123 S.E. 904, 1924 Ga. App. LEXIS 505 (1924).

Payment of costs is prerequisite. — It is essential to plaintiff's right to recommence action, after a dismissal, that accrued costs in former action be paid. Gheesling v. Louisville & N.R.R., 38 Ga. App. 485, 144 S.E. 328, 1928 Ga. App. LEXIS 305 (1928).

When plaintiff voluntarily dismisses an action, the plaintiff may recommence the action on payment of costs. Dickson v. Hutchinson, 173 Ga. 644, 161 S.E. 139, 1931 Ga. LEXIS 374 (1931).

Payment of costs is condition precedent to right to renew original dismissed action. Grier v. Wade Ford, Inc., 135 Ga. App. 821, 219 S.E.2d 43, 1975 Ga. App. LEXIS 1839 (1975); Perry v. Landmark Fin. Corp., 141 Ga. App. 62, 232 S.E.2d 399, 1977 Ga. App. LEXIS 1763 (1977).

Requirement that costs be paid is in nature of penalty. — Condition imposed on the plaintiff as to payment of costs before renewing action is in the nature of a penalty for not being ready and willing to press original action to a hearing on its merits. Kraft v. Forest Park Realty & Ins. Co., 111 Ga. App. 621, 142 S.E.2d 402, 1965 Ga. App. LEXIS 1044 (1965).

Full payment of costs is required and no mere arrangement whereby some collecting officer gives a receipt without payment is sufficient so far as it relates to costs due other officers or private persons. McLaurin v. Fields, 4 Ga. App. 688, 62 S.E. 114, 1908 Ga. App. LEXIS 508 (1908); Williams v. Holland, 9 Ga. App. 494, 71 S.E. 760, 1911 Ga. App. LEXIS 201 (1911); German Alliance Ins. Co. v. Hawes, 18 Ga. App. 338, 89 S.E. 527, 1916 Ga. App. LEXIS 350 (1916).

Charging costs to counsel is insufficient. Board of Educ. v. Kelley, 126 Ga. 479, 55 S.E. 238, 1906 Ga. LEXIS 418 (1906).

This section has no application when second action is substantially different from the one that has been brought and dismissed. Ford v. Clark, 75 Ga. 612, 1885 Ga. LEXIS 188 (1885); White v. Moss & Childs, 92 Ga. 244, 18 S.E. 13, 1893 Ga. LEXIS 50 (1893); Doody Co. v. Jeffcoat, 127 Ga. 301, 56 S.E. 421, 1907 Ga. LEXIS 241 (1907); Southern Ry. v. Rowe, 2 Ga. App. 557, 59 S.E. 462, 1907 Ga. App. LEXIS 451 (1907); Bunting v. Hutchinson, 5 Ga. App. 194, 63 S.E. 49, 1908 Ga. App. LEXIS 64 (1908).

Section not applicable to federal cases. — This section, imposing penalty upon those who dismiss cases, is not applicable to cases in federal court. McIver v. Florida, C. & P.R.R., 110 Ga. 223, 36 S.E. 775, 1900 Ga. LEXIS 347 (1900), writ of error dismissed, 22 S. Ct. 937, 46 L. Ed. 1265 (1902); Southern Ry. v. Rowe, 2 Ga. App. 557, 59 S.E. 462, 1907 Ga. App. LEXIS 451 (1907).

Retraxit

Rules in this section governing retraxit are codified from the English common law. Harvey v. Boyd, 24 Ga. App. 561, 101 S.E. 708, 1919 Ga. App. LEXIS 931 (1919).

Retraxit is act by which plaintiff abandons claim and withdraws the plaintiff's suit. West v. Flynn Realty Co., 53 Ga. App. 594, 186 S.E. 753, 1936 Ga. App. LEXIS 330 (1936).

Coplaintiff not barred by retraxit entered without consent. — When retraxit is entered by one joint plaintiff without consent of the coplaintiff, the latter may continue to prosecute the claim. Harvey v. Boyd, 24 Ga. App. 561, 101 S.E. 708, 1919 Ga. App. LEXIS 931 (1919).

Statement of plaintiff's attorney that plaintiff was not seeking rent but was only seeking to recover possession of premises would not amount to retraxit. West v. Flynn Realty Co., 53 Ga. App. 594, 186 S.E. 753, 1936 Ga. App. LEXIS 330 (1936).

Dismissal of plaintiff's action on condition that defendants pay costs is not a renunciation of plaintiff's cause of action and does not amount to a retraxit. Corbin v. Goepper, 184 Ga. 559, 192 S.E. 24, 1937 Ga. LEXIS 571 (1937).

Dismissal when previous retraxit entered. — When decree of retraxit was rendered more than three years before action on guardian's bond was filed and more than three years after plaintiff attained majority and petition alleged no

facts to relieve plaintiff of bar on the ground that the plaintiff was deterred from the plaintiff's action, the court could not do otherwise than dismiss the action. Brinsfield v. Robbins, 183 Ga. 258, 188 S.E. 7, 1936 Ga. LEXIS 212 (1936).

Dismissal or Discontinuance

Costs paid only when action is dismissed or discontinued by plaintiff's act. — It is only when action has been dismissed or discontinued by an act of the plaintiff that, as a condition precedent to recommencing an action, the costs of the former action must be paid or an affidavit in forma pauperis in lieu thereof be made. Dowe v. Debus Mfg. Co., 52 Ga. App. 713, 184 S.E. 362, 1936 Ga. App. LEXIS 232 (1936).

Cost requirement inapplicable when first action dismissed for want of prosecution. — Requirement under this section that the plaintiff pay costs upon recommencement applies to voluntary dismissal by the plaintiff, not dismissal for want of prosecution. City of Chamblee v. Village of N. Atlanta, 217 Ga. 517, 123 S.E.2d 663, 1962 Ga. LEXIS 311 (1962).

Payment of costs in former action dismissed for want of prosecution is not a prerequisite to filing another action between the same parties on the same cause of action. Kraft v. Forest Park Realty & Ins. Co., 111 Ga. App. 621, 142 S.E.2d 402, 1965 Ga. App. LEXIS 1044 (1965) (arguing for adoption by Supreme Court of contrary rule).

Prepayment of costs was not condition of right to proceed when party was not served in former action. Hackney v. Asbury & Co., 124 Ga. 678, 52 S.E. 886, 1906 Ga. LEXIS 584 (1906).

Before it is required, as condition precedent to filing of action, that costs which accrued in former action be paid or affidavit of indigence be made, former action must have been one pending between the parties; and when, in former action, service of the defendant was not perfected, and action was dismissed on this ground, former action was never pending. Dowe v. Debus Mfg. Co., 52 Ga. App. 713, 184 S.E. 362, 1936 Ga. App. LEXIS 232 (1936); Register v. Sanders, 103 Ga. App. 368, 119 S.E.2d 294, 1961 Ga. App. LEXIS 942 (1961).

Mere filing with the clerk without issuance of process is not institution of action, and payment of costs is not condition precedent to filing at the next term of court the identical cause of action. Register v. Sanders, 103 Ga. App. 368, 119 S.E.2d 294, 1961 Ga. App. LEXIS 942 (1961).

Action against trustee formerly sued as individual. — Prepayment of costs was not condition of right to proceed in action against trustee who was formerly sued as individual. Moore v. Bower, 6 Ga. App. 450, 65 S.E. 328, 1909 Ga. App. LEXIS 339 (1909).

Action against partnership after action against partner. — When partnership was sued after action against partner, prepayment of costs was not condition of right to proceed. Doody Co. v. Jeffcoat, 127 Ga. 301, 56 S.E. 421, 1907 Ga. LEXIS 241 (1907).

This section does not apply if one settles action instituted against that person. Graham v. Massengale Adv. Agency, 4 Ga. App. 826, 62 S.E. 567, 1908 Ga. App. LEXIS 544 (1908).

Proof of dismissal. — Unchallenged entry of dismissal, as made on docket by trial judge, must be taken as conclusive proof of dismissal. Smith v. Merchants & Farmers Bank, 22 Ga. App. 505, 96 S.E. 342, 1918 Ga. App. LEXIS 579 (1918).

Contention that verdict and judgment for divorce were void and should be set aside for reason that plaintiff had instituted divorce action without paying court costs accrued in action for divorce which the plaintiff had previously filed and dismissed came too late when made for the first time in a petition to set aside the verdict and judgment. Crenshaw v. Crenshaw, 198 Ga. 536, 32 S.E.2d 177, 1944 Ga. LEXIS 430 (1944).

RESEARCH REFERENCES

Am. Jur. 2d.
24 Am. Jur. 2d, Dismissal, Discontinuance, and Nonsuit, §§ 1, 3, 6.
C.J.S.
27 C.J.S., Dismissal and Nonsuit, § 5 et seq.
ALR.
Reinstatement, after expiration of term, of case which has been voluntarily withdrawn, dismissed, or nonsuited, 111 A.L.R. 767.

Statute permitting new action after failure of original action commenced within period of limitation, as applicable in cases where original action failed for lack of jurisdiction, 6 A.L.R.3d 1043.

9-2-63. Affidavit of indigence for renewal of action.

When any action is dismissed or discontinued and the plaintiff desires to recommence his action, if he will make and file with his complaint, summons, or other proceedings an affidavit in writing stating that he is advised and believes that he has good cause for recommencing his action and that because of his indigence he is unable to pay the costs that have accrued in the case, he shall have the right to renew the action without payment of the cost as aforesaid.

History.
Ga. L. 1901, p. 80, § 1; Civil Code 1910, § 5626; Code 1933, § 3-509.
Cross references.
Constitutional guarantee of access to courts, Ga. Const. 1983, Art. I, Sec. I, Para. XII.

Filing of affidavit of indigence generally, § 9-15-2.

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It is condition precedent to renewal of action after voluntary dismissal that plaintiff pay costs or file affidavit of indigence before or at time of renewing the action. Kraft v. Forest Park Realty & Ins. Co., 111 Ga. App. 621, 142 S.E.2d 402, 1965 Ga. App. LEXIS 1044 (1965).

Payment of costs prerequisite only when first action is dismissed by act of plaintiff. — It is only when action has been dismissed or discontinued and dismissal or discontinuance is by act of plaintiff that, as condition precedent to recommencing action, costs of former action must be paid or an affidavit in forma pauperis in lieu thereof be made. Dowe v. Debus Mfg. Co., 52 Ga. App. 713, 184 S.E. 362, 1936 Ga. App. LEXIS 232 (1936).

Service must have been had in first action. — Before it is required as condition precedent to filing of action that costs which accrued in former action between same parties for same cause be paid or an affidavit in forma pauperis be made, former action must have been one pending between the parties; and when, in former action, service of the defendant was not perfected, and an action was dismissed on this ground, the former action was never pending. Dowe v. Debus Mfg. Co., 52 Ga. App. 713, 184 S.E. 362, 1936 Ga. App. LEXIS 232 (1936); Register v. Sanders, 103 Ga. App. 368, 119 S.E.2d 294, 1961 Ga. App. LEXIS 942 (1961).

Mere filing with clerk, without issuance of process, is not institution of an action, and payment of costs is not condition precedent to filing at next term of court on identical cause of action. Register v. Sanders, 103 Ga. App. 368, 119 S.E.2d 294, 1961 Ga. App. LEXIS 942 (1961).

No further affidavit of indigence when affidavit filed in prior action. — Provision in O.C.G.A. § 9-15-2(a) that an affidavit of indigence relieves a party of "any deposit, fee, or other cost" requires that, when a plaintiff files such an affidavit upon bringing an action, takes a voluntary dismissal, then seeks to renew the action, no payment of accrued costs and no

further affidavit of indigence are required for the filing of the renewal action. McKenzie v. Seaboard Sys. R.R., 173 Ga. App. 402, 326 S.E.2d 502, 1985 Ga. App. LEXIS 2629 (1985).

Two actions must be identical as to parties and causes of action before this section applies. May Realty Co. v. Lohman, 176 Ga. 740, 168 S.E. 772, 1933 Ga. LEXIS 275 (1933).

Affidavit under this section must be filed at time of commencement of second action. Johnson v. Central of Ga. Ry., 119 Ga. 185, 45 S.E. 988, 1903 Ga. LEXIS 83 (1903).

Affidavit in this section is considered part of petition with which it is filed and must be filed with petition at time of its filing. Southern Grocery Stores, Inc. v. Kelly, 52 Ga. App. 551, 183 S.E. 924, 1936 Ga. App. LEXIS 181 (1936).

Timing of filing of petition and affidavit. — When affidavit and petition appear separately and are not physically attached to each other, but are at the same time filed with the court clerk, filing of the affidavit is in compliance with this section. Powell v. Fidelity & Deposit Co., 48 Ga. App. 529, 173 S.E. 196, 1934 Ga. App. LEXIS 119 (1934).

Affidavit need not be attached to the petition in order to be considered filed therewith. North Am. Accident Ins. Co. v. Scarborough, 49 Ga. App. 833, 176 S.E. 671, 1934 Ga. App. LEXIS 571 (1934).

Amendment of venue statement in affidavit. — When state and county in heading of venue of affidavit made under this section were by mistake incorrectly stated, and it appeared from the jurat that the affidavit was actually signed and sworn to in the proper jurisdiction, the judge did not err in allowing the affidavit to be amended. Southern Grocery Stores, Inc. v. Kelly, 52 Ga. App. 551, 183 S.E. 924, 1936 Ga. App. LEXIS 181 (1936).

Affidavit by next friend. — Affidavit in forma pauperis in renewed action brought by minor through the minor's next friend should be made and filed by the next friend. Powell v. Fidelity & Deposit Co., 48 Ga. App. 529, 173 S.E. 196, 1934 Ga. App. LEXIS 119 (1934).

This section has no application when former action was pending in federal court. Powell v. Fidelity & Deposit Co., 48 Ga. App. 529, 173 S.E. 196, 1934 Ga. App. LEXIS 119 (1934).

Action against partnership composed of two partners was not subject to abatement when former action on same account had been brought by the plaintiff against one partner as an individual, which action had been dismissed, and the plaintiff had failed to pay costs of the action or file an affidavit of indigence before institution of an action against the partnership. May Realty Co. v. Lohman, 176 Ga. 740, 168 S.E. 772, 1933 Ga. LEXIS 275 (1933).

RESEARCH REFERENCES

Am. Jur. 2d.

24 Am. Jur. 2d, Dismissal, Discontinuance, and Nonsuit, § 97 et seq.

C.J.S.

20 C.J.S., Costs, § 90 et seq. 27 C.J.S., Dismissal and Nonsuit, § 28 et seq.

ALR.

Reinstatement, after expiration of term, of case which has been voluntarily withdrawn, dismissed, or nonsuited, 111 A.L.R. 767.

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CHAPTER 3

LIMITATIONS OF ACTIONS

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Time limitation on enforcement of right to workers' compensation, § 34-9-82.

Time limitation on bringing of action against rural telephone cooperatives, § 46-5-97.

Time limitation on bringing of actions by common carriers for recovery of charges, § 46-9-5.

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ARTICLE 1

GENERAL PROVISIONS

JUDICIAL DECISIONS

Statutes of limitations are intended to embrace all causes of action not specially excepted from operations and should not be so construed as to defeat that object. Trust Co. Bank v. Union Circulation Co., 241 Ga. 343, 245 S.E.2d 297, 1978 Ga. LEXIS 940 (1978).

Courts cannot engraft on statutes of limitations exceptions not contained therein, however inequitable enforcement of statute, without such exceptions, may be. Harrison v. Holsenbeck, 208 Ga. 410, 67 S.E.2d 311, 1951 Ga. LEXIS 395 (1951).

Except as provided therein, statutes of limitations should not be evaded, as they are considered beneficial and resting in principles of sound public policy. Harrison v. Holsenbeck, 208 Ga. 410, 67 S.E.2d 311, 1951 Ga. LEXIS 395 (1951).

Statute of limitations begins to run on any given claim on the date claim accrues, in other words, on the date that

action on the claim can first be brought. Hoffman v. Insurance Co. of N. America, 241 Ga. 328, 245 S.E.2d 287, 1978 Ga. LEXIS 950 (1978).

Period within which action may be brought is measured from date upon which the plaintiff could have successfully maintained the action. Jankowski v. Taylor, Bishop & Lee, 246 Ga. 804, 273 S.E.2d 16, 1980 Ga. LEXIS 1287 (1980).

Bar of statute of limitations is a personal privilege and is not available to the defendant unless specially asserted. Burch v. Wofford-Terrell Co., 52 Ga. App. 685, 184 S.E. 419, 1936 Ga. App. LEXIS 221 (1936).

Use of state limitations when foreign substantive law controls. — In this state, statutes of limitations are remedial and procedural, rather than substantive; hence, courts in this state apply state statutes of limitations even when substantive law of another jurisdiction controls. Cash v. Armco Steel Corp., 462 F. Supp. 272, 1978 U.S. Dist. LEXIS 13893 (N.D. Ga. 1978).

Application of state limitations to federal actions. — When Congress creates a federal right without prescribing a period for enforcement, the applicable period of limitations is that which the state itself would enforce had the action seeking similar relief been brought in a court of that state. United States v. Georgia Power Co., 474 F.2d 906, 1973 U.S. App. LEXIS 11611 (5th Cir. 1973).

Violation of federal antitrust laws. — In cases involving violation of antitrust statutes, Georgia statutes of limitations apply; federal authorities, however, determine the question as to when cause of action accrued. Service Stages, Inc. v. Greyhound Corp., 170 F. Supp. 482, 1959 U.S. Dist. LEXIS 3741 (D. Ga.), aff'd, 268 F.2d 739, 1959 U.S. App. LEXIS 5337 (5th Cir. 1959).

Right of purchaser to plead statute against mortgagee. — One who purchases land covered by a mortgage acquires such a privity of relationship to the debtor as to entitle the purchaser to plead statute of limitations against mortgagee, so far as the subjection of the land itself is sought, whether the mortgagor pleads it or omits to plead it. Krauss v. National Bank, 184 Ga. 456, 192 S.E. 12, 1937 Ga. LEXIS 564 (1937).

RESEARCH REFERENCES

ALR.

Depreciation in market value of land as affecting the general rule that cause of action arises when injury is inflicted, and not when cause is created, 3 A.L.R. 682.

Statutory or contractual limitation where presumption of death of the insured from seven years' absence is relied upon, 34 A.L.R. 91; 61 A.L.R. 686; 119 A.L.R. 1308.

"De minimis non curat lex," 44 A.L.R. 168.

Reasonableness of period allowed for existing causes of action by statute reducing period of limitation, 49 A.L.R. 1263; 120 A.L.R. 758.

Right of foreign corporation to plead statute of limitations, 59 A.L.R. 1336; 122 A.L.R. 1194.

State statute of limitations as affecting action or proceeding by federal government or its officials, 61 A.L.R. 412.

Construction of statutes of limitation as regards their retrospective application to causes of action already barred, 67 A.L.R. 297.

Construction, application, and effect of statute of forum which admits bar of statute of limitation of other state, 75 A.L.R. 203; 149 A.L.R. 122.

When statute of limitations commences to run against action for breach of warranty on sale of chattels, 75 A.L.R. 1086.

Applicability of statutes of limitation to defenses, 78 A.L.R. 1074.

Anticipatory breach of executory contract as starting running of statute of limitations, 94 A.L.R. 455.

Applicability of statute of nonclaim or limitation statute as between surviving partner and estate of deceased partner, 96 A.L.R. 441; 157 A.L.R. 1114.

Bar of statute of limitations against debt secured by pledge as affecting rights and remedies in respect of the subject of the pledge, 103 A.L.R. 430; 137 A.L.R. 928.

Right of subrogation in respect of encumbrances paid by third person under

mistake or in order to protect his interest in property as affected by statute of limitations or laches, 103 A.L.R. 1182.

Time limitation as to filing of claims against insolvent as affected by excuses, and the nature of such excuses, 109 A.L.R. 1404.

Liability of automobile liability or indemnity insurer as affected by statute of limitations against action based on insured's tort, 111 A.L.R. 1069.

Acceleration provision in respect of special assessments as affecting running of statute of limitations, 113 A.L.R. 1168.

Amendment of complaint or declaration by setting up death statute after expiration of period to which action is limited by the death statute or by the statute of limitations, 134 A.L.R. 779.

Running of statute of limitations as affected by uncertainty as to existence of a cause of action because of delay in settling or determining a matter of general or governmental concern upon which it depends, 135 A.L.R. 1339.

When statute of limitations commences to run against action by principal to recover money or other property from agent, 141 A.L.R. 361.

Amendment of pleading after limitation period changing from allegation of negligence to allegation of fraud, or vice versa, as stating a new cause of action, 141 A.L.R. 1363.

Employer's breach of agreement regarding discharge or restoration after layoff of employee not employed for a fixed term, as creating a single cause of action, or repeated causes of action, as regards statute of limitation or the right to bring successive actions, 142 A.L.R. 797.

Validity and construction of war enactment in United States suspending operation of statute of limitations, 143 A.L.R. 1519.

Limitation applicable to cause of action created by statute of another state which allows a longer period than the statute of the forum, 146 A.L.R. 1356.

Right of action to recover from owner taxes which plaintiff, by mistake, paid upon the former's property, as subject to statutes of limitation, 147 A.L.R. 457.

Applicability to limitation prescribed by policy of insurance, or by special statutory provision in relation to insurance, of provisions of statute of limitations extending time or fixing time when action deemed commenced, 149 A.L.R. 483.

Public records as constructive notice as regards action predicated upon fraudulent misrepresentation or concealment, so as to start the running of the statute of limitations against the bringing of such action, 152 A.L.R. 461.

Mandamus as subject to statute of limitations, 155 A.L.R. 1144.

Statute of limitations or presumption of payment from lapse of time as ground for affirmative relief from debt or lien, 164 A.L.R. 1387.

Amendment after limitation period of allegations of negligence as stating new cause of action, 171 A.L.R. 1087.

Validity of contractual waiver of statute of limitations, 1 A.L.R.2d 1445.

Limitation period as affected by requirement of notice or presentation of claim against governmental body, 3 A.L.R.2d 711.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Reviving, renewing, or extending judgment by order entered after expiration of statutory limitation period on motion made or proceeding commenced within such period, 52 A.L.R.2d 672.

Construction, application, and effect, with reference to statutory causes of action, of statute of forum which admits bar of statute of limitations of other state, 67 A.L.R.2d 216.

Right of creditor to set up statute of limitations against other creditors of his debtor, 71 A.L.R.2d 1049.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 A.L.R.2d 1080.

General appearance as avoiding otherwise effective bar of statute of limitations, 82 A.L.R.2d 1200.

Federal court's adoption of state period of limitation, in action to enforce federally created right, as including related or subsidiary state laws or rules as to limitations, 90 A.L.R.2d 265.

Extraterritorial operation of limitation applicable to statutory cause of action,

other than by reason of "borrowing statute," 95 A.L.R.2d 1162.

Validity of contractual time period, shorter than statute of limitations, for bringing action, 6 A.L.R.3d 1197.

Statute of limitations: effect of delay in appointing administrator or other representative on cause of action accruing at or after death of person in whose favor it would have accrued, 28 A.L.R.3d 1141.

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations, 45 A.L.R.3d 630.

Delay caused by other litigation as estopping reliance on statute of limitations, 45 A.L.R.3d 703.

Validity of contractual provision establishing period of limitations longer than that provided by state statute of limitations, 84 A.L.R.3d 1172.

Statute of limitations as bar to arbitration under agreement, 94 A.L.R.3d 533.

Statutes of limitation: actions by purchasers or contractees against vendors or contractors involving defects in houses or other buildings caused by soil instability, 12 A.L.R.4th 866.

When statute of limitations commences to run on automobile no-fault insurance personal injury claim, 36 A.L.R.4th 357.

What constitutes rejection of claim against estate to commence running of statute of limitations applicable to rejected claims, 36 A.L.R.4th 684.

Which statute of limitations applies to efforts to compel arbitration of a dispute, 77 A.L.R.4th 1071.

Time when cause of action accrues for civil action under state antitrust, monopoly, or restraint of trade statutes, 90 A.L.R.4th 1102.

What statute of limitations applies to action to compel arbitration pursuant to § 301 of Labor Management Relations Act (29 USCS § 185), 96 A.L.R. Fed. 378.

9-3-1. Limitations against the state.

Except as otherwise provided by law, the state shall be barred from bringing an action if, under the same circumstances, a private person would be barred.

History.

Ga. L. 1855-56, p. 233, § 38; Code 1873, § 2925a; Code 1882, § 2925a; Civil Code 1895, § 3777; Civil Code 1910, § 4371; Code 1933, § 3-715.

Law reviews.

For article, "Statutes of Limitations: Counterproductive Complexities," see 37 Mercer L. Rev. 1 (1985).

JUDICIAL DECISIONS

This section changed common-law rule enunciated in Brinsfield v. Carter, 2 Ga. 143 (1847), and must be strictly construed. Georgia R.R. & Banking v. Wright, 124 Ga. 496, 53 S.E. 251 (1906).

Effect of section on legislative powers. — Legislative powers, including granting of a license by a municipality, cannot be abridged by this section. City Council v. Burum & Co., 93 Ga. 68, 19 S.E. 820, 1893 Ga. LEXIS 357 (1893).

Prescription does not run against state. Kirschner v. Western & A.R.R., 67 Ga. 760, 1881 Ga. LEXIS 275 (1881); Dean v. Feely, 69 Ga. 804, 1883 Ga. LEXIS 121 (1883).

This section applies to counties. MacNeill v. McElroy, 193 Ga. 55, 17 S.E.2d 169, 1941 Ga. LEXIS 582 (1941).

Action to recover money illegally drawn from treasury. — Former Civil Code 1910, § 4371 (see now O.C.G.A. § 9-3-1) rendered former Civil Code 1910, § 4362 (see now O.C.G.A. § 9-3-25) applicable to action by county to recover money illegally drawn from the treasury. Swords v. Walker, 141 Ga. 450, 81 S.E. 235, 1914 Ga. LEXIS 3 (1914).

In action brought by county to recover fees paid to probate court judge by mutual mistake, this section applies. McAlpin v. Chatham County, 26 Ga. App.

695, 107 S.E. 74, 1921 Ga. App. LEXIS 596 (1921).

Payday lending litigation governed by statute of limitations. — Supreme Court of Georgia is not persuaded that the Georgia legislature intended the period of limitation for bringing an enforcement action pursuant to the Payday Lending Act, O.C.G.A. § 16-17-1 et seq., to be governed by the one-year limitation period for forfeiture actions pursuant to the usury laws; instead, the Court concludes the remedies set forth in the Payday Lending Act are governed by the 20-year statute of limitation set forth in O.C.G.A. § 9-3-1. W. Sky Fin., LLC v. State of Ga. ex rel. Olens, 300 Ga. 340, 793 S.E.2d 357, 2016 Ga. LEXIS 783 (2016).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Limitation of Actions, § 63 et seq.

C.J.S.

54 C.J.S., Limitations of Actions, §§ 43, 44, 49.

ALR.

Statute limiting duration of lien, or life, of judgment, or revival thereof, as applicable to judgment in favor of state or political units thereof, 118 A.L.R. 929.

Liquidation or other proceeding by government against bank or other corporation, as suspending statute of limitations as regards choses in action belonging to corporation, or stockholder's superadded liability, 122 A.L.R. 945.

When statute of limitation commences to run against action to recover tax, 131 A.L.R. 822.

Running of limitation as to action by public body against officer or employee as deferred until defendant ceases to be officer or employee, or until the end of his term of office or employment, 137 A.L.R. 674.

Limitation applicable to action for consequential damage as result of taking or damaging of property for public use, 139 A.L.R. 1288.

Limitation of time for collection or enforcement of succession, estate, or inheritance tax, 139 A.L.R. 1397.

Limitation statute applicable to action on bonds of public body or on obligation to collect revenues for their payment, 38 A.L.R.2d 930.

9-3-2. Limitations against municipalities.

Any claim or demand held by any municipality not in the nature of a special contract or not reduced to execution shall be barred by the general statutes of limitation of force, and all executions issued by any municipality shall be subject to the same laws relating to the statutes of limitation governing other executions.

History.

Ga. L. 1899, p. 60, § 1; Civil Code 1910, § 4372; Code 1933, § 3-716.

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Limitation of Actions, § 63 et seq.

C.J.S.

54 C.J.S., Limitations of Actions, § 45 et seq.

ALR.

Validity of contract exempting municipality from liability for negligence, 41 A.L.R. 1358.

Liability of municipality for injury to

lateral support in grading street, 44 A.L.R. 1494.

When statute of limitations begins to run against warrant of municipal or quasi municipal corporation, 56 A.L.R. 830.

Action by municipality to enforce lien for special assessment as within statute of limitations not specifically covering it, 103 A.L.R. 885.

Statute of limitations as applicable to action by municipality or other political subdivision in absence of specific provision in that regard, 113 A.L.R. 376.

Liquidation or other proceeding by government against bank or other corporation, as suspending statute of limitations as regards choses in action belonging to corporation, or stockholder's superadded liability, 122 A.L.R. 945.

When statute of limitations commences to run as to action against municipality for damages to riparian premises by pollution of stream by discharge of sewage, 122 A.L.R. 1509.

Applicability of statute of limitations to action to enforce special assessments as affected by question whether imposition or enforcement of the assessment is an exercise of a governmental function, 136 A.L.R. 572.

Limitation applicable to action for consequential damage as result of taking or damaging of property for public use, 139 A.L.R. 1288.

Statutory provision that statute of limitation shall not apply to action in name of municipality or other public corporation, as applicable to actions involving proprietary as distinguished from governmental functions, 162 A.L.R. 261.

Waiver of, or estoppel to rely upon, contractual limitation of time for bringing action against municipality or other political subdivision, 81 A.L.R.2d 1039.

9-3-3. Applicability of limitation statutes; equitable bar.

Unless otherwise provided by law, limitation statutes shall apply equally to all courts. In addition, courts of equity may interpose an equitable bar whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights.

History.

Ga. L. 1855-56, p. 233, §§ 28, 39; Code 1863, § 2865; Code 1868, § 2873; Code 1873, § 2924; Code 1882, § 2924; Civil Code 1895, § 3775; Civil Code 1910, § 4369; Code 1933, § 3-712.

Cross references.

Laches, § 23-1-25.

Law reviews.

For article discussing application of the principle that he who would have equity must do equity to taxpayer's suits, see 7 Ga. St. B.J. 305 (1971).

JUDICIAL DECISIONS

Former Civil Code 1895, § 3775 (see now O.C.G.A. § 9-3-3) must be construed with former Civil Code 1895, § 3939 (see now O.C.G.A. § 23-1-25) which permitted the defendant to defeat assertions of purely equitable rights by laches, even though no legal limitation bars right. Moore v. Moore, 103 Ga. 517, 30 S.E. 535, 1898 Ga. LEXIS 155 (1898).

Provisions of this section are not available to complainant. Steele v. City of Waycross, 190 Ga. 816, 10 S.E.2d 867, 1940 Ga. LEXIS 577 (1940).

Principle that stale demand will not be enforced is available to the defendant only, and cannot be employed under this section by complainant in equitable proceeding to enjoin enforcement of purely legal right. Steele v. City of Waycross, 190 Ga. 816, 10 S.E.2d 867, 1940 Ga. LEXIS 577 (1940).

Equitable doctrine of laches. — Eq-

uitable doctrine as to stale demands has no application when action is a legal one and period fixed by statute of limitations for assertion of claim has not expired. Louther v. Tift, 20 Ga. App. 309, 93 S.E. 70, 1917 Ga. App. LEXIS 877 (1917).

Equitable doctrine of laches is not applicable to actions at law. Fletcher v. Gillespie, 201 Ga. 377, 40 S.E.2d 45, 1946 Ga. LEXIS 489 (1946); Columbus Bank & Trust Co. v. Dempsey, 120 Ga. App. 5, 169 S.E.2d 349, 1969 Ga. App. LEXIS 659 (1969).

Doctrine of laches is an equitable one and has no relevancy to an action when rights to be enforced rest upon legal grounds, and the statute of limitation has not run. Cosby v. A.M. Smyre Mfg. Co., 158 Ga. App. 587, 281 S.E.2d 332, 1981 Ga. App. LEXIS 2324 (1981).

Trial court did not abuse the court's discretion in entering an interlocutory injunction to preserve the status quo pending adjudication of the merits of the creditor's action against the debtors alleging breach of contract and fraudulent transfers in violation of the Georgia Uniform Fraudulent Transfers Act, O.C.G.A. § 18-2-70 et seq., because the debtors presented no evidence of harm from the creditor's delay in amending its complaint to seek an interlocutory injunction, and the delay resulted primarily from the debtors' concealment of their actions and obstruction of the creditor's efforts to discover the details. Vague assertions of harm supported by no citation to evidence in the record are insufficient to sustain a defense of laches, and there is a balance between a plaintiff's knowing that a cause of action exists and that interim injunctive relief may be needed and sitting on its rights to the prejudice of the defendant. SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 289 Ga. 1, 709 S.E.2d 267, 2011 Ga. LEXIS 270 (2011).

Laches is not a remedy for delay during litigation, but is an affirmative defense asserting an inequitable delay in instituting a proceeding. Stuckey v. Storms, 265 Ga. 491, 458 S.E.2d 344, 1995 Ga. LEXIS 516 (1995); Head v. CSX Transp., Inc., 227 Ga. App. 818, 490 S.E.2d 497.

Laches and statute of limitations distinguished. — Defense of "laches" is different from defense of statute of limitations as in order to bar remedy because of laches there must appear, in addition to mere lapse of time, some circumstances from which the defendant or other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if remedy is allowed; whereas in case of statute of limitations, mere lapse of time will constitute a bar. Prudential Ins. Co. v. Sailors, 69 Ga. App. 628, 26 S.E.2d 557, 1943 Ga. App. LEXIS 155 (1943).

Statute of limitation signifies fixed period within which action may be brought to preserve a right, while laches signifies delay independent of statute. Prudential Ins. Co. v. Sailors, 69 Ga. App. 628, 26 S.E.2d 557, 1943 Ga. App. LEXIS 155 (1943).

Laches is not, like limitations, mere matter of time, but principally question of inequity of permitting claim to be enforced, founded on some intermediate change in conditions. Manry v. Manry, 196 Ga. 365, 26 S.E.2d 706, 1943 Ga. LEXIS 354 (1943); Cooper v. Aycock, 199 Ga. 658, 34 S.E.2d 895, 1945 Ga. LEXIS 409 (1945); Georgian Villa, Inc. v. City Nat'l Bank, 10 B.R. 79, 1981 Bankr. LEXIS 4745 (Bankr. N.D. Ga. 1981).

Laches did not bar claims that were not barred by statute of limitations. — Trial court erred in finding that all of a state court judge's claims to recover compensation under state law, O.C.G.A. § 15-7-22, a local law, 2006 Ga. Laws 206, and a county ordinance, were barred by laches; the judge's claims were subject to the two-year limitations period in O.C.G.A. § 9-3-22, meaning the judge could pursue claims on or after October 6, 2015; however, the judge was not entitled to mandamus because the judge had received all the compensation to which the judge was entitled. Cowen v. Clayton County, 306 Ga. 698, 832 S.E.2d 819, 2019 Ga. LEXIS 594 (2019).

Applicability of doctrine of laches depends on facts of each particular case. Georgian Villa, Inc. v. City Nat'l Bank, 10 B.R. 79, 1981 Bankr. LEXIS 4745 (Bankr. N.D. Ga. 1981).

Doctrine of laches refers to neglect, for unreasonable and unexplained length of time, to do that which by

exercise of due diligence could and should have been done earlier if at all. Prudential Ins. Co. v. Sailors, 69 Ga. App. 628, 26 S.E.2d 557, 1943 Ga. App. LEXIS 155 (1943).

Laches may be applied when it would be inequitable to enforce rights. — Doctrine of laches not only forbids relief to one whose long delay renders ascertainment of truth difficult, but also authorizes courts of equity to interpose equitable bar whenever, from lapse of time and laches of complainant, it would be inequitable to allow party to enforce legal rights. Goodwin v. First Baptist Church, 225 Ga. 448, 169 S.E.2d 334, 1969 Ga. LEXIS 527 (1969).

Laches did not bar enforcement of restrictive covenants. — Purchaser of a 10-acre lot in a subdivision was bound by restrictive covenants governing the cutting of trees and dividing of lots in the subdivision; the subdivision owners were not barred by laches from enforcing the covenants after trees were cut and fences erected because there was no evidence as to when the owners discovered the violations of the covenants. Gilbert v. Canterbury Farms, LLC, 346 Ga. App. 804, 815 S.E.2d 303, 2018 Ga. App. LEXIS 392 (2018), cert. denied, No. S18C1606, 2019 Ga. LEXIS 209 (Ga. Apr. 1, 2019).

Under this section, doctrine of stale demand is purely equitable and only arises where from lapse of time and laches of plaintiff it would be inequitable to allow the plaintiff to enforce plaintiff's legal rights. Ellis v. Smith & Bussey, 112 Ga. 480, 37 S.E. 739, 1900 Ga. LEXIS 211 (1900).

Equity will not aid in enforcement of stale demands. Cannon v. Fulton Nat'l Bank, 206 Ga. 609, 57 S.E.2d 917, 1950 Ga. LEXIS 525 (1950); Welch v. Welch, 215 Ga. 198, 109 S.E.2d 757, 1959 Ga. LEXIS 434 (1959).

Equity gives no relief to one whose long delay renders ascertainment of truth difficult, even though no legal limitation bars the right. Persons v. Dallas, 178 Ga. 778, 174 S.E. 699, 1934 Ga. LEXIS 182 (1934); Stephens v. Walker, 193 Ga. 330, 18 S.E.2d 537, 1942 Ga. LEXIS 385 (1942).

There is no absolute rule as to what constitutes laches or staleness of demand, and no one decision constitutes a precedent in strict sense; each case is to be determined according to its own particular circumstances. Manry v. Manry, 196 Ga. 365, 26 S.E.2d 706, 1943 Ga. LEXIS 354 (1943).

Criteria for determining laches. — In determining whether there has been laches, there are various factors to be considered, including: duration of delay in asserting claim; sufficiency of excuse offered in extenuation of delay; whether plaintiff acquiesced in assertion or operation of corresponding adverse claim; character of evidence by which plaintiff's right is sought to be established; whether during delay evidence has been lost or become obscured or conditions have so changed as to render enforcement of right inequitable; whether third persons have acquired intervening rights; nature of right asserted and relief asked; nature of duty or obligation sought to be enforced, and whether plaintiff or defendant was in possession of property at issue during delay. Cooper v. Aycock, 199 Ga. 658, 34 S.E.2d 895, 1945 Ga. LEXIS 409 (1945).

In determining whether there has been laches, various factors are to be considered, including: duration of delay in asserting claim; sufficiency of excuse offered in extenuation thereof; whether during delay evidence has been lost or become obscure; whether the plaintiff or the defendant was in possession of property at issue during the delay; whether the party charged with laches had an opportunity to have acted sooner, and whether the party charged with laches acted at the first possible opportunity. Welch v. Welch, 215 Ga. 198, 109 S.E.2d 757, 1959 Ga. LEXIS 434 (1959); Ehrhart v. Brooks, 231 Ga. 272, 201 S.E.2d 464, 1973 Ga. LEXIS 670 (1973).

When from lapse of time and other circumstances it would be inequitable to grant relief to a party, the doctrine of laches will be applied. Georgian Villa, Inc. v. City Nat'l Bank, 10 B.R. 79, 1981 Bankr. LEXIS 4745 (Bankr. N.D. Ga. 1981).

For laches to apply, delay must have worked injury, prejudice, or disadvantage to the defendant or others adversely interested; or the plaintiff must have abandoned or waived the plaintiff's

right, acquiesced in assertion or operation of adverse right, or lost the plaintiff's right by estoppel; or sufficient time must have elapsed to create or justify presumption against existence or validity of the plaintiff's right, or presumption that if the plaintiff was ever possessed of a right, it has been abandoned, waived, or satisfied, or presumption that in consequence of delay adverse party would be inequitably prejudiced by enforcement of right asserted. Grant v. Fourth Nat'l Bank, 229 Ga. 855, 194 S.E.2d 913, 1972 Ga. LEXIS 807 (1972).

To constitute the defense of laches, the delay must have been such as practically to preclude the court from arriving at a safe conclusion as to the truth of the matters in controversy. Georgian Villa, Inc. v. City Nat'l Bank, 10 B.R. 79, 1981 Bankr. LEXIS 4745 (Bankr. N.D. Ga. 1981).

If both parties are equally to blame for delay, neither should be allowed to invoke the rule of laches in order to gain advantage over an adversary. City of McRae v. Folsom, 191 Ga. 272, 11 S.E.2d 900, 1940 Ga. LEXIS 632 (1940).

Delay which is not beyond statute of limitation cannot be held laches sufficient to bar the action. Cosby v. A.M. Smyre Mfg. Co., 158 Ga. App. 587, 281 S.E.2d 332, 1981 Ga. App. LEXIS 2324 (1981).

Delay is excusable when induced by adverse party; a person cannot take advantage of delay which that person personally caused or to which the person contributed. City of McRae v. Folsom, 191 Ga. 272, 11 S.E.2d 900, 1940 Ga. LEXIS 632 (1940).

If party sues substantially as soon as occasion arises for assertion of the party's rights, laches is not imputable to that party. Cooper v. Aycock, 199 Ga. 658, 34 S.E.2d 895, 1945 Ga. LEXIS 409 (1945).

Laches does not arise from mere lapse of time. Columbus Bank & Trust Co. v. Dempsey, 120 Ga. App. 5, 169 S.E.2d 349, 1969 Ga. App. LEXIS 659 (1969).

Mere lapse of time is not itself laches. Grant v. Fourth Nat'l Bank, 229 Ga. 855, 194 S.E.2d 913, 1972 Ga. LEXIS 807 (1972).

Period from which laches is determined is fixed according to circumstances in each case. Eller v. McMillan, 174 Ga. 729, 163 S.E. 910, 1932 Ga. LEXIS 126 (1932).

Laches is equitable doctrine which is independent of statute of limitations, and as to lapse of time necessary for invoking doctrine of laches it may or may not correspond with time specified in the statute of limitations. Prudential Ins. Co. v. Sailors, 69 Ga. App. 628, 26 S.E.2d 557, 1943 Ga. App. LEXIS 155 (1943).

Although lapse of time is an important element of laches, unless the case falls within operation of statute of limitations, there is no fixed period within which person must assert claim or be barred by laches; length of time depends on circumstances of particular case. Cooper v. Aycock, 199 Ga. 658, 34 S.E.2d 895, 1945 Ga. LEXIS 409 (1945).

Courts may use analogy to statutes of limitations. — Prior to enactment of this section, equity courts acted by analogy to statute of limitations. McDonald v. Sims, 3 Ga. 383, 1847 Ga. LEXIS 118 (1847).

While equitable doctrine of laches operates independently of any statute of limitations, courts of equity usually act in obedience and in analogy to statutes of limitations, in cases when it would not be unjust and inequitable to do so. Cooper v. Aycock, 199 Ga. 658, 34 S.E.2d 895, 1945 Ga. LEXIS 409 (1945).

In fixing time when bar of laches may be interposed, the law did not measure altogether by the lapse of time, as was shown by former Code 1933, § 37-119 (see now O.C.G.A. § 23-1-25). Wright v. City of Metter, 192 Ga. 75, 14 S.E.2d 443, 1941 Ga. LEXIS 390 (1941).

Unreasonable delay until after death of essential witnesses, practically precluding court from arriving at safe conclusion as to truth of matters in controversy, will bar action for cancellation of deed. Stephens v. Walker, 193 Ga. 330, 18 S.E.2d 537, 1942 Ga. LEXIS 385 (1942).

Three-month delay in service. — No abuse of discretion resulted from an order dismissing a personal injury complaint based on insufficient service of process as

the trial judge properly found that the plaintiff's delay in serving the complaint almost three months after learning the defendant's whereabouts, and after the statute of limitation had expired, was attributable to a failure to exercise either reasonable diligence or the greatest possible diligence in doing so. Williams v. Wendland, 283 Ga. App. 109, 640 S.E.2d 684, 2006 Ga. App. LEXIS 1560 (2006).

Equitable action to cancel deed on ground of fraud, which clearly shows that complainant failed to use even slightest diligence to discover fraud, fails to allege cause of action. Hillis v. Clark, 222 Ga. 604, 150 S.E.2d 922, 1966 Ga. LEXIS 574 (1966).

Long acquiescence or laches by parties out of possession is productive of much hardship and injustice to others, and cannot be excused without showing some actual hindrance or impediment caused by fraud or concealment of party in possession. Bryan v. Tate, 138 Ga. 321, 75 S.E. 205, 1912 Ga. LEXIS 294 (1912).

Minority stockholder who postpones complaint that corporate act is ultra vires or irregular for an unreasonable time, or with full knowledge allows large operations to be completed or money to be expended before the stockholder brings suit, is barred by laches and acquiescence of any right to equitable relief with respect thereto. Norris v. Osburn, 243 Ga. 483, 254 S.E.2d 860, 1979 Ga. LEXIS 951 (1979).

Twelve years was unreasonable time to bring action on ultra vires contract of corporation. Winter v. Southern Sec. Co., 155 Ga. 590, 118 S.E. 214, 1923 Ga. LEXIS 130 (1923).

Voluntary delay of three years after knowledge of fraud perpetrated seven years before was inexcusable and barred petitioner of any right of action which the petitioner might have had. Reynolds & Hamby Estate Mtg. Co. v. Martin, 116 Ga. 495, 42 S.E. 796, 1902 Ga. LEXIS 148 (1902); Bryan v. Tate, 138 Ga. 321, 75 S.E. 205, 1912 Ga. LEXIS 294 (1912).

Delay of 18 years after knowledge of fraud is laches. McWhorter v. Cheney, 121 Ga. 541, 49 S.E. 603, 1904 Ga. LEXIS 225 (1904).

Thirty-six year delay was an inordinate delay. — When an executrix waited 36 years after certain property was titled in a brother's name to bring a constructive trust in favor of a decedent's estate under former O.C.G.A. § 53-12-93(a) (see now O.C.G.A. § 53-12-132), the delay was inordinate; therefore, the claim was barred by laches under O.C.G.A. § 9-3-3 and summary judgment was properly granted. Cagle v. Cagle, 277 Ga. 219, 586 S.E.2d 665, 2003 Ga. LEXIS 783 (2003).

Action to complete sale by sheriff was barred by laches, when two years elapsed before it was brought. Hardin v. Adair, 140 Ga. 263, 78 S.E. 1073, 1913 Ga. LEXIS 102 (1913).

Since an owner of property allowed street improvements to be made and enjoyed benefits thereof for several years without taking legal proceedings to prevent expenditure of money for project, the owner was estopped from enjoining sale of the owner's property to pay assessments. Raines v. Clay, 161 Ga. 574, 131 S.E. 499, 1926 Ga. LEXIS 304 (1926).

Mere failure of insured to read policy does not amount to such laches as will debar the insured from having such policy reformed for mistake therein. Southern Feed Stores, Inc. v. Great Am. Indem. Co., 182 Ga. 442, 185 S.E. 723, 1936 Ga. LEXIS 382 (1936).

Defendant's suit is properly barred by laches when defendant's claim of a resulting trust in a house is based on payments made 35 years ago to a person who is the sole record owner and is now dead. Stone v. Williams, 265 Ga. 480, 458 S.E.2d 343, 1995 Ga. LEXIS 390 (1995).

Laches does not apply to mandamus. Addis v. Smith, 226 Ga. 894, 178 S.E.2d 191, 1970 Ga. LEXIS 728 (1970), overruled, Marsh v. Clarke County Sch. Dist., 292 Ga. 28, 732 S.E.2d 443, 2012 Ga. LEXIS 791 (2012).

Laches not available in legal action. — Because defendants were timely served in a renewal action brought under O.C.G.A. § 9-2-61(a), the defendants could not assert as a defense the fact that the defendants were served five years after the initial action, which had been dismissed following service of defendants. The equitable doctrine of laches, O.C.G.A. § 9-3-3, did not apply in a personal injury action because the action was a legal action. Boyd v. Robinson, 299 Ga. App. 795,

683 S.E.2d 862, 2009 Ga. App. LEXIS 977 (2009), aff'd, 288 Ga. 53, 701 S.E.2d 165, 2010 Ga. LEXIS 772 (2010).

Plaintiff's right to recover share of remainder estate is plain statutory right not subject to bar of laches. Perkins v. First Nat'l Bank, 221 Ga. 82, 143 S.E.2d 474, 1965 Ga. LEXIS 389 (1965).

Laches not applicable to recovery of land. — Doctrine of stale demands, or laches, is purely equitable and is not applicable to complaint for recovery of land. Latham v. Fowler, 192 Ga. 686, 16 S.E.2d 591, 1941 Ga. LEXIS 557 (1941); Jones v. Tri-State Elec. Coop., 212 Ga. 577, 94 S.E.2d 497, 1956 Ga. LEXIS 449 (1956).

Laches will not be imputed to one in peaceable possession of property for delay in resorting to court of equity to establish right to legal title. Shirley v. Shirley, 209 Ga. 366, 72 S.E.2d 719, 1952 Ga. LEXIS 533 (1952).

While equity follows the law as to limitations of actions, neither laches nor statute of limitations will run against one in peaceable possession of property under claim of ownership for delay in resorting to courts of equity to establish one's rights. Crow v. Whitfield, 105 Ga. App. 436, 124 S.E.2d 648, 1962 Ga. App. LEXIS 949 (1962).

Quiet title actions. — Trial court did not err in failing to rule that a railroad's petition to quiet title was barred by laches as no evidence was presented regarding when the railroad became aware of the contestant's affidavits of possession, the reason for the railroad's delay in filing a petition to quiet title, whether the railroad could have acted sooner than it did, and whether any evidence was lost due to the delay. Thompson v. Cent. of Ga. R.R., 282 Ga. 264, 646 S.E.2d 669, 2007 Ga. LEXIS 415 (2007).

Laches does not apply to uncollected child support. — Judgment forgiving a father's child support arrearage based on the mother's delay in making the claim was reversed because laches does not apply to claims for uncollected child support and the dormancy statute, O.C.G.A. § 9-12-60(a), did not apply to child support orders entered after July 1, 1997, such as the one involved in the case. Wynn v. Craven, 301 Ga. 30, 799 S.E.2d 172, 2017 Ga. LEXIS 240 (2017).

Seven-year bar for implied trusts. — Although there is no statute fixing seven years as bar in cases of implied trusts, the court has held by analogy that the period of seven years will apply in such cases. Eller v. McMillan, 174 Ga. 729, 163 S.E. 910, 1932 Ga. LEXIS 126 (1932).

RESEARCH REFERENCES

Am. Jur. 2d.

27A Am. Jur. 2d, Equity, §§ 107 et seq., 161 et seq . 51 Am. Jur. 2d, Limitation of Actions, §§ 5 et seq., 10 et seq., 74 et seq., 155 et seq.

C.J.S.

30A C.J.S., Equity, § 127 et seq. 54 C.J.S., Limitation of Actions, § 125 et seq.

ALR.

Laches: waiver or estoppel on part of government respecting obstruction to navigation, 2 A.L.R. 1694.

Laches as preventing recovery of property diverted from one religious sect or denomination to another, 18 A.L.R. 692.

Estoppel by delay, after knowledge, in disclosing forgery of commercial paper, 25 A.L.R. 177; 50 A.L.R. 1374.

Check in payment of interest or installment of principal as tolling statute of limitations, 28 A.L.R. 84; 125 A.L.R. 271.

Lapse of time as affecting rights and remedies of parties to absolute deed intended as mortgage, 28 A.L.R. 554.

Institution of suit as relieving one of charge of laches precluding relief in equity, 43 A.L.R. 921.

Effect of recovery of judgment on unfiled or abandoned claim after expiration of time allowed for filing claim against estate, 60 A.L.R. 736.

Laches of stockholders in attacking sale of corporate assets, 70 A.L.R. 53.

Estoppel against defense of limitation in tort actions, 77 A.L.R. 1044.

Waiver of, or estoppel to assert, debtor's exemption, by laches or delay, 82 A.L.R. 648.

Right to equitable relief from usury as affected by laches, 111 A.L.R. 126.

Applicability of statute of limitations or doctrine of laches as between husband and wife, 121 A.L.R. 1382.

Estoppel to rely on statute of limitations, 130 A.L.R. 8; 24 A.L.R.2d 1413.

Statute of limitations or doctrine of laches in relation to declaratory actions, 151 A.L.R. 1076.

Mandamus as subject to statute of limitations, 155 A.L.R. 1144.

Applicability of statute of nonclaim or limitation statute as between surviving partner and estate of deceased partner, 157 A.L.R. 1114.

State statute of limitations as applicable in equity suits in federal court to enforce a federally created right, 162 A.L.R. 724.

Pleading laches, 173 A.L.R. 326.

Delay in bringing suit as affecting right to divorce, 4 A.L.R.2d 1321.

Delay of stockholders in exercising their right to convert their stock into other class of stock or corporate obligation, 10 A.L.R.2d 587.

Delay as defense to action for accounting between joint adventurers, 13 A.L.R.2d 765.

Laches as precluding cancellation of or other relief against release for personal injuries, 34 A.L.R.2d 1314.

When statute of limitations starts to run against enforcement of constructive trust, 55 A.L.R.2d 220.

Right to attack validity of statute, ordinance, or regulation relating to occupational or professional license as affected by applying for, or securing license, 65 A.L.R.2d 660.

What constitutes laches barring right to relief in taxpayer's action, 71 A.L.R.2d 529.

When statute of limitations or laches commences to run against action to set aside fraudulent conveyance or transfer in fraud of creditors, 100 A.L.R.2d 1094.

Delay in asserting contractual right to arbitration as precluding enforcement thereof, 25 A.L.R.3d 1171.

Settlement negotiations as estopping reliance on statute of limitations, 39 A.L.R.3d 127.

Agreement of parties as estopping reliance on statute of limitations, 43 A.L.R.3d 756.

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations, 45 A.L.R.3d 630.

Delay caused by other litigation as estopping reliance on statute of limitations, 45 A.L.R.3d 703.

Estoppel or laches precluding lawful spouse from asserting rights of decedent's estate as against putative spouse, 81 A.L.R.3d 110.

Attorneys at law: delay in prosecution of disciplinary proceeding as defense or mitigating circumstance, 93 A.L.R.3d 1057.

Insurer's waiver of defense of statute of limitations, 104 A.L.R.5th 331.

Estoppel of insurer to assert statute-of-limitations defense — Homeowners' insurers, 4 A.L.R.6th 509.

Proof of foreign official record under Rule 44(a)(2) of Federal Rules of Civil Procedure, 41 A.L.R. Fed. 784.

9-3-4. [Reserved] Limitations as to trusts.

History.

Orig. Code 1863, § 3128; Code 1868, § 3140; Code 1873, § 3196; Code 1882, § 3196; Civil Code 1895, § 3198; Civil Code 1910, § 3782; Code 1933, § 3-713; repealed by Ga. L. 1991, p. 810, § 3, effective July 1, 1991.

9-3-5. Beneficiaries barred along with trustee.

Where a trustee is barred, the beneficiaries of the estate represented by him shall also be barred.

History.
Civil Code 1895, § 3773; Civil Code 1910, § 4367; Code 1933, § 3-710.
History of Section.
This Code section is derived from the decision in Salter v. Salter, 80 Ga. 178, 4 S.E. 391 (1887).

JUDICIAL DECISIONS

Beneficiaries barred by trustee's nonaction. — Under this section, cestuis que trustent are barred by nonaction of trustee, where legal title is vested in the trustee. Clark v. Flannery & Co., 99 Ga. 239, 25 S.E. 312, 1896 Ga. LEXIS 321 (1896); Miller v. Butler, 121 Ga. 758, 49 S.E. 724 (1905).

Minority of cestui que trust is immaterial. Pendergrast v. Foley, 8 Ga. 1, 1850 Ga. LEXIS 1 (1850).

Beneficiaries of homestead estate are barred by this section when head of family is barred. Taylor v. James, 109 Ga. 327, 34 S.E. 674, 1899 Ga. LEXIS 646 (1899).

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Limitation of Actions, § 74 et seq., 76. 76 Am. Jur. 2d, Trusts, § 645 et seq.
C.J.S.
54 C.J.S., Limitations of Actions, §§ 41, 257 et seq.
ALR.
Scope and application of exception, as regards causes of action cognizable at law, to general rule exempting express trusts from operation of statute of limitations, 122 A.L.R. 286.

Pledge as a trust as regards statute of limitations, 139 A.L.R. 1333.

Attorney as trustee for purpose of running of statute of limitations against claim for money or property received or collected by him, 151 A.L.R. 1388.

When statute of limitations starts to run against enforcement of resulting trust, 45 A.L.R.2d 382.

9-3-6. Applicability of limitations to setoffs.

The statute of limitations applies to the subject matter of setoff as well as to the plaintiff's demand.

History.
Orig. Code 1863, § 3399; Code 1868, § 3418; Code 1873, § 3470; Code 1882, § 3470; Civil Code 1895, § 5089; Civil Code 1910, § 5673; Code 1933, § 3-708.

Law reviews.
For comment, "Antenuptial Agreements and Divorce in Georgia: Scherer v. Scherer," see 17 Ga. L. Rev. 231 (1982).

JUDICIAL DECISIONS

This section prevents setoff of demands barred by statute of limitations. Lee v. Lee, 31 Ga. 26, 1860 Ga. LEXIS 292 (1860).

Application to counties. — This section applied to counties. MacNeill v. McElroy, 193 Ga. 55, 17 S.E.2d 169, 1941 Ga. LEXIS 582 (1941).

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Limitation of Actions, § 98 et seq.

ALR.
Claim of government against taxpayer which is barred by lapse of time as avail-

able to defeat or diminish claim of taxpayer against government, or vice versa, 109 A.L.R. 1354; 130 A.L.R. 838; 154 A.L.R. 1052; 12 A.L.R.2d 815.

Claim barred by limitation as subject of setoff, counterclaim, recoupment, cross bill, or cross action, 1 A.L.R.2d 630.

Personal representative's right of retainer or setoff, against debtor's distributive share of estate, of debt barred by statute of limitations, 39 A.L.R.2d 675.

When statute of limitations begins to run against action to recover money paid by mistake, 79 A.L.R.3d 754.

9-3-7. When mutual accounts postpone running of limitations.

The statute of limitations for a mutual account begins to run on the date of the last item thereof. A mutual account must include an indebtedness on both sides. Mere entries of credits of partial payments shall not be sufficient.

History.

Civil Code 1895, § 3769; Civil Code 1910, § 4363; Code 1933, § 3-707.

History of Section.

This Code section is derived from the decision in Lark v. Cheatham, 80 Ga. 1, 5 S.E. 290 (1888).

JUDICIAL DECISIONS

"Mutual account" defined. — Mutual account is one based on course of dealing wherein each party has given credit to the other, on faith of indebtedness to that party. Gunn v. Gunn, 74 Ga. 555, 1885 Ga. LEXIS 361 (1885); Reid v. Wilson Bros., 109 Ga. 424, 34 S.E. 608, 1899 Ga. LEXIS 670 (1899); Howard v. Blanchard, 29 Ga. App. 469, 116 S.E. 33, 1923 Ga. App. LEXIS 72 (1923); Turner v. Davidson, 188 Ga. 736, 4 S.E.2d 814, 1939 Ga. LEXIS 618 (1939).

Basis for doctrine of mutual accounts. — Mutual accounts are based upon express or implied agreement of parties. Gunn v. Gunn, 74 Ga. 555, 1885 Ga. LEXIS 361 (1885); Mobley, Ward & Davis v. Pendergrast, 8 Ga. App. 565, 70 S.E. 18, 1911 Ga. App. LEXIS 53 (1911).

Doctrine of mutual account rests not on notion that every credit in favor of one party is admission by that party of indebtedness to the other or new promise to pay, but upon mutual understanding, either express or implied from conduct of both parties, that they will continue to credit each other until one or both parties desire to terminate course of confidential dealing, at which time the balance will be ascertained, become due, and be paid by the one finally indebted. Turner v. Davidson, 188 Ga. 736, 4 S.E.2d 814, 1939 Ga. LEXIS 618 (1939).

For mutual account to exist, there must be reciprocal extension of credit between the parties, so that each becomes both creditor and debtor of the other. Perry v. Laurens Hdwe. Co., 93 Ga. App. 251, 91 S.E.2d 375, 1956 Ga. App. LEXIS 707 (1956).

In order to make a mutual account, there must be indebtedness on both sides; and in the absence of evidence of such mutual dealings and indebtedness, mere entries of credits of partial payments made on a debt evidenced by open account will not make it such a mutual account as will prevent the statute of limitations from beginning to run until the date of the last item thereof. Vanguard Ins. Agency & Real Estate Co. v. Walker, 157 Ga. App. 838, 278 S.E.2d 723, 1981 Ga. App. LEXIS 2028 (1981).

Entry of partial payments is immaterial. Liseur v. Hitson, 95 Ga. 527, 20 S.E. 498, 1894 Ga. LEXIS 577 (1894).

Mere entries of credits of partial payments made on debt evidenced by open account will not make it such a mutual account as will prevent statute of limitations from beginning to run until date of last item thereof. Williams v. Leide As-

socs., 133 Ga. App. 454, 211 S.E.2d 407, 1974 Ga. App. LEXIS 1110 (1974).

If items in favor of one side are mere payments on indebtedness to the other, the account is not mutual. Turner v. Davidson, 188 Ga. 736, 4 S.E.2d 814, 1939 Ga. LEXIS 618 (1939).

Presumption of law exists that agreement once proved continues. Gunn v. Gunn, 74 Ga. 555, 1885 Ga. LEXIS 361 (1885).

Whether or not account is mutual is question of fact. Turner v. Davidson, 188 Ga. 736, 4 S.E.2d 814, 1939 Ga. LEXIS 618 (1939).

Jury is to decide question of whether account is mutual or not. Kirven & Co. v. Thornton, 110 Ga. 276, 34 S.E. 848, 1899 Ga. LEXIS 545 (1899).

Statute of limitations begins to run with respect to mutual accounts from date of last item embraced within mutual dealings. Turner v. Davidson, 188 Ga. 736, 4 S.E.2d 814, 1939 Ga. LEXIS 618 (1939).

Mutual claims between shareholders and former partners. — Any mutual claims in general accounting between shareholders and former partners in corporation formed from partnership, for indebtedness existing between partner and corporation, would not be barred by the running of the statute. Jones v. J.S.H. Co., 199 Ga. 755, 35 S.E.2d 288, 1945 Ga. LEXIS 368 (1945).

Return of refrigerator was not transaction in which buyer extended credit to seller, absent indication that buyer did not receive credit for value of refrigerator immediately upon its return. Perry v. Laurens Hdwe. Co., 93 Ga. App. 251, 91 S.E.2d 375, 1956 Ga. App. LEXIS 707 (1956).

Setoff of barred account against promissory note given in such dealings will not be permitted. Adams v. Holland, 101 Ga. 43, 28 S.E. 434, 1897 Ga. LEXIS 152 (1897).

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Accounts and Accounting, § 22. 51 Am. Jur. 2d, Limitation of Actions, § 112 et seq.

C.J.S.

54 C.J.S., Limitation of Actions, § 210.

ALR.

Limitation of actions: acknowledgment, new promise, or payment by grantee of mortgaged premises, 18 A.L.R. 1027; 142 A.L.R. 615.

Check in payment of interest or installment of principal as tolling statute of limitations, 28 A.L.R. 84; 125 A.L.R. 271.

Payment on account as removing or tolling statute of limitation, 36 A.L.R. 346; 156 A.L.R. 1082.

What constitutes an open, current account within the statute of limitations, 39 A.L.R. 369; 57 A.L.R. 201.

Bar of statute of limitations against action to recover principal of obligation as affecting right to recover interest, 115 A.L.R. 728.

Ratification of unauthorized credit on debt or obligation as tolling, or removing bar of, statute of limitations, 124 A.L.R. 234.

When is account "mutual" for purposes of rule that limitations run from last item in open, current, and mutual account, 45 A.L.R.3d 446.

ARTICLE 2

SPECIFIC PERIODS OF LIMITATION

Cross references.

Time limitation on bringing of actions against counties, § 36-11-1.

Time limitation on actions on bonds given by person handling public funds, § 45-8-9.

Time limitation on bringing of actions against railroad companies for recovery of

damages for any wrong or injury inflicted by such companies, § 46-1-2.

Time limitation on bringing of product liability actions, § 51-1-11.

JUDICIAL DECISIONS

Effect of commencement and service of process statutes. — By holding that service of process does not relate back to toll statutes of limitations unless the plaintiff has acted diligently, the Georgia courts have interpreted O.C.G.A. §§ 9-11-3 and 9-11-4 as integral parts of the state statutes of limitations. Cambridge Mut. Fire Ins. Co. v. City of Claxton, 720 F.2d 1230, 1983 U.S. App. LEXIS 14793 (11th Cir. 1983).

RESEARCH REFERENCES

ALR.

Statute of limitations as applied to certificate of deposit, 23 A.L.R. 7; 128 A.L.R. 157.

Applicability to limitation prescribed by policy of insurance or by special statutory provision in relation to insurance of provisions of statute of limitations extending time or fixing time when action deemed commenced, 23 A.L.R. 97; 149 A.L.R. 483.

Limitation of actions: availability of statute, and time when it begins to run, where one assumes and agrees to pay another's debt, 31 A.L.R. 1056.

When statute of limitations begins to run against action to recover interest, 36 A.L.R. 1085.

When limitation begins to run against action to enforce stockholder's superadded liability, 55 A.L.R. 1068; 137 A.L.R. 788.

When limitation commences to run against action to enforce personal liability of bank officers or directors for receiving deposits after knowledge of bank's unsafe condition, 78 A.L.R. 897.

When statute of limitations begins to run against action to recover upon contract payable in installments, 82 A.L.R. 316.

Liability insurance: limitation of time within which to sue insurer, 83 A.L.R. 748.

Rendition of bank of statement of balance to depositor's credit as starting statute of limitations in respect of amount claimed in excess of balance shown, 87 A.L.R. 344.

When does statute of limitations commence to run against action for breach of covenant against encumbrances, 99 A.L.R. 1050.

When cause of action between master and servant deemed to be upon a liability created by statute within contemplation of statute of limitations, 104 A.L.R. 462.

When does limitation or laches commence to run against suit to reform an instrument, 106 A.L.R. 1338.

When statute of limitation commences to run against an action based on breach of duty by recording officer, 110 A.L.R. 1067.

Action by one not in possession of land to cancel deed upon ground of fraud as within statute of limitations applicable to actions for relief upon ground of fraud, or statute relating to actions for recovery of real property, 118 A.L.R. 199.

Statute of limitation applicable to action to enforce superadded statutory liability of stockholder of bank or other corporation, in absence of limitation provision specifically applicable to such action, 126 A.L.R. 264.

Statute of limitation applicable to suit by creditor to set aside transfers of debtor's property, 128 A.L.R. 1289.

Necessity of introducing evidence dehors written contract as affecting question as to which statute of limitations applies, 129 A.L.R. 603.

Commencement of running of statute of limitations against option or right in nature of option exercisable on demand, 132 A.L.R. 429.

Statute of limitations in respect of action or proceeding to establish right to, or recovery of benefits of, pension, 136 A.L.R. 809.

Statute of limitations as affecting suit to enforce mortgage or lien securing debt payable in installments, 153 A.L.R. 785.

Constitutionality, construction, and application of statutes affecting the rights or

remedies of purchasers under antecedent executory contracts for purchase of real property, 153 A.L.R. 1209.

Application of limitation statutes to nonderivative suits based upon wrongs of corporate officers or directors, 174 A.L.R. 1217.

What statute of limitations governs action to reform instrument, 36 A.L.R.2d 687.

What statute of limitations governs action or claim for affirmative relief against usurious obligation or to recover usurious payment, 48 A.L.R.2d 401.

What statute of limitations applies to action under dramshop or civil damage act, 55 A.L.R.2d 1286.

Construction, application, and effect, with reference to statutory causes of action, of statute of forum which admits bar of statute of limitations of other state, 67 A.L.R.2d 216.

Limitation of action: physician's claim for compensation for medical services or treatment, 99 A.L.R.2d 251.

What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor, 1 A.L.R.3d 914.

Validity of contractual time period, shorter than statute of limitations, for bringing action, 6 A.L.R.3d 1197.

Application of statute of limitations to damage actions against public accountants for negligence in performance of professional services, 26 A.L.R.3d 1438.

What statute of limitations covers action for indemnity, 57 A.L.R.3d 833.

What statute of limitations governs action for interference with contract or other economic relations, 58 A.L.R.3d 1027.

What statute of limitations applies to action for surplus of proceeds for sale of collateral, 59 A.L.R.3d 1205.

When statute of limitations begins to run against action to recover money paid by mistake, 79 A.L.R.3d 754.

What statute of limitations governs damage action against attorney for malpractice, 2 A.L.R.4th 284.

Applicability of statute of limitations or doctrine of laches to proceeding to revoke or suspend license to practice medicine, 51 A.L.R.4th 1147.

Application of statute of limitations to actions for breach of duty in performing services of public accountant, 7 A.L.R.5th 852.

Application of statute of limitations in private tort actions based on injury to persons or property caused by underground flow of contaminants, 11 A.L.R.5th 438.

Emotional or psychological "blocking" or repression as tolling running of statute of limitations, 11 A.L.R.5th 588.

What statute of limitations applies to state law action by public sector employee for breach of union's duty of fair representation, 12 A.L.R.5th 950.

Causes of action governed by limitations period in UCC § 2-725, 49 A.L.R.5th 1.

9-3-20. Actions on foreign judgments.

All actions upon judgments obtained outside this state, except judgments for child support or spousal support, or both, shall be brought within five years after such judgments have been obtained.

History.

Laws 1805, Cobb's 1851 Digest, p. 564.; Ga. L. 1855-56, p. 233, § 7; Code 1863, § 2854; Code 1868, § 2862; Code 1873, § 2913; Code 1882, § 2913; Civil Code 1895, § 3760; Civil Code 1910, § 4354; Code 1933, § 3-701; Ga. L. 1997, p. 1613, § 1.

Law reviews.

For annual survey on law of domestic relations, see 42 Mercer L. Rev. 201 (1990).

For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

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Full faith and credit is not denied foreign judgments by this section. Watkins v. Conway, 221 Ga. 374, 144 S.E.2d 721, 1965 Ga. LEXIS 466 (1965), aff'd, 385 U.S. 188, 87 S. Ct. 357, 17 L. Ed. 2d 286, 1966 U.S. LEXIS 76 (1966).

This section does not discriminate against foreign judgments, but focuses on law of the foreign state. Watkins v. Conway, 385 U.S. 188, 87 S. Ct. 357, 17 L. Ed. 2d 286, 1966 U.S. LEXIS 76 (1966).

This section applies to judgments rendered in favor of sister state. Tennessee v. Virgin, 36 Ga. 388, 1867 Ga. LEXIS 51 (1867).

Limitation runs from rendition of foreign judgment, so long as judgment is not dormant under laws of sister state. Frank v. Wolf, 17 Ga. App. 468, 87 S.E. 697, 1916 Ga. App. LEXIS 698 (1916).

Trial court properly found that an action to enforce a Florida judgment entered against a judgment debtor was time-barred under Georgia law, granting the judgment debtor's motion to stay enforcement of said judgment, as the statute of limitations on enforcement of the Florida judgment had run under the law of Georgia, the receiving state, when viewed from the date of rendition of the judgment in the State of Florida, the state in which the judgment originated; moreover, to run the Georgia time limitation from the date of the filing of the judgment rather than from the date of rendition of the judgment would be contrary to the language of the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., and of Georgia's dormancy-of-judgment and judgment-renewal statutes, O.C.G.A. §§ 9-12-60 and 9-12-61. Corzo Trucking Corp. v. West, 281 Ga. App. 361, 636 S.E.2d 39, 2006 Ga. App. LEXIS 991 (2006).

Limitation runs from time of revival of foreign judgment. Fegan v. Bently, 32 Ga. 534, 1861 Ga. LEXIS 227 (1861).

Statute commences to run from point in time when judgment was revived and not from time when judgment was first obtained when judgment was revived according to statute law of state in which it was rendered. Baty v. Holston, 108 Ga. App. 359, 133 S.E.2d 107, 1963 Ga. App. LEXIS 642 (1963).

Section is not bar to action on revived judgment from another state unless five years have elapsed since revival. Baty v. Holston, 108 Ga. App. 359, 133 S.E.2d 107, 1963 Ga. App. LEXIS 642 (1963).

Actions on foreign judgments are barred by this section only if plaintiff cannot revive judgment in state where it was originally obtained. Watkins v. Conway, 385 U.S. 188, 87 S. Ct. 357, 17 L. Ed. 2d 286, 1966 U.S. LEXIS 76 (1966).

Filing foreign judgment under uniform law not barred. — O.C.G.A. § 9-3-20 does not bar the filing and enforcement of a properly authenticated foreign judgment under the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-30 et seq. Wright v. Trust Co. Bank, 219 Ga. App. 551, 466 S.E.2d 74, 1995 Ga. App. LEXIS 1090 (1995).

Grant of a stay of a filed foreign judgment was erroneous because under O.C.G.A. § 9-12-134(b) a judgment rendered by a court in Georgia is not subject to the limitation period imposed on foreign judgments by O.C.G.A. § 9-3-20; rather, judgments filed under the Uniform Law are subject to a stay of execution if they are dormant under O.C.G.A. § 9-12-60(a). Aetna Ins. Co. v. Williams, 237 Ga. App. 881, 517 S.E.2d 109.

Installment payments of alimony. — Under Alabama chancery decree awarding alimony to be paid in monthly installments, plaintiff was not barred until five years after failure of the defendant to abide by decree, even though the judgment was barred. Heakes v. Heakes, 157 Ga. 863, 122 S.E. 777, 1924 Ga. LEXIS 266 (1924).

This section does not begin to run against installment payments of alimony provided for in foreign judgment until maturity and failure to pay them pursuant to requirements of judgment. McLendon v. McLendon, 66 Ga. App. 156, 17 S.E.2d 252, 1941 Ga. App. LEXIS 161 (1941); Albert v. Albert, 86 Ga. App. 560, 71 S.E.2d 904, 1952 Ga. App. LEXIS 1009

(1952); Levine v. Seley, 217 Ga. 384, 123 S.E.2d 1, 1961 Ga. LEXIS 465 (1961).

In action to enforce payment of past due installments of monthly alimony provided for in foreign judgment, recovery may be had for all matured and unpaid installments within period of five years before date of bringing action. McLendon v. McLendon, 66 Ga. App. 156, 17 S.E.2d 252, 1941 Ga. App. LEXIS 161 (1941).

Since right to sue on alimony judgment is vested in parent and not children, five-year limitation period for bringing action on such foreign alimony judgment by plaintiff parent is not tolled because of minority of the children. Levine v. Seley, 217 Ga. 384, 123 S.E.2d 1, 1961 Ga. LEXIS 465 (1961).

Section does not provide statute of limitation defense to action for child support arrearages under foreign state judgment. — When plaintiff-wife and defendant-husband were divorced in Ohio in 1974, and in 1985 plaintiff instituted an action pursuant to the Uniform Reciprocal Enforcement of Support Act (URESA), against defendant, seeking to recover arrearages in child support awarded by the Ohio judgment, and defendant moved to dismiss the URESA petition, insofar as it sought a recovery of child support arrearages which had accrued more than five years prior to the initiation of the action, the trial court correctly denied the defendant's motion to dismiss and entered judgment against the defendant for all accrued arrearages, since O.C.G.A. § 9-3-20 does not provide the defendant with a statute of limitation defense to this URESA action for child support arrearages under the Ohio judgment. Brookins v. Brookins, 190 Ga. App. 852, 380 S.E.2d 494, 1989 Ga. App. LEXIS 439 (1989).

O.C.G.A. §§ 9-3-20 and 9-12-60(a)(1) did not apply to a Uniform Reciprocal Enforcement of Support Act action to enforce arrearages on a foreign child support order. Georgia Dep't of Human Resources v. Deason, 238 Ga. App. 853, 520 S.E.2d 712.

Divorce decree. — Where an action to domesticate a Pennsylvania divorce decree was barred by the five-year statute of limitations in Georgia and, further, there was no authority for a Georgia court to "correct" a domesticated judgment of another state, denial of a summary judgment in favor of a former wife as to her claim for domestication and correction of the decree was proper. Eickhoff v. Eickhoff, 263 Ga. 498, 435 S.E.2d 914, 1993 Ga. LEXIS 713 (1993), overruled, Lee v. Green Land Co., 272 Ga. 107, 527 S.E.2d 204, 2000 Ga. LEXIS 128 (2000).

Enforcement of foreign judgment barred. — When a judgment creditor sought to domesticate a foreign judgment, but did not notify the trial court of the creditor's intent to rely on the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., it was an action to enforce a judgment which was barred because it was filed more than five years after the judgment was entered. Williams v. American Credit Servs., Inc., 229 Ga. App. 801, 495 S.E.2d 121.

Judgments from an in-state federal court are not subject to the statute. — Judgments from federal courts within the state are judgments obtained within the state and are not included in the definition of a foreign judgment that would require domestication before obtaining lien priority. Tunnelite, Inc. v. Estate of Sims, 266 Ga. App. 476, 597 S.E.2d 555, 2004 Ga. App. LEXIS 412 (2004), cert. denied, No. S04C1322, 2004 Ga. LEXIS 760 (Ga. Sept. 7, 2004).

RESEARCH REFERENCES

Am. Jur. 2d.

47 Am. Jur. 2d, Judgments, § 749 et seq. 51 Am. Jur. 2d, Limitation of Actions, § 74 et seq.

C.J.S.

50 C.J.S., Judgments, § 1244 et seq.

ALR.

Foreign judgment based upon or which fails to give effect to a judgment previously rendered at the forum or in the third jurisdiction, 44 A.L.R. 457; 53 A.L.R. 1146.

Statute of limitation applicable to interest on judgment, 120 A.L.R. 719.

Conflict of laws as to time limitations governing action on foreign judgment, 36 A.L.R.2d 567.

Causes of action governed by limitations period in UCC § 2-725, 49 A.L.R.5th 1.

Proof of foreign official record under Rule 44(a)(2) of Federal Rules of Civil Procedure, 41 A.L.R. Fed. 784.

9-3-21. [Reserved] Proceedings to set aside judgments.

History.

Ga. L. 1876, p. 100, § 1; Code 1882, § 2914a; Civil Code 1895, § 3764; Civil Code 1910, § 4358; Code 1933, § 3-702; repealed by Ga. L. 1986, p. 294, § 2, effective July 1, 1986.

Editor's notes.

Ga. L. 1986, p. 294, § 2 repealed and reserved this Code section, effective July 1, 1986.

9-3-22. Enforcement of rights under statutes, acts of incorporation; recovery of wages, overtime, and damages.

All actions for the enforcement of rights accruing to individuals under statutes or acts of incorporation or by operation of law shall be brought within 20 years after the right of action has accrued; provided, however, that all actions for the recovery of wages, overtime, or damages and penalties accruing under laws respecting the payment of wages and overtime shall be brought within two years after the right of action has accrued.

History.

Ga. L. 1855-56, p. 233, § 12; Code 1863, § 2857; Code 1868, § 2865; Code 1873, § 2916; Code 1882, § 2916; Civil Code 1895, § 3766; Civil Code 1910, § 4360; Code 1933, § 3-704; Ga. L. 1943, p. 333, § 1.

Cross references.

Time limitation on bringing of action by employee to recover difference between wages actually paid and state minimum wage, § 34-4-6.

Time limitation on action to recover wages not paid as result of sex discrimination, § 34-5-5.

Law reviews.

For article, "Some Rescission Problems in Truth-In-Lending, as Viewed From Georgia," see 7 Ga. St. B.J. 315 (1971).

For article surveying local government law in 1984-85, see 37 Mercer L. Rev. 313 (1985).

For survey article on trial practice and procedure for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 439 (2003).

For annual survey of labor and employment law, see 57 Mercer L. Rev. 251 (2005).

JUDICIAL DECISIONS

Analysis

General Consideration
Rights Under Statutes
Recovery for Wages, Overtime, and Other Employment Issues

General Consideration

Purpose of section. — Evident purpose of this section is to fix a period of limitation for special cases not provided for by general statute of limitations or otherwise, when rights accruing to "individuals" are sought to be enforced. McDaniel v. Kelley, 61 Ga. App. 105, 5 S.E.2d 672, 1939 Ga. App. LEXIS 229 (1939).

Legislative intent. — Before enactment of Ga. L. 1855-56, p. 233, § 12, from which this section was codified, there was of force in this state no statute prescribing a limitation as is fixed by the enactment; hence, the legislature enacted a plain and unambiguous statement of the law, which was intended to relieve the feeling of uncertainty and doubt theretofore existing. Nixon v. Nixon, 196 Ga. 148, 26 S.E.2d 711, 1943 Ga. LEXIS 355 (1943).

This section provides omnibus time provision for all statutorily created remedies which do not themselves specify an applicable limitation period. McNeal v. Paine, Webber, Jackson & Curtis, Inc., 598 F.2d 888, 1979 U.S. App. LEXIS 13305 (5th Cir. 1979).

Meaning of "actions". — Word "suits" (now "actions"), as used in this section, is general term denoting any legal proceeding in court. Nixon v. Nixon, 196 Ga. 148, 26 S.E.2d 711, 1943 Ga. LEXIS 355 (1943).

Rights must arise under legislative enactment. — The 20-year statute of limitation of this section has reference only to rights which arise under legislative enactment, and which would not exist except for some Act of the legislature. Williams v. Clemons, 178 Ga. 619, 173 S.E. 718, 1934 Ga. LEXIS 116 (1934); Houston v. Doe, 136 Ga. App. 583, 222 S.E.2d 131, 1975 Ga. App. LEXIS 1427 (1975); McMillian v. City of Rockmart, 653 F.2d 907, 1981 U.S. App. LEXIS 18720 (5th Cir. 1981).

This section applies to cases in which a special liability is created by a special charter or statute. Williams v. Clemons, 178 Ga. 619, 173 S.E. 718, 1934 Ga. LEXIS 116 (1934).

Rights do not arise by contract. — Statutory liability is one that depends for its existence and creation upon special enactment of a statute and not upon contract of the parties on which an additional remedy by statute is given. Pare v. Mahone, 32 Ga. 253, 1861 Ga. LEXIS 169 (1861); Savannah & Ogeechee Canal Co. v. Shuman, 98 Ga. 171, 25 S.E. 415, 1896 Ga. LEXIS 2 (1896); Peavy v. Turner, 107 Ga. 401, 33 S.E. 409, 1899 Ga. LEXIS 83 (1899); Wimbush v. Curry, 8 Ga. App. 223, 68 S.E. 951, 1910 Ga. App. LEXIS 113 (1910); McDaniel v. Kelley, 61 Ga. App. 105, 5 S.E.2d 672, 1939 Ga. App. LEXIS 229 (1939).

Right arising under statute, in contemplation of this section, must arise in virtue of provisions of the statute and not in virtue of contract between the parties. Nixon v. Nixon, 196 Ga. 148, 26 S.E.2d 711, 1943 Ga. LEXIS 355 (1943).

Right must be conferred on specified individuals or class. — Limitation of this section was enacted for rights of action given to individuals by special legislative Acts, such as statute of incorporation. Hendryx v. E.C. Atkins & Co., 79 F.2d 508, 1935 U.S. App. LEXIS 4168 (5th Cir. 1935).

This section refers to statutes that confer rights upon specified individuals or designated class of individuals and not upon general public as a whole. Nixon v. Nixon, 196 Ga. 148, 26 S.E.2d 711, 1943 Ga. LEXIS 355 (1943).

Every statute specifically conferring rights upon individual or class to which individual belongs is embraced in this section. Nixon v. Nixon, 196 Ga. 148, 26 S.E.2d 711, 1943 Ga. LEXIS 355 (1943).

Statute involved must be special enactment which creates liability in favor of particular individuals for 20-year limitation period to apply. Dudley v. Southeastern Factor & Fin. Corp., 57 F.R.D. 177, 1972 U.S. Dist. LEXIS 10998 (N.D. Ga. 1972).

This section is not applicable to rights conferred by law upon members of public at large, and as such, 20-year limitation period provided by this section has no application. Carter v. Seaboard Coast Line R.R., 392 F. Supp. 494, 1974 U.S. Dist. LEXIS 6564 (S.D. Ga. 1974).

This section applies only to rights of action given to individuals by spe-

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cial legislative Acts and is not applicable in cases when a wrong against the public must first be done before a person can be injured. Greene v. Lam Amusement Co., 145 F. Supp. 346, 1956 U.S. Dist. LEXIS 2602 (D. Ga. 1956); McMillian v. City of Rockmart, 653 F.2d 907, 1981 U.S. App. LEXIS 18720 (5th Cir. 1981).

Rights of action within this section are those given to individuals by special legislative Acts, such as a statute of incorporation, but not actions based upon invasion of plaintiff's personal rights, which are common with all other persons, when as part of the public the plaintiff has right of action for injuries sustained. Service Stages, Inc. v. Greyhound Corp., 170 F. Supp. 482, 1959 U.S. Dist. LEXIS 3741 (D. Ga.), aff'd, 268 F.2d 739, 1959 U.S. App. LEXIS 5337 (5th Cir. 1959).

In order to bring case within 20-year limitation period provided by this section, the liability must be one expressly created in favor of individual or class to which plaintiff belongs, as distinguished from one arising under general law in favor of all persons who might be injured. Carter v. Seaboard Coast Line R.R., 392 F. Supp. 494, 1974 U.S. Dist. LEXIS 6564 (S.D. Ga. 1974).

Assignee's recovery of collateral under a life insurance policy. — Bank was properly granted summary judgment in an interpleader action involving competing claims between the bank and a widow to the proceeds of a life insurance policy as the decedent, the widow's spouse, had assigned the policy to the bank as collateral for a loan in 1977 and, despite having had the debt discharged in bankruptcy, the bank was not precluded to recover the bank's collateral. Further, the bank's right to recover did not accrue until the decedent's death; therefore, the statutes of limitation had not expired. Miller v. Branch Banking & Trust Co., 292 Ga. App. 189, 663 S.E.2d 756, 2008 Ga. App. LEXIS 659 (2008).

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Not applicable to migrant workers' breach of contract claims. — Contrary to the employers' argument, the state law breach of contract claims of guest workers from Mexico arising prior to July 11, 2003, were not barred by the two-year statute of limitations in O.C.G.A. § 9-3-22 because 20 C.F.R. § 655.102(b)(14) specified that the workers held contract claims for underpayment, the six-year statute of limitations in O.C.G.A. § 9-3-24 applied; the workers' state law breach of contract claims were filed on July 11, 2005, easily within six years of the dates the claims accrued, and so the claims were timely filed under O.C.G.A. § 9-3-24, and were not subject to dismissal on statute of limitations grounds. Morales-Arcadio v. Shannon Produce Farms, Inc., No. 605CV062, 2006 U.S. Dist. LEXIS 3159 (S.D. Ga. Jan. 12, 2006).

Statutory liability or penalty. — The 20-year statute of limitation is clearly applicable to a statutory liability or penalty. Bankers Fid. Life Ins. Co. v. Oliver, 106 Ga. App. 305, 126 S.E.2d 887, 1962 Ga. App. LEXIS 1073 (1962).

When action was brought on independent statutory remedy afforded by Ga. L. 1976, p. 1564, § 1 (see now O.C.G.A. § 33-22-14(a)), relating to return of unearned insurance premiums, predicated on statutory obligation contained therein, and the statutory remedy was not a codification of a remedy existing at common law but was one arising solely from statute, former Code 1933, § 3-704 (see now O.C.G.A. § 9-3-22) applied. Perry & Co. v. Knight Ins. Underwriters, Inc., 149 Ga. App. 128, 253 S.E.2d 808, 1979 Ga. App. LEXIS 1752 (1979).

Claim by retired fireman for payment of monthly pension, being for a liability fixed by statute, was one to which the 20-year period of limitation applies. Pierce v. Rhodes, 208 Ga. 554, 67 S.E.2d 771, 1951 Ga. LEXIS 433 (1951).

Contribution actions. — The 20-year statute of limitations for contribution actions is governed by O.C.G.A. § 9-3-22. Krasaeath v. Parker, 212 Ga. App. 525, 441 S.E.2d 868, 1994 Ga. App. LEXIS 287 (1994), cert. denied, No. S94C1072, 1994 Ga. LEXIS 705 (Ga. May 13, 1994).

Claim for contribution maintainable under a 20-year statute of limitations, based on an earlier medical malpractice action and alleging that x-ray studies

were negligently interpreted by the defendant radiologist, was barred by the five-year statute of repose for medical malpractice cases. Krasaeath v. Parker, 212 Ga. App. 525, 441 S.E.2d 868, 1994 Ga. App. LEXIS 287 (1994), cert. denied, No. S94C1072, 1994 Ga. LEXIS 705 (Ga. May 13, 1994).

Actions for contribution and indemnity are governed by the 20-year statute of limitations contained in O.C.G.A. § 9-3-22. Union Carbide Corp. v. Thiokol Corp., 890 F. Supp. 1035, 1994 U.S. Dist. LEXIS 20413 (S.D. Ga. 1994); Rolleston v. Cherry, 226 Ga. App. 750, 487 S.E.2d 354.

O.C.G.A. § 9-3-22 is applicable only to rights which arise under legislative enactment and which would not exist except for some act of the legislature; thus, it is not applicable to claims for the right of contribution filed by one co-maker of a debt against another pursuant to O.C.G.A. § 10-7-50, which arises not out of statutory enactment, but is a claim based in equity. Gray v. Currie, No. 1:04-CV-3211-TWT, 2005 U.S. Dist. LEXIS 31407 (N.D. Ga. Nov. 21, 2005).

Contribution and indemnity for subcontractor. — Subcontractor's claim against a consultant for contribution was given by statute, O.C.G.A. § 51-12-32(a), and the subcontractor's claim for indemnity arose by operation of law. Therefore, the subcontractor's suit for contribution and indemnity against the consultant was a claim to enforce rights that accrued by operation of law or a statute and was subject to a 20-year statute of limitations under O.C.G.A. § 9-3-22. Saiia Constr., LLC v. Terracon Consultants, Inc., 310 Ga. App. 713, 714 S.E.2d 3, 2011 Ga. App. LEXIS 502 (2011).

Insurance subrogation actions. — Under O.C.G.A. § 33-7-11(f), in a subrogation action by an insurer to recover personal injury payments made to its insured, the insurer is bound by the two-year statute of limitation of O.C.G.A. § 9-3-33, not the 20-year limitation of O.C.G.A. § 9-3-22. Whirl v. Safeco Ins. Co., 241 Ga. App. 654, 527 S.E.2d 262, 1999 Ga. App. LEXIS 1683 (1999), cert. denied, No. S00C0682, 2000 Ga. LEXIS 437 (Ga. May 26, 2000).

Rights created by insurance company charter and bylaws. — Rights of beneficiary of member of insurance company, contained in charter and bylaws, come within scope of this section. Georgia Masonic Ins. Co. v. Davis, 63 Ga. 471, 1879 Ga. LEXIS 251 (1879) (see now O.C.G.A. § 9-3-22).

Subrogation of motor vehicle accident claims. — Subrogation of insurance claims arising out of motor vehicle accidents are statutory and are subject to the 20-year statute of limitation. Hanover Ins. Co. v. Canal Ins. Co., 163 Ga. App. 20, 293 S.E.2d 509, 1982 Ga. App. LEXIS 2382 (1982).

When charter provision confers right of action upon persons injured by failure of company to repair its canal, this section is applicable. Savannah & Ogeechee Canal Co. v. Shuman, 98 Ga. 171, 25 S.E. 415, 1896 Ga. LEXIS 2 (1896) (see now O.C.G.A. § 9-3-22).

Maryland action to enforce stockholder's liability. — This section and not statute of limitations in Maryland applies to action in Maryland against stockholder in Georgia corporation to enforce liability as stockholder as created by corporate charter. Brunswick Term. Co. v. National Bank, 99 F. 635, 1900 U.S. App. LEXIS 4174 (4th Cir.), cert. denied, 178 U.S. 611, 20 S. Ct. 1029, 44 L. Ed. 1215, 1900 U.S. LEXIS 1704 (1900) (see now O.C.G.A. § 9-3-22).

Section applicable to causes of action arising solely under the Sale of Business Opportunities Act. — General statute of limitations, providing that an action to enforce a right accruing to an individual under state statute must be brought within 20 years after the action accrues, governs a cause of action arising solely under the Sale of Business Opportunities Act, O.C.G.A. § 10-1-410 et seq., since the act itself contains no statute of limitations. Hornsby v. Phillips, 190 Ga. App. 335, 378 S.E.2d 870, 1989 Ga. App. LEXIS 231 (1989).

This section does not apply to actions under § 10(b) of the federal Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.), as this section applies only to special legislative statutes and acts of incorporation which confer rights upon particular individuals or a particular class of individuals and not to statutes which deal with the personal

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legal rights of the public at large. Dudley v. Southeastern Factor & Fin. Corp., 57 F.R.D. 177, 1972 U.S. Dist. LEXIS 10998 (N.D. Ga. 1972) (see now O.C.G.A. § 9-3-22).

Uniform Deceptive Trade Practices Act. — Four-year period of O.C.G.A. § 9-3-31 was applicable for purposes of the Georgia Uniform Deceptive Trade Practices Act, § 10-1-370 et seq., not the 20-year period of O.C.G.A. § 9-3-22. Kason Indus. v. Component Hdwe. Group, 120 F.3d 1199, 1997 U.S. App. LEXIS 22846 (11th Cir. 1997).

Payday lending litigation. — Supreme Court of Georgia is not persuaded that the Georgia legislature intended the period of limitation for bringing an enforcement action pursuant to the Payday Lending Act, O.C.G.A. § 16-17-1, et seq., to be governed by the one-year limitation period for forfeiture actions pursuant to the usury laws; instead, the Court concludes the remedies set forth in the Payday Lending Act are governed by the 20-year statute of limitation set forth in O.C.G.A. § 9-3-1. W. Sky Fin., LLC v. State of Ga. ex rel. Olens, 300 Ga. 340, 793 S.E.2d 357, 2016 Ga. LEXIS 783 (2016).

Right to recover for "injury or damages" contemplated by Uninsured Motorist Act (see now O.C.G.A. § 33-7-11) existed at common law and was not created anew by the legislature. Houston v. Doe, 136 Ga. App. 583, 222 S.E.2d 131, 1975 Ga. App. LEXIS 1427 (1975).

Penalty under O.C.G.A. § 47-17-60. — In mandamus action brought by Board of Commissioners of Peace Officers Annuity and Benefit Fund against county commissioners to collect penalty under Ga. L. 1975, p. 578, § 1 (see now O.C.G.A. § 47-17-60) for failure to pay amounts due, the one-year limitation of former Code 1933, § 3-714 (see now O.C.G.A. § 9-3-28), and not the 20-year limitation of former Code 1933, § 3-704 (see now O.C.G.A. § 9-3-22), applied. Busbee v. Gillis, 241 Ga. 353, 245 S.E.2d 304, 1978 Ga. LEXIS 935 (1978).

Subscription contract. — This section does not apply to an action on a contract of subscription to capital stock. McDonell v. Hines, 28 Ga. App. 197, 110 S.E. 505, 1922 Ga. App. LEXIS 384 (1922).

Section inapplicable under provision requiring entry of contracts on public records. — As the object of O.C.G.A. § 36-9-2, requiring the entry of contracts of conveyance on the minutes of a public official's records, is to give information to the public, the statute of limitation in O.C.G.A. § 9-3-22 was inapplicable because the action arose from a claim that a public officer had failed to perform the officer's official duty. Dade County v. Miami Land Co., 253 Ga. 776, 325 S.E.2d 750, 1985 Ga. LEXIS 590 (1985).

Action for mileage tickets. — This section does not apply to an action for mileage tickets. South Georgia Ry. v. South Ga. Grocery Co., 17 Ga. App. 349, 86 S.E. 939, 1915 Ga. App. LEXIS 416 (1915).

Recovery of interstate freight charges. — This section does not apply to an action by a carrier for interstate freight charges. Cincinnati, N.O. & T.P. Ry. v. Malsby Co., 22 Ga. App. 595, 96 S.E. 710, 1918 Ga. App. LEXIS 614 (1918).

Enforcement of attorney's lien. — Former Civil Code 1895, § 3766 (see now O.C.G.A. § 9-3-22) did not apply to enforcement of attorney's lien created by former Civil Code 1895, § 2814 (see now O.C.G.A. § 15-19-14). Peavy v. Turner, 107 Ga. 401, 33 S.E. 409, 1899 Ga. LEXIS 83 (1899).

When charter declares that "at the time of suits," stockholders shall be individually liable for ultimate payment of debts of bank, in given proportion, this section does not begin to run in favor of stockholders until after date of such a suit. Wheatley v. Glover, 125 Ga. 710, 54 S.E. 626, 1906 Ga. LEXIS 2 (1906).

Subrogation rights under workers' compensation. — O.C.G.A. § 9-3-22 did not apply to a subrogation claim filed pursuant to O.C.G.A. § 34-9-11.1(c), which allows an insurer who has paid worker's compensation benefits to assert the employee's cause of action against a third party who caused the injuries. Newsome v. Department of Admin. Servs., 241 Ga. App. 357, 526 S.E.2d 871, 1999 Ga. App. LEXIS 1633 (1999).

Trial court properly granted judgment on the pleadings to the companies in a former employee's action alleging violations of O.C.G.A. § 34-7-2 because the employee did not file an action claiming that a forfeiture clause in a stock incentive plan constituted a violation of wage requirements within the relevant two-year statute of limitations provided by O.C.G.A. § 9-3-22, and the action was therefore time barred. Milhollin v. Salomon Smith Barney, Inc., 272 Ga. App. 267, 612 S.E.2d 72, 2005 Ga. App. LEXIS 264 (2005).

Federal Civil Rights Act actions. — O.C.G.A. § 9-3-22 applies under § 1981 of the federal Civil Rights Act, 42 U.S.C. § 1983. Freeman v. Motor Convoy, Inc., 700 F.2d 1339, 1983 U.S. App. LEXIS 29536 (11th Cir. 1983).

Since the federal civil rights statute, 42 U.S.C. § 1983, does not contain its own statute of limitations, it is well settled that the period of limitations to be used is the most analogous one provided by state law. The applicable limitations period for first amendment and due process claims is not the six-month period provided by O.C.G.A. § 45-19-36 for filing an administrative complaint for unlawful discrimination committed by a public employer; the most analogous limitations period provided by Georgia law for these claims appears to be either the one provided by O.C.G.A. § 9-3-22 (enforcement of statutory rights) or the one provided by O.C.G.A. § 9-3-33 (injuries to person or reputation). Cook v. Ashmore, 579 F. Supp. 78, 1984 U.S. Dist. LEXIS 20170 (N.D. Ga. 1984).

Appropriate Georgia state statute of limitations to be borrowed in a federal civil rights action under 42 U.S.C. § 1983 is O.C.G.A. § 9-3-22 (rights under statutes), not O.C.G.A. § 45-19-36 (unlawful labor practice). Solomon v. Hardison, 746 F.2d 699, 1984 U.S. App. LEXIS 17132 (11th Cir. 1984).

Appropriate state statute of limitations to be "borrowed" in an action under 42 U.S.C. § 1983 is O.C.G.A. § 9-3-22. East Cent. Health Dist. v. Brown, 752 F.2d 615, 1985 U.S. App. LEXIS 28064 (11th Cir. 1985).

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Action based on common-law grounds not within this section. — Action based on complaint setting forth alternative claims based on express contract and quantum meruit, involving rights recognized under common law and codified from common law, is not action "for the recovery of wages" within meaning of this section, which has reference to rights arising solely from statute. Bass v. Hilts S. Equip. Co., 151 Ga. App. 883, 261 S.E.2d 787, 1979 Ga. App. LEXIS 2725 (1979), dismissed, Hilts Southern Equipment Co. v. Bass, 245 Ga. 591, 267 S.E.2d 623, 1980 Ga. LEXIS 868 (1980).

Action by retired teachers regarding amount of benefits under employment contract. — As a class of retirees had a right to retirement pay from the Teachers Retirement System of Georgia that arose from their contracts of employment and not from a statutory right, the six-year limitations period of O.C.G.A. § 9-3-24 applicable to contract matters was controlling; the 20-year limitations period of O.C.G.A. § 9-3-22 was not the correct limitations period to apply in the circumstances. Teachers Ret. Sys. v. Plymel, 296 Ga. App. 839, 676 S.E.2d 234, 2009 Ga. App. LEXIS 172 (2009).

Employment discrimination action is governed by two-year limitation period provided under this section. Carter v. Seaboard Coast Line R.R., 392 F. Supp. 494, 1974 U.S. Dist. LEXIS 6564 (S.D. Ga. 1974).

In a suit for wages by municipal employees seeking recovery as authorized by a municipal ordinance, the action must be brought within two years. City of Atlanta v. Adams, 256 Ga. 620, 351 S.E.2d 444, 1987 Ga. LEXIS 536 (1987).

Federal civil rights action for back pay. — When federal laws create rights to back pay as part of general remedial relief, this section applies. United States v. Georgia Power Co., 474 F.2d 906, 1973 U.S. App. LEXIS 11611 (5th Cir. 1973).

Two-year period of limitations provided by this section, and not alternative 20-year period, governs portion of federal

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civil rights suits regarding recovery of back pay. Stroud v. Delta Airlines, 392 F. Supp. 1184, 1975 U.S. Dist. LEXIS 13402 (N.D. Ga. 1975), aff'd, Stroud v. Delta Air Lines, Inc., 544 F.2d 892, 1977 U.S. App. LEXIS 10714 (5th Cir. 1977), cert. denied, Stroud v. Delta Air Lines, Inc., 434 U.S. 844, 98 S. Ct. 146, 54 L. Ed. 2d 110, 1977 U.S. LEXIS 3077 (1977).

This section may bar recovery of back pay in actions brought by federal Equal Employment Opportunity Commission. EEOC v. C & D Sportswear Corp., 398 F. Supp. 300, 1975 U.S. Dist. LEXIS 12069 (M.D. Ga. 1975).

Equal Employment Opportunity Commission complaint for recovery of back pay is a private action and is thus bound by this section, the applicable state statute of limitations. EEOC v. Metropolitan Atlanta Girls' Club, Inc., 416 F. Supp. 1006, 1976 U.S. Dist. LEXIS 14330 (N.D. Ga. 1976); EEOC v. Upjohn Corp., 445 F. Supp. 635, 1977 U.S. Dist. LEXIS 12476 (N.D. Ga. 1977).

Two-year limitations period under this section is applicable to actions under 42 U.S.C. § 1981. Roberts v. H.W. Ivey Constr. Co., 408 F. Supp. 622, 1975 U.S. Dist. LEXIS 15057, 1975 U.S. Dist. LEXIS 15415 (N.D. Ga. 1975); Harris v. Anaconda Aluminum Co., 479 F. Supp. 11, 1979 U.S. Dist. LEXIS 13340 (N.D. Ga. 1979).

When actions brought under federal civil rights statutes are seeking back pay as part of general remedial relief, this section, which governs actions for unpaid wages, applies. Grimes v. Pitney Bowes, Inc., 480 F. Supp. 1381, 1979 U.S. Dist. LEXIS 7899 (N.D. Ga. 1979).

Federal civil rights claim for back pay is not barred by the applicable two-year statute of limitations in O.C.G.A. § 9-3-22 since the plaintiff first exhausted the plaintiff's state administrative remedies, the statute of limitations being tolled from the date the plaintiff begins to pursue the plaintiff's state administrative remedies until the date of the final decision of the Georgia Supreme Court. Brown v. Ledbetter, 569 F. Supp. 170, 1983 U.S. Dist. LEXIS 18151 (N.D. Ga. 1983).

Action under 42 U.S.C. § 1981 alleging plaintiff's former employer wrongfully denied the plaintiff severance pay and certain reemployment assistance allegedly given to other employees because of the plaintiff's race had to be filed within two years after the plaintiff knew or reasonably should have known that the alleged discrimination occurred. Greason v. Southeastern R.R. Associated Bureaus, 650 F. Supp. 1, 1986 U.S. Dist. LEXIS 27531 (N.D. Ga. 1986), aff'd, Greason v. Southeastern R.R., 813 F.2d 410, 1987 U.S. App. LEXIS 2537 (11th Cir. 1987).

Limitations periods of O.C.G.A. § 9-3-22 are not tolled by the pendency of a Title VII employment discrimination charge. Calloway v. Westinghouse Elec. Corp., 642 F. Supp. 663, 1986 U.S. Dist. LEXIS 21887 (M.D. Ga. 1986), dismissed without op., 831 F.2d 1069, 1987 U.S. App. LEXIS 13233 (11th Cir. 1987).

Employment discrimination actions under 42 U.S.C. § 1981 are governed by O.C.G.A. § 9-3-22. Calloway v. Westinghouse Elec. Corp., 642 F. Supp. 663, 1986 U.S. Dist. LEXIS 21887 (M.D. Ga. 1986), dismissed without op., 831 F.2d 1069, 1987 U.S. App. LEXIS 13233 (11th Cir. 1987).

In an employment discrimination action under 42 U.S.C. § 1981, the 20-year period of limitation of O.C.G.A. § 9-3-22 applies to claims for declaratory and injunctive relief and the two-year period of limitation applies to claims for damages. Stafford v. Muscogee County Bd. of Educ., 688 F.2d 1383, 1982 U.S. App. LEXIS 24828 (11th Cir. 1982).

There is no relevant federal statute of limitation for 42 U.S.C. § 1981 actions, so the controlling period is that stated in O.C.G.A. § 9-3-22, the most appropriate one provided by state law. Evans v. Meadow Steel Prods., Inc., 572 F. Supp. 250, 1983 U.S. Dist. LEXIS 12823 (N.D. Ga. 1983).

Two-year limitations period for recovery of wages specified in O.C.G.A. § 9-3-22 applies to federal employment discrimination claims for back pay, and the 20-year limitations period to enforce individual statutory rights applies to federal employment discrimination claims for equitable relief. Mack v. W.R. Grace Co., 578 F.

Supp. 626, 1983 U.S. Dist. LEXIS 12776 (N.D. Ga. 1983); Buffington v. General Time Corp., 677 F. Supp. 1186, 1988 U.S. Dist. LEXIS 324 (M.D. Ga. 1988).

Employment discrimination actions under 42 U.S.C. § 1981 most closely resemble state-law "suits for the enforcement of rights accruing to individuals under statutes" and therefore are governed by O.C.G.A. § 9-3-22. Howard v. Roadway Express, Inc., 726 F.2d 1529, 1984 U.S. App. LEXIS 24621 (11th Cir. 1984).

Municipal employees. — Limitation of O.C.G.A. § 9-3-22 applies to actions for wages brought by municipal employees pursuant to municipal ordinances; the trial court correctly determined that a portion of a mechanic's wage claims were time barred pursuant to § 9-3-22. Willis v. City of Atlanta, 265 Ga. App. 640, 595 S.E.2d 339, 2004 Ga. App. LEXIS 214 (2004).

When section begins to run for EEOC complaint. — When Equal Employment Opportunity Commission complaint seeks recovery of back pay, this section begins to run from last act of discrimination. EEOC v. Metropolitan Atlanta Girls' Club, Inc., 416 F. Supp. 1006, 1976 U.S. Dist. LEXIS 14330 (N.D. Ga. 1976).

Filing of an Equal Employment Opportunity Commission charge tolls statute of limitations. Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100, 1975 U.S. Dist. LEXIS 14890 (N.D. Ga. 1975), aff'd, 700 F.2d 1339, 1983 U.S. App. LEXIS 29536 (11th Cir. 1983).

Limitations period for EEOC complaint is tolled from filing of charge with EEOC until notice is given the charging party that conciliation efforts have failed. EEOC v. Metropolitan Atlanta Girls' Club, Inc., 416 F. Supp. 1006, 1976 U.S. Dist. LEXIS 14330 (N.D. Ga. 1976).

This section does not bar Equal Employment Opportunity Commission from seeking injunctive relief. EEOC v. C & D Sportswear Corp., 398 F. Supp. 300, 1975 U.S. Dist. LEXIS 12069 (M.D. Ga. 1975).

Action seeking to recover reasonable value of services, less credit for partial payment in form of reduced rentals, clearly came under four-year limitation of former Code 1933, § 3-706 (see now O.C.G.A. § 9-3-25), and was not an action "for the recovery of wages" under former Code 1933, § 3-704 (see now O.C.G.A. § 9-3-22). Parks v. Brissey, 114 Ga. App. 563, 151 S.E.2d 896, 1966 Ga. App. LEXIS 850 (1966).

Claims under federal Employee Retirement Income Security Act. — O.C.G.A. § 9-3-22 governed employees' claims under the federal Employee Retirement Income Security Act, 29 U.S.C. § 1051 et seq., for backpay, front pay, and reinstatement. Clark v. Coats & Clark, Inc., 865 F.2d 1237, 1989 U.S. App. LEXIS 1809 (11th Cir. 1989).

Action by migrant farm workers. — In a class action in which migrant farm workers' state law breach of contract claims against farmers were in reality wages or contract for wages set by statute, farmers' motion to dismiss the state law claims was granted as to claims before 2004, as they were barred by the two-year statute of limitations in O.C.G.A. § 9-3-22. Antonio-Candelaria v. Gibbs Farms, Inc., No. 1:06-CV-39, 2008 U.S. Dist. LEXIS 16295 (M.D. Ga. Mar. 4, 2008).

Plaintiffs, who were Mexican temporary farm workers, filed a breach of contract claim against defendant employer, alleging the employer violated the terms of an immigration clearance order, which promised compliance with all employ-ment-related law and reimbursement for certain expenses and payment of wages on a weekly basis, the six-year statute of limitations for simple contracts, provided by O.C.G.A. § 9-3-24, applied to such claims, rather than the two-year limitations period of O.C.G.A. § 9-3-22 as to payment of wages because regulations governing the worker program expressly stated that the job clearance order created a contract between the employer and the worker, thus invoking the six-year statute of limitations specified in § 9-3-24. Ramos-Barrientos v. Bland, 728 F. Supp. 2d 1360, 2010 U.S. Dist. LEXIS 22921 (S.D. Ga. 2010).

Action against labor pool. — Action for claims under O.C.G.A. §§ 34-7-2 and 34-7-3 which accrued more than two years prior to the filing of the action was barred by O.C.G.A. § 9-3-22. Sakas v. Settle

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Down Enters., Inc., 90 F. Supp. 2d 1267, 2000 U.S. Dist. LEXIS 3839 (N.D. Ga. 2000).

State court judge's action for unpaid compensation. — Trial court erred in finding that all of a state court judge's claims to recover compensation under state law, O.C.G.A. § 15-7-22, a local law, 2006 Ga. Laws 206, and a county ordinance, were barred by laches; the judge's claims were subject to the two-year limitations period in O.C.G.A. § 9-3-22, meaning the judge could pursue claims on or after October 6, 2015; however, the judge was not entitled to mandamus because the judge had received all the compensation to which the judge was entitled. Cowen v. Clayton County, 306 Ga. 698, 832 S.E.2d 819, 2019 Ga. LEXIS 594 (2019).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Limitation of Actions, § 74 et seq.

ALR.

Servant's right to compensation for extra work or overtime, 25 A.L.R. 218; 107 A.L.R. 705.

When cause of action between master and servant deemed to be upon a liability created by statute within contemplation of statute of limitations, 104 A.L.R. 462.

Conflict of laws as to period of limitation to enforce stockholders' statutory liability, 143 A.L.R. 1442.

Statute of limitations applicable to action to recover minimum wage, overtime compensation, or liquidated damages under Fair Labor Standards Act, 157 A.L.R. 545; 162 A.L.R. 237.

Action by passenger against carrier for personal injuries as based on contract or on tort, with respect to application of statutes of limitation, 20 A.L.R.2d 331.

What statute of limitations is applicable to a damage action under federal civil rights acts, 98 A.L.R.2d 1160.

When does cause of action accrue, for purposes of statute of limitations, against action based upon encroachment of building or other structure upon land of another, 12 A.L.R.3d 1265.

Accrual of cause of action and tolling of limitation period of § 6 of the Federal Employers' Liability Act (45 U.S.C. § 56), 16 A.L.R.3d 637.

Reductions to back pay awards under Title VII of Civil Rights Act of 1964 (42 USCS § 2000e et seq.), 135 A.L.R. Fed 1.

9-3-23. Sealed instruments.

Actions upon bonds or other instruments under seal shall be brought within 20 years after the right of action has accrued. No instrument shall be considered under seal unless so recited in the body of the instrument.

History.

Laws 1806, Cobb's 1851 Digest, p. 566.; Ga. L. 1855-56, p. 233, § 11; Code 1863, § 2856; Code 1868, § 2864; Code 1873, § 2915; Code 1882, § 2915; Civil Code 1895, § 3765; Civil Code 1910, § 4359; Code 1933, § 3-703.

Law reviews.

For comment on Baxley Hdwe. Co. v. Morris, 165 Ga. 359, 140 S.E. 869 (1927), see 1 Ga. B.J. 51 (1927).

For article surveying Real Property law in 1984-1985, see 37 Mercer L. Rev. 343 (1985).

For article, "Construction Law," see 63 Mercer L. Rev. 107 (2011).

JUDICIAL DECISIONS

Phrase "shall be brought" refers to commencement of an action. Jordan v. Bosworth, 123 Ga. 879, 51 S.E. 755, 1905 Ga. LEXIS 619 (1905).

Six-year limitation applicable in absence of allegation of seal. — When appellant commenced action for proceeds of insurance policy over twenty years after the cause of action, if any, arose, and the appellant neither alleged nor presented any evidence to the trial court that the contract of insurance was under seal, the trial court properly applied the six-year limitations period applicable to simple contracts in writing and concluded that the action was barred. Lester v. Aetna Life Ins. Co., 172 Ga. App. 486, 323 S.E.2d 655, 1984 Ga. App. LEXIS 2553 (1984).

Breach of sealed contract to purchase inventory. — Action for breach of a written contract, under seal, to purchase the inventory of a retail business was governed by the four-year limitation period under the UCC and not by the 20-year limitation period applicable to actions on sealed instruments. McLean v. Gray, 180 Ga. App. 794, 350 S.E.2d 815, 1986 Ga. App. LEXIS 2289 (1986).

Definition of sealed instrument part of limitation statute. — Definition of a sealed instrument, including recital of sealing in body thereof, is a part of this limitation statute. Alropa Corp. v. Rossee, 86 F.2d 118, 1936 U.S. App. LEXIS 3674 (5th Cir. 1936).

Easement agreement under seal is within O.C.G.A. § 9-3-23. — After the LLC granted the condominium association an easement to a perpetual nonexclusive right to access the LLC's private roadway system, the association's claims were not time barred as the statute of limitation for an action on an instrument under seal was 20 years; and the easement was an instrument under seal because the body of the easement provided that the duly authorized representatives of the LLC and the association had signed and sealed the agreement; the LLC placed its corporate seal, containing the word "SEAL," adjacent to its signature; and the LLC's intent to seal the contract was shown in the body of the instrument. One Buckhead Loop Condo. Ass'n v. Regent Tower Holdings, 341 Ga. App. 5, 798 S.E.2d 633, 2017 Ga. App. LEXIS 87 (2017).

Designation as sealed instrument and representation of seal required. — Under this section, in order for note to be a sealed instrument, it must not only be designated as such by terms of instrument itself, but there must also be annexed to the signature some representation of a seal. Lanier v. Berry, 41 Ga. App. 34, 151 S.E. 821, 1930 Ga. App. LEXIS 451 (1930).

Word "seal" in a scroll or its equivalent, following signature, does not make instrument one under seal within meaning of this section unless there is a recital of a seal in the body of the instrument. Alropa Corp. v. Rossee, 86 F.2d 118, 1936 U.S. App. LEXIS 3674 (5th Cir. 1936).

Even though an escrow agreement stated it was signed under seal and signatures of the borrowers and sellers were followed by the word "seal," the six-year limitation period for ordinary contracts, not O.C.G.A. § 9-3-23, applied since the signature of the escrow agent was not accompanied by such designation. McCalla v. Stuckey, 233 Ga. App. 397, 504 S.E.2d 269.

Sealing must be indicated, etc. Promissory notes must recite that they are under seal in body of instrument and seal must be attached to signature of maker, before this section applies. Skrine v. Lewis, 68 Ga. 828, 1882 Ga. LEXIS 142 (1882); Barnes v. Walker & Co., 115 Ga. 108, 41 S.E. 243, 1902 Ga. LEXIS 316 (1902); Jackson v. Augusta S.R.R., 125 Ga. 801, 54 S.E. 697, 1906 Ga. LEXIS 282 (1906); Anderson v. Peteet, 6 Ga. App. 69, 64 S.E. 284, 1909 Ga. App. LEXIS 181 (1909).

Contract which did not recite that it was under seal was not a sealed instrument, even though "L.S." appeared after signatures. Cooper v. Dixie Cotton Co., 144 Ga. 33, 86 S.E. 242, 1915 Ga. LEXIS 30 (1915).

In order to render promissory note a sealed instrument, intention to execute it as such must appear both in body of

instrument and after signature. Johnson v. International Agric. Corp., 41 Ga. App. 740, 154 S.E. 465, 1930 Ga. App. LEXIS 1079 (1930).

Written contract which recites in body thereof that it is executed under seal and contains word "seal" or letters "L.S." after signature of party executing the contract is a contract under seal. Crosby v. Burkhalter, 50 Ga. App. 610, 179 S.E. 180, 1935 Ga. App. LEXIS 237 (1935).

Sealed instrument must contain recital in the body of the instrument that it is given under seal, and signature of party to the instrument must have attached thereto a seal or scroll; in other words, there must be both recital in body of instrument of intention to use a seal, as well as affixing of seal or scroll after the signature. Chastain v. L. Moss Music Co., 83 Ga. App. 570, 64 S.E.2d 205, 1951 Ga. App. LEXIS 910 (1951).

Contract was a sealed instrument and 20-year period of limitations applied when the promissory portion of the contract ended "Signed, sealed and delivered by the Buyer . . ." and following buyer's signature on the contract appeared the word "(SEAL)." Telfair Fin. Co. v. Williams, 172 Ga. App. 489, 323 S.E.2d 689, 1984 Ga. App. LEXIS 2555 (1984).

Promissory note was under seal and thus subject to a 20 year statute of limitations since the words "Witness hand and seal" were found in the body of the note, and the decedent's signature was followed by the letters "L. S.;" although the word "my" was not written in the blank, the blank was obviously meant to be filled with either the singular "my" or the plural "our," depending on the number of makers. Brown v. Cooper, 237 Ga. App. 348, 514 S.E.2d 857.

There was no basis for a homebuilder's claim that because the agreements at issue recited that the parties had "hereunto set their hand and seals," the agreements were in fact executed under seal, and were thus subject to the 20-year limit of O.C.G.A. § 9-3-23; in fact, the agreements bore no seal, and were thus subject to the six-year statute of limitation for written contracts. Koncul Enters. v. Fleet Fin., Inc., 279 Ga. App. 39, 630 S.E.2d 567, 2006 Ga. App. LEXIS 451 (2006).

Sealed amendments to unsealed contract did not render the contract one under seal. — Contract for the sale of an office building was not a contract under seal to which the 20-year statute of limitations of O.C.G.A. § 9-3-23 applied, but was governed by the 6-year statute of limitations, O.C.G.A. § 9-3-24, because, although the agreement recited that it was under seal, the word "Seal" did not appear next to the signatures. Five amendments to the agreement, which were executed under seal, did not convert the existing agreement into a contract under seal because there was no evidence the parties intended such a conversion. Perkins v. M&M Office Holdings, LLC, 303 Ga. App. 770, 695 S.E.2d 82, 2010 Ga. App. LEXIS 398 (2010).

Indication of sealing plus "(L.S.)". — When the written lease agreement utilized a basic form consisting of a clause within the body of the contract stating that the parties had "set their hands and affixed their seals" thereto with the letters "(L.S.)" following their signatures, it constituted a valid instrument under seal. Travel Centre, Ltd. v. Starr-Mathews Agency, Inc., 179 Ga. App. 406, 346 S.E.2d 840, 1986 Ga. App. LEXIS 1929 (1986).

"(Seal)" after signatures insufficient. — Option to purchase contract, bearing only the imprimatur "(SEAL)" after the signatures, does not create an instrument under seal. Travel Centre, Ltd. v. Starr-Mathews Agency, Inc., 179 Ga. App. 406, 346 S.E.2d 840, 1986 Ga. App. LEXIS 1929 (1986).

"Seal" after signature required. — Licensor's claim as to the licensee was time barred because the note was missing one of the two necessary elements to make it an instrument under seal as to the licensee since there was no affixed seal or use of the word "seal" after the signature for the licensee. Holiday Hosp. Franchising, LLC v. Oakbrook Realty & Invs., LLC, 817 Fed. Appx. 694, 2020 U.S. App. LEXIS 17103 (11th Cir. 2020).

Recital in note plus notation "seal" after signatures sufficient. — Note that stated that the note was "given under

the hand and seal of each of the undersigned" and the appearance of the notation "(seal)" after the debtors' signatures rendered the document one under seal and subject to a 20-year statute of limitations. Thomas v. Summers, 329 Ga. App. 250, 764 S.E.2d 578, 2014 Ga. App. LEXIS 661 (2014).

State gold bond recited that it was attested to under the seal of the State of Georgia, and so the trial court correctly concluded that the applicable limitation period was that for instruments under seal. Sparagon v. State, 249 Ga. App. 440, 548 S.E.2d 118, 2001 Ga. App. LEXIS 519 (2001).

Plat signed by the surveyor and with the surveyor's seal attached did not qualify as an "instrument under seal" governed by the 20-year statute of limitation. Landmark Eng'g, Inc. v. Cooper, 222 Ga. App. 752, 476 S.E.2d 63.

Recital that note is "given under hand and seal of each party" is a recital therein that it is executed under seal of the party subscribing the party's name thereto as the maker. Crosby v. Burkhalter, 50 Ga. App. 610, 179 S.E. 180, 1935 Ga. App. LEXIS 237 (1935).

Recital in note, "witness my hand and seal," is recital that note is executed under seal of person whose name is subscribed thereto as maker. Crosby v. Burkhalter, 50 Ga. App. 610, 179 S.E. 180, 1935 Ga. App. LEXIS 237 (1935).

Phrase "signed, sealed, and delivered in presence of," or the like, above space for witnessing, does not indicate intention of parties to execute sealed instrument, but is merely statement to be signed by witness or witnesses. Johnson v. International Agric. Corp., 41 Ga. App. 740, 154 S.E. 465, 1930 Ga. App. LEXIS 1079 (1930).

Promissory note under seal is within this section. Barnwell v. Hanson, 80 Ga. App. 738, 57 S.E.2d 348, 1950 Ga. App. LEXIS 765 (1950).

This section is applicable to promissory note executed under seal of maker thereof. Harris v. Stribling, 66 Ga. App. 321, 17 S.E.2d 766, 1941 Ga. App. LEXIS 207 (1941).

Endorsement of a sealed instrument is itself a contract under seal, even though the signature of the endorser has no seal or scroll attached to it, and the statutory bar applicable to the endorser is 20 years; this is true whether endorsement is for purpose of passing title to the instrument or for accommodation purpose of giving credit to it. Pitman v. Pitman, 215 Ga. 585, 111 S.E.2d 721, 1959 Ga. LEXIS 548 (1959).

This section applies to contract of endorsement on sealed instrument, even though no seal appears after signature of payee. Milledge v. Gardner, 29 Ga. 700, 1860 Ga. LEXIS 278 (1860); Baldwin Fertilizer Co. v. Carmichael, 116 Ga. 762, 42 S.E. 1002, 1902 Ga. LEXIS 251 (1902).

Unsealed acknowledgment of original sealed obligation. — Unsealed written acknowledgment or recognition of original obligation under seal revives or extends such obligation for period of time during which a sealed paper would run, which is 20 years. King v. Edel, 69 Ga. App. 607, 26 S.E.2d 365, 1943 Ga. App. LEXIS 149 (1943).

Sealed writing implying promise to pay indebtedness. — Signed and sealed writing acknowledging indebtedness by maker to another named person, in a certain sum, and specifying when it is to become due, imports promise to pay said sum at the time specified, and, although promise is not express, but understood, period of limitation for an action thereon is 20 years. King v. Edel, 69 Ga. App. 607, 26 S.E.2d 365, 1943 Ga. App. LEXIS 149 (1943).

Recital in a deed which is under seal, legally executed and accepted by the grantee, obligating the grantor to pay grantee sum of money, is not barred by statute of limitations until 20 years have elapsed from date of delivery of the deed. King v. Edel, 69 Ga. App. 607, 26 S.E.2d 365, 1943 Ga. App. LEXIS 149 (1943).

Breach of covenants in sealed deed. — When grantee accepts a deed which is under seal and thereby becomes bound by covenants therein, period of limitation applicable to action for a breach of such covenants is 20 years. Brice v. National Bondholders Corp., 187 Ga. 511, 1 S.E.2d 426, 1939 Ga. LEXIS 423 (1939) (decided prior to enactment of O.C.G.A. § 9-3-29).

Statute of limitations on sheriff's official bond is 20 years, since such bond

is under seal and there is no express statute providing for different period of limitation of actions. Washburn v. Foster, 87 Ga. App. 132, 73 S.E.2d 240, 1952 Ga. App. LEXIS 630 (1952).

Contracts for purchase of land. — This section has been applied to contracts for purchase of land, which would include contracts for purchase of an interest in land, such as purported lease brought to be canceled. Baxley Hdwe. Co. v. Morris, 165 Ga. 359, 140 S.E. 869, 1927 Ga. LEXIS 394 (1927) (for comment, see 1 Ga. B.J. 51 (1927)).

Promissory note under seal is within this section. — O.C.G.A. § 9-3-23, not the four-year limitation prescribed by the UCC, applied to an action on a promissory note that was secured by defendant's automobile since the note was a contract under seal. Georgia Receivables, Inc. v. Cheatham, 216 Ga. App. 656, 455 S.E.2d 375, 1995 Ga. App. LEXIS 260 (1995).

Promissory note executed in another state, which does not contain recital in body thereof that it is under seal, is not a sealed instrument upon which suit may be brought at any time within 20 years after right of action accrues, even though the word "seal" is written after the signature to the note. Gaffe v. Williams, 68 Ga. App. 299, 22 S.E.2d 765, 1942 Ga. App. LEXIS 113 (1942).

Assignee's recovery of collateral under a life insurance policy. — Bank was properly granted summary judgment in an interpleader action involving competing claims between the bank and a widow to the proceeds of a life insurance policy as the decedent, the widow's spouse, assigned the policy to the bank as collateral for a loan in 1977 and, despite having the debt discharged in bankruptcy, the bank was not precluded to recover the bank's collateral. Further, the bank's right to recover did not accrue until the decedent's death; therefore, the statutes of limitation had not expired. Miller v. Branch Banking & Trust Co., 292 Ga. App. 189, 663 S.E.2d 756, 2008 Ga. App. LEXIS 659 (2008).

Computing 20-year period. — Day promissory note was due and payable is to be excluded in reckoning period named in statute of limitations. Harris v. Stribling, 66 Ga. App. 321, 17 S.E.2d 766, 1941 Ga. App. LEXIS 207 (1941).

Accrual of action. — When a second mortgage note specified that a default on the first mortgage executed on the same date would constitute a default on the second mortgage, a cause of action for payment of the second note accrued on the date of default on the first note. Blanton v. Whelan, 232 Ga. App. 631, 502 S.E.2d 746.

Maturity date of debt instruments under seal is the commencing point for when a right of action accrues for purposes of the 20-year statute of limitation. Sparagon v. State, 249 Ga. App. 440, 548 S.E.2d 118, 2001 Ga. App. LEXIS 519 (2001).

Statutory reversion occurs automatically and independently of statutes of limitation.— Statutory reversion of title held to occur automatically and independently of operation of statutes of limitation, and once automatic reversion occurred the deed holder's right of foreclosure was extinguished, regardless of the running (or tolling) of any applicable limitation period, and regardless of any equitable considerations. White Properties Investments, LLC v. DIP Lending I, LLC, 366 Ga. App. 242, 881 S.E.2d 706, 2022 Ga. App. LEXIS 544 (2022).

Questions of fact remained to be determined. — Grant of summary judgment to the creditors was reversed because questions of fact existed as to whether one creditor's failure to confirm the foreclosure sale barred the claims asserted by it and the other creditor as well as a question of fact existed as to whether all of the debts at issue, including the 2004 loan, were owed to a single creditor and were given for the same purpose. Bryant v. Optima Int'l, 339 Ga. App. 696, 792 S.E.2d 489, 2016 Ga. App. LEXIS 642 (2016).

OPINIONS OF THE ATTORNEY GENERAL

It is necessary to retain an entire highway project file for a 20-year period in order to adequately protect the state's interests in compliance with state

law because highway construction contracts are sealed contracts and are therefore subject to the 20-year statute of limitations under this section. 1973 Op. Att'y Gen. No. 73-89.

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Limitation of Actions, § 114. 68 Am. Jur. 2d, Seals, § 1 et seq.

C.J.S.

54 C.J.S., Limitations of Actions, § 97 et seq.

ALR.

Statutes of limitations or laches as bar to suit by heirs or next of kin to set aside conveyance or transfer by ancestor, 2 A.L.R. 447.

Effect of absence of seal from execution, 28 A.L.R. 936.

Statute of limitations applicable to coupons detached from bonds or other instruments, 62 A.L.R. 270.

Statute of limitations in actions or proceedings to secure return of purchase price paid to municipality or other public body for bonds that are invalid, 94 A.L.R. 608.

What constitutes a promise in writing to pay money within statutes of limitation, 111 A.L.R. 984.

Right to deficiency or personal judgment under mortgage notwithstanding bar of limitation against action on personal debt, 124 A.L.R. 640.

Bar of limitation against action on debt secured by mortgage as affecting suit to foreclose mortgage, 161 A.L.R. 886.

What period of limitation governs in an action against a public officer and the surety on his official bond, 18 A.L.R.2d 1176.

Liability on statutory bond as within statute of limitations prescribing specific limitation period for liabilities created by statute, 32 A.L.R.2d 1240.

Limitation statute applicable to action on bonds of public body or on obligation to collect revenues for their payment, 38 A.L.R.2d 930.

When statute of limitations begins to run against action on bond of personal representative, 44 A.L.R.2d 807.

When statute of limitations begins to run against note payable on demand, 71 A.L.R.2d 284.

Choice of law as to applicable statute of limitations in contract actions, 78 A.L.R.3d 639.

9-3-24. Actions on simple written contracts; exceptions.

All actions upon simple contracts in writing shall be brought within six years after the same become due and payable. However, this Code section shall not apply to actions for the breach of contracts for the sale of goods under Article 2 of Title 11 or to negotiable instruments under Article 3 of Title 11.

History.

Orig. Code 1863, § 2858; Code 1868, § 2866; Code 1873, § 2917; Code 1882, § 2917; Civil Code 1895, § 3767; Civil Code 1910, § 4361; Code 1933, § 3-705; Ga. L. 1962, p. 156, § 1; Ga. L. 1996, p. 1306, § 15.

Law reviews.

For article surveying recent legislative and judicial developments regarding Georgia's insurance laws, see 31 Mercer L. Rev. 117 (1979).

For article, "Construction Law," see 53 Mercer L. Rev. 173 (2001).

For annual survey of construction law, see 57 Mercer L. Rev. 79 (2005).

For annual survey of insurance law, see 57 Mercer L. Rev. 221 (2005).

For survey article on construction law, see 60 Mercer L. Rev. 59 (2008).

For annual survey on insurance, see 61 Mercer L. Rev. 179 (2009).

For annual survey of law on construction law, see 62 Mercer L. Rev. 71 (2010).

For annual survey on construction law, see 65 Mercer L. Rev. 67 (2013).

For note, "Forty-Eight States are Probably Not Wrong: An Argument for Modernizing Georgia's Legal Malpractice Statute of Limitations," see 33 Ga. St. U.L. Rev. 805 (2017).

JUDICIAL DECISIONS

Analysis

General Consideration
Actions on Simple Written Contracts
Running of Limitation

General Consideration

Letter of confirmation. — When attorneys' letter to client merely confirmed representation in broad terms and outlined in detail only the fee arrangement between the parties and thus clearly did not constitute the entire agreement for legal services between the parties, an action based on malpractice by attorneys fell within the four-year limitation in O.C.G.A. § 9-3-25 and not the six-year limitation in O.C.G.A. § 9-3-24. Frates v. Sutherland, Asbill & Brennan, 164 Ga. App. 243, 296 S.E.2d 788, 1982 Ga. App. LEXIS 2763 (1982).

Limitation applicable to sale of business. — Six-year limitation period in O.C.G.A. § 9-3-24, not the four-year period in the UCC, applied to contract for sale of businesses since, even though some goods were involved in the sale, the contract as a whole provided for the sale of the businesses in their entirety. Flo-Mor, Inc. v. Birmingham, 176 Ga. App. 375, 336 S.E.2d 264, 1985 Ga. App. LEXIS 2372 (1985).

Applicable to a party not in privity. — Six year statute of limitations stated in O.C.G.A. § 9-3-24 applied to a surety's breach of contract claims by right of subrogation against a construction program manager wherein the surety sought to recover the money it paid out on a performance bond it had granted to a construction company that subsequently defaulted. Carolina Cas. Ins. Co. v. R.L. Brown & Assocs., No. 1:04-cv-3537-GET, 2006 U.S. Dist. LEXIS 71056 (N.D. Ga. Sept. 29, 2006).

Contracts not under seal. — Even though an escrow agreement stated it was signed under seal and signatures of the borrowers and sellers were followed by the word "seal," O.C.G.A. § 9-3-24, not the 20-year limitation period for contracts under seal, applied since the signature of the escrow agent was not accompanied by such designation. McCalla v. Stuckey, 233 Ga. App. 397, 504 S.E.2d 269.

O.C.G.A. § 9-3-24 was not applicable to legal malpractice claim, since the contract creating the attorney-client relationship covered certain issues such as fees, expenses, etc., but did not constitute the entire agreement between the parties, not specifying, for example, the manner in which the attorney was to carry out the attorney's duties, when suit was to be filed, etc. As such, the four-year statute of limitations, O.C.G.A. § 9-3-25, applicable to oral contracts, had to be applied. Plumlee v. Davis, 221 Ga. App. 848, 473 S.E.2d 510.

Section inapplicable to action to enforce arbitration award. — State law afforded no reasonably applicable rule as to the proper time limitation for a union's action to enforce an arbitration award rendered under the terms of a collective bargaining agreement; therefore, the six-month limitation period found in § 10(b) of the National Labor Relations Act was adopted. Samples v. Ryder Truck Lines, 755 F.2d 881, 1985 U.S. App. LEXIS 28475 (11th Cir. 1985).

Inapplicable when limitation period contained in contract. — Heating system customer's claim that a letter agreement that contained no period of limitation meant that the parties' contract, which contained a one-year limitation period, was inapplicable and that O.C.G.A. § 9-3-24 applied instead lacked

merit as the letter agreement predated the parties' contract. Carrier Corp. v. Rollins, Inc., 316 Ga. App. 630, 730 S.E.2d 103, 2012 Ga. App. LEXIS 623 (2012).

Statute of limitation applies to breach of written contract. — Six-year statute of limitation applied to the homeowners' claim asserting a breach of written contract; to the extent that the complaint alleged breach of an implied contract such claim would be subject to the four-year statute of limitation. Gropper v. STO Corp., 250 Ga. App. 820, 552 S.E.2d 118, 2001 Ga. App. LEXIS 795 (2001), cert. denied, No. S01C1747, 2002 Ga. LEXIS 541 (Ga. June 21, 2002), cert. denied, No. S01C1790, 2002 Ga. LEXIS 542 (Ga. June 21, 2002).

Professional malpractice claim premised on a written contract is governed by the six-year statute of limitation in O.C.G.A. § 9-3-24. Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., 317 Ga. App. 464, 731 S.E.2d 361, 2012 Ga. App. LEXIS 737 (2012), cert. denied, No. S13C0031, 2013 Ga. LEXIS 101 (Ga. Jan. 22, 2013).

Sealed amendments to unsealed contract did not render the original contract one under seal. — Contract for the sale of an office building was not a contract under seal to which the 20-year statute of limitations of O.C.G.A. § 9-3-23 applied, but was governed by the 6-year statute of limitations, O.C.G.A. § 9-3-24, because, although the agreement recited that it was under seal, the word "Seal" did not appear next to the signatures. Five amendments to the agreement, which were executed under seal, did not convert the existing agreement into a contract under seal because there was no evidence the parties intended such a conversion. Perkins v. M&M Office Holdings, LLC, 303 Ga. App. 770, 695 S.E.2d 82, 2010 Ga. App. LEXIS 398 (2010).

Requirement for seal not met. — Licensor's claim as to the licensee was time barred because the note was missing one of the two necessary elements to make it an instrument under seal as to the licensee since there was no affixed seal or use of the word "seal" after the signature for the licensee. Holiday Hosp. Franchising, LLC v. Oakbrook Realty & Invs., LLC, 817 Fed. Appx. 694, 2020 U.S. App. LEXIS 17103 (11th Cir. 2020).

Section inapplicable to condominium assessments. — O.C.G.A. § 9-3-29, rather than O.C.G.A. § 9-3-24, applied to an action by a homeowners association to collect past due condominium assessments for which a property owner was liable under a restrictive covenant in the declaration of record. Heard v. Whitehall Forest E. Homeowners Ass'n, 230 Ga. App. 61, 495 S.E.2d 318.

Mixed contract for sale of goods and services. — When the predominant element of a contract is the sale of goods, the contract is viewed as a sales contract and O.C.G.A. § 11-2-725 is the applicable statute of limitations even though a substantial amount of service is to be rendered in installing the goods. When the predominant element of a contract is the furnishing of services, O.C.G.A. § 9-3-24 applies. Factors to be considered in determining the predominant element include the proportion of the total contract cost allocated to the goods and whether the price of the goods are segregated from the price for services. Southern Tank Equip. Co. v. Zartic, Inc., 221 Ga. App. 503, 471 S.E.2d 587.

Contract was sale of goods and barred by statute of limitations. — Grant of summary judgment in favor of a bank was properly reversed because the predominant purpose of the contract was the sale of a good; thus, the four year statute of limitation in O.C.G.A. § 11-2-725(1) applied and the bank's deficiency claim was barred since the claim was filed more than four years after the cause of action accrued. SunTrust Bank v. Venable, 299 Ga. 655, 791 S.E.2d 5, 2016 Ga. LEXIS 588 (2016).

No statements tolling statute of limitations. — Trial court's rulings that there was no genuine issue of material fact showing that the defendants made any statements sufficient to toll the statute of limitation as a matter of law were affirmed since the plaintiff did not exercise due diligence, and the statute of limitation had run on the plaintiff's claim for breach of contract per se, even if such a claim existed. Southern States Chemical v. Tampa Tank & Welding, 359 Ga. App.

General Consideration (Cont'd)

731, 858 S.E.2d 72, 2021 Ga. App. LEXIS 169 (2021).

Actions on Simple Written Contracts

Other state's statutory provisions restricting contractual limitation of right to sue enforceable. — While O.C.G.A. § 9-3-24 provides that actions on contracts shall be brought within six years, parties are permitted to contract as to a lesser time limit within which an action may be brought so long as the period fixed be not so unreasonable as to raise a presumption of imposition or undue advantage in some way. But Georgia has no public policy which affirmatively requires the priority of such contractual provisions to the exclusion of all other factors. Hence, Georgia will enforce another state's statutory provisions restricting the contractual limitation of the right to sue when such state's law is the proper one to apply. GECC v. Home Indem. Co., 168 Ga. App. 344, 309 S.E.2d 152, 1983 Ga. App. LEXIS 3398 (1983).

This section merely affects the remedy, and is not a discharge of debt. Langston v. Aderhold, 60 Ga. 376, 1878 Ga. LEXIS 475 (1878).

Section applicable when no allegation that contract was sealed. — When appellant commenced action for proceeds of insurance policy over twenty years after the cause of action, if any, arose, and the appellant neither alleged nor presented any evidence to the trial court that the contract of insurance was under seal, the trial court properly applied the six-year limitations period applicable to simple contracts in writing and concluded that the action was barred. Lester v. Aetna Life Ins. Co., 172 Ga. App. 486, 323 S.E.2d 655, 1984 Ga. App. LEXIS 2553 (1984).

Limitation applicable to provisions implied in contract by operation of law. — Six-year statute of limitations on all simple contracts in writing is applicable whether the promise sued on, e.g. the promise to repay a loan, is expressed in the writing or implied and written into the contract by the law. Nelson v. Nelson, 176 Ga. App. 107, 335 S.E.2d 411, 1985 Ga. App. LEXIS 2274 (1985).

Statute of limitations on all simple contracts in writing is six years, and this is true whether the promise sued on is expressed in the writing or implied and written into it by the law. Muscogee County Bd. of Educ. v. Boisvert, 196 Ga. App. 537, 396 S.E.2d 303, 1990 Ga. App. LEXIS 956 (1990), cert. denied, No. S90C1513, 1990 Ga. LEXIS 513 (Ga. Nov. 9, 1990).

Court of Appeals erred in holding that a professional malpractice claim premised on a written contract between an engineering firm and the firm's client was governed by the four-year statute of limitations in O.C.G.A. § 9-3-25, rather than the six-year statute of limitations in O.C.G.A. § 9-3-24. Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., 288 Ga. 236, 703 S.E.2d 323, 2010 Ga. LEXIS 884 (2010).

Applicability of section to simple written contracts. — Specific provisions of former Code 1933, § 109A-2-725 (see now O.C.G.A. § 11-2-725) applied to sales contracts, and former Code 1933, § 3-705 (see now O.C.G.A. § 9-3-24) applied to all other simple contracts in writing. Cleveland Lumber Co. v. Proctor & Schwartz, Inc., 397 F. Supp. 1088, 1975 U.S. Dist. LEXIS 14052 (N.D. Ga. 1975).

When the contract forming the basis of the action is in writing, the provisions of O.C.G.A. § 9-3-24 are applicable. Muscogee County Bd. of Educ. v. Boisvert, 196 Ga. App. 537, 396 S.E.2d 303, 1990 Ga. App. LEXIS 956 (1990), cert. denied, No. S90C1513, 1990 Ga. LEXIS 513 (Ga. Nov. 9, 1990).

Regardless of whether amount of liability is fixed. — When contract forming basis of action is in writing, this section applies, regardless of whether or not contract in writing fixes amount of liability. Adams v. Lee County Bank & Trust Co., 178 Ga. 154, 172 S.E. 224, 1934 Ga. LEXIS 3 (1934).

Section applied as contract was not rendered divisible. — Contract obligation was not divisible as the contractual consideration at issue was a single sum certain to be paid in one lump sum and the fact that the whole sum could have been due at different times, whichever came first, according to the contract, did not

render the contract divisible; accordingly, the six year statute of limitations found in O.C.G.A. § 9-3-24 for breaches of written contracts applied and time barred the defendant's counterclaim. Bridge Capital Investors II v. Small, No. 3:02-CV-80, 2005 U.S. Dist. LEXIS 17088 (M.D. Ga. Aug. 11, 2005), aff'd, 185 Fed. Appx. 836, 2006 U.S. App. LEXIS 15179 (11th Cir. 2006).

O.C.G.A. § 9-3-25 distinguished. — Former Code 1882, § 2917 (see now O.C.G.A. § 9-3-24) differed from former Code 1882, § 2918 (see now O.C.G.A. § 9-3-25), in that the latter related only to accounts and claims without written evidence from debtor personally of their validity. Hill v. Hackett, 80 Ga. 53, 4 S.E. 856, 1887 Ga. LEXIS 321 (1887); Seaboard Air-Line Ry. v. Averett, 159 Ga. 876, 127 S.E. 211 (1925).

Checks. — Statute of limitation for action on check is six years. Gray v. National Bank & Trust Co., 154 Ga. App. 759, 270 S.E.2d 44, 1980 Ga. App. LEXIS 2376 (1980).

Action to collect unpaid credit card debt. — Because an action filed by a creditor to collect unpaid credit card charges was based on a written contract, and not an open account, the trial court properly held that the six-year limitations period under O.C.G.A. § 9-3-24 applied, supporting summary judgment in the creditor's favor; moreover, because the transaction at issue was a written contract, the form of the debtor's acceptance was immaterial. Hill v. Am. Express, 289 Ga. App. 576, 657 S.E.2d 547, 2008 Ga. App. LEXIS 65 (2008), cert. denied, No. S08C1008, 2008 Ga. LEXIS 490 (Ga. June 2, 2008).

Claim based on construction contract. — Six-year statute of limitations of O.C.G.A. § 9-3-24, not the four-year limitation in O.C.G.A. § 9-3-30, applied to a claim for breach of contract arising out of the construction of an office building. Costrini v. Hansen Architects, P.C., 247 Ga. App. 136, 543 S.E.2d 760, 2000 Ga. App. LEXIS 1432 (2000).

Trial court properly granted summary judgment in a breach of contract claim to a construction company and one of the company's representatives as the suing homeowner had brought suit in 2007, and the work on the interior of the home was substantially completed in 1999; thus, the suit was barred by the six year limitation period set forth in O.C.G.A. § 9-3-24. The suit did not sound in tort since the homeowner failed to allege any property damage and only sought repair/replacement damages. Wilks v. Overall Constr., Inc., 296 Ga. App. 410, 674 S.E.2d 320, 2009 Ga. App. LEXIS 32 (2009).

Section applicable to action against builder-seller of house. — Six-year statute of limitations governing simple written contracts applied to the plaintiff's cause of action for breach of contract against the builder-seller of their home for damages allegedly caused by the use of synthetic stucco. Smith v. KLS Constr. Co., 247 Ga. App. 493, 544 S.E.2d 197, 2001 Ga. App. LEXIS 13 (2001).

Breach of warranty action. — In an action for breach of implied warranties arising from moisture damage under the synthetic stucco cladding used in the construction of the plaintiffs' home, the trial court should have applied the six-year limitation period for contract actions contained in O.C.G.A. § 9-3-24, rather than the four-year limitation period for damage to property actions contained in O.C.G.A. § 9-3-30. Hickey v. Bowden, 248 Ga. App. 647, 548 S.E.2d 347, 2001 Ga. App. LEXIS 259 (2001), rev'd in part, aff'd in part, 275 Ga. 249, 569 S.E.2d 495, 2002 Ga. LEXIS 479 (2002).

Parties may contract for lesser time limit. — While O.C.G.A. § 9-3-24 provides that actions on simple contracts in writing should be brought within six years, parties are permitted to contract as to a lesser time limit within which an action may be brought so long as the period fixed be not so unreasonable as to raise a presumption of imposition or undue advantage in some way. Rabey Elec. Co. v. Housing Auth., 190 Ga. App. 89, 378 S.E.2d 169, 1989 Ga. App. LEXIS 77 (1989).

Employment contracts. — If employment contract is in writing, employee has six years after expiration within which to bring action. Rosenstock v. Congregation Agudath Achim, 118 Ga. App. 443, 164

Actions on Simple Written Contracts (Cont'd)

S.E.2d 283, 1968 Ga. App. LEXIS 1424 (1968).

Action by retired teachers regarding amount of benefits under employment contract. — As a class of retirees had a right to retirement pay from the Teachers Retirement System of Georgia that arose from their contracts of employment and not from a statutory right, the six-year limitations period of O.C.G.A. § 9-3-24 applicable to contract matters was controlling; the 20-year limitations period of O.C.G.A. § 9-3-22 was not the correct limitations period to apply in the circumstances. Teachers Ret. Sys. v. Plymel, 296 Ga. App. 839, 676 S.E.2d 234, 2009 Ga. App. LEXIS 172 (2009).

Action under Employment Retirement Income Security Act. — Any claim an employee may have had against an employer under the Employment Retirement Income Security Act (ERISA) was barred by the statute of limitations; because the action was brought in Georgia, the applicable statute of limitations was six years, pursuant to O.C.G.A. § 9-3-24 and the employee failed to file the employee's complaint within the six-year statute of limitations. Warren v. Schwerman, 155 Fed. Appx. 416, 2005 U.S. App. LEXIS 19089 (11th Cir. 2005).

Insurance contracts. — Contract of insurance, not executed under seal, is a simple contract in writing, and, when no contractual limitations are contained therein as to time when action on policy shall be brought, statute of limitations applicable to simple contracts in writing applies. Burton v. Metropolitan Life Ins. Co., 48 Ga. App. 828, 173 S.E. 922, 1934 Ga. App. LEXIS 213 (1934); Patrick v. Travelers' Ins. Co., 51 Ga. App. 253, 180 S.E. 141, 1935 Ga. App. LEXIS 653 (1935); Banks v. Aetna Life Ins. Co., 56 Ga. App. 760, 194 S.E. 34, 1937 Ga. App. LEXIS 226 (1937).

Insurance is a matter of contract, and the applicable statute of limitations on a simple contract is six years. Childs v. Armour Food Co., 175 Ga. App. 455, 333 S.E.2d 377, 1985 Ga. App. LEXIS 2119 (1985).

O.C.G.A. § 9-3-24 is applicable, and provides for a six-year statute of limitations, both to claims which seek to establish the insured's right to optional benefits — the additional coverage provided by O.C.G.A. § 33-34-5 — (since repealed) and to claims for any losses incurred by the insured to which the optional coverage might apply. Bryant v. Allstate Ins. Co., 254 Ga. 328, 326 S.E.2d 753, 1985 Ga. LEXIS 627 (1985).

While a crop insurance policy's 12-month limitation period for bringing a legal action superseded O.C.G.A. § 9-3-24's six-year limitation period for actions on contracts, as the insured filed a demand for arbitration within 12 months of the insurer's denial of the claim, as required by the policy and applicable federal regulations, the insured had timely filed a "legal action." Therefore, the insured's subsequent lawsuit against the insurer was not time-barred. Bullington v. Blakely Crop Hail, Inc., 294 Ga. App. 147, 668 S.E.2d 732, 2008 Ga. App. LEXIS 1050 (2008).

Insurer could not recover all of the payments subject to the deductible amount because the six-year statute of limitations applicable to actions on a written contract applied to preclude any claim for deductibles paid before July 30, 2012. Fairbanks Co. v. Nat'l Union Fire Ins. Co. (In re Fairbanks Co.), No. 18-41768-pwb, 2020 Bankr. LEXIS 2385 (Bankr. N.D. Ga. Sept. 9, 2020).

Officers' bonds. — This section applies to action to recover for breach of warden's bond (by virtue of death of inmate). Fidelity-Phenix Ins. Co. v. Mauldin, 123 Ga. App. 108, 179 S.E.2d 525, 1970 Ga. App. LEXIS 1390 (1970).

Collective bargaining agreement. — In action by company for damages against union for violation of collective bargaining agreement, pursuant to § 301 of Federal Labor Management Act, six-year period provided in former Code 1933, § 3-705 (see now O.C.G.A. § 9-3-24) was applicable, and not four-year period former Code 1933, § 3-711 (see now O.C.G.A. § 9-3-26). Kaufman & Broad Home Systems, Inc. v. International Brotherhood of Firemen & Oilers, 607 F.2d 1104, 1979 U.S. App. LEXIS 9956 (5th Cir. 1979).

Union members' claim that union breached a collective bargaining agreement regarding work place safety was governed by O.C.G.A. § 9-3-24. Sams v. United Food & Com. Workers Int'l Union, 866 F.2d 1380, 1989 U.S. App. LEXIS 2362 (11th Cir. 1989).

Promissory notes. — Actions upon promissory notes not under seal must be brought within six years after the same become due and payable. Hamby v. Crisp, 48 Ga. App. 418, 172 S.E. 842, 1934 Ga. App. LEXIS 91 (1934); Gaffe v. Williams, 68 Ga. App. 299, 22 S.E.2d 765, 1942 Ga. App. LEXIS 113 (1942).

Secured transactions. — While it appeared that O.C.G.A. § 9-3-24, rather than O.C.G.A. § 11-2-725, would most likely apply to defendant collection attorney's state court deficiency action against plaintiff consumer, and it was not for the federal court to say what the Georgia courts would hold, the uncertainty meant there was no intentional unfair conduct and the consumer's Fair Debt Collection Practices Act, 15 U.S.C. § 1692, claim was dismissed. Almand v. Reynolds & Robin, P.C., 485 F. Supp. 2d 1361, 2007 U.S. Dist. LEXIS 31907 (M.D. Ga. 2007).

Acknowledgment of receipt of claims. — This section applies to written acknowledgment of receipt of claims, with promise to account for them. Hill v. Hackett, 80 Ga. 53, 4 S.E. 856, 1887 Ga. LEXIS 321 (1887).

Contracts to be performed outside state. — This section applies to contracts to be performed in another state. Obear v. First Nat'l Bank, 97 Ga. 587, 25 S.E. 335, 1895 Ga. LEXIS 533 (1895).

Computation of limitation period. — In computing time under this section, day of maturity is excluded. Blitch v. Brewer, 83 Ga. 333, 9 S.E. 837, 1889 Ga. LEXIS 61 (1889).

Motion to dismiss. — This section may be set up as defense by motion to dismiss complaint, when from allegations thereof cause of action appears to be barred. Davis v. Boyett, 120 Ga. 649, 48 S.E. 185, 1904 Ga. LEXIS 666 (1904); Marbut v. Hamilton, 32 Ga. App. 187, 122 S.E. 738, 1924 Ga. App. LEXIS 326 (1924).

Enforceability of limitation in contract. — Contract limitation upon right to sue, fixing shorter period than that allowed by statute, is lawful, provided period fixed is not so unreasonable as to raise presumption of imposition or undue advantage. Darnell v. Fireman's Fund Ins. Co., 115 Ga. App. 367, 154 S.E.2d 741, 1967 Ga. App. LEXIS 1109 (1967).

A 12-month limitation period in contract is enforceable and is not in conflict with this section. Gravely v. Southern Trust Ins. Co., 151 Ga. App. 93, 258 S.E.2d 753, 1979 Ga. App. LEXIS 2441 (1979).

Drawer of a check may not place words thereon shortening limitation period for bringing action on such check when it has been presented for payment according to its terms. Gray v. National Bank & Trust Co., 154 Ga. App. 759, 270 S.E.2d 44, 1980 Ga. App. LEXIS 2376 (1980).

Bar not avoided by agreement without consideration. — In action against administrator based on alleged liability of intestate as endorser of note, when alleged obligation was barred by statute of limitations, bar was not avoided by fact that after endorsement payee signed and delivered to endorser an agreement not to call upon the endorser for payment during the endorser's natural life, which agreement was not based on any valuable consideration. Exchange Nat'l Bank v. Alford, 187 Ga. 60, 200 S.E. 128, 1938 Ga. LEXIS 762 (1938).

Effect of laches. — Independently of statute of limitations, right to maintain action on an insurance policy may be barred by plaintiff's laches. Burton v. Metropolitan Life Ins. Co., 48 Ga. App. 828, 173 S.E. 922, 1934 Ga. App. LEXIS 213 (1934).

Insurer obtaining rights of insured through subrogation is subject to same statute of limitations as is the insured. National Hills Shopping Ctr., Inc. v. Insurance Co. of N. Am., 320 F. Supp. 1146, 1970 U.S. Dist. LEXIS 8973 (S.D. Ga. 1970).

Claim of bar by transferee of debtor. — While as a general rule right to claim benefit of statute of limitations is personal to the debtor, it may also be claimed by debtor's transferee when it is sought to subject property transferred to that person as to payment of debt. Remington-Rand, Inc. v. Emory Univ., 185 Ga.

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571, 196 S.E. 58, 1938 Ga. LEXIS 490 (1938).

Foreclosure of mortgage when action on debt barred. — Mortgage may be foreclosed even though this section bars action on debt. Elkins v. Edwards, 8 Ga. 325, 1850 Ga. LEXIS 55 (1850).

Remedy on note secured by mortgage, barred by statute of limitations, does not bar remedy on mortgage itself, which is not barred until its applicable statute of limitations has run. Alropa Corp. v. Goldstein, 69 Ga. App. 168, 25 S.E.2d 116, 1943 Ga. App. LEXIS 39 (1943).

Leasehold interests. — O.C.G.A. § 9-3-24 was applicable to a contract between a corporation and a limited partnership in which the partnership agreed to sublease land from the corporation for exploratory drilling for oil and natural gas, and to have the corporation arrange for drilling on the subleased land, because the contract was not a contract for the sale of goods under the meaning of O.C.G.A. § 11-2-107, which would include oil and gas but which did not include conveyances of leasehold interests in the real property to be explored for oil and gas. ABF Capital Corp. v. Yancey, 264 Ga. App. 850, 592 S.E.2d 492, 2003 Ga. App. LEXIS 1588 (2003).

Farm quotas and impact on dissolution of family farm partnership. — In a dispute involving a family farm partnership, the trial court erred by granting summary judgment to the children/grandchildren as to the claim regarding the peanut and tobacco quotas and assignments where certain claims were not untimely because genuine issues of fact existed as to whether a son inappropriately used a power of attorney as to the quotas and assignments and the father/grandfather sought to recover damage to personalty. Godwin v. Mizpah Farms, LLLP, 330 Ga. App. 31, 766 S.E.2d 497, 2014 Ga. App. LEXIS 808 (2014).

Claim based on engineering contract. — Engineering firm was properly granted summary judgment in a breach of contract suit because the three documents the customer claimed to form the written contract did not contain the essential element of consideration; thus, the parties' agreement was not a contract in writing and the four-year limitation period under O.C.G.A. § 9-3-25 applied and the suit was time barred. Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., 317 Ga. App. 464, 731 S.E.2d 361, 2012 Ga. App. LEXIS 737 (2012), cert. denied, No. S13C0031, 2013 Ga. LEXIS 101 (Ga. Jan. 22, 2013).

Questions of fact remained to be determined. — Grant of summary judgment to the creditors was reversed because questions of fact existed as to whether one creditor's failure to confirm the foreclosure sale barred the claims asserted by it and the other creditor as well as a question of fact existed as to whether all of the debts at issue, including the 2004 loan, were owed to a single creditor and were given for the same purpose. Bryant v. Optima Int'l, 339 Ga. App. 696, 792 S.E.2d 489, 2016 Ga. App. LEXIS 642 (2016).

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Time of breach, not time of damage or discovery, controlling. — Statute of limitations runs from time contract is broken and not from time actual damage results or is ascertained. Mobley v. Murray County, 178 Ga. 388, 173 S.E. 680, 1934 Ga. LEXIS 59 (1934); National Hills Shopping Ctr., Inc. v. Insurance Co. of N. Am., 320 F. Supp. 1146, 1970 U.S. Dist. LEXIS 8973 (S.D. Ga. 1970); R.L. Sanders Roofing Co. v. Miller, 153 Ga. App. 225, 264 S.E.2d 731, 1980 Ga. App. LEXIS 1759 (1980).

Statute of limitations begins to run from time right of action accrues for breach of duty or contract or for a wrong, without regard to time when actual damage results. Ginn v. State Farm Mut. Auto. Ins. Co., 417 F.2d 119, 1969 U.S. App. LEXIS 10577 (5th Cir. 1969).

When action is based on breach of written contract and implied warranty, time of breach, not time of discovery of breach, starts statute of limitations. National Hills Shopping Ctr., Inc. v. Insurance Co. of N. Am., 320 F. Supp. 1146, 1970 U.S. Dist. LEXIS 8973 (S.D. Ga. 1970).

Claim based on improper replacement of roof on plaintiff's home was barred by

six-year statute of limitations on simple contracts because the statute of limitations runs from the time the contract is broken and not at the time actual damage results or is ascertained. Owen v. Mobley Constr. Co., 171 Ga. App. 462, 320 S.E.2d 255, 1984 Ga. App. LEXIS 2235 (1984).

Statute of limitation begins running on the date of the accident for any claim an insured might have had for no-fault benefits and does not begin to run only after the insurer dishonored the insured's assignment of benefits. Pridgen v. Auto-Owners Ins. Co., 204 Ga. App. 322, 419 S.E.2d 99, 1992 Ga. App. LEXIS 814 (1992).

When a house was not completed at closing, and the parties agreed to place funds in escrow to be released to the builder upon the completion of construction by a certain date, but the funds were subsequently released to the builder without the home being completed, the homeowners had six years from the date of the builder's breach to sue, which occurred when the funds were released to the builder, less than six years before suit was filed, so the suit was timely. Wallace v. Bock, 279 Ga. 744, 620 S.E.2d 820, 2005 Ga. LEXIS 658 (2005).

Proposition that a period of limitations to sue under a construction contract begins to run on the date of substantial completion, i.e., the date that the certificate of occupancy is issued, is certainly applicable in a case when the date of issuance of the certificate of occupancy coincides with the date that the contractor's obligation under the construction contract became "due and payable," but it is only the "general rule" and as such is not applicable in all circumstances. Wallace v. Bock, 279 Ga. 744, 620 S.E.2d 820, 2005 Ga. LEXIS 658 (2005).

Trial court properly concluded that a plaintiff's breach of contract claim was time-barred since the breach of the written contract at issue accrued in 1998 and the plaintiff waited until seven years later to file the complaint. Hamburger v. PFM Capital Mgmt., 286 Ga. App. 382, 649 S.E.2d 779, 2007 Ga. App. LEXIS 786 (2007).

Georgia's statute of limitations for actions to recover on a written contract did not bar them from drawing on the letters of credit because the insurers' right to draw on the letters of credit was not dependent on their ability to successfully bring a breach of contract action under the program agreements (by their terms, the letters of credit were clean and unconditional and the insurers' right to draw on them is independent of the program agreements); O.C.G.A. § 9-3-24 operated to bar only judicial remedies, but the statute did not affect the parties' substantive rights or bar non-judicial remedies. Williams Serv. Group v. Nat'l Union Fire Ins. Co., 495 Fed. Appx. 1, 2012 U.S. App. LEXIS 22004 (11th Cir. 2012).

Discovery rule did not apply to breach of contract. — Georgia courts have continuously held that the discovery rule does not apply to breach of contract claims, and other state courts have reached the same result when considering similar factual scenarios. The discovery rule did not apply to the plaintiff's breach of contract claim. Odelia v. Alderwoods (Ga.), LLC, 823 Fed. Appx. 742, 2020 U.S. App. LEXIS 24616 (11th Cir. 2020).

Homebuilder's action against a financing company was time barred since the homebuilder believed that payoff amounts quoted by the financing company were inaccurate when received, and thus had reason to believe that a breach of contract had occurred at that time; O.C.G.A. § 9-3-24 required the suit to be brought within six years of that date, but it was not. Koncul Enters. v. Fleet Fin., Inc., 279 Ga. App. 39, 630 S.E.2d 567, 2006 Ga. App. LEXIS 451 (2006).

Conditions precedent. — When condition precedent to right of actions exists, statute of limitations does not begin to run until that condition is performed. Ginn v. State Farm Mut. Auto. Ins. Co., 417 F.2d 119, 1969 U.S. App. LEXIS 10577 (5th Cir. 1969).

Applicability. — Summary judgment was properly granted to a buyer as: (1) a seller's claim was time-barred under O.C.G.A. § 11-2-725 since a document dated May 5, 2000, was not an invoice to the buyer, but was a compilation of invoices previously submitted to the buyer; (2) even if the seller provided the buyer with services in conjunction with the

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goods it sold, O.C.G.A. § 11-2-725 applied as the predominant element of the agreement was the sale of goods; (3) under O.C.G.A. § 7-4-16, a commercial account became due and payable upon the date a statement of the account was rendered to the obligor; and (4) the seller's claim that the six-year limitation period contained in O.C.G.A. § 9-3-24 applied was rejected as there was no contract and the claim was not raised before the trial court. All Tech Co. v. Laimer Unicon, LLC, 281 Ga. App. 579, 636 S.E.2d 753, 2006 Ga. App. LEXIS 1177 (2006).

Because the complaint was filed on July 1, 2011, to the extent the plaintiff's backward looking breach of contract claims arose before July 1, 2005, the claims were time-barred. Nebo Ventures, LLC v. NovaPro Risk Solutions, L.P., 324 Ga. App. 836, 752 S.E.2d 18, 2013 Ga. App. LEXIS 947 (2013), cert. denied, No. S14C0475, 2014 Ga. LEXIS 235 (Ga. Mar. 10, 2014).

Accrual of actions. — Because a plaintiff alleged that the defendant, an investment advisory company, committed a breach of fiduciary duty by collecting management fees for certain stock after the stock was categorized as an unmanaged asset, and the categorization occurred some time between March 31, 2001, and June 20, 2001, the plaintiff's claim accrued within four years of the date of the filing of the complaint and was therefore timely; regardless of whether a four-year or a six-year statute of limitation period was applied, the trial court erred by granting summary judgment as to that particular claim on the ground that it was time-barred. Hamburger v. PFM Capital Mgmt., 286 Ga. App. 382, 649 S.E.2d 779, 2007 Ga. App. LEXIS 786 (2007).

Cause of action for breach of fiduciary duty accrues each time the defendant commits a wrongful act that causes appreciable damage. Hamburger v. PFM Capital Mgmt., 286 Ga. App. 382, 649 S.E.2d 779, 2007 Ga. App. LEXIS 786 (2007).

Trial court erred in finding that the agency agreement did not include a provision for indemnification. Because it did, and because the record did not show that more than six years elapsed between the date upon which the claims for indemnity accrued and the filing of this lawsuit, the trial court erred in granting partial summary judgment based on O.C.G.A. § 9-3-24. Old Republic Nat'l Title Ins. Co. v. Darryl J. Panella, LLC, 319 Ga. App. 274, 734 S.E.2d 523, 2012 Ga. App. LEXIS 972 (2012).

Trial court erred by granting summary judgment in favor of the plaintiff because the six year limitations period under O.C.G.A. § 9-3-24 governed the breach of contract action and the action was not commenced within six years of the last breach claimed by the plaintiff. Houghton v. Sacor Financial, Inc., 337 Ga. App. 254, 786 S.E.2d 903, 2016 Ga. App. LEXIS 307 (2016).

Pro se tenant's breach of contract claim against the Secretary of Housing and Urban Development was time-barred under O.C.G.A. § 8-3-24 since the six year limitations period would have begun to run no later than September 10, 2008, and the tenant filed the tenant's complaint on September 16, 2014, more than six years after the statute of limitations began to run on the tenant's contract claims. Smith v. Sec'y, 680 Fed. Appx. 791, 2017 U.S. App. LEXIS 2537 (11th Cir.), cert. denied, 138 S. Ct. 96, 199 L. Ed. 2d 62, 2017 U.S. LEXIS 5316 (2017).

Trial court did not err in finding the firefighters' claims over compensation were time-barred because it was undisputed from the record that of fifty firefighters who brought suit against the city, seven were promoted prior to March 31, 2008 and in the March 7, 2017 order, the trial court assumed the pay policy was divisible, and the statute of limitations began to run at the time of each promotion. Shelnutt v. Mayor & Aldermen of Savannah, 349 Ga. App. 499, 826 S.E.2d 379, 2019 Ga. App. LEXIS 190 (2019), cert. denied, No. S19C0999, 2019 Ga. LEXIS 807 (Ga. Nov. 18, 2019).

Tobacco farmers' suit time barred. — Trial court properly dismissed the tobacco farmers' suit for specific performance as time barred because one of the farmers testified that the last application for common stock was in the 1990s and,

since the instant lawsuit was filed in 2007, well after the applicable limitation period ran, the claim for specific performance was barred. Rigby v. Flue-Cured Tobacco Coop. Stabilization Corp., 327 Ga. App. 29, 755 S.E.2d 915, 2014 Ga. App. LEXIS 257 (2014), cert. denied, No. S14C1205, 2014 Ga. LEXIS 872 (Ga. Oct. 20, 2014).

If act of creditor is necessary to complete cause of action, such as demand or notice, such demand must be made within statutory period for bringing action on contract, and if not made within that period, action will be barred; there are exceptions, however, as when delay in making demand is contemplated by contract itself, as in case of note to be paid on demand at any time within payee's life. Prudential Ins. Co. v. Sailors, 69 Ga. App. 628, 26 S.E.2d 557, 1943 Ga. App. LEXIS 155 (1943).

Running of limitation from maturity date of surety's obligation. — Right of action upon unsealed contract of surety is barred by statute of limitation upon expiration of six years after date of maturity of obligation, not six years after date of execution of agreement, since no right of action accrues until maturity date of obligation. Chatham v. Georgia Pac. Corp., 163 Ga. App. 525, 295 S.E.2d 226, 1982 Ga. App. LEXIS 2562 (1982).

Contract payable in installments. — In entire contract for stated sum, providing for payment in annual equal installments, statute of limitations does not begin to run until after date last installment became due. Glass v. Grant, 46 Ga. App. 327, 167 S.E. 727, 1933 Ga. App. LEXIS 50 (1933); Metropolitan Life Ins. Co. v. Foster, 53 Ga. App. 21, 184 S.E. 660, 1936 Ga. App. LEXIS 3 (1936).

Statute of limitation as to all payments under an entire contract does not begin to run until after date last payment becomes due. Wall v. Citizens & S. Bank, 153 Ga. App. 29, 264 S.E.2d 523, 1980 Ga. App. LEXIS 1657 (1980), aff'd, 247 Ga. 216, 274 S.E.2d 486, 1981 Ga. LEXIS 645 (1981), overruled, McKeever v. State, 189 Ga. App. 445, 375 S.E.2d 899, 1988 Ga. App. LEXIS 1437 (1988), overruled in part, Southall v. State, 300 Ga. 462, 796 S.E.2d 261, 2017 Ga. LEXIS 33 (2017).

Exercise of acceleration clause. — If creditor elects to exercise option to accelerate maturity of debt, statute of limitation begins to run from time of such election. Wall v. Citizens & S. Bank, 153 Ga. App. 29, 264 S.E.2d 523, 1980 Ga. App. LEXIS 1657 (1980), aff'd, 247 Ga. 216, 274 S.E.2d 486, 1981 Ga. LEXIS 645 (1981), overruled, McKeever v. State, 189 Ga. App. 445, 375 S.E.2d 899, 1988 Ga. App. LEXIS 1437 (1988), overruled in part, Southall v. State, 300 Ga. 462, 796 S.E.2d 261, 2017 Ga. LEXIS 33 (2017).

Divisible sublease. — Because a sublessee failed to file its claims under a divisible sublease within the six-year period after they arose, pursuant to the requirements of O.C.G.A. § 9-3-24, and a different limitations period applicable to construction contracts and express warranties did not apply, partial summary judgment to the sublessor as to the time-barred claims was properly entered. New Morn Foods, Inc. v. B & B Egg Co., 286 Ga. App. 29, 648 S.E.2d 428, 2007 Ga. App. LEXIS 680 (2007).

Parties did not express an intent to extend the six-year statute of limitations for breach of contract actions and since the trial court erred in interpreting the anti-waiver clause to extend the statute of limitations period, the trial court also erred in denying the buyer's motion to dismiss. Wolf Creek Landfill, LLC v. Twiggs County, 337 Ga. App. 211, 786 S.E.2d 862, 2016 Ga. App. LEXIS 298 (2016), cert. denied, No. S16C1678, 2016 Ga. LEXIS 825 (Ga. Dec. 8, 2016).

Employment contracts. — If employee elects to treat employment contract as continuing after wrongful discharge, right of action as to last installment of the employee's salary does not accrue until expiration of stipulated term of employment. Rosenstock v. Congregation Agudath Achim, 118 Ga. App. 443, 164 S.E.2d 283, 1968 Ga. App. LEXIS 1424 (1968).

Migrant workers' breach of contract claims. — Contrary to the employers' argument, the state law breach of contract claims of guest workers from Mexico arising prior to July 11, 2003, were not barred by the two-year statute of limitations in O.C.G.A. § 9-3-22 because 20 C.F.R. § 655.102(b)(14) specified that the

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workers held contract claims for underpayment, and the six-year statute of limitations in O.C.G.A. § 9-3-24 applied; the workers' state law breach of contract claims were filed on July 11, 2005, easily within six years of the dates the claims accrued, and so the claims were timely filed under O.C.G.A. § 9-3-24, and were not subject to dismissal on statute of limitations grounds. Morales-Arcadio v. Shannon Produce Farms, Inc., No. 605CV062, 2006 U.S. Dist. LEXIS 3159 (S.D. Ga. Jan. 12, 2006).

Immigrant workers' claims. — When plaintiff Mexican temporary farm workers filed a breach of contract claim against defendant employer, alleging the employer violated the terms of an immigration clearance order, which promised compliance with all employment-related law and reimbursement for certain expenses and payment of wages on a weekly basis, the six-year statute of limitations for simple contracts, provided by O.C.G.A. § 9-3-24, applied to such claims, rather than the two-year limitations period of O.C.G.A. § 9-3-22 as to payment of wages because regulations governing the worker program expressly stated that the job clearance order created a contract between the employer and the worker, thus invoking the six-year statute of limitations specified in § 9-3-24. Ramos-Barrientos v. Bland, 728 F. Supp. 2d 1360, 2010 U.S. Dist. LEXIS 22921 (S.D. Ga. 2010).

Date city policy changed triggered statute. — City's policy of paying employees for up to 90 days of sick leave upon retirement was not an executory contract, and therefore, the city's decision to phase out the policy triggered the running of the statute of limitations, and not the employee's retirement date, even though the amount of payment would be calculated at the time of retirement. City of Lafayette v. Bates, 234 Ga. App. 662, 507 S.E.2d 252.

Severable contract. — An action alleging that defendant company breached a sales representative agreement by removing areas from the representative's territory and by repeatedly reducing the commission rate below that provided in the agreement was not time barred as to sales within the six-year limitation period prior to the suit, even though the removal of territory and rate reduction occurred more than six years before the suit was brought, since the commissions were not due until sales were consummated. Douglas & Lomason Co. v. Hall, 212 Ga. App. 475, 441 S.E.2d 870, 1994 Ga. App. LEXIS 304 (1994), cert. denied, No. S94C1045, 1994 Ga. LEXIS 700 (Ga. May 5, 1994).

Life insurance policies. — In absence of policy provision postponing time of payment of insurance, statutory period of limitation runs from time of insured's death, if on such date demand could be made payable by presenting proper proof. Burton v. Metropolitan Life Ins. Co., 48 Ga. App. 828, 173 S.E. 922, 1934 Ga. App. LEXIS 213 (1934).

When insurance policy provides for payment upon receipt and approval of proof of death, statute does not commence to run until company either approves proof of death or refuses to concede death, not from the date of the death. Burton v. Metropolitan Life Ins. Co., 48 Ga. App. 828, 173 S.E. 922, 1934 Ga. App. LEXIS 213 (1934).

Disability insurance contracts. — Right of action upon insurance contract with provision that no payment thereunder shall be payable until submission of due proof of disability does not ordinarily arise until sum claimed thereunder is due and payable. Patrick v. Travelers' Ins. Co., 51 Ga. App. 253, 180 S.E. 141, 1935 Ga. App. LEXIS 653 (1935).

On cause of action of beneficiary of insurance policy for money payable by reason of disability, statute begins to run from day on which the person could have made demand payable by presenting proper proof of total and permanent disabilities, for on that date beneficiary, by the beneficiary's own act and in spite of insurance company, might have made demand payable by proper notice or proof of loss. Prudential Ins. Co. v. Sailors, 69 Ga. App. 628, 26 S.E.2d 557, 1943 Ga. App. LEXIS 155 (1943).

Dentist filed a lawsuit more than seven years after submitting a claim for benefits under the dentist's disability insurance policies; thus, the dentist's suit was untimely, both under the provisions of the

policies, and under O.C.G.A. § 9-3-24. Giddens v. Equitable Life Assur. Soc'y of the United States, 356 F. Supp. 2d 1313, 2004 U.S. Dist. LEXIS 26981 (N.D. Ga. 2004), aff'd in part and rev'd in part, 445 F.3d 1286, 2006 U.S. App. LEXIS 8970 (11th Cir. 2006).

Trial court did not err in finding that a retirement plan participant's breach of contract action, which was related to the denial of the participant's claim for disability benefits, was barred by the six-year statute of limitation contained in O.C.G.A. § 9-3-24 because the participant brought the participant's claim for benefits under a retirement plan more than six years after those benefits became due and payable; the six-year statute of limitation began to run when the participant received a Social Security award because at that point, the participant satisfied the conditions precedent for disability benefits, and those benefits became due and payable under the retirement plan. Paschal v. Fulton-DeKalb Hosp. Auth. Emples. Ret. Plan, 305 Ga. App. 6, 699 S.E.2d 357, 2010 Ga. App. LEXIS 661 (2010), cert. denied, No. S10C1888, 2011 Ga. LEXIS 72 (Ga. Jan. 24, 2011).

When "no action" clause of insurance contract specifically prohibits action for breach of contract until injured party has secured final judgment against insured, statute of limitations does not begin to run until date of such final judgment. Ginn v. State Farm Mut. Auto. Ins. Co., 417 F.2d 119, 1969 U.S. App. LEXIS 10577 (5th Cir. 1969).

Inapplicable to fire insurance policy with express contrary language. — One-year time-to-sue clause in an insured's homeowner's insurance policy was clear and unambiguous, and it was not tolled during the 60-day loss payment period; as the insured's suit was not filed within the one-year period from the date of loss, as required in the policy, the insured's action against the insurer was properly dismissed. The limitations period pursuant to O.C.G.A. § 9-3-24 was not controlling due to the clear and unambiguous policy language. Thornton v. Ga. Farm Bureau Mut. Ins. Co., 287 Ga. 379, 695 S.E.2d 642, 2010 Ga. LEXIS 483 (2010).

Statute of limitations in claims for optional benefits begins to run on the date of the accident, and the claim for optional benefits under O.C.G.A. § 33-34-5 (since repealed) must be filed within six years thereof, as provided by O.C.G.A. § 9-3-24. Bryant v. Allstate Ins. Co., 254 Ga. 328, 326 S.E.2d 753, 1985 Ga. LEXIS 627 (1985); Sentry Ins. v. Echols, 174 Ga. App. 541, 330 S.E.2d 725, 1985 Ga. App. LEXIS 1875 (1985), superseded by statute as stated in Dallas Blue Haven Pools, Inc. v. Taslimi, 180 Ga. App. 734, 350 S.E.2d 265, 1986 Ga. App. LEXIS 2771 (1986).

In cause of action seeking $45,000.00 in additional personal injury protection benefits pursuant to Flewellen case (250 Ga. 709, 300 S.E.2d 673 (1983)) for losses incurred prior to date of that decision, six-year statute of limitations provided by O.C.G.A. § 9-3-24 applies and begins to run on the date of the accident. Commercial Union Ins. Co. v. Hawkins, 254 Ga. 331, 328 S.E.2d 532, 1985 Ga. LEXIS 653 (1985).

Statute of limitations on a claim for optional personal injury protection (PIP) benefits under the Motor Vehicle Accident Reparations Act begins to run on the date of the accident, not on the date when the insurer received notice of the policyholder's intent to elect optional PIP coverage by the policyholder's tender of additional premiums and filing of proof of loss. Georgia Farm Bureau Mut. Ins. Co. v. Musgrove, 254 Ga. 333, 328 S.E.2d 365, 1985 Ga. LEXIS 661 (1985).

In a claim for retroactive benefits seeking to extend coverage pursuant to O.C.G.A. § 33-34-5 (since repealed), Flewellen v. Atlanta Cas. Co., 250 Ga. 709, 300 S.E.2d 673 (1983), the six-year statute of limitations on simple written contracts in O.C.G.A. § 9-3-24 begins to run from the date of the accident. Langley v. Georgia Farm Bureau Mut. Ins. Co., 175 Ga. App. 719, 334 S.E.2d 700, 1985 Ga. App. LEXIS 2166 (1985).

Negligence in design and construction of building. — Cause of action arising out of alleged negligent design and construction of building by defendants under contract with plaintiff accrues and statute of limitation starts to run when negligent acts resulting in damage to

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plaintiff are committed and not when defendant's negligence becomes apparent. Space Leasing Assocs. v. Atlantic Bldg. Sys., 144 Ga. App. 320, 241 S.E.2d 438, 1977 Ga. App. LEXIS 2689 (1977); Costrini v. Hansen Architects, P.C., 247 Ga. App. 136, 543 S.E.2d 760, 2000 Ga. App. LEXIS 1432 (2000).

Action against builder time barred. — Action against builder of a house based on alleged defective construction of the house was time barred since the homeowner did not acquire title to the house until after the tort and contract statutes of limitation had expired, and the homeowner was not allowed to revive those causes of action; neither the discovery rule nor the continuing tort theory applied to actions involving only damage to real property, and since all representations allegedly made by the builder took place after the statutes of limitation had expired, equitable estoppel did not toll the running. Bauer v. Weeks, 267 Ga. App. 617, 600 S.E.2d 700, 2004 Ga. App. LEXIS 733 (2004).

Because a belated claim filed against an alleged homebuilder's partner did not relate back to the date of the original complaint, as required by O.C.G.A. § 9-11-15(c), summary judgment in favor of the homebuilder was correctly granted, based on the expiration of the six-year limitation period under O.C.G.A. § 9-3-24. Wallick v. Lamb, 289 Ga. App. 25, 656 S.E.2d 164, 2007 Ga. App. LEXIS 1317 (2007).

Action against contractor. — Statute of limitations in action against contractor following construction of a sewer line commenced to run when the landowner was aware that the construction was substantially completed, and was not tolled by alleged oral promises to remedy breach when there was no allegation of actual fraud in any promises made. Mullins v. Wheatley Grading Contractors, 184 Ga. App. 119, 361 S.E.2d 10, 1987 Ga. App. LEXIS 2165 (1987).

Although the franchisees were transferees of a builder's warranty, they were not third party beneficiaries under O.C.G.A. § 9-2-20(b); nevertheless, because there were material issues of fact as to whether all repairs were properly made and the franchisees brought suit within the six-year statute of limitation in O.C.G.A. § 9-3-24, the trial court erred in granting summary judgment to the contractor. Danjor, Inc. v. Corporate Constr., Inc., 272 Ga. App. 695, 613 S.E.2d 218, 2005 Ga. App. LEXIS 367 (2005).

Docks. — Trial court did not err in failing to conclude that neighbors had established that a landowner's breach of contract claim was filed outside the applicable limitation period, O.C.G.A. § 9-3-24, because the landowner filed the landowner's complaint in 2010, and the trial court found, based on photographic evidence, that the landowner's cause of action accrued sometime in late 2006 or early 2007 when the neighbors moved their dock west of the location where the neighbor's dock was to be located pursuant to the site plan. Dillon v. Reid, 312 Ga. App. 34, 717 S.E.2d 542, 2011 Ga. App. LEXIS 882 (2011).

Municipal warrants. — Statute of limitations begins to run only after demand for payment of municipal warrants is repudiated, or from time when fund out of which warrants can be paid is provided. City of Abbeville v. Eureka Fire Hose Mfg. Co., 177 Ga. 204, 170 S.E. 23, 1933 Ga. LEXIS 149 (1933).

Sheriff's bond. — Cause of action ex contractu for breach of sheriff's official bond by virtue of unlawful killing was not barred until after expiration of at least six years from date of its accrual. Powell v. Fidelity & Deposit Co., 48 Ga. App. 529, 173 S.E. 196, 1934 Ga. App. LEXIS 119 (1934).

Agreement to give note pursuant to property division. — Assuming that instrument wherein the defendant agreed to give the plaintiff a note for a certain sum pursuant to the division of property among heirs was binding and an enforceable contract for payment of money, since no time was specified therein performance was due and a right of action, if any, accrued thereon immediately upon the signing thereof, and a suit filed more than six years later was barred by statute of limitations. Haswell v. Haswell, 84 Ga. App. 651, 67 S.E.2d 148, 1951 Ga. App. LEXIS 759 (1951).

Statute of limitations on action by guarantor of student loan against borrower does not begin to run until guarantor pays loan debt to lender. Lewis v. State of N.J. Dep't of Higher Educ., 165 Ga. App. 574, 302 S.E.2d 128, 1983 Ga. App. LEXIS 1954 (1983).

Six-year statute applied to implied promise to perform professionally. — Because an implied promise to perform professionally pursuant to a written agreement for professional services is written into a contract for professional services by the law, an alleged breach of this implied obligation is necessarily governed by the six-year contract statute of limitation of O.C.G.A. § 9-3-24, not the four-year statute applicable to professional malpractice actions under O.C.G.A. § 9-3-25. Saiia Constr., LLC v. Terracon Consultants, Inc., 310 Ga. App. 713, 714 S.E.2d 3, 2011 Ga. App. LEXIS 502 (2011).

Breach of tenure contract. — In an action by a teacher against a school for breach of contract in terminating the teacher without cause despite the teacher's alleged tenure status, since the breach occurred more than six years prior to the filing of the suit and the school board expressly notified the teacher that tenure was no longer part of the faculty's benefits, the statute of limitations began to run on that date, not the later date of the teacher's termination when actual damages resulted. Gamble v. Lovett School, 180 Ga. App. 708, 350 S.E.2d 311, 1986 Ga. App. LEXIS 2253 (1986).

Legal malpractice. — Plaintiff's right of action for legal malpractice arose on the date the attorney mistakenly filed a bankruptcy petition, and the attorney's failure to dismiss the petition did not constitute a subsequent act of malpractice which triggered a new limitation period. Green v. White, 229 Ga. App. 776, 494 S.E.2d 681.

Application to class actions. — Breach of contract claim of one named plaintiff in a purported class action was filed after the expiration of the six-year statute of limitations for actions based on written contracts under Georgia law; thus, the claim was time-barred. In re Tri-State Crematory Litig., 215 F.R.D. 660, 2003 U.S. Dist. LEXIS 4538 (N.D. Ga. 2003).

Attorney-client fee contracts. — Parties' fee contract showed that the attorney was entitled to payment of fees during the progress of the litigation, and, therefore, the attorney's cause of action for payment of the fees accrued as services were rendered; because the attorney was seeking to recover fees for services rendered as early as April 1992 and because the attorney's suit was not brought until September 1998, the six-year statute of limitation may have barred the attorney's recovery of some of the fees sought; thus, summary judgment to the attorney on the former client's statute of limitation defense was reversed. Burnham v. Cooney, 265 Ga. App. 246, 593 S.E.2d 701, 2004 Ga. App. LEXIS 68 (2004).

Agreement between a doctor and a hospital which provided, inter alia, for the doctor to repay to the hospital an ongoing monthly payment of an amount based on the doctor's monthly practice income, due on a month-to-month basis, was a divisible contract, and claims for amounts due more than six years before suit was filed were time barred; the trial court erred in entering summary judgment for the hospital, and the judgment was reversed. Carswell v. Oconee Reg'l Med. Ctr., Inc., 270 Ga. App. 155, 605 S.E.2d 879, 2004 Ga. App. LEXIS 1375 (2004).

District court properly granted summary judgment to a lender with respect to three promissory notes and denied the borrower's motion for reconsideration because, inter alia, the claim was untimely under Georgia law, the notes all contained a recital in the body of the instrument of an intention to use a seal, and the printed writing immediately adjacent to the word SEAL constituted a signature under Georgia law. Davis v. Daniels, 655 Fed. Appx. 755, 2016 U.S. App. LEXIS 12904 (11th Cir. 2016).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Limitation of Actions, § 116 et seq.

C.J.S.

17B C.J.S., Contracts, § 840 et seq. 54 C.J.S., Limitations of Actions, § 91 et seq.

ALR.

Grantee's assumption of mortgage indebtedness by deed as simple contract or specialty within statute of limitations, 51 A.L.R. 981.

Entry or endorsement by creditor on note, bond, or other obligation as evidence of part payment which will toll the statute of limitations, 59 A.L.R. 903; 23 A.L.R.2d 1331.

When statute of limitations commences to run against action against one who has misrepresented or exceeded his authority to contract for another, 64 A.L.R. 1194.

Scope and application of limitation provision of statute or policy against actions under forfeited policy, 105 A.L.R. 1093.

What constitutes a promise in writing to pay money within statutes of limitation, 111 A.L.R. 984.

When action considered to be one on contract rather than one for fraud as regards statute of limitations, 114 A.L.R. 525.

Suit to rescind contract as one based on contract or covenant within statute of limitations, 114 A.L.R. 1525.

Bar of statute of limitations against action to recover principal of obligation as affecting right to recover interest, 115 A.L.R. 728.

Promise by holder of obligation to extend time for payment or not to press for payment as tolling statute of limitations, 120 A.L.R. 765.

Liability of surety as affected by running of limitation in favor of principal or cosurety, 122 A.L.R. 204.

Statute of limitations as applied to certificate of deposit, 128 A.L.R. 157.

Statute of limitations applicable to action on check, 139 A.L.R. 1280.

Statute of limitations: action by one secondarily liable on negotiable instrument against others secondarily liable, or against principal, as an action on such instrument, or an action on an implied promise, or similar action, 140 A.L.R. 888; 143 A.L.R. 1062.

Promise to pay debt conditioned upon future act of creditor as tolling statute of limitations, 143 A.L.R. 1429.

When statute of limitations begins to run against action on a contract which contemplates an actual demand, 159 A.L.R. 1021.

What constitutes a contract in writing within statute of limitations, 3 A.L.R.2d 809.

Right of creditor to set aside transfer of property as fraudulent as affected by the fact that his claim is barred by statute of limitation, 14 A.L.R.2d 598.

What period of limitation governs in an action against a public officer and the surety on his official bond, 18 A.L.R.2d 1176.

Action by passenger against carrier for personal injuries as based on contract or on tort, with respect to application of statutes of limitation, 20 A.L.R.2d 331.

When statute of limitations commences to run against promise to pay debt "when able," "when convenient," or the like, 28 A.L.R.2d 786; 67 A.L.R.5th 479.

Payment by obligor on note or other instrument containing warrant of attorney to confess judgment as extending time within which power to confess may be exercised, 35 A.L.R.2d 1452.

When limitations begin to run against actions on public securities or obligations to be paid out of special or particular fund, 50 A.L.R.2d 271.

When statute of limitations begins to run on contractual obligation to pay for minor's support, 52 A.L.R.2d 1125.

When statute of limitations begins to run against note payable on demand, 71 A.L.R.2d 284.

Statute of limitations applicable in action to enforce, or recover damages for breach of, contract to make a will, 94 A.L.R.2d 810.

Choice of law as to applicable statute of limitations in contract actions, 78 A.L.R.3d 639.

When statute of limitations begins to run against action to recover money paid by mistake, 79 A.L.R.3d 754.

What statute of limitations governs damage action against attorney for malpractice, 2 A.L.R.4th 284.

Debtor's restrictive language accompanying part payment as preventing interruption of statute of limitations, 10 A.L.R.4th 932.

Computer sales and leases: time when cause of action for failure of performance accrues, 90 A.L.R.4th 298.

Application of statute of limitations to actions for breach of duty in performing services of public accountant, 7 A.L.R.5th 852.

When statute of limitations commences to run as to cause of action for wrongful discharge, 19 A.L.R.5th 439.

Modern status of the application of "discovery rule" to postpone running of limitations against actions relating to breach of building and construction contracts, 33 A.L.R.5th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time of occurrence of negligent act or omission, 11 A.L.R.6th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time of occurrence of sustaining damage or injury and other theories, 12 A.L.R.6th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time client discovers, or should have discovered, negligent act or omission — Statement of rule and application of rule to providing client with allegedly negligent advice or failing to advise, 13 A.L.R.6th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time client discovers, or should have discovered, negligent act or omission — Application of rule to conduct of litigation and delay or inaction in conducting client's affairs, 14 A.L.R.6th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time client discovers, or should have discovered, negligent act or omission — Application of rule to property, estate, corporate, and document cases, 15 A.L.R.6th 427.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time client discovers, or should have discovered, negligent act or omission — Application of rule to negligent misrepresentation, failure to supervise junior counsel, conflict of interest, billing disputes, and unspecified acts of negligence, 16 A.L.R.6th 653.

Construction and application of "key man" life insurance, 12 A.L.R.7th 6.

9-3-25. Open accounts; breach of certain contracts; implied promise; exception.

All actions upon open account, or for the breach of any contract not under the hand of the party sought to be charged, or upon any implied promise or undertaking shall be brought within four years after the right of action accrues. However, this Code section shall not apply to actions for the breach of contracts for the sale of goods under Article 2 of Title 11.

History.

Laws 1809, Cobb's 1851 Digest, p. 566.; Ga. L. 1855-56, p. 233, § 10; Code 1863, § 2859; Code 1868, § 2867; Code 1873, § 2918; Code 1882, § 2918; Civil Code 1895, § 3768; Civil Code 1910, § 4362; Code 1933, § 3-706; Ga. L. 1962, p. 156, § 1.

Law reviews.

For survey article on construction law, see 60 Mercer L. Rev. 59 (2008).

For annual survey of law on construction law, see 62 Mercer L. Rev. 71 (2010).

For note, "Forty-Eight States are Probably Not Wrong: An Argument for Modernizing Georgia's Legal Malpractice Statute of Limitations," see 33 Ga. St. U.L. Rev. 805 (2017).

For annual survey on real property law, see 70 Mercer L. Rev. 209 (2018).

JUDICIAL DECISIONS

Analysis

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General Consideration

This section applies to counties. MacNeill v. McElroy, 193 Ga. 55, 17 S.E.2d 169, 1941 Ga. LEXIS 582 (1941).

"Hand" defined. — "Hand" is used in legal parlance to denote either handwriting or a written signature. Scarboro v. Ralston Purina Co., 160 Ga. App. 576, 287 S.E.2d 623, 1981 Ga. App. LEXIS 3106 (1981).

Actions, Generally

Preemption by statute of limitations contained in federal Interstate Commerce Act. — While the federal Interstate Commerce Act, 49 U.S.C. § 1 et seq., did not preempt a motor carrier's state law actions against a shipping broker for breach of contract and recovery on an open account, the state law statute of limitations for those actions found in O.C.G.A. §§ 9-3-25 and 46-9-5 were preempted by the 18-month statute of limitations in 49 U.S.C. § 14705(a); therefore, the carrier's action, filed five days after the 18-month time limit had expired, was untimely. Exel Transp. Servs. v. Sigma Vita, Inc., 288 Ga. App. 527, 654 S.E.2d 665, 2007 Ga. App. LEXIS 1247 (2007).

Service of process beyond statute of limitation period. — Trial court erred in granting a creditor summary judgment in its action against a guarantor to collect on a past due commercial account because the guarantor was served several years beyond either the two-year statute of limitation period, O.C.G.A. § 11-2-725, or the four-year limitation period, O.C.G.A. § 9-3-25; the creditor had notice of a service of process issue at least as early as March 2007 and knew of the service problem in January 2008, but it did not serve the guarantor with process until September 2008, and the creditor failed to prove that it exercised due diligence in attempting to effect service. Scanlan v. Tate Supply Co., 303 Ga. App. 9, 692 S.E.2d 684, 2010 Ga. App. LEXIS 270 (2010), overruled in part, Giles v. State Farm Mut. Ins. Co., 330 Ga. App. 314, 765 S.E.2d 413, 2014 Ga. App. LEXIS 717 (2014).

Limitation for action based on written acknowledgment of open account is four years, not six, as nature of original obligation rather than new promise determines limitation. Jackson v. Brown, 118 Ga. App. 558, 164 S.E.2d 450, 1968 Ga. App. LEXIS 1456 (1968).

Open account for continuous service of attorney, for which the attorney is entitled to be paid only after particular result is procured and accepted by employer, is not barred until four years after such result is accepted. City of Summerville v. Sellers, 94 Ga. App. 152, 94 S.E.2d 69, 1956 Ga. App. LEXIS 493 (1956).

This section applies when contract is admittedly oral. Piedmont Life Ins. Co. v. Bell, 103 Ga. App. 225, 119 S.E.2d 63, 1961 Ga. App. LEXIS 913 (1961).

When contract is partly in writing and partly in parol, entire contract is considered one in parol. G.M. Shutt & Co. v. Andrews, 47 Ga. App. 530, 171 S.E. 219, 1933 Ga. App. LEXIS 548 (1933).

Period of limitation applicable to action for contribution based upon implied contract is four years from time right of action accrues. Powell v. Powell,

171 Ga. 840, 156 S.E. 677, 1931 Ga. LEXIS 478 (1931).

Right of one who paid promissory note signed by that person personally and another as coprincipal to call on the latter for contribution under an implied contract for money paid is limited to a period of four years. Porter v. Ingram, 47 Ga. App. 266, 170 S.E. 299, 1933 Ga. App. LEXIS 365 (1933).

Statute of limitation as to action by comaker of promissory note for contribution from another comaker is four years. Bell v. Kleinberg, 102 Ga. App. 623, 117 S.E.2d 262, 1960 Ga. App. LEXIS 696 (1960).

Action for money had and received must under this section be brought within four years from time right of action accrues. Norris v. Nixon, 78 Ga. App. 769, 52 S.E.2d 529, 1949 Ga. App. LEXIS 977 (1949).

Recovery of excessive salary received by probation officer. — When assistant county probation officer was paid salary under statute subsequently held invalid, such salary being more than the salary which had been properly fixed, right of county to recover excess of salary paid would be subject to four-year period of limitation stated in this section, computed from time when each payment was made, regardless of continuance in office of probation officer. MacNeill v. McElroy, 193 Ga. 55, 17 S.E.2d 169, 1941 Ga. LEXIS 582 (1941).

Assumpsit between partners subsequent to dissolution. — When foundation of action is promise to account or contract to account, not under seal, made subsequent to dissolution of partnership, action was one on assumpsit, and four-year statute of limitations applied. Dukes v. Rogers, 67 Ga. App. 661, 21 S.E.2d 295, 1942 Ga. App. LEXIS 496 (1942).

Action for accounting based on parol contract of partnership, filed more than four years after termination of partnership, was barred by the statute of limitations. Baker v. Schneider, 210 Ga. 493, 80 S.E.2d 783, 1954 Ga. LEXIS 345 (1954).

Action between representatives of deceased partners. — Since the firm was composed of two partners, both of whom died before the dissolution agreement had been made or the partnership affairs settled, an action upon demand or claim by a representative of one partner against a representative of the other was timely, if brought within four years of the death of the partner who died first. Powell v. Powell, 171 Ga. 840, 156 S.E. 677, 1931 Ga. LEXIS 478 (1931).

Recovery of reasonable value of services. — Action seeking to recover reasonable value of services, less credit for partial payment in form of reduced rentals, clearly came under the four-year limitation of former Code 1933, § 3-706 (see now O.C.G.A. § 9-3-25), and was not an action "for recovery of wages," as that term was used in former Code 1933, § 3-704 (see now O.C.G.A. § 9-3-22). Parks v. Brissey, 114 Ga. App. 563, 151 S.E.2d 896, 1966 Ga. App. LEXIS 850 (1966).

Complaint in equity. — Suit in equity to enjoin enforcement of a judgment which allegedly has been satisfied by settlement after institution of the litigation and payment of the agreed amount is not barred by the three-year statute of limitations set forth in O.C.G.A. § 9-11-60(f), nor is it barred by the four-year statutes applicable to breach of contract. Wells v. Mullis, 255 Ga. 426, 339 S.E.2d 574, 1986 Ga. LEXIS 532 (1986).

Legal malpractice. — When an individual assumes relation of confidence to another, such as relationship of attorney and client, without disclosing lack of qualification and authorization to perform legal services contracted for, the client's cause of action for rescission of the contract and recovery of fees paid to the attorney, when no benefits were received by the client from such services as may have been performed, arises when the client discovers the attorney's lack of qualification and authorization to act as attorney-at-law. Lowe v. Presley, 86 Ga. App. 328, 71 S.E.2d 730, 1952 Ga. App. LEXIS 947 (1952).

In this state legal malpractice is based upon breach of duty imposed by attorney-client contract of employment, and as such, the applicable statute of limitations is four years. Riddle v. Driebe, 153 Ga. App. 276, 265 S.E.2d 92, 1980 Ga. App. LEXIS 1770 (1980).

Actions, Generally (Cont'd)

Action for attorney malpractice accrues and period of limitations begins to run from date of attorney's breach of duty, that is, from date of alleged negligent or unskillful act. Riddle v. Driebe, 153 Ga. App. 276, 265 S.E.2d 92, 1980 Ga. App. LEXIS 1770 (1980).

When plaintiffs sued defendant attorney and defendant's former law partner and partnership for malpractice, this four-year statute of limitation, O.C.G.A. § 9-3-25, applied. Peppers v. Siefferman, 166 Ga. App. 389, 304 S.E.2d 511, 1983 Ga. App. LEXIS 2181 (1983).

Since the only underlying contractual relationship that could be established based on the pleadings would be a contract of employment to perform the legal services and such was not a written contract at all but rather an oral one, and the instruments alleged to be defective were not in part or in whole the contract but were merely the work product or the objective of the contract for services, the defendant's claim was subject to a four-year statute of limitations either because the defendant's action was based on malpractice or an oral contract, both of which are subject to a four-year statute of limitations. Loftin v. Brown, 179 Ga. App. 337, 346 S.E.2d 114, 1986 Ga. App. LEXIS 1899 (1986).

A cause of action for legal malpractice, alleging negligence or unskillfulness, sounds in contract (agency) and, in the case of an oral agreement, is subject to the four-year statute of limitations in O.C.G.A. § 9-3-25, but such a cause of action can also sound in tort and, thus, be subject to the one-year and/or two-year limitation of O.C.G.A. § 9-3-33. Ballard v. Frey, 179 Ga. App. 455, 346 S.E.2d 893, 1984 Ga. App. LEXIS 2765 (1984); Coleman v. Hicks, 209 Ga. App. 467, 433 S.E.2d 621, 1993 Ga. App. LEXIS 904 (1993), cert. denied, No. S93C1714, 1993 Ga. LEXIS 1076 (Ga. Nov. 5, 1993).

When defendant's counterclaim did not seek tort damages for any "injuries to the person" within the ambit of O.C.G.A. § 9-3-33, but sought only those damages alleged to be the result of plaintiff-attorney's negligent breach of the plaintiff's contract of employment, the trial court erred in striking the counterclaim based upon the two-year statute of limitation defense. Ballard v. Frey, 179 Ga. App. 455, 346 S.E.2d 893, 1984 Ga. App. LEXIS 2765 (1984).

Cause of action for legal malpractice, alleging attorney's negligent breach of the attorney's contract of employment, was subject to the four-year limitation provided by O.C.G.A. § 9-3-25. Royal v. Harrington, 194 Ga. App. 457, 390 S.E.2d 668, 1990 Ga. App. LEXIS 116 (1990).

Plaintiff's cause of action accrued and the period of limitation began to run when defendant attorney committed unskillful acts during the plaintiff's criminal trial, and the failure of the defendant to argue on plaintiff's appeal from conviction the defendant's own possible ineffective assistance rendered during trial was not a separate act of malpractice for purposes of the statute of limitations. Long v. Wallace, 214 Ga. App. 466, 448 S.E.2d 229, 1994 Ga. App. LEXIS 924 (1994), cert. denied, No. S94C1903, 1995 Ga. LEXIS 200 (Ga. Jan. 17, 1995).

Cause of action based on attorney's allegedly negligent preparation of a promissory note was subject to limitation of O.C.G.A. § 9-3-25, and the limitation period was not tolled when there was no allegation or evidence of concealment or misrepresentation of any negligence in the preparation of the note. Jaraysi v. Soloway, 215 Ga. App. 531, 451 S.E.2d 521, 1994 Ga. App. LEXIS 1288 (1994).

Because a breach of contract would occur upon the commission of the wrongful act violating the contractual duty, a cause of action ex contractu, like a cause of action ex delicto, arises and the statute of limitations for legal malpractice is triggered immediately upon the commission of the wrongful act. Jones, Day, Reavis & Pogue v. American Envirecycle, Inc., 217 Ga. App. 80, 456 S.E.2d 264, 1995 Ga. App. LEXIS 345 (1995), cert. denied, No. S95C1208, 1995 Ga. LEXIS 1028 (Ga. Sept. 13, 1995).

When legal malpractice is alleged to arise from negligent preparation of a contractual document, the date of contract execution is the controlling date giving rise to a cause of action for malpractice

and in commencing the running of the statute of limitations. Jones, Day, Reavis & Pogue v. American Envirecycle, Inc., 217 Ga. App. 80, 456 S.E.2d 264, 1995 Ga. App. LEXIS 345 (1995), cert. denied, No. S95C1208, 1995 Ga. LEXIS 1028 (Ga. Sept. 13, 1995).

Actions for legal malpractice averring negligence or unskillfulness are subject to the four-year statute of limitation, which commences to run from the date of the attorney's alleged wrongful act of negligence or unskillfulness. Brown v. Kinser, 218 Ga. App. 385, 461 S.E.2d 564, 1995 Ga. App. LEXIS 737 (1995).

Legal malpractice claim may sound either in tort or contract, depending on the circumstances. The circumstances on which it depends, however, are those involving the attorney-client relationship, the duty involved, and the breach thereof, not those involving the nature of the underlying action for which the attorney was consulted or retained. Plumlee v. Davis, 221 Ga. App. 848, 473 S.E.2d 510.

O.C.G.A. § 9-3-24 (simple contracts in writing) was not applicable to a legal malpractice claim, since the contract creating the attorney-client relationship covered certain issues such as fees, expenses, etc., but did not constitute the entire agreement between the parties, not specifying, for example, the manner in which the attorney was to carry out the attorney's duties, when suit was to be filed, etc. As such, O.C.G.A. § 9-3-25, applicable to oral contracts, had to be applied. Plumlee v. Davis, 221 Ga. App. 848, 473 S.E.2d 510.

In a legal malpractice action based on the defendant's failure to advise the plaintiff regarding the applicable statute of limitation in a prior action, the statute of limitation began to run when the statute of limitation on the plaintiff's original personal injury claim expired without suit being filed. Harrison v. Beckham, 238 Ga. App. 199, 518 S.E.2d 435.

Legal malpractice statute of limitation was four years and was triggered upon the commission of the alleged wrongful act; a malpractice action, asserting a lawyer's negligence in the representation during a medical malpractice trial, was time-barred since the complaint was filed more than five years after the trial. Villani v. Hughes, 279 Ga. App. 618, 631 S.E.2d 709, 2006 Ga. App. LEXIS 331 (2006).

Georgia Court of Appeals erred in determining the taxpayers failed, as a matter of law, to exercise reasonable diligence to discover the law firm's allegedly fraudulent acts because once the IRS initiated an audit in 2005, the taxpayers did not ignore the problem and hired a law firm, which was an independent counsel with an established reputation in tax matters to assist them. Coe v. Proskauer Rose, LLP, 314 Ga. 519, 878 S.E.2d 235, 2022 Ga. LEXIS 239 (2022).

Motion to enforce lien for attorney's fees timely. — Trial court did not err in granting an attorney's motion to vacate the dismissal of a client's medical malpractice suit and to foreclose the attorney's lien for attorney fees under O.C.G.A. § 15-19-14(b) because the attorney's motion to enforce the lien was timely under the four-year statute of limitations applicable to open accounts, O.C.G.A. § 9-3-25, since the motion was filed within the same year the attorney's right of action accrued; the statute of limitation did not begin to run until the client settled the client's lawsuit on February 6, 2008, the attorney filed the attorney's notice of attorney's lien the day after the client executed the settlement release, and when the client filed a dismissal of the lawsuit without satisfying the lien the attorney filed the attorney's motion to vacate the dismissal and to enforce the attorney's lien on September 10, 2008. Woods v. Jones, 305 Ga. App. 349, 699 S.E.2d 567, 2010 Ga. App. LEXIS 675 (2010), cert. denied, No. S10C2000, 2011 Ga. LEXIS 64 (Ga. Jan. 24, 2011).

Legal malpractice contract-based claims not time-barred. — See Morris v. Atlanta Legal Aid Soc'y, Inc., 222 Ga. App. 62, 473 S.E.2d 501.

Letter confirming representation. — When attorneys' letter to the client merely confirmed representation in broad terms and outlined in detail only the fee arrangement between the parties and thus clearly did not constitute the entire agreement for legal services between the parties, an action based on malpractice by attorneys fell within the four-year limita-

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tion in O.C.G.A. § 9-3-25 and not the six-year limitation in O.C.G.A. § 9-3-24. Frates v. Sutherland, Asbill & Brennan, 164 Ga. App. 243, 296 S.E.2d 788, 1982 Ga. App. LEXIS 2763 (1982).

Allegations of accountant malpractice are clearly analogous to charges of attorney malpractice when issues of negligence or unskillfulness are raised. A breach of duty of an accountant's professional competence falls within the four-year statute of limitation as set forth in O.C.G.A. § 9-3-25. Consolidated Mgt. Servs., Inc. v. Halligan, 186 Ga. App. 621, 368 S.E.2d 148, 1988 Ga. App. LEXIS 449, aff'd, 258 Ga. 471, 369 S.E.2d 745, 1988 Ga. LEXIS 306 (1988).

Allegations of engineering malpractice. — Engineering firm was properly granted summary judgment in a breach of contract suit because the three documents the customer claimed to form the written contract did not contain the essential element of consideration; thus, the parties' agreement was not a contract in writing and the four-year limitation period under O.C.G.A. § 9-3-25 applied and the suit was time barred. Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., 317 Ga. App. 464, 731 S.E.2d 361, 2012 Ga. App. LEXIS 737 (2012), cert. denied, No. S13C0031, 2013 Ga. LEXIS 101 (Ga. Jan. 22, 2013).

This section is applicable to claims against estate by executor for enhancing value of the estate. Evans v. Evans, 237 Ga. 549, 228 S.E.2d 857, 1976 Ga. LEXIS 1302 (1976).

Payments made by executor for care of life tenant, when not made from portions of remainder of estate as provided by will, are treated as loans from individual, and recovery of them is governed by this section. Evans v. Evans, 237 Ga. 549, 228 S.E.2d 857, 1976 Ga. LEXIS 1302 (1976).

Claims for money paid to satisfy obligations of estate. — Claim of decedent's widow for reimbursement of money she expended personally to satisfy obligations of her husband's estate were barred by O.C.G.A. § 9-3-25 because she failed to file the claim within four years from the date the money was advanced. Kicklighter v. Woodward, 267 Ga. 157, 476 S.E.2d 248.

Action to collect unpaid credit card debt not an action on open account. — Because an action filed by a creditor to collect unpaid credit card charges was based on a written contract, and not an open account, the trial court properly held that the six-year limitations period under O.C.G.A. § 9-3-24 applied (and not that under O.C.G.A. § 9-3-25), supporting summary judgment in the creditor's favor; moreover, because the transaction at issue was a written contract, the form of the debtor's acceptance was immaterial. Hill v. Am. Express, 289 Ga. App. 576, 657 S.E.2d 547, 2008 Ga. App. LEXIS 65 (2008), cert. denied, No. S08C1008, 2008 Ga. LEXIS 490 (Ga. June 2, 2008).

Claim to be subrogated to rights of former holders of county warrants paid with money of claimant is one arising upon an implied undertaking within this section. Farmers' Loan & Trust Co. v. Wilcox County, 298 F. 772, 1924 U.S. Dist. LEXIS 1682 (D. Ga.), aff'd, 2 F.2d 465, 1924 U.S. App. LEXIS 2081 (5th Cir. 1924).

This section does not apply to widow's application for a year's support, as right to year's support is not an open account, nor is it based upon a contract or an implied assumpsit or undertaking. Bacon v. Bacon, 37 Ga. App. 171, 139 S.E. 111, 1927 Ga. App. LEXIS 563 (1927).

Specific performance of oral contract to convey land is not governed by this section. Jones v. Citizens & S. Nat'l Bank, 231 Ga. 765, 204 S.E.2d 116, 1974 Ga. LEXIS 1228 (1974).

In action for recovery of land by equitable owners, by statute, clearly no four-year statute of limitation is applicable. Smith v. Aldridge, 192 Ga. 376, 15 S.E.2d 430, 1941 Ga. LEXIS 463 (1941).

Section not applicable to action for employment discrimination. — Right to be free from discriminatory practices in employment is not analogous to right of action on implied or unwritten contracts which are governed by four-year limitation period of this section; rather, it is failure to contract for employment or promotion on an equal basis which gives rise

to an action. United States v. Georgia Power Co., 474 F.2d 906, 1973 U.S. App. LEXIS 11611 (5th Cir. 1973).

Claim for failure to employ cannot be characterized as contractual in nature because refusal or failure to employ implicitly excludes existence of mutual assent which is necessary for any contract. Carter v. Seaboard Coast Line R.R., 392 F. Supp. 494, 1974 U.S. Dist. LEXIS 6564 (S.D. Ga. 1974).

Section inapplicable to action brought under O.C.G.A. § 9-3-22. — When action was brought on independent statutory remedy afforded by Ga. L. 1976, p. 1564, § 1 (see now O.C.G.A. § 33-22-14), relating to disposition of unearned insurance premiums, and claim for relief was predicated on statutory obligation contained therein, former Code 1933, § 3-704 (see now O.C.G.A. § 9-3-22), rather than former Code 1933, § 3-706 (see now O.C.G.A. § 9-3-25), applied. Perry & Co. v. Knight Ins. Underwriters, Inc., 149 Ga. App. 128, 253 S.E.2d 808, 1979 Ga. App. LEXIS 1752 (1979).

Applicability to agreement that was not a written contract. — Document and blueprints did not create a written contract under O.C.G.A. § 13-3-1 and thus the parties' construction agreement was an oral/parol one and the limitations period of O.C.G.A. § 9-3-25 applied; the documents could not be read together as the documents did not reference each other and were not contemporaneous, and moreover even if the documents could be read together, the documents did not identify the subject matter of the contract or the specific parties to the contract, and neither was signed, thus failing to reflect the parties' assent. Harris v. Baker, 287 Ga. App. 814, 652 S.E.2d 867, 2007 Ga. App. LEXIS 1111 (2007).

Action by broker against executrix of deceased speculator to recover for advancements made and for commissions on transactions in buying and selling stocks for speculator, when only evidence of written contract consisted in telegraphic communications and letters exchanged between broker and speculator, was not upon a written contract, but was upon a contract "not under the hand of the party sought to be charged" and upon an "implied assumpsit or undertaking." G.M. Shutt & Co. v. Andrews, 47 Ga. App. 530, 171 S.E. 219, 1933 Ga. App. LEXIS 548 (1933).

Claim of bar on open account by privy to debtor. — While as general rule right to claim benefit of statute of limitations is personal to debtor, it may also be claimed by debtor's transferee when it is sought to subject property transferred to the debtor to payment of debt; hence, in action against alleged fraudulent grantee, seeking to set aside alleged fraudulent transfer and to subject property to payments of debts, to which suit debtor has not been made a party, alleged fraudulent grantee, being a privy in estate to debtor grantor, may claim benefit of statute of limitations against debts represented by open accounts. Remington-Rand, Inc. v. Emory Univ., 185 Ga. 571, 196 S.E. 58, 1938 Ga. LEXIS 490 (1938).

Actions by Resolution Trust Corporation. — Georgia's four-year statute of limitations governed the Resolution Trust Corporation's actions as receiver; the federal Financial Institutions Reform, Recovery, and Enforcement Act (12 U.S.C. § 1821) does not operate to revive stale state actions. Resolution Trust Corp. v. Artley, 28 F.3d 1099, 1994 U.S. App. LEXIS 21327 (11th Cir. 1994).

Jurisdiction of suit by foreign company on open account. — Italian companies that sold goods to a Georgia corporation were not required to obtain a certificate of authority from the State of Georgia prior to doing business in Georgia, and Georgia courts had jurisdiction over actions which the Italian companies filed against the Georgia corporation after they delivered goods, submitted invoices for payment, but were not fully paid. Imex Int'l v. Wires Eng'g, 261 Ga. App. 329, 583 S.E.2d 117, 2003 Ga. App. LEXIS 565 (2003), cert. denied, No. S03C1410, 2003 Ga. LEXIS 802 (Ga. Sept. 22, 2003), cert. denied, No. S03C1408, 2003 Ga. LEXIS 803 (Ga. Sept. 22, 2003).

Monthly wire transfer payments from a debtor to a creditor containing notations regarding the debtor's account constituted new promises by the debtor to pay under O.C.G.A. §§ 9-3-110 and 9-3-112 and sufficed to renew the

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running of the four-year statute of limitations, O.C.G.A. § 9-3-25. Because the last payment was made in July 2008, the creditor's suit in March 2012 was not time-barred. SKC, Inc. v. eMag Solutions, LLC, 326 Ga. App. 798, 755 S.E.2d 298, 2014 Ga. App. LEXIS 160 (2014), cert. denied, No. S14C1134, 2014 Ga. LEXIS 642 (Ga. Sept. 8, 2014).

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Controlling effect of time of breach. — When action is based on breach of written contract and implied warranty, time of breach, not time of discovery of breach, starts the statute of limitations. National Hills Shopping Ctr., Inc. v. Insurance Co. of N. Am., 320 F. Supp. 1146, 1970 U.S. Dist. LEXIS 8973 (S.D. Ga. 1970).

Breach of duty, not time special damage results, is beginning period for right of action. Waddey v. Davis, 149 Ga. App. 308, 254 S.E.2d 465, 1979 Ga. App. LEXIS 1829 (1979).

Statute of limitation on the breach of the duty imposed by the contract of employment runs from the date of the breach of duty, and not from the time when the extent of the resulting injury is ascertained. McClain v. Johnson, 160 Ga. App. 548, 288 S.E.2d 9, 1981 Ga. App. LEXIS 3091 (1981), cert. denied, 248 Ga. 877, 289 S.E.2d 247, 1982 Ga. LEXIS 721 (1982).

Former employer was entitled to summary judgment as to a former employee's breach of contract claim because the four-year statute of limitations barred the claim since the employee's right of action accrued either when the former employer's owner first agreed to give the employee 10% of the company or when the employee's compensation changed to only a base salary and the owner refused to give the employee a written document of any kind. Contract Furniture Refinishing & Maint. Corp. v. Remanufacturing & Design Group, LLC, 317 Ga. App. 47, 730 S.E.2d 708, 2012 Ga. App. LEXIS 686 (2012).

Creditor's nondischargeability complaint against the debtor failed as a matter of law because there was no enforceable debt to except from the debtor's bankruptcy discharge after the creditor failed to file a suit against the debtor within four years after the debtor missed the date agreed upon for repayment in the oral contract between the parties. Even if the contract was entered into fraudulently, the same limitations period applied, and the statute began to run from the date the fraud was discovered, which was also the date of initial default on repayment of the loan. Stinson v. Robinson (In re Robinson), 525 B.R. 822, 2015 Bankr. LEXIS 565 (Bankr. N.D. Ga. 2015).

Statute of limitations on open account runs from date it is due. Murray v. Lightsey, 58 Ga. App. 100, 197 S.E. 870, 1928 Ga. App. LEXIS 652 (1928); Leonard v. Cesaroni, 98 Ga. App. 715, 106 S.E.2d 362, 1958 Ga. App. LEXIS 665 (1958).

Running of statute on severable account. — When an account grew out of implied undertakings that amounted to a severable contract as defined by law, rights of action accrued and statute of limitation began to run as services were rendered and charges were made from time to time on the account. Yeargin v. Bramblett, 115 Ga. App. 862, 156 S.E.2d 97, 1967 Ga. App. LEXIS 1284 (1967).

Open account with fixed dates for payments. — When one merchant sells goods to another on open account, and due date of account is expressly and definitely fixed in contract of sale, seller's cause of action thereon is barred after expiration of four years from such date. Robinson v. Jackson, 57 Ga. App. 431, 195 S.E. 877, 1938 Ga. App. LEXIS 622 (1938).

In action of claim for money received, statute does not begin to run until demand is made. Goodwyn v. Roop, 53 Ga. App. 847, 187 S.E. 127, 1936 Ga. App. LEXIS 410 (1936).

Statute runs from time of demand when loan based on oral promise to pay. — When a loan is made on the basis of an oral promise to pay, it will be assumed the parties intended either expressly or impliedly that demand for repayment would not be made until some future time; the statute of limitations in O.C.G.A. § 9-3-25 will not commence before the date of demand. McRae v. Smith, 159 Ga. App. 19, 282 S.E.2d 676, 1981 Ga.

App. LEXIS 2463 (1981); Mills v. Barton, 205 Ga. App. 413, 422 S.E.2d 269, 1992 Ga. App. LEXIS 1197 (1992).

Demand note. — When money is loaned, payable on demand, an express or implied agreement between the parties that the parties' arrangement should continue into the future for a considerable length of time before the plaintiff would be expected to demand the plaintiff's money delays the running of the statute of limitations. Scarboro v. Ralston Purina Co., 160 Ga. App. 576, 287 S.E.2d 623, 1981 Ga. App. LEXIS 3106 (1981).

In action based on breach of oral agreement to provide plaintiff with 10% of the stock of a certain corporation, as no time was set for performance, the cause of action accrued at the date of the oral agreement. Palmer v. Neal, 602 F. Supp. 882, 1984 U.S. Dist. LEXIS 18441 (N.D. Ga. 1984).

In action based on breach of an oral agreement which provided that the plaintiff and defendant would be joint owners of any patent issued for the apparatus in question, the breach occurred when the defendant executed the patent application naming the defendant as the sole inventor, but the statute of limitations was not tolled by fraud since the defendant had no duty to disclose the defendant's actions to the plaintiff, the plaintiff having previously terminated the association with the defendant. Palmer v. Neal, 602 F. Supp. 882, 1984 U.S. Dist. LEXIS 18441 (N.D. Ga. 1984).

Under Georgia law, contracts that are partly written and partly in parol must be considered as in parol and are governed by the four-year statute of limitation applicable to oral contracts under O.C.G.A. § 9-3-25. Bridge Capital Investors II v. Small, 144 Fed. Appx. 762, 2005 U.S. App. LEXIS 14182 (11th Cir. 2005).

Accrual of right of contribution. — When principal obligor, with own funds, pays joint debt due by the obligor and the coprincipal, the right upon implied contract of coprincipal to bear share of common burden arises when payment extinguishes debt of common debtor. Powell v. Powell, 171 Ga. 840, 156 S.E. 677, 1931 Ga. LEXIS 478 (1931).

Mere ignorance of facts constituting cause of action does not prevent running of statute of limitations. Ponder v. Barrett, 46 Ga. App. 757, 169 S.E. 257, 1933 Ga. App. LEXIS 231 (1933).

Statute of limitation was not tolled by defective service of process. — Because the defendant was not properly served by the plaintiff, the statute of limitation continued to run even after the action was filed, and the statute of limitation expired without the defendant being properly served. Gamlins, Solicitors & Notaries v. A.E. Roberts & Assocs., Inc., 254 Ga. App. 763, 564 S.E.2d 29, 2002 Ga. App. LEXIS 333 (2002).

Fraud necessary to toll statute. — In a legal malpractice action filed subsequent to the running of the four-year statute of limitations, when there was no evidence giving rise to factual merit in the plaintiff's claim that the limitations statute was tolled due to fraud, and since there existed no justiciable issue of law as to such claim, the trial court erred in denying the defendant attorneys' motion for attorney fees. Brown v. Kinser, 218 Ga. App. 385, 461 S.E.2d 564, 1995 Ga. App. LEXIS 737 (1995).

Employee's claims for unjust enrichment and unpaid compensation were partially barred by the statutes of limitations as the statutes of limitations were not tolled since the employee failed to show fraud by claiming that the employee justifiably relied on the corporation's representations that the employee would be paid all the monies owed. Heretyk v. P.M.A. Cemeteries, Inc., 272 Ga. App. 79, 611 S.E.2d 744, 2005 Ga. App. LEXIS 223 (2005).

Four-year statute of limitations applicable to accountant malpractice actions, O.C.G.A. § 9-3-25, was not tolled by fraud because there was no evidence that the accountant concealed or failed to disclose information that deterred the client from filing suit within the limitation period; the accountant consistently informed the client that the tax return was not complete. Bryant v. Golden, 302 Ga. App. 760, 691 S.E.2d 672, 2010 Ga. App. LEXIS 234 (2010).

Certain of plaintiff's claims for fraud, conversion, and breach of oral contract arose outside of the four-year statutes of limitation, and the undisputed facts

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showed that the plaintiff did not exercise reasonable diligence in discovering the defendant's alleged fraud as to a certain account as the defendant was put on notice of the account when the defendant received two personal checks issued from that account, endorsed and cashed the checks, but never inquired as to the checks' source. Hot Shot Kids Inc. v. Pervis (In re Pervis), 497 B.R. 612, 2013 Bankr. LEXIS 3374 (Bankr. N.D. Ga. 2013).

Accrual of cause with discovery of fraud. — When fraudulent concealment of cause of action is in breach of confidential relation involving duty to make full disclosure, statute does not begin to run until discovery of fraud. Lowe v. Presley, 86 Ga. App. 328, 71 S.E.2d 730, 1952 Ga. App. LEXIS 947 (1952).

Party's action was barred since the party failed to bring an action against an employer until more than four years after discovering that the party's pension payments were lower than what the party believed the employer had orally agreed to since the party would have become aware of any alleged fraud by the employer when the party discovered the true amount of payments. Leathers v. Timex Corp., 174 Ga. App. 430, 330 S.E.2d 102, 1985 Ga. App. LEXIS 1825 (1985).

Accrual of right to receive commissions. — Employee was properly granted summary judgment for breach of an oral employment agreement for commission payments; claims for commissions for jobs done before November 1999 were not time-barred because the commissions were not payable until the employee submitted a worksheet calculating them, and no worksheet had been submitted before that time. CPD Plastering, Inc. v. Miller, 284 Ga. App. 172, 643 S.E.2d 392, 2007 Ga. App. LEXIS 272 (2007).

Co-tenant's claim for contribution of amounts paid does not arise until other tenant asserts adverse interest. — In an estate's claim for partition of property, a co-tenant's counterclaim for contribution and set-off for sums the co-tenant paid in loan and tax payments was not barred by the four-year statute of limitations, O.C.G.A. § 9-3-25, because under O.C.G.A. § 44-6-122, the statute did not begin to run until the estate filed its complaint. Khimani v. Ruppenthal, 344 Ga. App. 658, 811 S.E.2d 448, 2018 Ga. App. LEXIS 107 (2018), cert. denied, No. S18C0916, 2018 Ga. LEXIS 571 (Ga. Aug. 20, 2018).

Statute tolled during pendency of arbitration proceedings. — Limitation of O.C.G.A. § 9-3-25 applicable to an action by a client based on an oral contract with the client's attorney was tolled during the pendency of proceedings on the client's petition under the Arbitration of Fees Disputes program of the State Bar. Antinoro v. Browner, 223 Ga. App. 664, 478 S.E.2d 392.

Statute not tolled during pendency of bankruptcy proceedings. — Debtor's filing of a bankruptcy petition under Chapter 11 did not toll the running of the statute of limitation during the pendency of the bankruptcy; if the limitation period has expired during a bankruptcy, suit against the debtor must be commenced within 30 days of the automatic stay. J.T. Indus. Contractors v. Hargis Railcar, Inc., 217 Ga. App. 679, 458 S.E.2d 702, 1995 Ga. App. LEXIS 554 (1995).

Discovery of bank's failure to apply proceeds. — After the plaintiff discovered in 1926 that proceeds from the sale of bonds which the plaintiff had intended to be applied to payment of the promissory note had never been accounted for by the bank, but did not bring an action until 1931, such action was barred by the statute of limitations, which ran against the plaintiff from date of discovery of the wrong, whether the action was brought in tort or in contract. Wall v. Middle Ga. Bank, 180 Ga. 431, 179 S.E. 363, 1935 Ga. LEXIS 281 (1935).

"Adverse domination" inapplicable. — Federal common law doctrine of "adverse domination" did not toll the state statute of limitations governing Resolution Trust Corporation's claims in a case when subject loans were made between 1982 and 1985, more than four years prior to the defendant bank's placement into receivership with the RTC's predecessor agency. Resolution Trust Corp. v. Artley, 28 F.3d 1099, 1994 U.S. App. LEXIS 21327 (11th Cir. 1994).

Accrual of action for attorney's negligence. — With respect to allegedly defective title examinations and opinions rendered by ab attorney to a client, this section, relating to an oral contract of employment, applies and begins to run from the date of the attorney's alleged negligent or unskillful act, not from the date of the client's discovery. Master Mtg. Corp. v. Byers, 130 Ga. App. 97, 202 S.E.2d 566, 1973 Ga. App. LEXIS 1238 (1973).

In a legal malpractice action, despite the fact that the trial court held that the client's failure to prove proximate causation supported an order granting summary judgment to the attorney and the attorney's law firm, the appeals court nevertheless held that summary judgment was properly granted to the attorney, under the "right for any reason" rule, as the suit was untimely filed. Moreover, the client's argument that the attorney could have amended the suit to add a damages claim up until the time of a pre-trial order, and that this later failure to act should be considered the triggering date for the malpractice action, was unavailing, as the attorney's failure to amend constituted a failure to avoid the effect of the earlier breach and a failure to mitigate damages, but was not a failure inflicting a new harm, thus triggering a new limitations period. Duke Galish, LLC v. Arnall Golden Gregory, LLP, 288 Ga. App. 75, 653 S.E.2d 791, 2007 Ga. App. LEXIS 1137 (2007), cert. denied, No. S08C0416, 2008 Ga. LEXIS 212 (Ga. Feb. 25, 2008).

In a legal malpractice case based on failure to protect an under-insured motorist claim, because the law firm could have served the insurance company, like any other named defendant, until November 2, 2013, the law firm was not subject to a cognizable claim for malpractice for failing to serve the insurance company prior to November 3, 2013, and the four-year statute of limitation for the legal malpractice action did not begin to run until November 3, 2013, at the earliest. Because the client filed a malpractice suit against the law firm on July 21, 2017, within the four-year limitation period, it was not time barred. Armstrong v. Cuffie, 311 Ga. 791, 860 S.E.2d 504, 2021 Ga. LEXIS 477 (2021).

In accountant malpractice cases, the statute of limitations runs from the date of the breach of the duty and not from the time when the extent of the resulting injury is ascertained, not from the date of the client's discovery of the error. Consolidated Mgt. Servs., Inc. v. Halligan, 186 Ga. App. 621, 368 S.E.2d 148, 1988 Ga. App. LEXIS 449, aff'd, 258 Ga. 471, 369 S.E.2d 745, 1988 Ga. LEXIS 306 (1988).

Running of statute against school district from time funds were available. — In action against local school district for money had and received, when there is no condition precedent to bringing such action that demand for payment be made, statute of limitation begins to run from time funds were on hand to discharge obligations. Jasper Sch. Dist. v. Gormley, 57 Ga. App. 537, 196 S.E. 232, 1938 Ga. App. LEXIS 332 (1938).

Not applicable to engineering malpractice claim arising out of written contract. — Court of Appeals erred in holding that a professional malpractice claim premised on a written contract between an engineering firm and the firm's client was governed by the four-year statute of limitations in O.C.G.A. § 9-3-25, rather than the six-year statute of limitations in O.C.G.A. § 9-3-24. Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., 288 Ga. 236, 703 S.E.2d 323, 2010 Ga. LEXIS 884 (2010).

Accrual of cause between partners after dissolution of firm. — After dissolution of partnership, statute of limitations does not begin to run in favor of one partner against another until partnership affairs relating to debtors and creditors have been wound up and settled, or at least until sufficient time has elapsed since dissolution to raise presumption that such was the fact. Dukes v. Rogers, 67 Ga. App. 661, 21 S.E.2d 295, 1942 Ga. App. LEXIS 496 (1942).

When running of limitation period commenced prior to beginning of alleged fraudulent concealment, the statute of limitation does not cease to run. Peppers v. Siefferman, 166 Ga. App. 389, 304 S.E.2d 511, 1983 Ga. App. LEXIS 2181 (1983); Kilby v. Shepherd, 177 Ga. App. 462, 339 S.E.2d 742, 1986 Ga. App. LEXIS 1443 (1986).

Rescission of contract action time-barred. — Trial court properly dismissed

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a firefighter's action against a city, as an employer, and a firefighters pension fund for rescission of an alleged contract and for fraud, as the claims were barred by the four-year limitations period for actions based on mutual mistake or fraud, pursuant to O.C.G.A. §§ 9-3-25, 9-3-26, and 9-3-31, and the firefighter did not show that the firefighter was prevented from bringing the action in a timely manner, rather than nine years after the firefighter's termination. Bradshaw v. City of Atlanta, 275 Ga. App. 609, 621 S.E.2d 563, 2005 Ga. App. LEXIS 1053 (2005).

Six-year statute applied to implied promise to perform professionally. — Because an implied promise to perform professionally pursuant to a written agreement for professional services is written into a contract for professional services by the law, an alleged breach of this implied obligation is necessarily governed by the six-year contract statute of limitation of O.C.G.A. § 9-3-24, not the four-year statute applicable to professional malpractice actions under O.C.G.A. § 9-3-25. Saiia Constr., LLC v. Terracon Consultants, Inc., 310 Ga. App. 713, 714 S.E.2d 3, 2011 Ga. App. LEXIS 502 (2011).

Accrual of action for repayment of personal loan. — In a suit for repayment of a personal loan, the trial court did not err by denying the debtor's motion for a directed verdict based on the debtor's assertion that the statute of limitations set forth in O.C.G.A. § 9-3-25 had expired as the facts showed that the parties intended, either expressly or impliedly, that demand for repayment would not be made until some future time. Therefore, the statute of limitations did not commence to run until the date of demand for repayment. Murphy v. Varner, 292 Ga. App. 747, 666 S.E.2d 53, 2008 Ga. App. LEXIS 749 (2008).

No tolling due to fraud of mortgagee. — In response to certified questions from a federal action which arose with respect to a mortgagee's charges that included substantial notary fees from a refinancing transaction, it was determined that even if there was actual fraud by the mortgagee, there was no tolling of limitations periods for claims of fraud and money had and received pursuant to O.C.G.A. §§ 9-3-25 and 9-3-31, as the mortgagors could have discovered the impropriety of the notary fees by simple reference to O.C.G.A. § 45-17-11. Anthony v. Am. Gen. Fin. Servs., 287 Ga. 448, 697 S.E.2d 166, 2010 Ga. LEXIS 478 (2010).

In an action by borrowers claiming that the lender's charging of an illegal notary fee gave rise to a "money had and received" claim, the district court did not err in dismissing, on statute of limitations grounds, the claim, which was brought more than five years after the borrowers signed the loan agreement because, even assuming the lender's conduct constituted actual fraud, Georgia's Supreme Court, in response to a certified question, declined to allow equitable tolling because the borrowers could have discovered the discrepancy between the notary fee statute and the actual fee charged at any time by simple reference to the notary fee statute. Anthony v. Am. Gen. Fin. Servs., 626 F.3d 1318, 2010 U.S. App. LEXIS 24446 (11th Cir. 2010).

Action time-barred in real estate firm's claims. — Trial court properly dismissed a real estate firm's counterclaims against a title insurance company as time barred because the firm did not bring the firm's counterclaims for complaint on account and money had and received until February 8, 2010, more than four years after the claims accrued; thus, those claims were brought outside the statute of limitation and the trial court properly granted summary judgment to the title insurance company on those claims. Dewrell Sacks, LLP v. Chicago Title Insurance Co., 324 Ga. App. 219, 749 S.E.2d 802, 2013 Ga. App. LEXIS 827 (2013).

OPINIONS OF THE ATTORNEY GENERAL

Partial payments made on open account do not renew account and suspend statute of limitations; on all open accounts, statute of limitations com-

mences to run from date of purchase of last item on that account. 1952-53 Ga. Op. Att'y Gen. 18.

RESEARCH REFERENCES

Am. Jur. 2d.

1 Am. Jur. 2d, Accounts and Accounting, § 4 et seq. 51 Am. Jur. 2d, Limitation of Actions, §§ 112 et seq., 140 et seq.

Am. Jur. Proof of Facts.

Proving Fraudulent Concealment to Toll Statutory Limitations Periods, 32 POF3d 129.

Am. Jur. Pleading and Practice Forms.

21B Am. Jur. Pleading and Practice Forms, Restitution and Implied Contracts, § 2.

C.J.S.

54 C.J.S., Limitations of Actions, § 91 et seq.

ALR.

What constitutes an open, current account within the statutes of limitations, 1 A.L.R. 1060; 39 A.L.R. 369; 57 A.L.R. 201.

Implied contract to reimburse one for expense of trip taken at request of relative, 24 A.L.R. 973; 68 A.L.R. 200.

Payment on account as removing or tolling statute of limitation, 36 A.L.R. 346; 156 A.L.R. 1082.

Right of one who by mistake pays taxes to recover against person benefited by payment, 91 A.L.R. 389.

Bar of statute of limitations against action to recover principal of obligation as affecting right to recover interest, 115 A.L.R. 728.

Liability of surety as affected by running of limitation in favor of principal or cosurety, 122 A.L.R. 204.

Vendee's right to recover back amount paid under executory contract for sale of land, 134 A.L.R. 1064.

Running of statute of limitations against claim for services rendered over extended period under indefinite employment not fixing time of payment, 7 A.L.R.2d 198.

Right of creditor to set aside transfer of property as fraudulent as affected by the fact that his claim is barred by statute of limitation, 14 A.L.R.2d 598.

Limitation of actions as applied to account stated, 51 A.L.R.2d 331.

Limitation of actions: physician's claim for compensation for medical services or treatment, 99 A.L.R.2d 251.

Judgment in action on express contract for labor or services as precluding, as a matter of res judicata, subsequent action on implied contract (quantum meruit) or vice versa, 35 A.L.R.3d 874.

What statute of limitations applies to action for contribution against joint tortfeasor, 57 A.L.R.3d 927.

What statute of limitations governs action arising out of transaction consummated by use of credit card, 2 A.L.R.4th 677.

Computer sales and leases: time when cause of action for failure of performance accrues, 90 A.L.R.4th 298.

Application of statute of limitations to actions for breach of duty in performing services of public accountant, 7 A.L.R.5th 852.

Modern status of the application of "discovery rule" to postpone running of limitations against actions relating to breach of building and construction contracts, 33 A.L.R.5th 1.

Attorney malpractice — tolling or other exceptions to running of statute of limitations, 87 A.L.R.5th 473.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time of occurrence of negligent act or omission, 11 A.L.R.6th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence-View that statute begins to run from time of occurrence of sustaining damage or injury and other theories, 12 A.L.R.6th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time client discovers, or should have discovered, negligent act or omission — Statement of rule and application of rule to providing client

with allegedly negligent advice or failing to advise, 13 A.L.R.6th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time client discovers, or should have discovered, negligent act or omission — Application of rule to conduct of litigation and delay or inaction in conducting client's affairs, 14 A.L.R.6th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time client discovers, or should have discovered, negligent act or omission — Application of rule to property, estate, corporate, and document cases, 15 A.L.R.6th 427.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time client discovers, or should have discovered, negligent act or omission — Application of rule to negligent misrepresentation, failure to supervise junior counsel, conflict of interest, billing disputes, and unspecified acts of negligence, 16 A.L.R.6th 653.

Application of relation-back doctrine permitting change in party after statute of limitations has run in state court action — construction cases, 104 A.L.R.6th 1.

Application of doctrine of adverse domination, 13 A.L.R.7th 3.

Preemptive effect of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), 75 A.L.R. Fed. 2d 257.

9-3-26. Other actions on contracts; exception.

All other actions upon contracts express or implied not otherwise provided for shall be brought within four years from the accrual of the right of action. However, this Code section shall not apply to actions for the breach of contracts for the sale of goods under Article 2 of Title 11.

History.

Ga. L. 1855-56, p. 233, § 18; Code 1863, § 2864; Code 1868, § 2872; Code 1873, § 2923; Code 1882, § 2923; Civil Code 1895, § 3774; Civil Code 1910, § 4368; Code 1933, § 3-711; Ga. L. 1962, p. 156, § 1.

Law reviews.

For article discussing aspects of third party practice (impleader) under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 355 (1968).

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This section is residual in nature. Kaufman & Broad Home Systems, Inc. v. International Brotherhood of Firemen & Oilers, 607 F.2d 1104, 1979 U.S. App. LEXIS 9956 (5th Cir. 1979).

Complaint in equity. — Suit in equity to enjoin enforcement of a judgment which allegedly has been satisfied by settlement after institution of the litigation and payment of the agreed amount is not barred by the three-year statute of limitations set forth in O.C.G.A. § 9-11-60(f), nor is it barred by the four-year statutes applicable to breach of contract. Wells v. Mullis, 255 Ga. 426, 339 S.E.2d 574, 1986 Ga. LEXIS 532 (1986).

Claim for failure to employ cannot be characterized as contractual in nature because refusal or failure to employ implicitly excludes existence of mutual assent which is necessary for existence of any contract. Carter v. Seaboard Coast Line R.R., 392 F. Supp. 494, 1974 U.S. Dist. LEXIS 6564 (S.D. Ga. 1974).

Claim for services rendered is subject to the four-year statute of limitations contained in this section. Troutman v. Southern Ry., 296 F. Supp. 963, 1968 U.S. Dist. LEXIS 9685 (N.D. Ga. 1968), aff'd, Troutman v. Southern R. Co., 441 F.2d 586, 1971 U.S. App. LEXIS 10678 (5th Cir. 1971).

Action for loss of freight was governed by this section. Southern Express

Co. v. Sinclair, 135 Ga. 155, 68 S.E. 1113, 1910 Ga. LEXIS 454 (1910).

In an action for unjust enrichment based on improvements to real property, the period of limitations begins to run on the accrual of the right of action; thus, the statute did not begin to run on a tenant's unjust enrichment action until the landlord refused to honor an alleged oral option to purchase. Engram v. Engram, 265 Ga. 804, 463 S.E.2d 12, 1995 Ga. LEXIS 874 (1995).

Unjust enrichment claim survived summary judgment because timeliness could not be determined as a matter of law; fact issues existed as to when an alleged fraud was discovered. Am. Pegasus SPC v. Clear Skies Holding Co., LLC, No. 1:13-CV-03035-ELR, 2015 U.S. Dist. LEXIS 189547 (N.D. Ga. Sept. 22, 2015).

Failure to show fraud in action for unjust enrichment and failure to pay compensation. — Employee's claims for unjust enrichment and unpaid compensation were partially barred by the statutes of limitations; the statutes of limitations were not tolled since the employee failed to show fraud by claiming that the employee justifiably relied on the corporation's representations that the employee would be paid all the monies owed. Heretyk v. P.M.A. Cemeteries, Inc., 272 Ga. App. 79, 611 S.E.2d 744, 2005 Ga. App. LEXIS 223 (2005).

Attorney's malpractice. — This section governed in action by client suing attorney for damages resulting from lack of skill in handling client's interest. Gould v. Palmer & Read, 96 Ga. 798, 22 S.E. 583, 1898 Ga. LEXIS 2 (1898).

Applicable statute of limitations for legal malpractice is four years, and the statute of limitations begins to run from the attorney's breach of duty which is the date of the alleged negligent or unskillful act. Ekern v. Westmoreland, 181 Ga. App. 741, 353 S.E.2d 571, 1987 Ga. App. LEXIS 1541 (1987).

Breach of contract to carry passenger. — This section was applicable to action for injuries arising from breach of contract to carry passenger. Patterson v. Augusta & S.R.R., 94 Ga. 140, 21 S.E. 283, 1894 Ga. LEXIS 31 (1894).

Divorce is not a contract action barred by this section. Mosely v. Mosely, 67 Ga. 92, 1881 Ga. LEXIS 138 (1881).

This section does not apply to specific performance of oral contract to convey land. Jones v. Citizens & S. Nat'l Bank, 231 Ga. 765, 204 S.E.2d 116, 1974 Ga. LEXIS 1228 (1974).

In action for recovery of land by equitable owners, by statute, clearly no four-year statute of limitation was applicable. Smith v. Aldridge, 192 Ga. 376, 15 S.E.2d 430, 1941 Ga. LEXIS 463 (1941).

When contract is rescinded and one party sues to recover property transferred to another party thereunder, this section does not apply. Eller v. McMillan, 174 Ga. 729, 163 S.E. 910, 1932 Ga. LEXIS 126 (1932).

Collective bargaining violation. — Former Code 1933, § 3-705 (see O.C.G.A. § 9-3-24), rather than former Code 1933, § 3-711 (see O.C.G.A. § 9-3-26) applied to action brought by company against union for violation of collective bargaining agreement under section 301 of federal Labor-Management Act. Kaufman & Broad Home Systems, Inc. v. International Brotherhood of Firemen & Oilers, 607 F.2d 1104, 1979 U.S. App. LEXIS 9956 (5th Cir. 1979).

Actions by Resolution Trust Corporation. — Georgia's four-year statute of limitations governed the Resolution Trust Corporation's actions as receiver; the federal Financial Institutions Reform, Recovery, and Enforcement Act (12 U.S.C. § 1821) does not operate to revive stale state actions. Resolution Trust Corp. v. Artley, 28 F.3d 1099, 1994 U.S. App. LEXIS 21327 (11th Cir. 1994).

"Adverse domination" inapplicable. — Federal common law doctrine of "adverse domination" did not toll the state statute of limitations governing Resolution Trust Corporation's claims in case when the subject loans were made between 1982 and 1985, more than four years prior to the defendant bank's placement into receivership with the RTC's predecessor agency. Resolution Trust Corp. v. Artley, 28 F.3d 1099, 1994 U.S. App. LEXIS 21327 (11th Cir. 1994).

Mere ignorance of facts constituting cause of action does not prevent running of statute of limitations. Ponder v. Barrett, 46 Ga. App. 757, 169 S.E. 257, 1933 Ga. App. LEXIS 231 (1933).

Any right to restrain threatened breach of alleged oral contract could not accrue until such threat occurred. Gaskins v. Vickery, 234 Ga. 833, 218 S.E.2d 617, 1975 Ga. LEXIS 1299 (1975).

Rescission of contract action time-barred. — Trial court properly dismissed a firefighter's action against a city, as an employer, and a firefighters pension fund for rescission of an alleged contract and for fraud as the claims were barred by the four-year limitations period for actions based on mutual mistake or fraud, pursuant to O.C.G.A. §§ 9-3-25, 9-3-26, and 9-3-31, and the firefighter did not show that the firefighter was prevented from bringing the action in a timely manner, rather than nine years after the firefighter's termination. Bradshaw v. City of Atlanta, 275 Ga. App. 609, 621 S.E.2d 563, 2005 Ga. App. LEXIS 1053 (2005).

Contract action not time barred. — One-year statute of limitations in § 13 of the Securities Act, 15 U.S.C. § 77m, did not bar an equity receiver of an investment company from suing sales agents who participated in a billboard sale-and-leaseback Ponzi scheme to force the agents to disgorge sales commissions and bonuses because the receiver did not sue under federal securities law but alleged only a state law claim for unjust enrichment/constructive trust, which fell under the four-year limitations period in O.C.G.A. § 9-3-26. Hays v. Adam, 512 F. Supp. 2d 1330, 2007 U.S. Dist. LEXIS 25321 (N.D. Ga. 2007).

Trustees failed to exercise minimal degree of due diligence to discover claims. — Dismissal of the trustees' claims as time barred was upheld because the trustees conceded that, despite signing numerous documents as trustees of the marital trust, the trustees made no attempt at all to obtain information the trustees were legally entitled to in that capacity; thus, the trustees failed to exercise even a minimal degree of due diligence to discover their claims as a matter of law. Rollins v. LOR, Inc., 345 Ga. App. 832, 815 S.E.2d 169, 2018 Ga. App. LEXIS 291 (2018), cert. denied, No. S18C1362, 2019 Ga. LEXIS 49 (Ga. Jan. 7, 2019).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Limitation of Actions, §§ 112 et seq., 140 et seq.

C.J.S.

54 C.J.S., Limitations of Actions, § 91 et seq.

ALR.

Statutes of limitations or laches as bar to suit by heirs or next of kin to set aside conveyance or transfer by ancestor, 2 A.L.R. 447.

Implied contract to reimburse one for expense of trip taken at request of relative, 24 A.L.R. 973.

When statute of limitations commences to run against action against one who has misrepresented or exceeded his authority to contract for another, 64 A.L.R. 1194.

Action to recover back tax illegally exacted as one upon contract as regards applicability of limitation statutes, 92 A.L.R. 1360.

Bar of statute of limitations against action to recover principal of obligation as affecting right to recover interest, 115 A.L.R. 728.

Statutory or contractual limitation where presumption of death of the insured from seven years' absence is relied upon, 119 A.L.R. 1308.

Ratification of unauthorized credit on debt or obligation as tolling, or removing bar of, statute of limitations, 124 A.L.R. 234.

Statute of limitations or doctrine of laches in relation to declaratory actions, 151 A.L.R. 1076.

Running of statute of limitations against claim for services rendered over extended period under indefinite employment not fixing time of payment, 7 A.L.R.2d 198.

When statute of limitations begins to run on contractual obligation to pay for minor's support, 52 A.L.R.2d 1125.

When statute of limitations begins to run against action by attorney, not employed on contingent fee basis, for compensation for services, 60 A.L.R.2d 1008.

Limitation of action against liability insurer for failure to settle claim or action against insured, 68 A.L.R.2d 892.

When statute of limitations starts to run against depositor's cause of action against bank to recover funds paid out on check bearing forged indorsement, 82 A.L.R.2d 933.

Statute of limitations applicable in action to enforce, or recover damages for breach of, contract to make a will, 94 A.L.R.2d 810.

When statute of limitations starts to run against action for breach of covenant of warranty or of seisin, 95 A.L.R.2d 913.

Time period for bringing action on standard form fire insurance policy provided for by statute, as running from time of fire (when loss occurs) or from time loss is payable, 95 A.L.R.2d 1023.

Judgment in action on express contract for labor or services as precluding, as a matter of res judicata, subsequent action on implied contract (quantum meruit) or vice versa, 35 A.L.R.3d 874.

What statute of limitations applies to action for contribution against joint tortfeasor, 57 A.L.R.3d 927.

Limitation of action against insurer for breach of contract to defend, 96 A.L.R.3d 1193.

What statutes of limitations governs damage action against attorney for malpractice, 2 A.L.R.4th 284.

When statute of limitations begins to run against action based on unwritten promise to pay money where there is no condition or definite time for repayment, 14 A.L.R.4th 1385.

When statute of limitations begins to run upon action against attorney for malpractice, 32 A.L.R.4th 260.

Computer sales and leases: time when cause of action for failure of performance accrues, 90 A.L.R.4th 298.

Causes of action governed by limitations period in UCC § 2-725, 49 A.L.R.5th 1.

When statute of limitations begins to run upon action against attorney for legal malpractice — deliberate wrongful acts or omissions, 67 A.L.R.5th 587.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time of occurrence of negligent act or omission, 11 A.L.R.6th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence-View that statute begins to run from time of occurrence of sustaining damage or injury and other theories, 12 A.L.R.6th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time client discovers, or should have discovered, negligent act or omission — Statement of rule and application of rule to providing client with allegedly negligent advice or failing to advise, 13 A.L.R.6th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time client discovers, or should have discovered, negligent act or omission — Application of rule to conduct of litigation and delay or inaction in conducting client's affairs, 14 A.L.R.6th 1.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time client discovers, or should have discovered, negligent act or omission — Application of rule to property, estate, corporate, and document cases, 15 A.L.R.6th 427.

When statute of limitations begins to run on action against attorney for malpractice based upon negligence — View that statute begins to run from time client discovers, or should have discovered, negligent act or omission — Application of rule to negligent misrepresentation, failure to supervise junior counsel, conflict of interest, billing disputes, and unspecified acts of negligence, 16 A.L.R.6th 653.

Application of relation-back doctrine permitting change in party after statute of limitations has run in state court action — construction cases, 104 A.L.R.6th 1.

Application of doctrine of adverse domination, 13 A.L.R.7th 3.

9-3-27. Actions against fiduciaries.

All actions against executors, administrators, or guardians, except on

their bonds, shall be brought within ten years after the right of action accrues.

History.

Orig. Code 1863, § 2863; Code 1868, § 2871; Code 1873, § 2922; Code 1882, § 2922; Civil Code 1895, § 3772; Civil Code 1910, § 4366; Code 1933, § 3-709; Ga. L. 1991, p. 810, § 4.

Law reviews.

For survey article on wills, trusts, guardianships, and fiduciary administration for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003).

JUDICIAL DECISIONS

Analysis

General Consideration
Actions Against Fiduciaries
Running of Limitation

General Consideration

Editor's notes. — Many of the cases appearing below were decided before the 1991 amendment deleting the word "trustees" from this Code section.

Actions Against Fiduciaries

This section applies only in actions against executors, administrators, guardians, or trustees and there cannot be an executor or administrator of an estate when application for no administration necessary has been made. Comerford v. Hurley, 154 Ga. App. 387, 268 S.E.2d 358, 1980 Ga. App. LEXIS 2184, aff'd, 246 Ga. 501, 271 S.E.2d 782, 1980 Ga. LEXIS 1175 (1980).

This section applies to constructive trusts. Wylly v. S.Z. Collins & Co., 9 Ga. 223, 1851 Ga. LEXIS 2 (1851); O'Neal v. O'Neal, 176 Ga. 418, 168 S.E. 262, 1933 Ga. LEXIS 91 (1933); Grant v. Hart, 192 Ga. 153, 14 S.E.2d 860, 1941 Ga. LEXIS 438 (1941); Murray County v. Pickering, 196 Ga. 208, 26 S.E.2d 287, 1943 Ga. LEXIS 321 (1943).

Action brought under constructive trust for accounting in equity must be brought within 10 years after right of action accrues. Murray County v. Pickering, 196 Ga. 208, 26 S.E.2d 287, 1943 Ga. LEXIS 321 (1943).

When complaint seeks to impose a constructive trust on personal property, this section applies. Clover Realty Co. v. J.L. Todd Auction Co., 240 Ga. 124, 239 S.E.2d 682, 1977 Ga. LEXIS 1420 (1977).

O.C.G.A. § 9-3-27 is applicable to actions for breach of constructive trust. Aldridge v. Lily-Tulip, Inc., 741 F. Supp. 906, 1990 U.S. Dist. LEXIS 8133 (S.D. Ga. 1990), aff'd in part and rev'd in part, 953 F.2d 587, 1992 U.S. App. LEXIS 1640 (11th Cir. 1992).

Guardian's assertion of claim adverse to ward. — In an action to impress a constructive trust, the statute of limitations began to run when the guardian of an incapacitated person, after listing the subject property as the property of the ward with full knowledge of the guardian's own individual interest in the property as a joint tenant, assumed the duties of guardian and later asserted a claim to the property adverse to title in the ward's estate. Moore v. Self, 222 Ga. App. 71, 473 S.E.2d 507.

Actions by beneficiaries, not creditors, governed by this section. — This section refers to actions by beneficiaries of estate for their interests in it, not to actions by creditors or others holding claims against estate. Murray v. Baldwin, 69 Ga. App. 473, 26 S.E.2d 133, 1943 Ga. App. LEXIS 119 (1943); Herrington v. Herrington, 70 Ga. App. 768, 29 S.E.2d 516, 1944 Ga. App. LEXIS 98 (1944).

Accounting by administrator. — Administrator of trustee can be compelled to account to beneficiaries at any time within 11 (now 10 ½) years. Coney v. Horne, 93 Ga. 723, 20 S.E. 213, 1894 Ga. LEXIS 396 (1894).

This section applies to a proceeding for an accounting against an administrator.

Rowland v. Rowland, 204 Ga. 603, 50 S.E.2d 343, 1948 Ga. LEXIS 582 (1948).

Inapplicability to subsisting trust. — In order for this period of limitations to apply, trustee must by word or act hold adversely to the trustee's cestui que trust, since as long as trust is "subsisting," that is, when trustee does not hold in the trustee's own right but for benefit of cestui que trust, under former Code 1933, § 3-713 (see former O.C.G.A. § 9-3-4), statute of limitation would not apply and recourse must be had to equitable doctrine of laches. Grant v. Hart, 192 Ga. 153, 14 S.E.2d 860, 1941 Ga. LEXIS 438 (1941).

Action by permanent administrator against temporary administrators. — This section does not apply to action by permanent administrator against temporary ones for accounting. Collins v. Henry, 155 Ga. 886, 118 S.E. 729, 1923 Ga. LEXIS 180 (1923).

Remainderman's rights against life tenant. — This section has no application to rights of remainderman against life tenant. Farrar v. Southwestern R.R., 116 Ga. 337, 42 S.E. 527, 1902 Ga. LEXIS 98 (1902); Denny v. Gardner, 152 Ga. 602, 110 S.E. 891, 1922 Ga. LEXIS 228 (1922).

Relationship of purchaser and vendor. — Limitation in this section has no reference to relationship created between vendor and purchaser in sale of uncollected salary due vendor as alleged trustee of executed trust for purchaser, after vendor has collected the money. Williams v. Parsons, 50 Ga. App. 122, 177 S.E. 257, 1934 Ga. App. LEXIS 649 (1934).

When testator directed that executors reduce residue of estate into money for purpose of paying debts and making distribution, without designating any time limit, and executors held residue for 15 years before reducing it to money, action filed by one of the legatees within six years after the residue had been reduced to money was not barred by the statute of limitations or laches. Manry v. Manry, 196 Ga. 365, 26 S.E.2d 706, 1943 Ga. LEXIS 354 (1943).

Reduction of limitation by laches. — Even though ten-year period prescribed by this section is applicable to alleged constructive trust involving personalty, this period could be reduced if special circumstances were alleged demanding equitable intervention. Grant v. Hart, 192 Ga. 153, 14 S.E.2d 860, 1941 Ga. LEXIS 438 (1941).

Running of Limitation

Owner not barred while title recognized. — As long as person who is in possession of property of another, using the property for the owner's benefit, recognizes the latter's ownership, no lapse of time will bar owner from asserting title as against person in possession; before lapse of time will bar owner, it must appear that person in possession has given notice, or there must be circumstances shown which would be equivalent to notice to owner that person in possession claims adversely to the owner; in such a case statute will begin to run from date of such notice. Reynolds v. Dorsey, 188 Ga. 218, 3 S.E.2d 564, 1939 Ga. LEXIS 487 (1939); Murray County v. Pickering, 196 Ga. 208, 26 S.E.2d 287, 1943 Ga. LEXIS 321 (1943); Manry v. Manry, 196 Ga. 365, 26 S.E.2d 706, 1943 Ga. LEXIS 354 (1943).

Not only in express or implied trusts, but also in other fiduciary relations, statute will not begin to run so long as trust or duty with regard to specific property continues, is acknowledged to be subsisting, and there is no change of status to show adverse holding of such property. Reynolds v. Dorsey, 188 Ga. 218, 3 S.E.2d 564, 1939 Ga. LEXIS 487 (1939); Salter v. Salter, 209 Ga. 90, 70 S.E.2d 453, 1952 Ga. LEXIS 389 (1952).

Neither laches nor statute of limitations will run against one in peaceable possession of property under claim of ownership for delay in resorting to court of equity to establish that person's rights. Whitworth v. Whitworth, 233 Ga. 53, 210 S.E.2d 9, 1974 Ga. LEXIS 671 (1974).

Time of repudiation of trust is when this section begins to run. Garner v. Lankford, 147 Ga. 235, 93 S.E. 411, 1917 Ga. LEXIS 139 (1917).

Statutes of limitation do not run against beneficiary while trust is express and clearly established; but when trustee openly disavows it, and sets up adverse title in the trustee, then the time begins to run. Powell v. Powell, 171 Ga. 840, 156 S.E. 677, 1931 Ga. LEXIS 478 (1931).

Running of Limitation (Cont'd)

Statute of limitation does not begin to run against party asserting title by way of implied trust until there has been notice of an adverse claim by trustee, or such change of circumstances as is calculated to put a reasonably prudent person on notice that the trust is no longer recognized as subsisting, or something to indicate to a reasonably prudent person that relation of trustee and cestui que trust has ceased. Whitworth v. Whitworth, 233 Ga. 53, 210 S.E.2d 9, 1974 Ga. LEXIS 671 (1974).

In cases of implied or constructive trusts founded on fraud, when the defendant claims title to property in the defendant's own right and the plaintiff seeks to convert the defendant into trustee by operation of law, the statute begins to run from the time of the defendant's possession since the defendant's possession was never possession of alleged cestui que trust. Grant v. Hart, 192 Ga. 153, 14 S.E.2d 860, 1941 Ga. LEXIS 438 (1941).

Cause of action for the breach of a fiduciary duty in the management of a trust begins to run at the time the wrongful act, accompanied by any appreciable damage, occurs. Allen v. Columbus Bank & Trust Co., 244 Ga. App. 271, 534 S.E.2d 917, 2000 Ga. App. LEXIS 692 (2000).

After dismissal of administrator, this section commences to run in the administrator's favor as against a claim of a distributee against the administrator. Jacobs v. Pou, 18 Ga. 346, 1855 Ga. LEXIS 200 (1855).

Summary judgment improperly granted to siblings on statute of limitations bar issue. — Trial court erred in granting summary judgment to the siblings on the basis that the challenging sister's claim against the estate seeking an accounting was time-barred because a question of fact remained as to whether the sister was on notice that they had claimed any estate property adversely to the sister; thus, a jury had to decide whether the 10-year bar of O.C.G.A. § 9-3-27(2) began to run before that time. In re Estate of Wade, 331 Ga. App. 535, 771 S.E.2d 214, 2015 Ga. App. LEXIS 197 (2015).

Statutory delay following qualification of administrator for bringing action. — When continuing fiduciary dies and administrator of estate attempts to administer trust or fiduciary property, ten-year period of limitation does not commence to run until expiration of one year (now six months) from date of administration. Reynolds v. Dorsey, 188 Ga. 218, 3 S.E.2d 564, 1939 Ga. LEXIS 487 (1939).

In action against administrator for accounting, statute of limitations does not commence to run until one year (now six months) after qualification of administrator, and continues for ten years thereafter. Rowland v. Rowland, 204 Ga. 603, 50 S.E.2d 343, 1948 Ga. LEXIS 582 (1948).

During minority of heir, statute of limitations applicable to proceeding for accounting against administrator would not run. Rowland v. Rowland, 204 Ga. 603, 50 S.E.2d 343, 1948 Ga. LEXIS 582 (1948).

Limitations period had not expired. — O.C.G.A. § 14-8-42 provides a retiring partner or the estate of a deceased partner, in the absence of a contrary agreement, a right of action for the value of the retiring or deceased partner's interest in the partnership at the time of dissolution plus interest on such amount or profits attributable to the use of the former partner's property right by the new firm; an executrix's complaint against a partnership sufficiently pled a claim for breach of fiduciary duty based on the decedent's interest in the partnership, and thus the 10-year statute of limitations of O.C.G.A. § 9-3-27 applied. Singleton v. Terry, 262 Ga. App. 151, 584 S.E.2d 613, 2003 Ga. App. LEXIS 635 (2003), cert. denied, No. S03C1641, 2003 Ga. LEXIS 959 (Ga. Nov. 10, 2003), cert. denied, No. S03C1679, 2003 Ga. LEXIS 960 (Ga. Nov. 10, 2003).

RESEARCH REFERENCES

Am. Jur. 2d.

31 Am. Jur. 2d, Executors and Administrators, § 1030 et seq. 51 Am. Jur. 2d, Limitation of Actions, § 103 et seq.

C.J.S.

54 C.J.S., Limitation of Actions, § 275.

ALR.

Applicability of nonclaim statutes to claims arising under contract executory at the time of death, 41 A.L.R. 144; 47 A.L.R. 896.

Applicability of statute of nonclaim or limitation statute as between surviving partner and estate of deceased partner, 96 A.L.R. 441; 157 A.L.R. 1114.

Applicability to existing claims of statute shortening period for filing claims against decedent's estate; and constitutionality of statute as so applied, 117 A.L.R. 1208.

Scope and application of exception, as regards causes of action cognizable at law, to general rule exempting express trusts from operation of statute of limitations, 122 A.L.R. 286.

Pledge as a trust as regards statute of limitations, 139 A.L.R. 1333.

Attorney as trustee for purpose of running of statute of limitations against claim for money or property received or collected by him, 151 A.L.R. 1388.

Limitation statute applicable to action on bonds of public body or on obligation to collect revenues for their payment, 38 A.L.R.2d 930.

When statute of limitations begins to run against action on bond of personal representative, 44 A.L.R.2d 807.

When statute of limitations starts to run against enforcement of resulting trust, 45 A.L.R.2d 382.

What constitutes sufficient repudiation of express trust by trustee to cause statute of limitations to run, 54 A.L.R.2d 13.

When statute of limitations starts to run against enforcement of constructive trust, 55 A.L.R.2d 220.

Running of statute of limitations as affected by doctrine of relation back of appointment of administrator, 3 A.L.R.3d 1234.

Estoppel or laches precluding lawful spouse from asserting rights in decedent's estate as against putative spouse, 81 A.L.R.3d 110.

9-3-28. Actions by informers.

All actions by informers to recover any fine, forfeiture, or penalty shall be commenced within one year from the time the defendant's liability thereto is discovered or by reasonable diligence could have been discovered.

History.

Laws 1767, Cobb's 1851 Digest, p. 563.; Code 1863, § 2866; Code 1868, § 2874; Code 1873, § 2925; Code 1882, § 2925; Civil Code 1895, § 3776; Civil Code 1910, § 4370; Code 1933, § 3-714.

Cross references.

Determination of precedence of actions by informers to recover fine, forfeiture, or penalty, § 9-2-47.

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Word "penalty" involves idea of punishment, whether enforced by civil or criminal procedure. Southern Ry. v. Inman, Akers & Inman, 11 Ga. App. 564, 75 S.E. 908, 1912 Ga. App. LEXIS 104 (1912).

All persons empowered to sue for penalties are treated as informers, and such actions are limited by this section. Greene v. Lam Amusement Co., 145 F. Supp. 346, 1956 U.S. Dist. LEXIS 2602 (D. Ga. 1956).

Action imposing penalty as quasi-criminal proceeding. — Action for purpose of imposing a penalty is in the nature

of a quasi-criminal proceeding. Sherman & Sons Co. v. Bitting, 26 Ga. App. 299, 105 S.E. 848, 1921 Ga. App. LEXIS 111 (1921).

Recovery of penalty against telegraph company for failure to deliver message is governed by this section. Western Union Tel. Co. v. Nunnally, 86 Ga. 503, 12 S.E. 578, 1891 Ga. LEXIS 6 (1891).

Action under Ga. L. 1906, p. 102, § 2 (see now O.C.G.A. § 46-9-48), regulating refunding of overpayments on freight, was controlled by former Code 1895, § 3776 (see now O.C.G.A. § 9-3-28). Central of Ga. Ry. v. Huson, 5 Ga. App. 529, 63 S.E. 597, 1909 Ga. App. LEXIS 53 (1909).

Penalties against railroads fixed by former Civil Code 1910, § 2755 (see now O.C.G.A. § 46-9-216) for failure to sell tickets of connecting lines were governed by former Civil Code 1910, § 4370 (see now O.C.G.A. § 9-3-28). Atlanta & W.P.R.R. v. Coleman, 142 Ga. 94, 82 S.E. 499, 1914 Ga. LEXIS 599 (1914).

Action based on violation of rule of railroad commission requiring carrier to furnish freight cars was governed by this section. Southern Ry. v. Inman, Akers & Inman, 11 Ga. App. 564, 75 S.E. 908, 1912 Ga. App. LEXIS 104 (1912).

Treble damages for alleged violation of federal anti-trust laws are not penalty or forfeiture, but are compensatory damages. Greene v. Lam Amusement Co., 145 F. Supp. 346, 1956 U.S. Dist. LEXIS 2602 (D. Ga. 1956).

This section does not apply to action by creditors against bank directors, when no fine is provided for. Neal v. Moultrie, 12 Ga. 104, 1852 Ga. LEXIS 99 (1852).

Actions under Consolidated Omnibus Budget Reconciliation Act. — District court erred in ruling that a former employee's improper-notification claim was barred by the applicable statute of limitations, O.C.G.A. § 9-3-28, because the employee's suit was within the one-year limitations period when the suit was filed because a Consolidated Omnibus Budget Reconciliation Act improper-notice claim accrued when a plaintiff either knew or should have known the facts necessary to bring an improper-notice claim, and the employee's claim did not accrue until the employee learned from a lawyer that the employee should have received notice of the employee's continuation right from the former employer. Cummings v. Wash. Mut., 650 F.3d 1386, 2011 U.S. App. LEXIS 17441 (11th Cir. 2011).

9-3-29. Breach of restrictive covenant.

(a) All actions for breach of any covenant restricting lands to certain uses shall be brought within two years after the right of action accrues, excepting violations for failure to pay assessments or fees, which shall be governed by subsection (b) of this Code section. This Code section shall apply to rights of action which may accrue as a result of the violation of a building set-back line.

(b) In actions for breach of covenant which accrue as a result of the failure to pay assessments or fees, the action shall be brought within four years after the right of action accrues.

(c) For the purpose of this Code section, the right of action shall accrue immediately upon the erection of a permanent fixture which results in a violation of the covenant restricting lands to certain uses or the violation of a set-back line provision. When an alleged violation or complaint is based upon a continuous violation of the covenant resulting from an act or omission, the right of action shall accrue each time such act or omission occurs. This Code section shall not be construed so

as to extend any applicable statute of limitations affecting actions in equity.

History.

Ga. L. 1953, Jan.-Feb. Sess., p. 238, §§ 1, 2; Ga. L. 1991, p. 665, § 1; Ga. L. 1995, p. 727, § 1; Ga. L. 2017, p. 352, § 1/SB 46.

Law reviews.

For comment, "Injunction Remedy for Breach of Restrictive Covenants: An Economic Analysis," see 45 Mercer L. Rev. 543 (1993).

For annual survey of real property law, see 68 Mercer L. Rev. 231 (2016).

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This section applies specifically to covenants, and does not include other land restrictions, such as conditions subsequent. Munford, Inc. v. Citizens & S. Nat'l Bank, 151 Ga. App. 112, 258 S.E.2d 766, 1979 Ga. App. LEXIS 2451 (1979).

Section inapplicable to easements. — O.C.G.A. §§ 9-3-29 and 44-5-60 limit the enforceability of restrictive covenants and hence are inapplicable to a cause of action which is based upon the alleged existence of easements. Estate of Seamans v. True, 247 Ga. 721, 279 S.E.2d 447, 1981 Ga. LEXIS 843 (1981).

Action on assessments. — Corporation's failure to file a declaratory judgment action within two years of the filing of a supplementary declaration containing a ceiling on assessments against additional property owners did not waive its right to challenge the ceiling's validity in a timely action for damages for failure to pay assessments. Martin's Landing Found., Inc. v. Landing Lake Assocs., 707 F.2d 1329, 1983 U.S. App. LEXIS 26424 (11th Cir. 1983).

O.C.G.A. § 9-3-29, rather than the statute of limitations applicable to written contracts, applied to an action by a homeowners association to collect past due condominium assessments. Heard v. Whitehall Forest E. Homeowners Ass'n, 230 Ga. App. 61, 495 S.E.2d 318.

Waiver. — There is no waiver when there is no knowledge of the breach of the restrictive covenant by those who have a right to enforce it. Devins v. Leafmore Forest Condominium Ass'n, 200 Ga. App. 158, 407 S.E.2d 76, 1991 Ga. App. LEXIS 778 (1991), cert. denied, No. S91C1374, 1991 Ga. LEXIS 549 (Ga. Sept. 6, 1991).

Downstream landowners' claims of negligence, strict liability, trespass and nuisance, based on discharge of wastewaters into a creek related to continuing abatable acts by the defendant and the statute of limitations only precluded the plaintiffs' recovery for injurious acts which occurred more than four years prior to the plaintiffs' filing suit. Culbertson v. Coats Am., Inc., 913 F. Supp. 1572, 1995 U.S. Dist. LEXIS 20668 (N.D. Ga. 1995).

Continuing nuisance theory does not apply to a claim for breach of a restrictive covenant. Helmley v. Liberty County, 242 Ga. App. 881, 531 S.E.2d 756, 2000 Ga. App. LEXIS 381 (2000).

Accrual of cause of action. — O.C.G.A. § 10-1-401(a)(1) did not bar a home buyer's claim under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because the buyer did not suffer any actual damages at the time of the alleged violation and could not have suffered any such damages at least until the homebuilder conveyed the house to the buyer without complying with code requirements or used the contractual language in question to deny liability; therefore, the buyer's cause of action did not accrue until less than two years prior to the date suit was filed. Tiismann v. Linda Martin Homes Corp., 279 Ga. 137, 610 S.E.2d 68, 2005 Ga. LEXIS 146 (2005).

Suit alleging violation of a restrictive covenant was timely under O.C.G.A. § 9-3-29(a) because the suit accrued when a real estate developer failed to build a fence between abutting properties, as required by the covenant, and the suit was filed within two years of accruing. Lesser

v. Doughtie, 300 Ga. App. 805, 686 S.E.2d 416, 2009 Ga. App. LEXIS 1271 (2009).

Under the express language of O.C.G.A. § 9-3-29, the limitation period begins to run immediately upon a property owner's first use of the owner's property in violation of a restrictive covenant; thus, to the extent that Black Island Homeowners Assn. v. Marra, 263 Ga. App. 559 (2003) and Marino v. Clary Lakes Homeowners Assn., 322 Ga. App. 839 (2013) apply the continuing nuisance theory to determine when the statute of limitation begins to run under § 9-3-29, those cases are overruled. S-D RIRA, LLC v. Outback Prop. Owners' Ass'n, 330 Ga. App. 442, 765 S.E.2d 498, 2014 Ga. App. LEXIS 846 (2014), cert. denied, No. S15C0643, 2015 Ga. LEXIS 341 (Ga. May 11, 2015), cert. denied, No. S17C0778, 2017 Ga. LEXIS 509 (Ga. June 5, 2017).

RESEARCH REFERENCES

Am. Jur. 2d.

20 Am. Jur. 2d, Covenants, Conditions, and Restrictions, §§ 112 et seq., 264, 265, 276 et seq. 51 Am. Jur. 2d, Limitation of Actions, § 112 et seq.

C.J.S.

21 C.J.S., Covenants, §§ 24 et seq., 50. 54 C.J.S., Limitations of Actions, § 82 et seq., 215.

ALR.

Limitation of actions: when does statute begin to run against action based on removal of lateral or subjacent support, 26 A.L.R. 1235.

When does statute of limitations commence to run against action for breach of covenant against encumbrances, 99 A.L.R. 1050.

Suit to rescind contract as one based on contract or covenant within statute of limitations, 114 A.L.R. 1525.

Continuing character, as regards limitation of actions, of breach of lessee's duty under oil and gas lease to protect against drainage by surrounding wells, 138 A.L.R. 257.

Use of property by college fraternity or sorority as violation of restrictive covenant, 7 A.L.R.2d 436.

Time when statute of limitation starts to run against breach of covenant running with land and requiring affirmative acts by covenantor, 17 A.L.R.2d 1251.

Commencement of running of statute of limitations respecting actions by owners of right of re-entry, or actions against third persons by reversioners, 19 A.L.R.2d 729.

Covenant restricting use of land, made for purpose of guarding against competition, as running with land, 25 A.L.R.3d 897.

Validity and construction of restrictive covenant requiring consent to construction on lot, 40 A.L.R.3d 864.

Change of neighborhood as affecting restrictive covenants precluding use of land for multiple dwelling, 53 A.L.R.3d 492.

Restrictive covenant limiting land use to "private residence" or "private residential purposes": interpretation and application, 43 A.L.R.4th 71.

Waiver of right to enforce restrictive covenant by failure to object to other violations, 25 A.L.R.5th 123.

Laches or delay in bringing suit as affecting right to enforce restrictive building covenant, 25 A.L.R.5th 233.

9-3-30. Trespass or damage to realty.

(a) All actions for trespass upon or damage to realty shall be brought within four years after the right of action accrues.

(b)(1) The causes of action specified in Code Section 51-1-11 and subsection (a) of Code Section 9-3-51 for recovery of damages to a dwelling due to the manufacture of or the negligent design or installation of synthetic exterior siding shall accrue when the damage to the dwelling is discovered or, in the exercise of reasonable

diligence, should have been discovered, whichever first occurs. In any event, such cause of action shall be brought within the time limits provided in Code Sections 51-1-11 and 9-3-51, respectively.

(2) This subsection shall apply to causes of action which had not expired under the former law before March 28, 2000. This subsection shall not revive any cause of action which was barred by former law before March 28, 2000.

History.

Laws 1767, Cobb's 1851 Digest, p. 562.; Laws 1805, Cobb's 1851 Digest, p. 564.; Ga. L. 1855-56, p. 233, § 3; Code 1863, § 2990; Code 1868, § 3003; Code 1873, § 3058; Code 1882, § 3058; Civil Code 1895, § 3898; Civil Code 1910, § 4495; Code 1933, § 3-1001; Ga. L. 2000, p. 212, § 1.

Cross references.

Injuries to real estate generally, § 51-9-1 et seq.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2000, "March 28, 2000" was substituted for "the effective date of this subsection" in two places in paragraph (b)(2).

Law reviews.

For comment on Wellerton Co. v. Sam N. Hodges, Jr. & Co., 114 Ga. App. 429, 151 S.E.2d 481 (1966), see 5 Ga. St. B.J. 169 (1968).

For article surveying Georgia cases dealing with the environment, natural resources, and land use from June 1977 through May 1978, see 30 Mercer L. Rev. 75 (1978).

For survey article on torts, see 34 Mercer L. Rev. 271 (1982).

For note, "The Effect of Georgia's Architectural Statutes of Limitations on Real and Personal Property Claims for Negligent Construction," see 7 Ga. St. U.L. Rev. 137 (1990).

For article, "Commercial Law," see 53 Mercer L. Rev. 153 (2001).

For article, "Construction Law," see 53 Mercer L. Rev. 173 (2001).

For article, "Torts," see 53 Mercer L. Rev. 441 (2001).

For survey article on tort law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 425 (2003).

For survey article on trial practice and procedure for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 439 (2003).

For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

For annual survey on real property, see 69 Mercer L. Rev. 251 (2017).

For article, "Construction Law," see 70 Mercer L. Rev. 51 (2018).

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General Consideration

Effect of O.C.G.A. § 9-3-51. — O.C.G.A. § 9-3-51 does not establish a new eight-year statute of limitation in place of the four-year statute that applies under O.C.G.A. § 9-3-30. Howard v. McFarland, 237 Ga. App. 483, 515 S.E.2d 629.

This section is plainly in derogation of common law and, under the well-established rules, must be given a strict construction. State Farm Fire &

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Cas. Co. v. Southern Bell Tel. & Tel. Co., 245 Ga. 5, 262 S.E.2d 895, 1980 Ga. LEXIS 663 (1980).

Construction with O.C.G.A. § 9-3-51. — O.C.G.A. § 9-3-51, establishing an outside time limit which commences upon substantial completion of an improvement to property, is a statute of ultimate repose and does not extend the limitation period of O.C.G.A. § 9-3-30. Armstrong v. Royal Lakes Assocs., 232 Ga. App. 643, 502 S.E.2d 758.

"Discovery rule" is inapplicable. — Discovery rule did not toll the statute of limitations in an action to recover the cost of removing asbestos, since the asbestos had been applied in 1969 and 1970, but was not discovered until 1984. St. Joseph Hosp. v. Celotex Corp., 874 F.2d 764, 1989 U.S. App. LEXIS 7894 (11th Cir. 1989), cert. denied, 493 U.S. 1081, 110 S. Ct. 1138, 107 L. Ed. 2d 1043, 1990 U.S. LEXIS 730 (1990).

Discovery rule no longer applies to suits merely for real property damage; this is true whether a statute of repose exists. Hanna v. McWilliams, 213 Ga. App. 648, 446 S.E.2d 741, 1994 Ga. App. LEXIS 762 (1994); Moore v. Meeks, 225 Ga. App. 287, 483 S.E.2d 383.

Four-year statute of limitations did not begin to run when the plaintiff discovered contamination of property because Georgia does not have a "discovery rule" as used in federal law. Smith v. Branch, 226 Ga. App. 626, 487 S.E.2d 35, 1997 Ga. App. LEXIS 614 (1997), cert. denied, No. S97C1414, 1997 Ga. LEXIS 890 (Ga. Oct. 10, 1997).

Action under the statute must be brought within four years of substantial completion of a house, notwithstanding the fact that the plaintiff might have had no knowledge of any alleged defects until after the substantial completion of the house. Mitchell v. Contractors Specialty Supply, Inc., 247 Ga. App. 628, 544 S.E.2d 533, 2001 Ga. App. LEXIS 67 (2001), cert. denied, No. S01C0734, 2001 Ga. LEXIS 511 (Ga. June 11, 2001).

Discovery rule does not apply to property damage claims. Andel v. Getz Servs., Inc., 197 Ga. App. 653, 399 S.E.2d 226, 1990 Ga. App. LEXIS 1441 (1990).

Application to bodily injury claims. — Discovery rule of King v. Seitzingers, Inc., 160 Ga. App. 318, 287 S.E.2d 252 (1981), is confined to cases of bodily injury which develop only over an extended period of time. An action under O.C.G.A. § 9-3-30 must be brought within four years of substantial completion. Corporation of Mercer Univ. v. National Gypsum Co., 258 Ga. 365, 368 S.E.2d 732, 1988 Ga. LEXIS 244 (1988), cert. denied, Corporation of Mercer University v. United States Gypsum Co., 493 U.S. 965, 110 S. Ct. 408, 107 L. Ed. 2d 374, 1989 U.S. LEXIS 5376 (1989); Armstrong v. Royal Lakes Assocs., 232 Ga. App. 643, 502 S.E.2d 758.

Tolling of a period of limitation by the discovery rule is confined to cases involving bodily harm. Fort Oglethorpe Assocs. II v. Hails Constr. Co., 196 Ga. App. 663, 396 S.E.2d 585, 1990 Ga. App. LEXIS 1011 (1990), cert. denied, No. S90C1669, 1990 Ga. LEXIS 552 (Ga. Oct. 4, 1990).

This section does not preclude recovery for any damages save those which were suffered more than four years prior to filing of action. Cox v. Cambridge Square Towne Houses, Inc., 239 Ga. 127, 236 S.E.2d 73, 1977 Ga. LEXIS 836 (1977).

Grant of injunctive relief against continuing trespass is not precluded by this section. Cox v. Cambridge Square Towne Houses, Inc., 239 Ga. 127, 236 S.E.2d 73, 1977 Ga. LEXIS 836 (1977) (see O.C.G.A. § 9-3-30).

Counts for mesne profits are within this section. Taylor v. James, 109 Ga. 327, 34 S.E. 674, 1899 Ga. LEXIS 646 (1899).

This section applies to a count for mesne profits based on action of trespass, and also applies to a nuisance or continuing trespass. Lankford v. Dockery, 85 Ga. App. 86, 67 S.E.2d 800, 1951 Ga. App. LEXIS 1005 (1951).

Statute barred claim for electrical damage to office equipment. — Dissolved corporation's failure to obtain reinstatement prior to the expiration of the four-year statute of limitations for the corporation's causes of action arising out of electrical damage to the corporation's

office equipment during a storm prevented the corporation from initiating a valid timely filed lawsuit. GC Quality Lubricants v. Doherty, Duggan, & Rouse Insurors, 304 Ga. App. 767, 697 S.E.2d 871, 2010 Ga. App. LEXIS 607 (2010), cert. denied, No. S10C1831, 2011 Ga. LEXIS 40 (Ga. Jan. 13, 2011).

Evidence excluded because of statute of limitations. — Trial court properly excluded the pre-purchase promises made by a seller to the purchasers regarding the maintenance of a dam because the alleged promises occurred prior to the applicable four-year statute of limitation. Bishop Eddie Long Ministries, Inc. v. Dillard, 272 Ga. App. 894, 613 S.E.2d 673, 2005 Ga. App. LEXIS 332 (2005), cert. denied, No. S05C1459, 2005 Ga. LEXIS 703 (Ga. Oct. 11, 2005), cert. denied, No. S05C1369, 2005 Ga. LEXIS 704 (Ga. Oct. 11, 2005).

State RICO claim expired. — When defendant sued a private youth treatment center for fraud under state RICO law nine years after the defendant reached the age of majority, and the statute of limitations began to run from the time the cause of action accrued, not from the time the racketeering activity terminated, the normal limitations restrictions of O.C.G.A. § 9-3-30 served to bar the defendant's claim. Blalock v. Anneewakee, Inc., 206 Ga. App. 676, 426 S.E.2d 165, 1992 Ga. App. LEXIS 1742 (1992), cert. denied, No. S92C0520, 1993 Ga. LEXIS 163 (Ga. Feb. 5, 1993).

Waiver. — Failure to plead the affirmative defense of the statute of limitations for suits against developers for construction defects, as provided in O.C.G.A. § 9-3-30, results in its being waived. Glenridge Unit Owners Ass'n v. Felton, 183 Ga. App. 858, 360 S.E.2d 418, 1987 Ga. App. LEXIS 2104 (1987).

This section does not govern actions for recovery of realty. Blocker v. Boswell, 109 Ga. 230, 34 S.E. 289, 1899 Ga. LEXIS 619 (1899).

Ejectment actions are not governed by this section. Roe v. John Doe, 46 Ga. 120, 1872 Ga. LEXIS 18 (1872).

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Section does not apply to action to cancel deed. — Trial court erred in applying the four-year statutes of limitation found in O.C.G.A. §§ 9-3-30 and 9-3-31 to enter summary judgment on the seller's action seeking to cancel a deed because Georgia law recognized an equitable seven-year limit on suits for cancellation of deeds. Serchion v. Capstone Partners, Inc., 298 Ga. App. 73, 679 S.E.2d 40, 2009 Ga. App. LEXIS 509 (2009), cert. denied, No. S09C1642, 2009 Ga. LEXIS 781 (Ga. Nov. 9, 2009).

Trial court erred in granting family members summary judgment on the issue of the limitation period applicable to the children's claims for cancellation of fraudulent deeds because the court should not have applied the four-year statute of limitation for fraud, O.C.G.A. §§ 9-3-30 and 9-3-31; although the trial court ruled that no evidence of fraud prevented the children from timely filing their claim within the four-year statute of limitation for fraud, the court did not consider whether fraud prevented the children from timely filing within the applicable seven-year period. Evans v. Dunkley, 316 Ga. App. 204, 728 S.E.2d 832, 2012 Ga. App. LEXIS 523 (2012).

Inapplicable to attempted wrongful foreclosure claim. — Attempted wrongful foreclosure allegations did not state a claim for trespass under O.C.G.A. § 51-9-1 when mortgagors did not allege property damage or an entry onto their property resulting from a mortgagee's initiation of foreclosure proceedings; therefore, the four-year limitations period under O.C.G.A. § 9-3-30 did not apply to the mortgagors' attempted wrongful disclosure claim arising from a 2001 foreclosure action, and the claim was time-barred. Hauf v. HomEq Servicing Corp., No. 4:05-CV-109, 2007 U.S. Dist. LEXIS 9439 (M.D. Ga. Feb. 9, 2007).

To establish passive concealment by the seller of defective realty, the purchaser must prove that the concealment was an act of fraud and deceit, that the defect could not have been discovered by the purchaser by the exercise of due diligence, and that the seller was aware of the defect and did not disclose the defect of. Wilson v. Phillips, 230 Ga. App. 290, 495 S.E.2d 904.

Suit by subsequent owner barred if barred as to original owner. — The fact that suit was being brought by a subse-

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quent owner did not revive the cause of action which was barred as to the original owners of a damaged building. U-Haul Co. v. Abreu & Robeson, Inc., 247 Ga. 565, 277 S.E.2d 497, 1981 Ga. LEXIS 787 (1981).

Shortage of acreage in deed. — Action brought in October, 1940 for recovery of damages by reason of shortage of acreage conveyed in deed dated January, 1929, was barred, notwithstanding allegation of recent discovery of the shortage. Rigdon v. Barfield, 194 Ga. 77, 20 S.E.2d 587, 1942 Ga. LEXIS 513 (1942).

Action for fraud and deceit for shortage in acreage of land must be brought within four years after the right of action accrues. The period of limitation begins to run upon discovery of the fraud. Forester v. McDuffie, 189 Ga. App. 359, 375 S.E.2d 488, 1988 Ga. App. LEXIS 1403 (1988).

Taking of property by railroad. — This section applies to action based on taking of property by railroad. Cobb v. Wrightsville & T.R.R., 129 Ga. 377, 58 S.E. 862, 1907 Ga. LEXIS 383 (1907); Adams v. Macon, D. & S.R.R., 141 Ga. 701, 81 S.E. 1110, 1914 Ga. LEXIS 122 (1914).

Taking of property for public use without just compensation. — When actual damage results to abutting property and is compensable under constitutional provision forbidding taking of private property without just compensation, action to recover such damage must be brought within four years from date right of action accrued. Southern Ry. v. Leonard, 58 Ga. App. 574, 199 S.E. 433, 1938 Ga. App. LEXIS 58 (1938).

Recovery of damages for depreciation in market value of property in action against municipality for taking or damaging property for public use and for creation of permanent and continuing nuisance must be had within four years from date of original injury. City of La Fayette v. Hegwood, 52 Ga. App. 168, 182 S.E. 860, 1935 Ga. App. LEXIS 87 (1935).

When work which resulted in damage to plaintiff's property, for which the plaintiff would have been entitled to recover under former Code 1933, § 2-301, and Ga. Const. 1877, Art. I, Sec. III, Para. I (see Ga. Const. 1983, Art. I, Sec. III, Paras. I, II and Art. III, Sec. VI, Para. II) was done more than four years previously, the action was barred by the statute of limitations. Lawrence v. City of La Grange, 63 Ga. App. 587, 11 S.E.2d 696, 1940 Ga. App. LEXIS 501 (1940).

Construction

Claim based on construction contract. — Six-year statute of limitations of O.C.G.A. § 9-3-24, not four-year limitations in O.C.G.A. § 9-3-30, applied to a claim for breach of contract arising out of the construction of an office building. Costrini v. Hansen Architects, P.C., 247 Ga. App. 136, 543 S.E.2d 760, 2000 Ga. App. LEXIS 1432 (2000).

Because the four-year statute of limitations in O.C.G.A. § 9-3-30(a) had expired, an insurer acting as subrogee of its insured, a general contractor, was precluded from pursuing a subrogation claim based on negligence against a subcontractor that had damaged a roadway while installing underground cables. Mass. Bay Ins. Co. v. Sunbelt Directional Drilling, Inc., No. 1:07-CV-0408-JOF, 2008 U.S. Dist. LEXIS 20066 (N.D. Ga. Feb. 14, 2008).

Action against builder time barred. — Action against builder of a house based on alleged defective construction of the house was time barred since the homeowner did not acquire title to the house until after the tort and contract statutes of limitation had expired, and the homeowner was not allowed to revive those causes of action; neither the discovery rule nor the continuing tort theory applied to actions involving only damage to real property, and since all representations allegedly made by the builder took place after the statutes of limitation had expired, equitable estoppel did not toll the running. Bauer v. Weeks, 267 Ga. App. 617, 600 S.E.2d 700, 2004 Ga. App. LEXIS 733 (2004).

Accrual of cause for negligent design and construction. — Cause of action to recover damages in tort arising out of alleged negligent design and construction of building by defendants under contract with plaintiff accrued, and statute of limitations started to run, when negligent acts were committed resulting in damage

to plaintiff, not when portion of building later collapsed as a result thereof. Wellston Co. v. Sam N. Hodges, Jr. & Co., 114 Ga. App. 424, 151 S.E.2d 481, 1966 Ga. App. LEXIS 789 (1966) (commented on in 5 Ga. St. B.J. 169 (1968)).

Cause of action by a property owner for damage to a building resulting from a construction or design defect accrues at the time of defective construction. Atlanta Gas Light Co. v. City of Atlanta, 160 Ga. App. 396, 287 S.E.2d 229, 1981 Ga. App. LEXIS 2984 (1981); Broadfoot v. Aaron Rents, Inc., 195 Ga. App. 297, 393 S.E.2d 39, 1990 Ga. App. LEXIS 454 (1990), aff'd in part and rev'd in part, 260 Ga. 836, 401 S.E.2d 257, 1991 Ga. LEXIS 109 (1991), overruled, Hanna v. McWilliams, 213 Ga. App. 648, 446 S.E.2d 741, 1994 Ga. App. LEXIS 762 (1994).

Cause of action by a property owner for damage to a building resulting from negligent construction or design accrues at the time of the completion of the building. Millard Matthews Bldrs., Inc. v. Plant Imp. Co., 167 Ga. App. 855, 307 S.E.2d 739, 1983 Ga. App. LEXIS 2640 (1983).

Action for damage to personal property resulting from any negligent building construction does not accrue until the actual injury to that property occurs. Millard Matthews Bldrs., Inc. v. Plant Imp. Co., 167 Ga. App. 855, 307 S.E.2d 739, 1983 Ga. App. LEXIS 2640 (1983).

Plaintiff's cause of action against a civil engineering firm for negligence in designing a drainage system for a neighboring subdivision which caused flooding on the plaintiff's property accrued on the date the property was first damaged. Travis Pruitt & Assocs. v. Bowling, 238 Ga. App. 225, 518 S.E.2d 453.

Claim for damage to real estate based on negligence in construction, design, or installation of that real property accrued on the date of substantial completion of the project and was subject to a four year statute of limitations; the "discovery rule" did not apply to actions seeking recovery for property damage only, and a cause of action brought by the subrogee of the owner of a house against a subcontractor alleging negligent installation of electrical wiring in the house was time barred when brought more than four years after the date of substantial completion of the house. Stamschror v. Allstate Ins. Co., 267 Ga. App. 692, 600 S.E.2d 751, 2004 Ga. App. LEXIS 756 (2004).

When manufacturer/seller of windows is sued for property damage to home and the windows were part of the initial construction of the home, the cause of action would have accrued at the time of the allegedly defective construction. Thus, when the date of installation (construction) and sale of the windows was June 2, 1976, the action filed on September 16, 1983, was too late unless the statute of limitation was effectively tolled or unless the circumstances allow a finding of a different beginning point in time from which the statute would run. Kemp v. Bell-View, Inc., 179 Ga. App. 577, 346 S.E.2d 923, 1986 Ga. App. LEXIS 1949 (1986).

Accrual of cause at time construction completed. — Property owner's cause of action for damage to a building resulting from negligent construction accrues at the time of the completion of the construction, not at the time of the discovery of the injury. Bicknell v. Richard M. Hearn Roofing & Remodeling, Inc., 171 Ga. App. 128, 318 S.E.2d 729, 1984 Ga. App. LEXIS 2121 (1984).

Limitations period does not run from time of actual damage. — Action under the statute must be brought within four years of substantial completion of a house, rather than within four years from the occurrence of damage to the house. Mitchell v. Contractors Specialty Supply, Inc., 247 Ga. App. 628, 544 S.E.2d 533, 2001 Ga. App. LEXIS 67 (2001), cert. denied, No. S01C0734, 2001 Ga. LEXIS 511 (Ga. June 11, 2001).

Suit barred by statute of limitations as suit was for breach of contract, not negligence. — Trial court properly granted summary judgment in a breach of contract claim to a construction company and one of the company's representatives as the suing homeowner had brought suit in 2007, and the work on the interior of the home was substantially completed in 1999; thus, the suit was barred by the six year limitation period set forth in O.C.G.A. § 9-3-24. The suit did not sound in tort since the homeowner

Construction (Cont'd)

failed to allege any property damage and only sought repair/replacement damages. Wilks v. Overall Constr., Inc., 296 Ga. App. 410, 674 S.E.2d 320, 2009 Ga. App. LEXIS 32 (2009).

Synthetic siding. — Amendment to the statute, which recognizes a discovery rule for property damage caused by synthetic siding, did not apply to an action for which the limitations period expired prior to the effective date of the amendment. Mitchell v. Contractors Specialty Supply, Inc., 247 Ga. App. 628, 544 S.E.2d 533, 2001 Ga. App. LEXIS 67 (2001), cert. denied, No. S01C0734, 2001 Ga. LEXIS 511 (Ga. June 11, 2001).

In an action for breach of implied warranties arising from moisture damage under the synthetic stucco cladding used in the construction of the plaintiffs' home, the trial court should have applied the six-year limitation period for contract actions contained in O.C.G.A. § 9-3-24, rather than the four-year limitation period for damage to property actions contained in O.C.G.A. § 9-3-30. Hickey v. Bowden, 248 Ga. App. 647, 548 S.E.2d 347, 2001 Ga. App. LEXIS 259 (2001), rev'd in part, aff'd in part, 275 Ga. 249, 569 S.E.2d 495, 2002 Ga. LEXIS 479 (2002).

In an HOA's suit alleging negligent construction against a developer and others, the four-year statute of limitation for the negligent installation of synthetic siding, O.C.G.A. § 9-3-30(b)(1), began running when the HOA should have discovered that condominiums were being damaged due to water intrusion from defective siding, and here potential problems were discovered well before that four-year window. Demere Marsh Assocs., LLC v. Boatright Roofing & Gen. Contr., Inc., 343 Ga. App. 235, 808 S.E.2d 1, 2017 Ga. App. LEXIS 473 (2017), cert. denied, No. S18C0445, 2018 Ga. LEXIS 324 (Ga. May 7, 2018), cert. denied, No. S18C0446, 2018 Ga. LEXIS 343 (Ga. May 7, 2018).

Substantial completion of building. — Four-year limitation period ran from last work performed on a building, when the last work constituted "substantial completion". Broadfoot v. Citizens S. Nat'l Bank, 208 Ga. App. 382, 430 S.E.2d 638, 1993 Ga. App. LEXIS 487 (1993), cert. denied, No. S93C1171, 1993 Ga. LEXIS 869 (Ga. Sept. 20, 1993).

Earliest date at which a house can be deemed to be substantially completed for purposes of the statute is when the certificate of occupancy is granted. Hickey v. Bowden, 248 Ga. App. 647, 548 S.E.2d 347, 2001 Ga. App. LEXIS 259 (2001), rev'd in part, aff'd in part, 275 Ga. 249, 569 S.E.2d 495, 2002 Ga. LEXIS 479 (2002).

Because the owner's negligence claims were brought more than four years after the construction of the owner's home was completed, the owner could not represent a class alleging defective materials and the manufacturer was entitled to summary judgment. Dryvit Sys. v. Stein, 256 Ga. App. 327, 568 S.E.2d 569, 2002 Ga. App. LEXIS 908 (2002).

O.C.G.A. § 9-3-30(a) governed homebuyers' claims for negligent construction, breach of warranty, and negligent misrepresentation against homebuilders and a company that manufactured stucco that was used in construction, but whereas the buyers' cause of action against the builders did not began to run until the buyers purchased the home, the buyers' cause of action against the manufacturer began to run when the home was substantially completed and because that date was more than four years before the buyers' filed suit, the buyers' claim against the manufacturer was barred. Colormatch Exteriors, Inc. v. Hickey, 275 Ga. 249, 569 S.E.2d 495, 2002 Ga. LEXIS 479 (2002).

Subsequent repairs do not toll the statute of limitation as the right of action accrues at the time of substantial completion of the project. Heffernan v. Johnson, 209 Ga. App. 139, 433 S.E.2d 108, 1993 Ga. App. LEXIS 794 (1993).

Contractor's suit against soils engineering firm. — O.C.G.A. § 9-3-30 was applied to a contractor's suit against a soils engineering firm, since the gravamen of the contractor's complaint was that the firm's actions in testing soil in a proposed building area led to damage to the real estate because subsequent construction was based on the firm's soil testing and recommendations. Bowen & Bowen, Inc. v.

McCoy-Gibbons, Inc., 185 Ga. App. 298, 363 S.E.2d 827, 1987 Ga. App. LEXIS 2484 (1987).

Other Examples

Liability of individual in possession as trespasser or tenant in common holding adversely to the cotenants ceased four years after the individual was no longer in possession or put others in possession. Lankford v. Dockery, 85 Ga. App. 86, 67 S.E.2d 800, 1951 Ga. App. LEXIS 1005 (1951).

Waste by life tenant. — Life tenant who commits waste by selling and removing timber, to the permanent injury of the estate, does not hold proceeds under implied or resulting trust in favor of remainderman, but is liable as a tort-feasor, and cause of action against the life tenant is barred in four years. Lazenby v. Ware, 178 Ga. 463, 173 S.E. 86, 1934 Ga. LEXIS 78 (1934).

Damages for timber cut and removed. — Right of action to recover damages for timber cut and removed from the plaintiff's land by the defendants accrued when timber was cut and removed, and whether the plaintiff's action was construed as one seeking damages for trespass upon realty or damages for conversion of personalty, the applicable period of limitation was four years. Harper v. Jones, 103 Ga. App. 40, 118 S.E.2d 279, 1961 Ga. App. LEXIS 849 (1961).

Inverse condemnation claim based on nuisance. — Since no clear rule exists in Georgia or elsewhere for distinguishing in specific cases between continuing and permanent nuisance, a plaintiff is allowed to choose how it will construe a defendant's alleged nuisance; thus, when the plaintiff alleged a cause of action for continuing nuisance and the alleged nuisance occurred within the four years preceding the date on which the plaintiff filed its suit, the defendant was not entitled to summary judgment. Speer v. Miller, 864 F. Supp. 1294, 1994 U.S. Dist. LEXIS 13460 (N.D. Ga.), amended, 864 F. Supp. 1294 (N.D. Ga. 1994).

Action for inverse condemnation based on increased noise caused by the opening of an airport runway accrued at the time the runway became operational and the injury became immediately apparent, not when the landowner was denied compensation for the taking. Southfund Partners v. City of Atlanta, 221 Ga. App. 666, 472 S.E.2d 499.

Complaint alleging that alterations in flight paths and increased noise since property was purchased filed more than four years after the city's opening of an airport runway was barred since the city presented evidence sufficient to show that there had been no increase in the nuisance over the landowner's property. Southfund Partners v. City of Atlanta, 221 Ga. App. 666, 472 S.E.2d 499.

To the extent that the landowners asserted a claim for permanent nuisance based on the installation of a drain pipe more than four years prior to filing the claim, the landowners' claim was barred by the statute of limitations. Liberty County v. Eller, 327 Ga. App. 770, 761 S.E.2d 164, 2014 Ga. App. LEXIS 424 (2014), cert. denied, No. S14C1664, 2014 Ga. LEXIS 695 (Ga. Sept. 8, 2014).

Application to nuisance action. — Trial court erred by allowing a homeowner's nuisance claim against a county to survive summary judgment because that claim was barred by the four-year statute of limitations period set forth in O.C.G.A. § 9-3-30(a) as the homeowner did not file suit until eight years after the county performed the drain work complained of in the action that was purportedly causing the homeowner's property to flood. Floyd County v. Scott, 320 Ga. App. 549, 740 S.E.2d 277, 2013 Ga. App. LEXIS 230 (2013), cert. denied, No. S13C1099, 2013 Ga. LEXIS 669 (Ga. Sept. 9, 2013).

Change of street's grade. — This section applies to action for change of street grade. Atkinson v. City of Atlanta, 81 Ga. 625, 7 S.E. 692, 1888 Ga. LEXIS 292 (1888); Holmes v. City of Atlanta, 113 Ga. 961, 39 S.E. 458, 1901 Ga. LEXIS 431 (1901); Witham v. Atlanta Journal, 124 Ga. 688, 53 S.E. 105, 1906 Ga. LEXIS 589 (1906).

County's maintenance of road a continuing nuisance. — Trial court erred in granting summary judgment to the county on the property owners' claim based on the county's maintenance of the road causing flooding on the owners' prop-

Other Examples (Cont'd)

erty on the ground that the owners' claim was barred by the statute of limitations because the claimed nuisance was a claim of a continuing nuisance and not barred by the applicable four year statute of limitations. Stroud v. Hall County, 339 Ga. App. 37, 793 S.E.2d 104, 2016 Ga. App. LEXIS 573 (2016).

In a continuing tort situation, only damages alleged to have occurred within four years of the plaintiff's bringing suit are not barred. Brooks v. Freeport Kaolin Co., 253 Ga. 678, 324 S.E.2d 170, 1985 Ga. LEXIS 515 (1985).

Continuing trespass. — Continuous trespass gives right of action, even when recovery for original act of trespass is barred. Monroe v. McCranie & Vickers, 117 Ga. 890, 45 S.E. 246, 1903 Ga. LEXIS 383 (1903).

In case of continuing trespass, entire cause of action will not be barred merely because original entry occurred more than four years before commencement of action. Savannah Elec. & Power Co. v. Horton, 44 Ga. App. 578, 162 S.E. 299, 1932 Ga. App. LEXIS 395 (1932).

When trespass is continuing in nature, new cause of action arises daily, and action may be maintained for all damages accruing during four years immediately preceding filing of action. Gleaton v. City of Atlanta, 131 Ga. App. 399, 206 S.E.2d 46, 1974 Ga. App. LEXIS 1432 (1974).

Continuing nuisance allegation. — Action alleging damage to landowner's property resulting from contractor's construction of a sewer line across property is an action under O.C.G.A. § 9-3-30 to which this section's limitations period applies rather than an action for a continuing nuisance to which the limitations period does not apply; even though a continuing nuisance existed due to soil erosion allegedly caused by the contractor's actions, the recovery sought was for damage to property directly inflicted during the time of construction. Mullins v. Wheatley Grading Contractors, 184 Ga. App. 119, 361 S.E.2d 10, 1987 Ga. App. LEXIS 2165 (1987).

When the plaintiff alleged that flights over its property constituted a nuisance for which it could recover common law tort damages and defendant city, as operator of the airport, did not carry its burden of showing that the plaintiff lacked evidence that the defendant did not properly operate the airport or that the defendant was not responsible for the allegedly offensive nature of overflights, the defendant was not entitled to summary judgment. Speer v. Miller, 864 F. Supp. 1294, 1994 U.S. Dist. LEXIS 13460 (N.D. Ga. 1994).

Because there was no evidence that a sewer line backup injured more than a few individuals who came into contact with it, the backup did not constitute a public nuisance pursuant to O.C.G.A. § 41-1-2, and the four-year limitations period of O.C.G.A. § 9-3-30 applied to the nuisance claim brought by property owners against a city. Davis v. City of Forsyth, 275 Ga. App. 747, 621 S.E.2d 495, 2005 Ga. App. LEXIS 998 (2005), cert. denied, No. S06C0356, 2006 Ga. LEXIS 235 (Ga. Mar. 27, 2006).

Action time barred. — Homeowners' claims for trespass and nuisance were time barred by the four year statute of limitations because it was clear that the trespass occurred and the nuisance was created when the sewer and storm lines were first installed on the homeowners' property more than 20 years earlier and although the homeowners were unaware of the existence of the lines at the time the homeowners purchased the home, it was undisputed that the homeowners became aware of the lines more than four years before the homeowners filed their complaint. City of Atlanta v. Carlisle, 359 Ga. App. 444, 858 S.E.2d 543, 2021 Ga. App. LEXIS 217 (2021).

Continuing nuisance gives rise to cause of action, despite bar against recovery for original act of nuisance. City Council v. Lombard, 101 Ga. 724, 28 S.E. 994, 1897 Ga. LEXIS 309 (1897).

In a continuing, abatable nuisance case, this section does not preclude recovery for any damages save those which were suffered more than four years prior to filing of action. City of Columbus v. Myszka, 246 Ga. 571, 272 S.E.2d 302, 1980 Ga. LEXIS 1201 (1980).

Although the act that originally caused the nuisance might not have been commit-

ted within the period of limitations of the action, the defendant presented some evidence that the groundwater contamination was a continuing tort that continued to inflict damages in the four years prior to the suit; therefore, summary judgment was inappropriate when based upon the suit being time barred. Tri-County Inv. Group v. Southern States, Inc., 231 Ga. App. 632, 500 S.E.2d 22, 1998 Ga. App. LEXIS 416 (1998).

Successive recoveries for successive injuries. — When nuisance is permanent in character and its construction and continuance are not necessarily injurious, injury to be compensated is only damage which has happened, and there may be as many successive recoveries as there are successive injuries; in such case, statute of limitations begins to run from happening of injury complained of. Georgia Power Co. v. Moore, 47 Ga. App. 411, 170 S.E. 520, 1933 Ga. App. LEXIS 420 (1933).

When nuisance is not permanent in character, but is one which can and should be abated, every continuance of such nuisance is a fresh nuisance, for which a fresh action will lie; action accrues at time of such continuance, and statute of limitations runs only from time of such accrual. Georgia Power Co. v. Moore, 47 Ga. App. 411, 170 S.E. 520, 1933 Ga. App. LEXIS 420 (1933).

When structure, though permanent in character, is not necessarily a permanent and continuing nuisance, but only becomes such in consequence of some supervening cause producing special injury at different periods, separate action lies for each injury thus occasioned, and statute begins to run against such cause of action only from time of its accrual, that is, from time when special injury is occasioned. Georgia Power Co. v. Moore, 47 Ga. App. 411, 170 S.E. 520, 1933 Ga. App. LEXIS 420 (1933).

Substantial increase in damages caused by nuisance. — When damage to property of lower-riparian owner was result of maintenance of continuing nuisance for over 20 years but had increased substantially within the four-year period next preceding filing of action for damages, the owner's cause of action was not barred by the statute of limitations. Vickers v. City of Fitzgerald, 216 Ga. 476, 117 S.E.2d 316, 1960 Ga. LEXIS 509 (1960), overruled, City of Chamblee v. Maxwell, 264 Ga. 635, 452 S.E.2d 488, 1994 Ga. LEXIS 894 (1994).

Federal CERCLA discovery rule applicable. — Under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9658, there is a federally mandated "discovery rule" for environmental torts brought under state law, despite the fact that Georgia generally does not provide such a rule for torts involving only property damage. Tucker v. Southern Wood Piedmont Co., 28 F.3d 1089, 1994 U.S. App. LEXIS 21576 (11th Cir. 1994).

Hazardous waste leakage a continuing tort. — Under Georgia's continuing tort doctrine, plaintiffs would be entitled to any damages that the plaintiffs can prove to have been caused by leakage of hazardous waste onto their property from and after September 6, 1987, i.e., four years prior to the date the action was filed. Tucker v. Southern Wood Piedmont Co., 28 F.3d 1089, 1994 U.S. App. LEXIS 21576 (11th Cir. 1994).

Damages resulting years after construction of dam. — Action for damages is not barred under this section when instrumentality causing damages, such as dam was in existence for many years, with knowledge of person damaged, but damages sought to be recovered accrued within four years from filing of complaint. Rogers v. Western & A.R.R., 209 Ga. 450, 74 S.E.2d 87, 1953 Ga. LEXIS 296 (1953).

Overflow of land by dam. — Action for overflow of land by lawfully constructed dam is governed by this section. Smith v. Dallas Util. Co., 27 Ga. App. 22, 107 S.E. 381, 1921 Ga. App. LEXIS 654 (1921).

Destruction of existing dam. — In suit by the owners of lakefront lots to enjoin a developer from destroying the dam which created the lake, the owners' cause of action did not accrue until the developer began to demolish the dam; thus, the suit was not barred by the statute of limitations for damage to property. Dillard v. Bishop Eddie Long Ministries, Inc., 258 Ga. App. 507, 574 S.E.2d 544,

Other Examples (Cont'd)

2002 Ga. App. LEXIS 1339 (2002), cert. denied, No. S03C0504, 2003 Ga. LEXIS 228 (Ga. Feb. 24, 2003).

Flow of sewage across property. — City's knowingly allowing human sewage from its sewage system to flow across owner's property for many months constituted a continuing, abatable nuisance, action for which was not barred by this section except with respect to damages suffered more than four years prior to the filing of the action. City of Columbus v. Myszka, 246 Ga. 571, 272 S.E.2d 302, 1980 Ga. LEXIS 1201 (1980).

Trial court properly determined that the property owners' claims of property damage, based on a continuing nuisance due to sewage backup, that were suffered more than six months prior to the filing of their ante litem notice pursuant to O.C.G.A. § 36-33-5(b) were barred as untimely; although a prior letter could have constituted an ante litem notice, the four-year limitations period under O.C.G.A. § 9-3-30 ran prior to the institution of the lawsuit, such that any claims in the six months prior to that letter were also barred. Davis v. City of Forsyth, 275 Ga. App. 747, 621 S.E.2d 495, 2005 Ga. App. LEXIS 998 (2005), cert. denied, No. S06C0356, 2006 Ga. LEXIS 235 (Ga. Mar. 27, 2006).

Emptying of sewer line into creek above property. — Petition against city for damages occasioned by emptying of sewer line into creek above plaintiffs' land contained sufficient allegations as to inability to grow consumable crops, inability to maintain healthy streams, and enforced abandonment of premises, as to show continuing nuisance and to constitute nucleus for a cause of action, completed by proffered amendment specifically electing to sue for diminution in rental value, for damage to realty by reason of reduced rental value; in such a case action would lie for damages accruing within four years before next filing of action. Segars v. City of Cornelia, 56 Ga. App. 718, 193 S.E. 794, 1937 Ga. App. LEXIS 212 (1937).

Nuisance action wherein railroad and city were alleged to have failed to maintain a culvert and drainage pipe that caused flood damage. — Appellate court erred by reversing summary judgment to a railroad and a city in the homeowners' nuisance and negligence suit against the entities as the homeowners' permanent nuisance claim was barred by the four year statute of limitations period set forth in O.C.G.A. § 9-3-30; the homeowners failed to show triable issues that the railroad improperly maintained the culvert and drainage pipe at issue; and the homeowners failed to show that the city had any duty to maintain the culvert and pipe since the homeowners failed to show that the city had taken any control over the property in question and, thus, became responsible for maintaining the culvert and pipe. City of Atlanta v. Kleber, 285 Ga. 413, 677 S.E.2d 134, 2009 Ga. LEXIS 175 (2009).

Claim based on alleged spillage of gasoline from tanks when the tanks were removed during construction was for property damage and thus, when past the four years statute of limitations, was barred. Griffin v. Kangaroo, Inc., 208 Ga. App. 190, 430 S.E.2d 82, 1993 Ga. App. LEXIS 481 (1993), cert. denied, No. S93C1095, 1993 Ga. LEXIS 751 (Ga. July 15, 1993).

Nuisance alleged from energy plant noise and vibrations. — Denial of summary judgment to an energy facility owner and operator was proper in an action by neighboring property owners, alleging a nuisance from the noise and vibrations emanating from the facility, as an issue of fact existed as to whether there was an adverse change in the nature of the alleged nuisance within the limitations period of O.C.G.A. § 9-3-30(a). Oglethorpe Power Corp. v. Forrister, 289 Ga. 331, 711 S.E.2d 641, 2011 Ga. LEXIS 466 (2011), dismissed, 332 Ga. App. 693, 774 S.E.2d 755, 2015 Ga. App. LEXIS 384 (2015).

Evidence supported a jury's verdict that there was a change in the nature of the noises produced by a power plant that used gas-fired combustion turbine units, sufficient to allow nearby landowners to bring nuisance claims that were timely under O.C.G.A. § 9-3-30(a); awards of damages, punitive damages, and attorney's fees were upheld. Oglethorpe Power Corp. v. Estate of Forrister, 332 Ga. App. 693, 774 S.E.2d 755, 2015 Ga. App. LEXIS 384 (2015), cert. denied, No. S15C1689, 2015 Ga. LEXIS 704 (Ga. Oct. 5, 2015).

Nuisance and trespass claims for injuries against an airport based on noise, dust, exhaust, and vibrations from the planes accrued when the airport began operation and, since the claims were filed more than four years thereafter, were barred by O.C.G.A. § 9-3-30. Provident Mut. Life Ins. Co. v. City of Atlanta, 938 F. Supp. 829, 1995 U.S. Dist. LEXIS 21202 (N.D. Ga. 1995).

Airport was permanent nuisance. — Airport was a permanent, rather than a continuing nuisance, since the damage complained of became apparent at the time the runways in question became operational. Southfund Partners v. City of Atlanta, 221 Ga. App. 666, 472 S.E.2d 499.

Accrual of cause for negligent misrepresentation. — Evidence showed that not until after the city activated its land application system did the city incur pecuniary losses due to misrepresentations in the engineering firm's report relating to the land application system; because the city filed suit within four years of that time, the negligent misrepresentation claim was not time barred. City of Cairo v. Hightower Consulting Eng'rs, Inc., 278 Ga. App. 721, 629 S.E.2d 518, 2006 Ga. App. LEXIS 365 (2006).

Accrual of cause for damage due to faulty utility service. — When a defect is not in the construction of a building or other structure but in the installation of equipment owned and maintained by a public utility for the purpose of providing service to the property, and it is totally unreasonable to expect the owner to discover it or assume responsibility for its repair, particularly when it is buried underground, the four-year limitation period established by O.C.G.A. § 9-3-30 does not begin to run until the date the property is damaged. Atlanta Gas Light Co. v. City of Atlanta, 160 Ga. App. 396, 287 S.E.2d 229, 1981 Ga. App. LEXIS 2984 (1981).

Suit arising from power poles time barred. — Owner's action against a power company arising from power poles on the owner's property was time barred under O.C.G.A. § 9-3-30 because the owner bought the property after the poles were installed and the lines were operating, but failed to bring suit within four years of the purchase date; the suit was barred whether brought as a trespass claim or an inverse condemnation claim. Adams v. Ga. Power Co., 299 Ga. App. 399, 682 S.E.2d 650, 2009 Ga. App. LEXIS 812 (2009), cert. denied, No. S09C2018, 2010 Ga. LEXIS 14 (Ga. Jan. 12, 2010).

RESEARCH REFERENCES

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51 Am. Jur. 2d, Limitation of Actions, §§ 121 et seq., 147 et seq.

C.J.S.

54 C.J.S., Limitations of Actions, §§ 82, 116 et seq.

ALR.

Limitation of actions: when does statute begin to run against action based on removal of lateral or subjacent support, 26 A.L.R. 1235.

When limitation begins to run against an action to recover on account of removal of mineral from land, 37 A.L.R. 1182.

Limitation of action against tenant for years or for life for waste or breach of obligation as to use and care of property, 53 A.L.R. 46.

Wrongful pollution of stream by municipality as creating single cause of action or successive causes of action, 75 A.L.R. 529.

Rights and remedies in respect of legacy charged upon land devised, 116 A.L.R. 7; 134 A.L.R. 361.

Rule that limitation begins to run when conditions causing a permanent injury to real property are created or when the permanent character of the injury be-

comes obvious, as affecting later increase or change in the nature of the damages, 126 A.L.R. 1284.

When statute of limitations commences to run on action for wrongful seizure of property of third person under process or court order, 156 A.L.R. 253.

When statute of limitation commences to run against damage from overflow of land caused by artificial construction or obstruction, 5 A.L.R.2d 302.

Commencement of running of statute of limitations respecting actions by owners of right of re-entry, or actions against third persons by reversioners, 19 A.L.R.2d 729.

Statute of limitations applicable to action for encroachment, 24 A.L.R.2d 903.

Statutes of limitation concerning actions of trespass as applicable to actions for injury to property not constituting a common-law trespass, 15 A.L.R.3d 1228.

Right of contingent remainderman to maintain action for damages for waste, 56 A.L.R.3d 677.

When statute of limitations commences to run against claim for contribution or indemnity based on tort, 57 A.L.R.3d 867.

What statute of limitations applies to action for contribution against joint tortfeasor, 57 A.L.R.3d 927.

Promises or attempts by seller to repair goods as tolling statute of limitations for breach of warranty, 68 A.L.R.3d 1277.

When statute of limitations begins to run on negligent design claim against architect, 90 A.L.R.3d 507.

Statutes of limitation: actions by purchasers or contractees against vendors or contractors involving defects in houses or other buildings caused by soil instability, 12 A.L.R.4th 866.

Right to compensation for real property damaged by law enforcement personnel in course of apprehending suspect, 23 A.L.R.5th 834.

Modern status of the application of "discovery rule" to postpone running of limitations against actions relating to breach of building and construction contracts, 33 A.L.R.5th 1.

Accrual of claims for continuing trespass or continuing nuisance for purposes of statutory limitations, 14 A.L.R.7th 8.

Accrual of Inverse Condemnation Claim Against Federal Government Based on Contamination, Dumping, or Cleanup, 50 A.L.R. Fed.3d 1.

9-3-30.1. Actions against manufacturers or suppliers of asbestos or material containing asbestos.

(a) Notwithstanding the provisions of Code Section 9-3-30 or any other law, every action against a manufacturer or supplier of asbestos or material containing asbestos brought by or on behalf of any person or entity, public or private; or brought by or on behalf of this state or any agency, department, political subdivision, authority, board, district, or commission of the state; or brought by or on behalf of any municipality, county, or any state or local school board or local school district to recover for:

(1) Removal of asbestos or materials containing asbestos from any building owned or used by such entity;

(2) Other measures taken to correct or ameliorate any problem related to asbestos in such building;

(3) Reimbursement for such removal, correction, or amelioration related to asbestos in such building; or

(4) Any other claim for damage to real property allowed by law relating to asbestos in such building

which might otherwise be barred prior to July 1, 1990, as a result of expiration of the applicable period of limitation, is revived or extended. Any action thereon shall be commenced no later than July 1, 1990.

(b) The enactment of this Code section shall not be construed to imply that any action against a manufacturer or supplier of asbestos or material containing asbestos is now barred by an existing limitations period.

(c) Nothing in this Code section shall be construed to revive, extend, change, or otherwise affect the applicable period of limitation for persons or entities not set forth and provided for in subsection (a) of this Code section.

(d) Nothing contained in this Code section shall be construed to have any effect on actions for personal injury or any other claim except as specifically provided in this Code section.

History.
Code 1981, § 9-3-30.1, enacted by Ga. L. 1988, p. 1996, § 1.

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 9-3-30.1 does not meet constitutional standards because it singles out for special treatment property claims against manufacturers and suppliers of asbestos and differentiates them from all other claims that might be based upon other hazardous or toxic substances. Celotex Corp. v. St. Joseph Hosp., 259 Ga. 108, 376 S.E.2d 880, 1989 Ga. LEXIS 96 (1989).

RESEARCH REFERENCES

Am. Jur. Trials.
Contractor's Liability for Mishandling Toxic Substance, 37 Am. Jur. Trials 115.
Cost Recovery Litigation: Abatement of Asbestos Contamination, 40 Am. Jur. Trials 317.
Handling Toxic Tort Litigation, 57 Am. Jur. Trials 395.
Asbestos Injury Litigation, 60 Am. Jur. Trials 73.

9-3-30.2. Actions against persons engaged in land surveying.

(a) As used in this Code section, the term "land surveying" shall have the same meaning as provided by paragraph (6) of Code Section 43-15-2.

(b) No action to recover damages for any deficiency, defect, omission, error, or miscalculation in a survey or plat shall be brought against registered surveyors or their employees engaged in the practice of land surveying who performed or furnished such survey or plat more than six years from the date of the survey or plat. The cause of action in such

cases shall accrue when such services are rendered as shown from the date on the survey or plat. Any such action not instituted within the six-year period provided by this subsection shall be forever barred.

History.
Code 1981, § 9-3-30.2, enacted by Ga. L. 1998, p. 178, § 1.

Cross references.
Professional engineers and land surveyors, § 43-15-1 et seq.

9-3-31. Injuries to personalty.

Actions for injuries to personalty shall be brought within four years after the right of action accrues.

History.
Laws 1767, Cobb's 1851 Digest, p. 562.; Laws 1805, Cobb's 1851 Digest, p. 564.; Ga. L. 1855-56, p. 233, § 4; Code 1863, § 2991; Code 1868, § 3004; Code 1873, § 3059; Code 1882, § 3059; Civil Code 1895, § 3899; Civil Code 1910, § 4496; Code 1933, § 3-1002.

Cross references.
Injuries to personalty generally, § 51-10-1 et seq.

Law reviews.
For note, "The Effect of Georgia's Architectural Statutes of Limitations on Real and Personal Property Claims for Negligent Construction," see 7 Ga. St. U.L. Rev. 137 (1990).

For article, "2013 Georgia Corporation and Business Organization Case Law Developments," see 19 Ga. St. B.J. 28 (April 2014).

JUDICIAL DECISIONS

Analysis

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General Consideration

History of this section, see Blocker v. Boswell, 109 Ga. 230, 34 S.E. 289, 1899 Ga. LEXIS 619 (1899).

Uniform Deceptive Trade Practices Act. — Four-year period of O.C.G.A. § 9-3-31 was applicable for purposes of the Georgia Uniform Deceptive Trade Practices Act, § 10-1-370 et seq., not the 20-year period of O.C.G.A. § 9-3-22. Kason Indus. v. Component Hdwe. Group, 120 F.3d 1199, 1997 U.S. App. LEXIS 22846 (11th Cir. 1997).

Section does not apply to action to cancel deed. — Trial court erred in applying four-year statutes of limitation found in O.C.G.A. §§ 9-3-30 and 9-3-31 to enter summary judgment on the seller's action seeking to cancel a deed because Georgia law recognized an equitable seven-year limit on suits for cancellation of deeds. Serchion v. Capstone Partners, Inc., 298 Ga. App. 73, 679 S.E.2d 40, 2009 Ga. App. LEXIS 509 (2009), cert. denied, No. S09C1642, 2009 Ga. LEXIS 781 (Ga. Nov. 9, 2009).

No tolling due to fraud. — In response to certified questions from a federal action which arose with respect to a mortgagee's charges that included substantial notary fees from a refinancing transaction, it was determined that even if there was actual fraud by the mortgagee, there was no tolling of limitation periods for claims of fraud and money had and received pursuant to O.C.G.A. §§ 9-3-25 and 9-3-31 as the mortgagors could have discovered the impropriety of the notary fees by simple reference to O.C.G.A. § 45-17-11. Anthony v. Am. Gen.

Fin. Servs., 287 Ga. 448, 697 S.E.2d 166, 2010 Ga. LEXIS 478 (2010).

Fact issues on peanut and tobacco quotas. — In a dispute involving a family farm partnership, the trial court erred by granting summary judgment to the children/grandchildren as to the claim regarding the peanut and tobacco quotas and assignments where certain claims were not untimely because genuine issues of fact existed as to whether a son inappropriately used a power of attorney as to the quotas and assignments and the father/grandfather sought to recover damage to personalty. Godwin v. Mizpah Farms, LLLP, 330 Ga. App. 31, 766 S.E.2d 497, 2014 Ga. App. LEXIS 808 (2014).

Claim not waived on appeal. — Appellants were entitled to urge on appeal that appellees failed to show that certain legal bills fell outside the limitation period of O.C.G.A. § 9-3-31, even if they did not raise that specific factual argument in the trial court; the statute of limitations was an affirmative defense, and so the burden was on appellees to come forward with evidence sufficient to make out a prima facie case that appellants' billing claim fell outside the limitation period. Falanga v. Kirschner & Venker, P.C., 286 Ga. App. 92, 648 S.E.2d 690, 2007 Ga. App. LEXIS 703 (2007).

Injuries to Personalty

Applicability of section to actions based on fraud. — As to mere action for damages for fraud or duress, period of limitation is the same as that for recovery of personal property, namely, four years. O'Callaghan v. Bank of Eastman, 180 Ga. 812, 180 S.E. 847, 1935 Ga. LEXIS 569 (1935); Shapiro v. Southern Can Co., 185 Ga. App. 677, 365 S.E.2d 518, 1988 Ga. App. LEXIS 211 (1988).

This section, applicable generally to actions for injuries to personalty, applies to actions based on fraud. McNeal v. Paine, Webber, Jackson & Curtis, Inc., 598 F.2d 888, 1979 U.S. App. LEXIS 13305 (5th Cir. 1979).

Four-year period of limitations applies to actions seeking damages for fraud. McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548, 1992 U.S. Dist. LEXIS 631 (M.D. Ga. 1992).

Four-year statute of limitation governs actions for fraud and negligent misrepresentation; an action predicated on alleged misrepresentations made by a city to a mechanic more than five years before suit was filed was time barred, and the trial court properly entered summary judgment for the city on the mechanic's fraud claim. Willis v. City of Atlanta, 265 Ga. App. 640, 595 S.E.2d 339, 2004 Ga. App. LEXIS 214 (2004).

Action to recover damages sustained in consequence of fraudulent representations and concealment made by defendant is governed by this section. Turpentine & Rosin Factors, Inc. v. Travelers Ins. Co., 45 F. Supp. 310, 1942 U.S. Dist. LEXIS 2774 (D. Ga. 1942).

Fraud and deceit inducing purchase. — This section applies to action for fraud and deceit inducing purchase of worthless stock. Frost v. Arnaud, 144 Ga. 26, 85 S.E. 1028, 1915 Ga. LEXIS 25 (1915).

This section applies to action for fraud and deceit inducing purchase of property. Phipps v. Wright, 28 Ga. App. 164, 110 S.E. 511, 1922 Ga. App. LEXIS 355 (1922).

Suit alleging fraudulent inducement in the purchase of property is an action for injury to property, and the four-year statute of limitation contained in O.C.G.A. § 9-3-31 is applicable. Kerce v. Bent Tree Corp., 166 Ga. App. 728, 305 S.E.2d 462, 1983 Ga. App. LEXIS 2311 (1983).

Common-law fraud. — Four-year limitations period is applicable to common-law fraud. Diamond v. Lamotte, 709 F.2d 1419, 1983 U.S. App. LEXIS 25755 (11th Cir. 1983).

Applicability to actions under blue sky statute. — Action under the Georgia blue sky statute is the more closely analogous action to a cause of action asserted for misrepresentation under the federal Securities Exchange Act, 15 U.S.C. § 78a et seq., and the two-year statute of limitations prescribed by O.C.G.A. § 10-5-14(d) governs the timeliness of plaintiffs' actions, rather than the four-year statute of limitations applicable to common-law fraud. Diamond v. Lamotte, 709 F.2d 1419, 1983 U.S. App. LEXIS 25755 (11th Cir. 1983).

False or deceptive representations relating to insurance policy. — Action for damages resulting from failure to fully

Injuries to Personalty (Cont'd)

inform individual of right to convert insurance policy, from giving of false information regarding cancellation or termination of insurance, and from evasive and deceptive conduct preventing filing of proofs of disability and death was in the nature of an action for deceit, fraud, or misrepresentation sounding in tort, and whether looked at as an injury to property or to the person it was barred in four or two years, respectively. Turpentine & Rosin Factors, Inc. v. Travelers Ins. Co., 45 F. Supp. 310, 1942 U.S. Dist. LEXIS 2774 (D. Ga. 1942).

Loss of services. — This section applies to action for loss of services. Frazier v. Georgia R.R. & Banking Co., 101 Ga. 70, 28 S.E. 684, 1897 Ga. LEXIS 159 (1897); Silvertooth v. Shallenberger, 49 Ga. App. 133, 174 S.E. 365, 1934 Ga. App. LEXIS 296 (1934), overruled, Parker v. Vaughan, 124 Ga. App. 300, 183 S.E.2d 605, 1971 Ga. App. LEXIS 902 (1971).

Damage sustained by father for loss of services of minor child is damage to a property right, and action for damages thus arising may be brought within four years. Bainbridge Power Co. v. Ivey, 33 Ga. App. 586, 144 S.E. 825 (1928).

Interference with right to follow profession. — Right to follow one's profession is a property right, and cause of action based on interference with this right is subject to four year limitation of this section. Woods v. Local 613, Int'l Bhd. of Elec. Workers, 404 F. Supp. 110, 1975 U.S. Dist. LEXIS 15316 (N.D. Ga. 1975).

Injury to bailed property. — This section applies to action for injury to property held by bailee. Raleigh & G.R.R. v. Western & Atl. R.R., 6 Ga. App. 616, 65 S.E. 586, 1909 Ga. App. LEXIS 406 (1909).

Conversion of money by vendor. — In action by assignee of purchaser against vendor for alleged collection and conversion of money, the period of limitations is four years. Williams v. Parsons, 50 Ga. App. 122, 177 S.E. 257, 1934 Ga. App. LEXIS 649 (1934).

Negligent construction of footing for a house. — In an action based on seller's fraudulent concealment of gross negligence in the construction of a footing for a house, the evidence supported a finding of buyer's due diligence in discovering, eight years after the purchase, the result which was settling of the house. Ramey v. Leisure, Ltd., 205 Ga. App. 128, 421 S.E.2d 555, 1992 Ga. App. LEXIS 1083 (1992), cert. denied, No. S92C1365, 1992 Ga. LEXIS 832 (Ga. Oct. 2, 1992).

Claim for damage to personal property accrued on the date of the fire which damaged the personal property and was governed by a four-year statute of limitation; a suit alleging that a subcontractor negligently installed electrical wiring in a house, thus causing a fire, accrued on the date of the fire as to the personal property damaged in the fire, not on the date of substantial completion of the house, and as suit was filed within the limitation period, the trial court correctly denied summary judgment on the claim for damage to personalty. Stamschror v. Allstate Ins. Co., 267 Ga. App. 692, 600 S.E.2d 751, 2004 Ga. App. LEXIS 756 (2004).

Fraud in pool construction not shown. — Homeowner's claims against a contractor for breach of contract, breach of warranty, and fraud, brought more than six years after construction of a swimming pool was complete, were barred by the applicable statutes of limitations. Another contractor's affidavit that the contractor's statements to the owner regarding the structural integrity of the pool were false was insufficient to prove fraud by the contractor. Smith v. Hilltop Pools & Spas, Inc., 306 Ga. App. 881, 703 S.E.2d 424, 2010 Ga. App. LEXIS 1080 (2010).

Injury to personalty caused by seller's negligence. — This section applies when injury to personalty is caused by seller's negligence as opposed to breach of warranty. Cleveland Lumber Co. v. Proctor & Schwartz, Inc., 397 F. Supp. 1088, 1975 U.S. Dist. LEXIS 14052 (N.D. Ga. 1975) (see O.C.G.A. § 9-3-31).

Damage to county from commissioners' negligence. — Limitation for action for loss or damage resulting to county by negligent actions of county commissioners in good faith would be four years from the date of such acts. Gwinnett County v. Archer, 102 Ga. App. 821, 118 S.E.2d 102, 1960 Ga. App. LEXIS 758 (1960).

Fraud involving sale of stock. — Common-law fraud claim, governed by

four-year statute of limitations, was not reduced to the two-year period applicable to violations of securities laws simply because the alleged fraud involved the sale of stock. Stricker v. Epstein, 213 Ga. App. 226, 444 S.E.2d 91, 1994 Ga. App. LEXIS 524 (1994), cert. denied, No. S94C1353, 1994 Ga. LEXIS 927 (Ga. Sept. 8, 1994).

Federal securities law violations. — This section is applicable to an action under section 10(b) of the federal Securities Exchange Act of 1934. Dudley v. Southeastern Factor & Fin. Corp., 57 F.R.D. 177, 1972 U.S. Dist. LEXIS 10998 (N.D. Ga. 1972).

Two-year limitation period in Ga. L. 1974, p. 284, § 16 (see now O.C.G.A. § 10-5-14), rather than four-year limitation period of former Code 1933, § 3-1002 (see now O.C.G.A. § 9-3-31) applied to federal security cases. Osterneck v. E.T. Barwick Indus., Inc., 79 F.R.D. 47, 1978 U.S. Dist. LEXIS 17822 (N.D. Ga. 1978).

Four-year period of limitations applicable to action under this section, and not two-year limitation applicable to actions brought under former section 13 of Georgia Securities Act of 1957, (Ga. L. 1957 p. 134), applies to causes of action alleged under both section 10(b) and section 7 of the federal Securities Exchange Act, (15 U.S.C. § 78a et seq.). McNeal v. Paine, Webber, Jackson & Curtis, Inc., 598 F.2d 888, 1979 U.S. App. LEXIS 13305 (5th Cir. 1979).

Actions for recovery of personalty were governed by Ga. L. 1855-56, § 2 (see now O.C.G.A. § 9-3-32), and not former Civil Code 1910, § 4496 (see now O.C.G.A. § 9-3-31). Hicks v. Moyer, 10 Ga. App. 488, 73 S.E. 754, 1912 Ga. App. LEXIS 586 (1912).

This section does not apply to action to recover mortgage notes and security deed to realty which were wrongfully transferred as collateral for another debt. Cross v. Citizens' Bank & Trust Co., 160 Ga. 647, 128 S.E. 898, 1925 Ga. LEXIS 222 (1925).

Amended claim not barred. — When complaint alleging conspiracy to defraud was amended to allege that company receiver defendant in original complaint had sold company property for well under fair market value, had failed to obtain and preserve accurate inventory of property, had failed to have property appraised or advertised, and had failed to take bids thereon, amended claim arose out of same transaction as preamended claim and was not barred by this section, having been constructively filed on the filing date of the preamended complaint. McLaughlin Lumber Co. v. Cohen, 246 Ga. 590, 272 S.E.2d 319, 1980 Ga. LEXIS 1214 (1980).

Running of Limitations

Running of statute is computed from date when plaintiff could first maintain action to successful result. Worrill v. Pitney-Bowes, Inc., 128 Ga. App. 741, 197 S.E.2d 848, 1973 Ga. App. LEXIS 1600 (1973).

Statute of limitations contained in this section begins to run on cause of action on date that suit on claim can first be successfully maintained. Limoli v. First Ga. Bank, 147 Ga. App. 755, 250 S.E.2d 155, 1978 Ga. App. LEXIS 2938 (1978).

Accrual of right of action determinative. — Point from which statute of limitations began to run under former Code 1933, § 3-1002 (see now O.C.G.A. § 9-3-31) when right of action accrued, not when act or omission occurred, as would be the case under Ga. L. 1976, p. 1363, § 1 (see now O.C.G.A. § 9-3-71), relating to malpractice. Simons v. Conn, 151 Ga. App. 525, 260 S.E.2d 402, 1979 Ga. App. LEXIS 2621 (1979), superseded by statute as stated in Hart v. Eldridge, 158 Ga. App. 834, 282 S.E.2d 369, 1981 Ga. App. LEXIS 2436 (1981).

In copyright infringement action, a customer's counterclaims for false endorsement and unjust enrichment were timely under O.C.G.A. § 9-3-31 because the false endorsement continued to occur until the copyright owner removed the objectionable material from its website. SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc., 455 F. Supp. 2d 1347, 2006 U.S. Dist. LEXIS 68407 (N.D. Ga. 2006).

Subsequent damage from act which is not tortious. — If act complained of does not in and of itself constitute invasion of some legal right, but recovery is sought only on account of damage subsequently accruing from and consequent upon act not in itself tortious, cause of

Running of Limitations (Cont'd)

action will be taken to accrue and the statute begins to run only when resultant damage is sustained. Silvertooth v. Shallenberger, 49 Ga. App. 133, 174 S.E. 365, 1934 Ga. App. LEXIS 296 (1934), overruled, Parker v. Vaughan, 124 Ga. App. 300, 183 S.E.2d 605, 1971 Ga. App. LEXIS 902 (1971).

Act constituting legal injury to plaintiff. — If act causing damage is of itself unlawful, in sense that it constitutes legal injury to plaintiff and is thus a completed wrong, cause of action accrues and statute begins to run from time such act is committed, however slight the damage then may be. Silvertooth v. Shallenberger, 49 Ga. App. 133, 174 S.E. 365, 1934 Ga. App. LEXIS 296 (1934), overruled, Parker v. Vaughan, 124 Ga. App. 300, 183 S.E.2d 605, 1971 Ga. App. LEXIS 902 (1971).

When chapter 13 debtors failed to schedule the debtors' claim against the defendant credit union as an asset, and failed to bring the claim within four years after the triggering event, the death of debtor wife's former husband, as required by O.C.G.A. §§ 9-3-31 and 9-3-32, summary judgment on judicial estoppel and limitations grounds was proper. Kirton v. Fort Stewart Federal Credit Union (In re Carroll), No. 00-2065, No. 99-20813, 2001 Bankr. LEXIS 2317 (Bankr. S.D. Ga. June 26, 2001).

Limited partners' claims for breach of fiduciary duty. — Claims by limited partners in a real estate investment limited partnership that the general partners had breached their fiduciary duty by making material misrepresentations and omissions about net sales proceeds for 13 years were time-barred under O.C.G.A. § 9-3-31; the first communication was in 1987, and the action had been brought more than four years after that date, and the limitation period was not tolled under O.C.G.A. § 9-3-96 because the limited partners had been on notice of the true contents of the partnership agreement the entire time and thus had always had proper notice of the information necessary to determine the truth. Hendry v. Wells, 286 Ga. App. 774, 650 S.E.2d 338, 2007 Ga. App. LEXIS 812 (2007), cert. denied, No. S07C1835, 2008 Ga. LEXIS 102 (Ga. Jan. 7, 2008).

Accrual of actions. — Cause of action for damages to personalty accrues (within the meaning of O.C.G.A. § 9-3-31) at the time of injury. Hanna v. McWilliams, 213 Ga. App. 648, 446 S.E.2d 741, 1994 Ga. App. LEXIS 762 (1994).

Evidence did not show that a limited liability company (LLC) which bought land from a city in 1994 and agreed to pay $125,000 for the land and an additional one percent of its profits up to $1 million did anything to conceal its profitability or business plans from the city at the time it bought the land, and the trial court ruled correctly that a claim alleging fraudulent concealment which the city filed after the LLC paid $125,000 but no more because it did not make a profit was governed by the four-year statute of limitations and that the statute of limitations was not tolled by O.C.G.A. § 9-3-96 because there was no evidence of fraudulent concealment; thus, the city's claim was time barred. City of McCaysville v. Cardinal Robotics, LLC, 263 Ga. App. 847, 589 S.E.2d 614, 2003 Ga. App. LEXIS 1348 (2003), cert. denied, No. S04C0498, 2004 Ga. LEXIS 226 (Ga. Mar. 1, 2004).

Because a plaintiff alleged that the defendant, an investment advisory company, committed a breach of fiduciary duty by collecting management fees for certain stock after the stock was categorized as an unmanaged asset, and the categorization occurred some time between March 31, 2001, and June 20, 2001, the plaintiff's claim accrued within four years of the date of the filing of the complaint and was therefore timely; regardless of whether a four-year or a six-year statute of limitation period was applied, the trial court erred by granting summary judgment as to that particular claim on the ground that the claim was time-barred. Hamburger v. PFM Capital Mgmt., 286 Ga. App. 382, 649 S.E.2d 779, 2007 Ga. App. LEXIS 786 (2007).

Cause of action for breach of fiduciary duty accrues each time the defendant commits a wrongful act that causes appreciable damage. Hamburger v. PFM Capital Mgmt., 286 Ga. App. 382, 649 S.E.2d 779, 2007 Ga. App. LEXIS 786 (2007).

Plaintiff borrower's fraud claims against defendant lenders, in connection with an alleged long-term tax-favorable loan failed under O.C.G.A. § 9-3-31's four year statute of limitations (S/L) because the limitations period began when the assumption agreement was signed but the suit was not filed until almost 6 years later, and, at the very latest, if O.C.G.A. § 9-3-96 applied to toll the limitations period, the S/L began to run nearly five years earlier when repayment was demanded only one year after the loan was made. Curtis Inv. Co., LLC v. Bayerische Hypo-Und Vereinsbank, AG, 341 Fed. Appx. 487, 2009 U.S. App. LEXIS 17469 (11th Cir. 2009).

Creditor's nondischargeability complaint against a debtor failed as a matter of law when there was no enforceable debt to except from the debtor's bankruptcy discharge because the creditor failed to file a suit against the debtor within four years after the debtor missed the date agreed upon for repayment in the oral contract between the parties. Even if the contract was entered into fraudulently, the same limitations period applied, and the statute began to run from the date the fraud was discovered, which was also the date of initial default on repayment of the loan. Stinson v. Robinson (In re Robinson), 525 B.R. 822, 2015 Bankr. LEXIS 565 (Bankr. N.D. Ga. 2015).

Fraud case was barred by the applicable statute of limitations because the plaintiff's failure to timely answer requests for admission conclusively established that the plaintiff became aware of the fraud in 2000 at the latest; thus, the suit was well outside Georgia's applicable four-year statute of limitations. Watkins v. Capital City Bank, 711 Fed. Appx. 591, 2018 U.S. App. LEXIS 3768 (11th Cir. 2018).

Generally, in tort action statute of limitation begins to run when damage from tortious act is actually sustained. Hunt v. Star Photo Finishing Co., 115 Ga. App. 1, 153 S.E.2d 602, 1967 Ga. App. LEXIS 977 (1967).

Running of statute on continuing tort. — In action for continuing tort, statute of limitations runs from happening of any given injury. Cleveland Lumber Co. v. Proctor & Schwartz, Inc., 397 F. Supp. 1088, 1975 U.S. Dist. LEXIS 14052 (N.D. Ga. 1975).

Successive recoveries for successive injuries. — When a nuisance is found in a permanent structure, and its construction and continuance are not necessarily injurious, but may or may not be so, there may be as many successive recoveries as there are successive injuries; in such case, statute of limitations begins to run from happening of injury complained of. Cleveland Lumber Co. v. Proctor & Schwartz, Inc., 397 F. Supp. 1088, 1975 U.S. Dist. LEXIS 14052 (N.D. Ga. 1975).

Suspension of bar by willful fraud. — When willful fraud was committed, former Civil Code 1910, § 4380 (see now O.C.G.A. § 9-3-96) may suspend bar of former Civil Code 1910, § 4496 (see now O.C.G.A. § 9-3-31). McCraine v. Bank of Willacoochee, 29 Ga. App. 552, 116 S.E. 202, 1923 Ga. App. LEXIS 113 (1923).

When actual fraud is the gravamen of the underlying action, no independent fraud is required for tolling of the statute of limitation, and the limitation period is tolled until the plaintiff discovers or in the exercise of reasonable diligence should have discovered the fraud. Hahne v. Wylly, 199 Ga. App. 811, 406 S.E.2d 94, 1991 Ga. App. LEXIS 666 (1991).

Statute of limitations did not bar a declaratory judgment action pertaining to a life insurance policy issued by the defendant to the plaintiffs; since the plaintiffs contended that there was actual fraud in the procurement of the life insurance policy in question, and the statute of limitations would not have begun to run until the plaintiffs discovered that their premiums had been fraudulently raised in contradiction to the terms to which they had agreed and paid for or until they could have reasonably discovered the alleged fraud. GE Life & Annuity Assur. Co. v. Donaldson, 189 F. Supp. 2d 1348, 2002 U.S. Dist. LEXIS 4022 (M.D. Ga. 2002).

Statute of limitations did not bar a declaratory judgment action pertaining to a life insurance policy issued by the defendant to the plaintiff; since the plaintiff contended that there was actual fraud in the procurement of the life insurance policy, the statute of limitations would not

Running of Limitations (Cont'd)

have begun to run until the plaintiff discovered the premium structure and cash value concepts were fraudulently represented at the time of sale, and the plaintiff could not have discovered the alleged fraud until the plaintiff was contacted by the attorney about other policies sold to other counterclaim plaintiffs. GE Life & Annuity Assur. Co. v. Barbour, 189 F. Supp. 2d 1360, 2002 U.S. Dist. LEXIS 4021 (M.D. Ga. 2002).

Statute of limitations did not bar a class action against an insurance company arising from life insurance policies issued by the company; as the plaintiff contended that there was actual fraud in the procurement of the life insurance policies in question, and the statute of limitations would not have begun to run until the plaintiff discovered that the premiums had actually been raised in contradiction to the terms to which plaintiff had agreed and paid for or when plaintiff could have reasonably discovered the alleged fraud. McBride v. Life Ins. Co., 190 F. Supp. 2d 1366, 2002 U.S. Dist. LEXIS 3923 (M.D. Ga. 2002).

Statute of limitations did not bar a declaratory judgment action pertaining to a life insurance policy issued by the defendant to the plaintiff; since the plaintiff contended that there was actual fraud in the procurement of the life insurance policy in question, and the statute of limitations would not have begun to run until the plaintiff discovered that the premiums had been fraudulently raised in contradiction to the terms to which the plaintiff had agreed and paid for or until the plaintiff could have reasonably discovered the alleged fraud. GE Life & Annuity Assur. Co. v. Combs, 191 F. Supp. 2d 1364, 2002 U.S. Dist. LEXIS 4125 (M.D. Ga. 2002).

Statute of limitations did not bar a declaratory judgment action pertaining to life insurance policies issued by the defendant to the plaintiffs; since the plaintiffs contended that there was actual fraud in the procurement and replacement of the life insurance policies, the statute of limitations would not have begun to run until the plaintiffs discovered that the initial premiums stated in the policies would not in fact sustain the policies in the future, and the plaintiffs could not have discovered the alleged fraud until the date the plaintiffs received notification that the policies had not actually sustained themselves. GE Life & Annuity Assur. Co. v. Barbour, 191 F. Supp. 2d 1375, 2002 U.S. Dist. LEXIS 4124 (M.D. Ga. 2002).

Actual fraud, through nondisclosure of a known injury or through acts to conceal the injury, which deters or debars the bringing of the action tolls the running of the statute of limitations until discovery of the fraud; when actual fraud is the gravamen of the underlying action, no independent fraud is required for tolling of the statute of limitation, and the limitation period is tolled until the plaintiff discovers or in the exercise of reasonable diligence should have discovered the fraud. When evidence existed that a decedent concealed the true nature of certain financial transactions that could have been designed to defraud the decedent's creditors, the statute of limitation would not have begun to run until the cause of action should have been discovered, and summary judgment was not proper on the basis of the expiration of the statute of limitation. Miller v. Lomax, 266 Ga. App. 93, 596 S.E.2d 232, 2004 Ga. App. LEXIS 303 (2004).

Legal malpractice. — Georgia Court of Appeals erred in determining the taxpayers failed, as a matter of law, to exercise reasonable diligence to discover the law firm's allegedly fraudulent acts because once the IRS initiated an audit in 2005, the taxpayers did not ignore the problem and hired a law firm, which was an independent counsel with an established reputation in tax matters to assist them. Coe v. Proskauer Rose, LLP, 314 Ga. 519, 878 S.E.2d 235, 2022 Ga. LEXIS 239 (2022).

Due diligence to discover fraud. — Summary judgment against sellers based on the statute of limitations was denied since failure to exercise reasonable diligence to discover an alleged fraud may be excused if a relationship of trust and confidence existed between the parties and the sellers had presented evidence such that a jury could determine that the purchaser was in a confidential relationship

with the heirs to the land. McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548, 1992 U.S. Dist. LEXIS 631 (M.D. Ga. 1992).

In an action by borrowers claiming that the lender defrauded the borrowers by charging an excessive notary fee, the district court did not err in dismissing, on statute of limitations grounds, the fraud claim, which was brought more than five years after the borrowers signed the loan agreement because, even assuming the lender's conduct constituted actual fraud, Georgia's Supreme Court, in response to a certified question, declined to allow equitable tolling because the borrowers could have discovered the discrepancy between the notary fee statute and the actual fee charged at any time by simple reference to the notary fee statute. Anthony v. Am. Gen. Fin. Servs., 626 F.3d 1318, 2010 U.S. App. LEXIS 24446 (11th Cir. 2010).

Townhome buyers' fraud and Interstate Land Sales Full Disclosure Act (ILSA) claims against a seller were barred by the four-year statute of limitations for fraud, O.C.G.A. § 9-3-31, and the three-year statute of limitations for ILSA violations, 15 U.S.C. § 1711; the buyers were on notice when the closing did not take place in 2003, and certainly when the closing did not occur by 2006, that something was wrong and should have discovered any alleged violations of ILSA. Allmond v. Young, 314 Ga. App. 230, 723 S.E.2d 691, 2012 Ga. App. LEXIS 89 (2012), cert. denied, No. S12C1083, 2012 Ga. LEXIS 827 (Ga. Oct. 15, 2012).

Certain of plaintiff's claims for fraud, conversion, and breach of oral contract arose outside of the four-year statute of limitation, and the undisputed facts showed that the plaintiff did not exercise reasonable diligence in discovering the defendant's alleged fraud as to a certain account as the defendant was put on notice of the account when the defendant received two personal checks issued from that account, endorsed and cashed the checks, but never inquired as the checks' source. Hot Shot Kids Inc. v. Pervis (In re Pervis), 497 B.R. 612, 2013 Bankr. LEXIS 3374 (Bankr. N.D. Ga. 2013).

Court did not err in dismissing the tax advisor's claims as time-barred because the advisor filed the complaint long after the limitations periods governing the fraud, breach of fiduciary duty, and Georgia RICO claims had expired, and the advisor had not plausibly alleged that the advisor exercised reasonable diligence in discovering the causes of action and thus could not have invoked tolling where the advisor received direct information that conflicted with the bank entities' representation that the tax shelter transactions at issue had economic substance, the advisor did not explain how the advisor exercised reasonable diligence in light of that notice, and the advisor did not explain why the advisor could not have sued earlier. Klopfenstein v. Deutsche Bank Sec., Inc., 592 Fed. Appx. 812, 2014 U.S. App. LEXIS 22077 (11th Cir. 2014).

Tolling due to fraud. — In a negligent misrepresentation case wherein a trustee obtained a $10 million verdict against an accounting firm, the evidence authorized the jury to find that the firm's fraud prevented the trustees from discovering the trusts' cause of action until January 2002, despite reasonable diligence and, therefore, the claim was properly filed within four years after the beginning of the limitation period. PricewaterhouseCoopers, LLP v. Bassett, 293 Ga. App. 274, 666 S.E.2d 721, 2008 Ga. App. LEXIS 876 (2008).

Summary judgment was properly granted for the insurer because the insured's complaint fell outside the four-year statute of limitation for fraud and negligent misrepresentation claims. Nash v. Ohio Nat'l Life Ins. Co., 266 Ga. App. 416, 597 S.E.2d 512, 2004 Ga. App. LEXIS 396 (2004).

Mere ignorance of facts constituting cause of action does not prevent running of statute of limitations for plaintiff must exercise reasonable diligence to learn of existence of cause of action. Limoli v. First Ga. Bank, 147 Ga. App. 755, 250 S.E.2d 155, 1978 Ga. App. LEXIS 2938 (1978).

Date of discovery of wrong. — When plaintiff discovered in 1926 that proceeds from sale of bonds which the plaintiff had intended to be applied to payment of a promissory note had never been accounted for by the bank, but did not bring action until 1931, such action was barred

Running of Limitations (Cont'd)

by the statute of limitations, which ran against the plaintiff from the date of discovery of the wrong, whether the action was brought in tort or in contract. Wall v. Middle Ga. Bank, 180 Ga. 431, 179 S.E. 363, 1935 Ga. LEXIS 281 (1935).

Accrual of cause based on negligent misrepresentations. — In a claim for economic injury sustained due to a reliance upon false information negligently provided by a defendant, the statute of limitations begins to run when the plaintiff suffers pecuniary loss with certainty, and not as a matter of pure speculation. Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc., 267 Ga. 424, 479 S.E.2d 727.

Fraud and deceit inducing agreement. — Teacher's fraudulent inducement claim against a school district arising from an agreement entered into between the parties with respect to the teacher's resignation was barred by the four-year statute of limitations pursuant to O.C.G.A. § 9-3-31; although the limitation period could be tolled pursuant to O.C.G.A. § 9-3-96 if the teacher was "debarred or deterred" from filing suit because of the district's fraud, the teacher failed to show the existence of facts that would toll the limitations period. Kaylor v. Rome City Sch. Dist., 267 Ga. App. 647, 600 S.E.2d 723, 2004 Ga. App. LEXIS 742 (2004).

Accrual of cause for fraudulent inducement to contract. — Cause of action for fraudulent inducement to execute a contract accrues when contract is executed, and action not commenced until more than four years after the date of such execution is barred by this section unless it falls within an exception to the general rule. Sears, Roebuck & Co. v. Green, 142 Ga. App. 770, 237 S.E.2d 10, 1977 Ga. App. LEXIS 2135 (1977).

Claim of fraudulent inducement in the execution of a contract accrues on the date of the execution of the contract. Kerce v. Bent Tree Corp., 166 Ga. App. 728, 305 S.E.2d 462, 1983 Ga. App. LEXIS 2311 (1983).

Cause of action for fraudulent inducement to enter an employment contract and lease accrued when the employee became aware of alleged fraud, assuming, arguendo, that the employer's fraud debarred or deterred the employee from bringing the action. Smith v. Alimenta Processing Corp., 197 Ga. App. 57, 397 S.E.2d 444, 1990 Ga. App. LEXIS 1148 (1990), cert. denied, No. S91C0023, 1990 Ga. LEXIS 500 (Ga. Oct. 24, 1990).

Since the individual's fraud in the inducement claim against a corporation was time-barred pursuant to O.C.G.A. § 9-3-31, the district court's grant of summary judgment in favor of the corporation was affirmed. Bridge Capital Investors II v. Small, 144 Fed. Appx. 762, 2005 U.S. App. LEXIS 14182 (11th Cir. 2005).

Claims for fraud and negligent misrepresentation not barred. — Complaint did not show with certainty that the mortgagor's claims for fraud and negligent misrepresentation were barred by the statute of limitation and the trial court, therefore, erred when the court dismissed those claims. Mbigi v. Wells Fargo Home Mortg., 336 Ga. App. 316, 785 S.E.2d 8, 2016 Ga. App. LEXIS 173 (2016).

Tolling due to bankruptcy filing. — Debtor's claim for property damages resulting from a wrongful foreclosure was not time barred because the debtor filed for bankruptcy protection within four years of the date of the foreclosure and the filing of the bankruptcy petition tolled the statute of limitations. McDaniel v. SunTrust Bank (In re McDaniel), 523 B.R. 895, 2014 Bankr. LEXIS 5111 (Bankr. M.D. Ga. 2014).

Claims brought under the Uniform Deceptive Trade Practices Act, the Georgia Uniform Limited Partnership Act, and common-law fraud were not barred by the four-year limitations period of O.C.G.A. § 9-3-31, which was tolled by the Georgia fraud discovery rule (O.C.G.A. § 9-3-96). Currie v. Cayman Resources Corp., 595 F. Supp. 1364, 1984 U.S. Dist. LEXIS 23274 (N.D. Ga. 1984), aff'd in part and rev'd in part, 835 F.2d 780, 1988 U.S. App. LEXIS 217 (11th Cir. 1988).

Accrual of cause for negligent design and manufacture. — In action for damages resulting from negligent design and manufacture of kiln, statute of limi-

tations begins to run when thing constructed is first installed, and not when it causes damage to plaintiff. Cleveland Lumber Co. v. Proctor & Schwartz, Inc., 397 F. Supp. 1088, 1975 U.S. Dist. LEXIS 14052 (N.D. Ga. 1975).

Four-year limitation period ran from last work performed on a building, when the last work constituted "substantial completion." Broadfoot v. Citizens S. Nat'l Bank, 208 Ga. App. 382, 430 S.E.2d 638, 1993 Ga. App. LEXIS 487 (1993), cert. denied, No. S93C1171, 1993 Ga. LEXIS 869 (Ga. Sept. 20, 1993).

Period not expired. — Despite the closing attorney's argument to the contrary, the statute of limitations for fraud did not bar the alleged client's fraud claim against the closing attorney regarding the alleged client's sale of timber from the father's estate as the four-year limitations period was tolled and did not start running until the alleged fraud was discovered or should have been discovered; since the alleged client's fraud claim was brought within four years of that time, the client's claim was not time-barred. Mays v. Askin, 262 Ga. App. 417, 585 S.E.2d 735, 2003 Ga. App. LEXIS 944 (2003), cert. denied, No. S03C1731, 2003 Ga. LEXIS 1043 (Ga. Nov. 17, 2003).

Investor's suit not time barred. — Despite the three individual principals' claims that the investor's lawsuit against them was for fraud and breach of fiduciary duty, and was barred by a statute of limitation, the investor's lawsuit was for injury to personalty and was not time barred as the evidence showed that the jury considered only items of compensatory damages that accrued within the applicable four-year statute of limitations period that occurred prior to the filing of the complaint. Kothari v. Patel, 262 Ga. App. 168, 585 S.E.2d 97, 2003 Ga. App. LEXIS 756 (2003), cert. denied, No. S03C1673, 2003 Ga. LEXIS 965 (Ga. Nov. 10, 2003).

Trustees failed to exercise minimal degree of due diligence to discover claims. — Dismissal of the trustees' claims as time barred was upheld because the trustees conceded that, despite signing numerous documents as trustees of the marital trust, the trustees made no attempt at all to obtain information the trustees were legally entitled to in that capacity; thus, the trustees failed to exercise even a minimal degree of due diligence to discover their claims as a matter of law. Rollins v. LOR, Inc., 345 Ga. App. 832, 815 S.E.2d 169, 2018 Ga. App. LEXIS 291 (2018), cert. denied, No. S18C1362, 2019 Ga. LEXIS 49 (Ga. Jan. 7, 2019).

Evidence barred because of the statute of limitations. — Trial court properly excluded the pre-purchase promises made by a seller to the purchasers regarding the maintenance of a dam because the alleged promises occurred prior to the applicable four-year statute of limitation. Bishop Eddie Long Ministries, Inc. v. Dillard, 272 Ga. App. 894, 613 S.E.2d 673, 2005 Ga. App. LEXIS 332 (2005), cert. denied, No. S05C1459, 2005 Ga. LEXIS 703 (Ga. Oct. 11, 2005), cert. denied, No. S05C1369, 2005 Ga. LEXIS 704 (Ga. Oct. 11, 2005).

Rescission of contract action time-barred. — Trial court properly dismissed a firefighter's action against a city, as an employer, and a firefighters pension fund for rescission of an alleged contract and for fraud, as the claims were barred by the four-year limitations period for actions based on mutual mistake or fraud, pursuant to O.C.G.A. §§ 9-3-25, 9-3-26, and 9-3-31, and the firefighter did not show that the firefighter was prevented from bringing the action in a timely manner, rather than nine years after the firefighter's termination. Bradshaw v. City of Atlanta, 275 Ga. App. 609, 621 S.E.2d 563, 2005 Ga. App. LEXIS 1053 (2005).

Failure to timely perfect service. — Owners' personal injury and property damages action against a manufacturer, which concerned a fire in January 30, 2000, was barred by the two- and four-year statutes of limitations, because the owners failed to timely perfect service, as required by O.C.G.A. § 9-11-4(c), until February 23, 2004, which was more than five days after the owners filed a renewed complaint under O.C.G.A. § 9-2-61(a) on October 28, 2003. Johnson v. Am. Meter Co., 412 F. Supp. 2d 1260, 2004 U.S. Dist. LEXIS 29142 (N.D. Ga. 2004).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Limitation of Actions, §§ 121 et seq., 147 et seq.

C.J.S.

54 C.J.S., Limitations of Actions, §§ 89 et seq., 304.

ALR.

What statute of limitation applies to an action, based on duress, to recover money or property, 77 A.L.R.2d 821.

When statute of limitations commences to run against claim for contribution or indemnity based on tort, 57 A.L.R.3d 867.

What statute of limitations applies to action for contribution against joint tort-feasor, 57 A.L.R.3d 927.

Tort claim against which period of statute of limitations has run as subject to setoff, counterclaim, cross bill, or cross action in tort action arising out of same accident or incident, 72 A.L.R.3d 1065.

When does statute of limitations begin to run upon an action by subrogated insurer against third party tort-feasor, 91 A.L.R.3d 844.

Tort liability of project architect or engineer for economic damages suffered by contractor or subcontractor, 61 A.L.R.6th 445.

Application of relation back doctrine permitting change in party after statute of limitations has run in state court action — motor vehicle accident or injury cases: individual drivers, parents, owners or lessors, and passengers, 97 A.L.R.6th 375.

Application of relation-back doctrine permitting change in party after statute of limitations has run in state court action — motor vehicle accident or injury cases: corporations, municipalities, insurers, and employers, 98 A.L.R.6th 93.

Application of relation-back doctrine permitting change in party after statute of limitations has run in state court action — motor vehicle accident or injury cases: estates, and other or unspecified parties, 99 A.L.R.6th 1.

Accrual of claims for continuing trespass or continuing nuisance for purposes of statutory limitations, 14 A.L.R.7th 8.

9-3-32. Accrual of actions for recovery of personal property or loss of timber; damages for conversion or destruction.

Actions for the recovery of personal property, or for damages for the conversion or destruction of the same, shall be brought within four years after the right of action accrues, and actions involving the unauthorized cutting or cutting and carrying away of timber from the property of another shall be brought within four years after the cutting or cutting and carrying away of timber.

History.

Ga. L. 1855-56, p. 233, § 2; Code 1933, § 3-1003; Ga. L. 2014, p. 695, § 1/HB 790.

History of Section.

The language in this Code section is derived in part from the decisions in Blocker v. Boswell, 109 Ga. 230, 34 S.E. 289 (1899), and Hicks v. Moyer, 10 Ga. App. 488, 73 S.E. 754 (1912).

Cross references.

Tort action for third party timber harvester, § 51-11-10.

JUDICIAL DECISIONS

History of this section, see Blocker v. Boswell, 109 Ga. 230, 34 S.E. 289, 1899 Ga. LEXIS 619 (1899).

This section was omitted from Code of 1910 by mistake, and is still in force. Hicks v. Moyer, 10 Ga. App. 488, 73 S.E. 754, 1912 Ga. App. LEXIS 586 (1912).

Statute of limitations not tolled by federal filing. — The running of the statute of limitations for the alleged con-

version of personal property was not tolled by the filing of a previous suit in federal court to recover for the same alleged injury. Brown v. Pearson, 171 Ga. App. 576, 320 S.E.2d 570, 1984 Ga. App. LEXIS 2281 (1984).

Application to 42 U.S.C. § 1983 claims. — It is not clear that, prior to the setting of a two year limitations period for all section 1983 claims under O.C.G.A. § 9-3-33, the four year limitations period for conversion or destruction of personal property under O.C.G.A. § 9-3-32 would have been applied to plaintiff's section 1983 claim. Williams v. City of Atlanta, 794 F.2d 624, 1986 U.S. App. LEXIS 27436 (11th Cir. 1986).

Pretrial detainee's 42 U.S.C. § 1983 federal due process claims concerning the loss of the detainee's personal property by prison officers was dismissed upon summary judgment because the detainee could pursue the claims pursuant to O.C.G.A. § 51-10-1 as the four-year statute of limitations in O.C.G.A. § 9-3-32 had not yet run. Price v. Busbee, No. 5:04-CV-313, 2006 U.S. Dist. LEXIS 8159 (M.D. Ga. Feb. 21, 2006).

Applicability of section to trover. — Four-year period of limitation of actions for conversion includes trover. Poss v. Hughes, 120 Ga. App. 293, 170 S.E.2d 435, 1969 Ga. App. LEXIS 745 (1969).

Recovery or damages for conversion of distributed property. — When decedent's personalty was distributed by authority of law after an application for "no administration necessary" by respondents, the controlling statute of limitations for action to recover such personalty or for damages for conversion was that found in former Code 1933, § 3-1003 (see now O.C.G.A. § 9-3-32), rather than in former Code 1933, § 3-709 (see now O.C.G.A. § 9-3-27). Comerford v. Hurley, 246 Ga. 501, 271 S.E.2d 782, 1980 Ga. LEXIS 1175 (1980).

When chapter 13 debtors failed to schedule the debtors' claim against the defendant credit union as an asset, and failed to bring the claim within four years after the triggering event, the death of debtor wife's former husband, as required by O.C.G.A. §§ 9-3-31 and 9-3-32, summary judgment on judicial estoppel and limitations grounds was proper. Kirton v. Fort Stewart Federal Credit Union (In re Carroll), No. 00-2065, No. 99-20813, 2001 Bankr. LEXIS 2317 (Bankr. S.D. Ga. June 26, 2001).

Conversion of notes or checks. — When legal title to notes was in plaintiff and possession was wrongfully obtained and withheld by defendant, the statute of limitations as to actions for personalty was applicable. O'Callaghan v. Bank of Eastman, 180 Ga. 812, 180 S.E. 847, 1935 Ga. LEXIS 569 (1935).

When legal title to notes or checks is in the plaintiff and conversion by the defendant is alleged, tort is an injury to personalty and falls within purview of this section. Talley-Corbett Box Co. v. Royals, 134 Ga. App. 769, 216 S.E.2d 358, 1975 Ga. App. LEXIS 2165 (1975).

Conversion of corporate stock. — When gravamen of plaintiff's complaint was conversion of corporate stock, and alleged conversion took place more than four years before action was instituted, it was not error to grant defendants' motions to dismiss for laches. Clark v. Lett & Barron, Inc., 227 Ga. 609, 182 S.E.2d 118, 1971 Ga. LEXIS 794 (1971).

Recovery of converted bank stock. — This section applies to action to recover bank stock that has been converted. Hill v. Fourth Nat'l Bank, 156 Ga. 704, 120 S.E. 1, 1923 Ga. LEXIS 312 (1923).

Petition seeking to recover money belonging to the intestate and obtained from her by defendant administratrix and her husband, sued in their individual capacities was barred after lapse of four years from appointment of administratrix. Harrison v. Holsenbeck, 208 Ga. 410, 67 S.E.2d 311, 1951 Ga. LEXIS 395 (1951).

Person's business is "property" in the pursuit of which the person is entitled to protection from tortious interference by a third person. Since this is a property right, the plaintiff has four years in which to bring the plaintiff's action. Hill v. Crabb, 166 Ga. App. 387, 304 S.E.2d 510, 1983 Ga. App. LEXIS 2180 (1983).

When the plaintiff's cause of action sounded in two phases, one setting forth an action for slander and the second for an interference with the plaintiff's

business, the trial court erred in granting defendant summary judgment on the basis of the bar of the statute of limitation for slander (O.C.G.A. § 9-3-33) since the cause of action arose some three years prior to when suit was brought. Hill v. Crabb, 166 Ga. App. 387, 304 S.E.2d 510, 1983 Ga. App. LEXIS 2180 (1983).

Cause of action for wrongful conversion of property interest in patent arose on the date on which the patent application was filed in the patent office, absent plaintiff's name. Palmer v. Neal, 602 F. Supp. 882, 1984 U.S. Dist. LEXIS 18441 (N.D. Ga. 1984).

In action for conversion of plaintiff's property interest in a patent, when the plaintiff ended the plaintiff's association with the defendant prior to the defendant's filing the patent application without the plaintiff's name, the defendant had no duty to disclose the defendant's actions to the plaintiff, and therefore there was no basis for tolling the statute of limitations for fraud. Palmer v. Neal, 602 F. Supp. 882, 1984 U.S. Dist. LEXIS 18441 (N.D. Ga. 1984).

Defendant's interference with plaintiff's business by filing liens against property on which nothing was owing with intention of coercing the plaintiff into paying the defendant money was interference with a property right, and the plaintiff had four years in which to bring action therefor. Dale v. City Plumbing & Heating Supply Co., 112 Ga. App. 723, 146 S.E.2d 349, 1965 Ga. App. LEXIS 822 (1965).

Failure of court clerk to transmit record to Supreme Court. — Action to recover damages from superior court clerk for negligent failure to send record to Supreme Court within time required by law was an action to recover damages for conversion of personal property, which fell within this section, not an action for injury to the person. Singletary v. GMAC, 73 F.2d 453, 1934 U.S. App. LEXIS 2730 (5th Cir. 1934).

Right of action to recover damages for timber cut and removed from the plaintiff's land by the defendants accrued when the timber was cut and removed, and whether the plaintiff's action was construed as one seeking damages for trespass upon realty or damages for conversion of personalty, the applicable period of limitation was four years. Harper v. Jones, 103 Ga. App. 40, 118 S.E.2d 279, 1961 Ga. App. LEXIS 849 (1961).

Cause of action for wrongful conversion of mining interest. — With the exception of cases involving personal injury that develop over an extended period of time, Georgia does not apply the discovery rule and the statute of limitations begins to run when a claim of subterranean conversion accrued. Therrell v. Georgia Marble Holdings Corp., 960 F.2d 1555, 1992 U.S. App. LEXIS 10307 (11th Cir. 1992).

When possession of property has been voluntarily surrendered for an indefinite time, demand and refusal are necessary to show conversion, and statute of limitations begins to run from date of such demand and refusal. Wood v. Garner, 156 Ga. App. 351, 274 S.E.2d 737, 1980 Ga. App. LEXIS 2978 (1980); Kornegay v. Thompson, 157 Ga. App. 558, 278 S.E.2d 140, 1981 Ga. App. LEXIS 1911 (1981).

Action against burglars was barred by statute of limitation. — Action that was filed in 1999 by two property owners against three alleged burglars to recover money which was stolen in 1993 was barred by the four-year statute of limitation of O.C.G.A. § 9-3-32 because the burglars' concealment of their identities as the perpetrators by making threats against those to whom they had admitted their guilt or by denying their involvement to others did not constitute concealment of the existence of the cause of action for purposes of tolling the statute of limitation under O.C.G.A. § 9-3-96. Stewart v. Warner, 257 Ga. App. 322, 571 S.E.2d 189, 2002 Ga. App. LEXIS 1144 (2002).

Claim for return of loaned property. — Executor's claim for the return of a painting that had been loaned to a school district by the decedent before the decedent's death accrued on the date that the executor of the estate was appointed, and because the cause of action was not brought within four years of that date, the action was barred by the statute of limitations. Rowland v. Clarke County Sch. Dist., 272 Ga. 471, 532 S.E.2d 91, 2000 Ga. LEXIS 488 (2000).

Statute does not begin to run in favor of bailee until the bailee denies bailment and converts bailed property to the bailee's own use. Bulloch v. Hutcheson, 49 Ga. App. 171, 174 S.E. 645, 1934 Ga. App. LEXIS 315 (1934).

Accrual of action for wrongful appropriation of corporate assets. — Action against corporate officer and director for wrongful conversion of assets of insolvent corporation cannot accrue until judgment is obtained against corporation and nulla bona is returned on execution. Emhart Corp. v. McLarty, 226 Ga. 621, 176 S.E.2d 698, 1970 Ga. LEXIS 731 (1970).

Prerequisite to action against stockholder and director for wrongful appropriation of corporate assets to the stock holder's and director's own use is judgment against the corporation and return of nulla bona on the execution. Emhart Corp. v. McLarty, 226 Ga. 621, 176 S.E.2d 698, 1970 Ga. LEXIS 731 (1970).

Action for wrongful appropriation of corporate assets does not accrue until judgment against corporation and return of nulla bona has occurred, and therefore the statute of limitation does not begin to run until that time. Johnston v. Investment Sav. Co., 125 Ga. App. 267, 187 S.E.2d 533, 1972 Ga. App. LEXIS 1288 (1972).

Accrual of action for fraudulent conveyance. — In determining when a cause of action accrued for purposes of O.C.G.A. § 9-3-32 it was necessary to ascertain the time when the plaintiff could first have maintained the plaintiff's action to a successful result. The relevant date for determining the statute of limitations on a fraudulent conveyance claim, pursuant to O.C.G.A. §§ 18-2-74, 18-2-75, and 18-2-76, was the date that the debtor incurred the obligation to make the transfer. Kipperman v. Onex Corp., 411 B.R. 805, 2009 U.S. Dist. LEXIS 71666 (N.D. Ga. 2009).

Accrual of action for selling goods. — When a recycler of shipping pallets retained pallets under a colorable claim of naked depository status but sold certain of the pallets, the claim of the putative owner of the pallets for conversion with regard to the sold pallets accrued when the pallets were sold rather than when the recycler obtained the pallets. CHEP USA v. Mock Pallet Co., 138 Fed. Appx. 229, 2005 U.S. App. LEXIS 12604 (11th Cir. 2005).

Accrual of conversion and misappropriation claims. — District court did not err in concluding that the four-year statute of limitations on the plaintiffs' conversion and misappropriation claims, under O.C.G.A. § 9-3-32, began to run no later than December 30, 2005, and that those claims were time-barred because the plaintiffs' demand that all of the plaintiffs' share of the proceeds from the sale be distributed to the plaintiffs, rather than be credited to other debts, was refused in a December 30, 2005, letter and the defendants paid the plaintiffs less than the distribution to which the plaintiffs felt the plaintiffs were entitled. HealthPrime, Inc. v. Smith/Packett/Med/Com, LLC, 428 Fed. Appx. 937, 2011 U.S. App. LEXIS 11324 (11th Cir. 2011).

Certain of the plaintiff's claims for fraud, conversion, and breach of oral contract arose outside of the four-year statute of limitation, and the undisputed facts showed that the plaintiff did not exercise reasonable diligence in discovering the defendant's alleged fraud as to a certain account as the defendant was put on notice of the account when the defendant received two personal checks issued from that account, endorsed and cashed the checks, but never inquired as to the checks' source. Hot Shot Kids Inc. v. Pervis (In re Pervis), 497 B.R. 612, 2013 Bankr. LEXIS 3374 (Bankr. N.D. Ga. 2013).

Trial court properly granted a tobacco cooperative summary judgment on the tobacco farmers' claim for conversion because any conversion of a farmer's prorata share of net gains for crop years 1967 through 1973 occurred in 1975, when the tobacco cooperative set aside the undistributed net gain into its capital reserve, thus, the suit filed in 2007 was timebarred. Rigby v. Flue-Cured Tobacco Coop. Stabilization Corp., 327 Ga. App. 29, 755 S.E.2d 915, 2014 Ga. App. LEXIS 257 (2014), cert. denied, No. S14C1205, 2014 Ga. LEXIS 872 (Ga. Oct. 20, 2014).

Failure of broker to deliver stock to customer. — When, although the plaintiff first requested the return of the plain-

tiff's stocks from a broker more than four years prior to filing suit, and although these requests went unheeded, the broker consistently acknowledged the plaintiff's ownership during this period by showing the stocks as the plaintiff's on periodic account statements sent to the plaintiff and by allowing the plaintiff to vote the stock and receive the dividends, clearly, the broker asserted no adverse ownership interest in the stocks but merely withheld possession as leverage to collect the plaintiff's alleged interest indebtedness, and, under these circumstances, the plaintiff's suit in trover was not barred by the statute of limitations. E.F. Hutton & Co. v. Weeks, 166 Ga. App. 443, 304 S.E.2d 420, 1983 Ga. App. LEXIS 2204 (1983).

Trustees failed to exercise minimal degree of due diligence to discover claims. — Dismissal of the trustees' claims as time barred was upheld because the trustees conceded that, despite signing numerous documents as trustees of the marital trust, the trustees made no attempt at all to obtain information the trustees were legally entitled to in that capacity; thus, the trustees failed to exercise even a minimal degree of due diligence to discover their claims as a matter of law. Rollins v. LOR, Inc., 345 Ga. App. 832, 815 S.E.2d 169, 2018 Ga. App. LEXIS 291 (2018), cert. denied, No. S18C1362, 2019 Ga. LEXIS 49 (Ga. Jan. 7, 2019).

Abandonment may result from acts of owner or from failure to bring action for recovery of personalty within four years. Maslia v. Hall, 121 Ga. App. 740, 175 S.E.2d 48, 1970 Ga. App. LEXIS 1339 (1970).

Recording of telephone conversations. — Two-year statute of limitations applicable to injuries to the person rather than four-year limitation applicable to property damage is applied to cause of action for invasion of privacy arising out of recordings of telephone conversations. Jones v. Hudgins, 163 Ga. App. 793, 295 S.E.2d 119, 1982 Ga. App. LEXIS 2652 (1982).

Application to action to set aside probate court order. — Action by alleged illegitimate children to set aside a probate court order declaring no administration of an estate was barred by O.C.G.A. § 9-3-32 to the extent that the complaint was for the recovery of personal property. Tolbert v. Whatley, 223 Ga. App. 508, 478 S.E.2d 587.

Action for damage to a corpse. — In an action regarding the alleged removal of eye tissue from a corpse without permission, to the extent plaintiff was suing to enforce property rights, the plaintiff's claims were subject to the limitation of O.C.G.A. § 9-3-32. Bauer v. North Fulton Med. Ctr., Inc., 241 Ga. App. 568, 527 S.E.2d 240, 1999 Ga. App. LEXIS 1673 (1999).

Conversion claim against EMCs for patronage capital barred. — Suits by classes of former and current members of distribution electric membership corporations (EMCs) seeking to recover millions of dollars in patronage capital from two wholesale EMCs were dismissed because the members lacked privity with the wholesale EMCs, and there was no legal duty under O.C.G.A. § 46-3-340(c) or the EMCs' bylaws requiring distribution of the patronage capital to the members. Walker v. Oglethorpe Power Corp., 341 Ga. App. 647, 802 S.E.2d 643, 2017 Ga. App. LEXIS 261 (2017), overruled in part, Hanham v. Access Mgmt. Group L.P., 305 Ga. 414, 825 S.E.2d 217, 2019 Ga. LEXIS 137 (2019).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Limitation of Actions, §§ 121 et seq., 147 et seq.

C.J.S.

54 C.J.S., Limitations of Actions, §§ 89 et seq., 304.

ALR.

Wrongful attachment or garnishment of debt as conversion, 40 A.L.R. 594.

Rights and remedies in respect of legacy charged upon land devised, 116 A.L.R. 7; 134 A.L.R. 361.

When statute of limitations commences to run against action to recover, or for conversion of, property stolen or otherwise wrongfully taken, 136 A.L.R. 658.

Statute of limitations governing damage action against warehouseman for loss

of or damage to stored goods, 23 A.L.R.2d 1466.

Nature of property or rights other than tangible chattels which may be subject of conversion, 44 A.L.R.2d 927.

When statute of limitations starts to run against bailor's action for recovery, or for damages for conversion or detention, of property deposited for an indefinite time, 57 A.L.R.2d 1044.

What statute of limitations applies to an action, based on duress, to recover money or property, 77 A.L.R.2d 821.

When statute of limitations commences to run against claim for contribution or indemnity based on tort, 57 A.L.R.3d 867.

What statute of limitations applies to action for contribution against joint tortfeasor, 57 A.L.R.3d 927.

Tort claim against which period of statute of limitations has run as subject of setoff, counterclaim, cross bill, or cross action in tort action arising out of same accident or incident, 72 A.L.R.3d 1065.

When does statute of limitations begin to run against action for wrongful appropriation of literary property or idea, 79 A.L.R.3d 820.

Accrual of claims for continuing trespass or continuing nuisance for purposes of statutory limitations, 14 A.L.R.7th 8.

9-3-33. Injuries to the person; injuries to reputation; loss of consortium; exception.

Except as otherwise provided in this article, actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year after the right of action accrues, and except for actions for injuries to the person involving loss of consortium, which shall be brought within four years after the right of action accrues.

History.

Laws 1767, Cobb's 1851 Digest, p. 562.; Laws 1805, Cobb's 1851 Digest, p. 564.; Ga. L. 1855-56, p. 233, § 5; Code 1863, § 2992; Code 1868, § 3005; Code 1873, § 3060; Code 1882, § 3060; Civil Code 1895, § 3900; Civil Code 1910, § 4497; Code 1933, § 3-1004; Ga. L. 1964, p. 763, § 1; Ga. L. 2015, p. 675, § 2-1/SB 8.

Editor's notes.

Ga. L. 2015, p. 675, § 1-1/SB 8, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Harbor/Rachel's Law Act.'"

Ga. L. 2015, p. 675, § 1-2/SB 8, not codified by the General Assembly, provides: "(a) The General Assembly finds that arresting, prosecuting, and incarcerating victimized children serves to retraumatize children and increases their feelings of low self-esteem, making the process of recovery more difficult. The General Assembly acknowledges that both federal and state laws recognize that sexually exploited children are the victims of crime and should be treated as victims. The General Assembly finds that sexually exploited children deserve the protection of child welfare services, including family support, crisis intervention, counseling, and emergency housing services. The General Assembly finds that it is necessary and appropriate to adopt uniform and reasonable assessments and regulations to help address the deleterious secondary effects, including but not limited to, prostitution and sexual exploitation of children, associated with adult entertainment establishments that allow the sale, possession, or consumption of alcohol on premises and that provide to their patrons performances and interaction involving various forms of nudity. The General Assembly finds that a correlation exists between adult live entertainment establishments and the sexual exploitation of children. The General Assembly finds that adult live entertainment establishments present a point of access for children to come into contact with individuals seeking to sexually exploit children. The General Assembly further finds that individuals seeking to exploit children utilize

adult live entertainment establishments as a means of locating children for the purpose of sexual exploitation. The General Assembly acknowledges that many local governments in this state and in other states found deleterious secondary effects of adult entertainment establishments are exacerbated by the sale, possession, or consumption of alcohol in such establishments.

"(b) The purpose of this Act is to protect a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in place in this state. The purpose and intended effect of this Act in imposing assessments and regulations on adult entertainment establishments is not to impose a restriction on the content or reasonable access to any materials or performances protected by the First Amendment of the United States Constitution or Article I, Section I, Paragraph V of the Constitution of this state."

Law reviews.

For article, "Actions for Wrongful Death in Georgia: Part Two," section two, see 20 Ga. B.J. 152 (1957).

For comment on Schimmel v. Greenway, 107 Ga. App. 257, 129 S.E.2d 542 (1963), see 14 Mercer L. Rev. 444 (1963).

For article discussing aspects of third party practice (impleader) under the Georgia Civil Practice Act (Ch. 11 of this title), see 4 Ga. St. B.J. 355 (1968).

For comment, "Strict Liability Actions — Which Statute of Limitations?," see 31 Mercer L. Rev. 773 (1980).

For survey article on insurance, see 34 Mercer L. Rev. 177 (1982).

For survey article on torts, see 34 Mercer L. Rev. 271 (1982).

For survey article on workers' compensation, see 34 Mercer L. Rev. 335 (1982).

For article, "Latent Injuries and the Statute of Limitations: A New Rule Emerges in Georgia," see 19 Ga. St. B.J. 12 (1982).

For survey of Eleventh Circuit cases on trial practice and procedure, see 39 Mercer L. Rev. 1307 (1988).

For annual survey of law of torts, see 56 Mercer L. Rev. 415 (2004).

For survey article on product liability law, see 59 Mercer L. Rev. 331 (2007).

For survey article on local government law, see 60 Mercer L. Rev. 263 (2008).

For annual survey on product liability, see 61 Mercer L. Rev. 267 (2009).

For comment, "Accrual and Unusual? Calibrating the Statute of Limitations on Section 1983 Method-of-Execution Challenges," see 62 Emory L.J. 407 (2012).

For note, "Taking a Toll on the Equities: Governing the Effect of the PLRA'S Exhaustion Requirements on State Statutes of Limitations," 47 Ga. L. Rev. 1321 (2013).

For article on the 2015 amendment of this Code section, see 32 Ga. St. U. L. Rev. 43 (2015).

For note, "I Tolled You I Had More Time!: The Future of Tolling Looks Bright for Crime Victims, as the Georgia Court of Appeals Establishes New Meaning of O.C.G.A. § 9-3-99," see 68 Mercer L. Rev. 557 (2017).

For article on the 2019 amendment of this Code section, see 36 Ga. St. U.L. Rev. 63 (2019).

JUDICIAL DECISIONS

Analysis

General Consideration
Injuries to Person
Injuries to Reputation
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Running of Limitations

General Consideration

Editor's notes. — For decisions under this section as to limitations for bringing medical malpractice actions prior to enactment of Article 4 of this chapter, see annotations under Code Section 9-3-71.

Fraud not shown. — Trial court erred in ruling that the statute of limitation in a

personal injury suit was tolled by fraud and in granting leave allowing motorist's employers to be added as parties to the suit after the statute of limitation had expired; there was no evidence that the motorist intentionally provided an incorrect answer to an interrogatory concerning the motorist's employment or that the motorist had conspired with the motorist's employers to prevent them from being added as parties. M.J.E.S. Enters. v. Martin, 265 Ga. App. 652, 595 S.E.2d 367, 2004 Ga. App. LEXIS 219 (2004).

Scope of application of O.C.G.A. § 9-3-33 is determined by nature of injury sustained rather than the legal theory underlying the claim for relief. Daniel v. American Optical Corp., 251 Ga. 166, 304 S.E.2d 383, 1983 Ga. LEXIS 759 (1983).

Action to recover for personal injuries is, in essence, a personal injury action, and, regardless of whether it is based upon an alleged breach of an implied warranty or is based upon an alleged tort, the limitations statute governing actions for personal injuries is controlling. Adair v. Baker Bros., 185 Ga. App. 807, 366 S.E.2d 164, 1988 Ga. App. LEXIS 59 (1988).

In an action against a corporate operator of a treatment program for violations of the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO), breach of third party beneficiary contract, breach of written contract, fraud, and breach of fiduciary duty, the general limitation of O.C.G.A. § 9-3-33 did not apply to the RICO, fraud, and ex contractu counts which were covered by the specific statutes of limitation pertaining thereto. Reaugh v. Inner Harbour Hosp., 214 Ga. App. 259, 447 S.E.2d 617, 1994 Ga. App. LEXIS 1437 (1994), cert. denied, No. S94C1817, 1994 Ga. LEXIS 1179 (Ga. Dec. 2, 1994).

In an action regarding the alleged removal of eye tissue from a corpse without permission, plaintiff's claims seeking redress for personal injury were properly dismissed pursuant to O.C.G.A. § 9-3-33. Bauer v. North Fulton Med. Ctr., Inc., 241 Ga. App. 568, 527 S.E.2d 240, 1999 Ga. App. LEXIS 1673 (1999).

Injury to property. — Insurer's negligence claim was timely because it sought recovery for damages to its property, and thus, the claim was governed by the four year limitations period of O.C.G.A. § 9-3-33, rather than by a two year limitations period. Arch Ins. Co. v. Bennett, No. 2:08-CV-0075-RWS, 2009 U.S. Dist. LEXIS 118321 (N.D. Ga. Dec. 21, 2009).

Counterclaims. — Counterclaim was timely if filed within the time that a party was obligated to answer the main action as long as the limitations period for the counterclaim had not expired before the main action was filed. When both the main action against a truck driver and the truck driver's third party complaint against an injured person were filed within the two year statute of limitations period, the injured person's personal injury counterclaim against the truck driver was not barred even though it was filed beyond the two year period, and the trial court erred in dismissing the counterclaim. Harpe v. Hall, 266 Ga. App. 340, 596 S.E.2d 666, 2004 Ga. App. LEXIS 314 (2004).

Claims under Rehabilitation Act. — When a federal statute does not contain a limitations period, courts should look to the most analogous state statute of limitations; because Georgia has not passed a state law identical to the Rehabilitation Act from which to borrow a limitations period, the two year statute of limitations for personal injury will be applied. Everett v. Cobb County Sch. Dist., 138 F.3d 1407, 1998 U.S. App. LEXIS 7490 (11th Cir. 1998).

Claims under Americans with Disabilities Act. — In a case in which the district court dismissed a tenant's claims under the Americans with Disabilities Act (ADA) and the Rehabilitation Act as time-barred based on the two-year statute of limitations in O.C.G.A. § 9-3-33, the tenant conceded that the complaint was filed more than two years after the last act of discrimination and unsuccessfully argued that the complaint was timely because the tenant was entitled to statutory tolling under the Fair Housing Act (FHA). Although the FHA contained a statutory tolling provision, the tenant cited no authority for the contention that the FHA extended to claims raised under the ADA or the Rehabilitation Act. Hunt v. Ga.

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Dep't of Cmty. Affairs, 490 Fed. Appx. 196, 2012 U.S. App. LEXIS 19535 (11th Cir. 2012).

Claims under the Individuals with Disabilities Education Act. — The 30 day limitations period applicable to administrative appeals, rather than the two year personal injury limitations period, applies to an appeal of an educational agency's final administrative decision under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. Cory D., by & Through Diane D. v. Burke County Sch. Dist., 285 F.3d 1294, 2002 U.S. App. LEXIS 4300 (11th Cir. 2002).

Claims under 29 U.S.C. § 794. — Although the specific claim of alleged wrongful termination for being HIV positive was one of employment discrimination to which O.C.G.A. § 34-6A-6(a) would have applied, the federal characterization of claims brought under 29 U.S.C. § 794 as "injuries to the person" makes O.C.G.A. § 9-3-33 the most analogous statute of limitations. Henrickson v. Sammons, 263 Ga. 331, 434 S.E.2d 51, 1993 Ga. LEXIS 625 (1993).

Application to 42 U.S.C. § 1985 claims. — In an employment discrimination case that alleged, inter alia, violations of 42 U.S.C. §§ 1983 and 1985, a district court's dismissal was affirmed because the complaint was not filed within the two-year limitations period established for such claims under O.C.G.A. § 9-3-33. Roberts v. Georgia, 228 Fed. Appx. 851, 2007 U.S. App. LEXIS 8005 (11th Cir. 2007).

Claims under 42 U.S.C. § 1981. — Employee's race discrimination claims against an employer under 42 U.S.C. § 1981, based on a failure to promote, were barred by the applicable two-year limitations period of O.C.G.A. § 9-3-33. Saunders v. Emory Healthcare, Inc., 360 Fed. Appx. 110, 2010 U.S. App. LEXIS 615 (11th Cir. 2010), cert. denied, 562 U.S. 1216, 131 S. Ct. 1473, 179 L. Ed. 2d 300, 2011 U.S. LEXIS 1389 (2011), superseded by statute as stated in, Higgens v. Trident Asset Mgmt., LLC, No. 16-24035-Civ, 2017 U.S. Dist. LEXIS 224483 (S.D. Fla. July 21, 2017).

Claims under 42 U.S.C. § 1983. — There was no error in dismissing the petitioner's civil rights complaint without prejudice and the petitioner's subsequent motion to reconsider because the petitioner did not identify any legal standards or procedures the judge improperly applied, manifest errors in fact-finding by the judge, or newly discovered evidence; 42 U.S.C. § 1983 claims were subject to the statute of limitations governing personal injury actions in the state where the Section 1983 action was brought. McFarlin v. Douglas County, 587 Fed. Appx. 593, 2014 U.S. App. LEXIS 18700 (11th Cir. 2014).

Because imposition of a sentence upon a plea of nolo contendere was not a dismissal or a nolle prosse, O.C.G.A. § 35-3-37(h)(2)(A), providing for restriction of access to certain criminal history records, did not apply to an applicant's plea of nolo contendre to theft by taking; and the applicant's civil rights claim was barred by the statute of limitations, O.C.G.A. § 9-3-33. Nasir v. Gwinnett County State Court, 341 Ga. App. 63, 798 S.E.2d 695, 2017 Ga. App. LEXIS 143 (2017), cert. denied, No. S17C1482, 2017 Ga. LEXIS 808 (Ga. Sept. 13, 2017).

Relevancy of delay in filing action. — If the plaintiff has filed the plaintiff's lawsuit within the statute of limitation, the plaintiff is entitled to seek to recover without having to address the irrelevant issue of why the plaintiff failed to institute the litigation earlier. The law only requires that a plaintiff file a lawsuit within the applicable statute of limitation. Therefore, the only "delay" in filing a complaint that has any legal relevancy whatsoever is that which renders the complaint untimely, not that which merely renders the complaint nearly untimely. Turner v. W.E. Pruett Co., 202 Ga. App. 287, 414 S.E.2d 248, 1991 Ga. App. LEXIS 1737 (1991), cert. denied, No. S92C0469, 1992 Ga. LEXIS 98 (Ga. Feb. 4, 1992).

Length of time that has passed between an allegedly actionable occurrence and the giving of an eyewitness' account of that

occurrence may be relevant to the credibility of that eyewitness' account. The memory of any eyewitness, whether for the plaintiff or the defendant, can fade over time. However, the length of time that has passed between an allegedly actionable occurrence and the filing of a lawsuit based upon that occurrence has absolutely no arguable relevance whatsoever to the credibility of the plaintiff's eyewitnesses. Turner v. W.E. Pruett Co., 202 Ga. App. 287, 414 S.E.2d 248, 1991 Ga. App. LEXIS 1737 (1991), cert. denied, No. S92C0469, 1992 Ga. LEXIS 98 (Ga. Feb. 4, 1992).

Separate classification of medical malpractice actions is rational exercise of legislative power, as is different treatment for actions for loss of consortium arising out of medical malpractice, insofar as limitation of actions is concerned. Hamby v. Neurological Assocs., P.C., 243 Ga. 698, 256 S.E.2d 378, 1979 Ga. LEXIS 1034 (1979); Perry v. Atlanta Hosp. & Medical Ctr., 255 Ga. 431, 339 S.E.2d 264, 1986 Ga. LEXIS 544 (1986).

Accrual of damages not limited. — Statute of limitations sets time in which action must be filed, but does not limit time in which damages may accrue, as the plaintiff may by amendment allege and prove additional damages which may have occurred after action is filed. Renfroe v. Bronson, 156 Ga. App. 216, 274 S.E.2d 659, 1980 Ga. App. LEXIS 3003 (1980).

Word "year" in O.C.G.A. § 9-3-33 means a calendar year, that is, from January 1 to December 31, inclusive. Georgia R.R. & Banking v. Thigpen, 113 Ga. App. 65, 147 S.E.2d 346, 1966 Ga. App. LEXIS 968 (1966).

Day of injury counts. — In computing time, day on which act was done is included. Peterson v. Georgia R.R. & Banking, 97 Ga. 798, 25 S.E. 370, 1895 Ga. LEXIS 585 (1895).

Day of the injury must be counted in determining whether action was brought within period of limitation, and no fractions of day are recognized. Dowling v. Lester, 74 Ga. App. 290, 39 S.E.2d 576, 1946 Ga. App. LEXIS 521 (1946); Lowe v. Bailey, 112 Ga. App. 516, 145 S.E.2d 622, 1965 Ga. App. LEXIS 758 (1965), cert. denied, 385 U.S. 824, 87 S. Ct. 56, 17 L. Ed. 2d 61, 1966 U.S. LEXIS 665 (1966), overruled, Lowe v. Pue, 150 Ga. App. 234, 257 S.E.2d 209, 1979 Ga. App. LEXIS 2129 (1979); Davis v. Hill, 113 Ga. App. 280, 147 S.E.2d 868, 1966 Ga. App. LEXIS 1037 (1966), overruled, Lowe v. Pue, 150 Ga. App. 234, 257 S.E.2d 209, 1979 Ga. App. LEXIS 2129 (1979); Holliday v. Lacy, 118 Ga. App. 341, 163 S.E.2d 750, 1968 Ga. App. LEXIS 932 (1968).

Effect of O.C.G.A. §§ 1-3-1(d)(3) and 9-11-6(a). — Time provisions of former Code 1933, § 102-102 and Ga. L. 1967, p. 226, §§ 5 and 6 (see now O.C.G.A. §§ 1-3-1(d)(3) and 9-11-6(a)) will not permit claim that was otherwise bound by two-year statute of limitations in former Code 1933, § 3-1004 (see now O.C.G.A. § 9-3-33) to be filed two years to the day after the date of the accident. Reese v. Henderson, 156 Ga. App. 809, 275 S.E.2d 664, 1980 Ga. App. LEXIS 3208 (1980), superseded by statute as stated in Davis v. DESA Int'l, Inc., 209 Ga. App. 318, 433 S.E.2d 410, 1993 Ga. App. LEXIS 874 (1993), superseded by statute as stated in Weems v. Munson Transp., 210 Ga. App. 766, 437 S.E.2d 640, 1993 Ga. App. LEXIS 1324 (1993).

When the plaintiff's cause of action sounded in two phases, one setting forth an action for slander and the second for an interference with the plaintiff's business, the trial court erred in granting the defendant summary judgment on the basis of the bar of the statute of limitations, under O.C.G.A. § 9-3-33, since the cause of action arose some three years prior to when the suit was brought. Hill v. Crabb, 166 Ga. App. 387, 304 S.E.2d 510, 1983 Ga. App. LEXIS 2180 (1983).

Wrongful death action. — In a wrongful death action, the Georgia statute of limitations was applicable because it constituted substantive law under Maryland's choice of law rules. Potts v. United Technologies Corp., 879 F. Supp. 1196, 1994 U.S. Dist. LEXIS 20327 (N.D. Ga. 1994).

As children of a deceased nursing home resident had not served two defendants by the time of a hearing on their motion to dismiss the wrongful death complaint against them, which hearing was held more than 17 months after the suit was

General Consideration (Cont'd)

filed and more than eight months after the motion seeking dismissal on the grounds of laches, and the children offered no reason for the delay, there was no abuse of discretion in granting the dismissal request; there was a two-year limitation period on the wrongful death claim under O.C.G.A. § 9-3-33, and the first complaint had been filed two days before that statutory period expired. Williams v. Alvista Healthcare Ctr., Inc., 283 Ga. App. 613, 642 S.E.2d 232, 2007 Ga. App. LEXIS 137 (2007).

Plaintiffs' motion to add the decedent's widow as a plaintiff in the wrongful death action was improperly denied as the plaintiff's motion met the relation-back requirements because the proposed amendment would not have altered the substance of the wrongful death claim or changed the underlying circumstances set forth in the original complaint; the widow's claim clearly arose out of the same occurrence as that alleged in the original complaint; there was no evidence of prejudice to the defendants or dilatory tactics by the plaintiffs as the original complaint was filed within the applicable statute of limitation; and, although the widow initially did not want to participate in the lawsuit, later the widow's mind was changed. Seay v. Valdosta Kidney Clinic, LLC, 353 Ga. App. 378, 837 S.E.2d 529, 2020 Ga. App. LEXIS 3 (2020).

Cause of action for legal malpractice, alleging negligence or unskillfulness, may sound in tort and thus be subject to the one-year and/or two-year limitation of O.C.G.A. § 9-3-33. Hamilton v. Powell, Goldstein, Frazer & Murphy, 167 Ga. App. 411, 306 S.E.2d 340, 1983 Ga. App. LEXIS 2506 (1983), aff'd, 252 Ga. 149, 311 S.E.2d 818, 1984 Ga. LEXIS 607 (1984); Kilby v. Shepherd, 177 Ga. App. 462, 339 S.E.2d 742, 1986 Ga. App. LEXIS 1443 (1986).

Cause of action for legal malpractice, alleging negligence or unskillfulness, sounds in contract (agency) and, in the case of an oral agreement, is subject to the four-year statute of limitation in O.C.G.A. § 9-3-25, but a cause of action can also sound in tort and, thus, be subject to the one-year and/or two-year limitation of O.C.G.A. § 9-3-33. Ballard v. Frey, 179 Ga. App. 455, 346 S.E.2d 893, 1984 Ga. App. LEXIS 2765 (1984); Coleman v. Hicks, 209 Ga. App. 467, 433 S.E.2d 621, 1993 Ga. App. LEXIS 904 (1993), cert. denied, No. S93C1714, 1993 Ga. LEXIS 1076 (Ga. Nov. 5, 1993).

When the defendant's counterclaim did not seek tort damages for any "injuries to the person" within the ambit of O.C.G.A. § 9-3-33, but sought only those damages alleged to be the result of plaintiff-attorney's negligent breach of a contract of employment, the trial court erred in striking the counterclaim based upon the two-year statute of limitation defense. Ballard v. Frey, 179 Ga. App. 455, 346 S.E.2d 893, 1984 Ga. App. LEXIS 2765 (1984).

Legal malpractice claim may sound either in tort or contract, depending on the circumstances. The circumstances on which it depends, however, are those involving the attorney-client relationship, the duty involved, and the breach thereof, not those involving the nature of the underlying action for which the attorney was consulted or retained. Plumlee v. Davis, 221 Ga. App. 848, 473 S.E.2d 510.

In a legal malpractice action based on the defendant's failure to advise the plaintiff regarding the applicable statute of limitation in a prior action, the statute of limitation began to run when the statute of limitation on the plaintiff's original personal injury claim expired without suit being filed. Harrison v. Beckham, 238 Ga. App. 199, 518 S.E.2d 435.

Actions barred. — Action brought on December 3, 1952, for damages for injuries to the person alleged to have been sustained on December 3, 1950, was barred by this section. Gibson v. Kelley, 88 Ga. App. 817, 78 S.E.2d 76, 1953 Ga. App. LEXIS 1216 (1953).

Action brought November 24, 1964, to recover damages for injury sustained November 24, 1962, is barred by this section, as running of the statute begins on the day the injury was suffered, without reference to time of day or fractions of days. Earwood v. Liberty Loan Corp., 136 Ga. App. 799, 222 S.E.2d 204, 1975 Ga. App. LEXIS 1488 (1975).

Since the automobile collision occurred on April 7, 1978, at 5:00 p.m., and the

plaintiff filed a complaint on Monday, April 7, 1980, at 3:56 p.m., the claim is barred by the two-year statute of limitations in this section. Reese v. Henderson, 156 Ga. App. 809, 275 S.E.2d 664, 1980 Ga. App. LEXIS 3208 (1980), superseded by statute as stated in Davis v. DESA Int'l, Inc., 209 Ga. App. 318, 433 S.E.2d 410, 1993 Ga. App. LEXIS 874 (1993), superseded by statute as stated in Weems v. Munson Transp., 210 Ga. App. 766, 437 S.E.2d 640, 1993 Ga. App. LEXIS 1324 (1993).

Trial court properly dismissed the second of two personal injury lawsuits, with prejudice, as such did not act as a renewal action, given evidence that the first suit, though timely filed, was void because service was never perfected; moreover, dismissal was properly entered with prejudice as res judicata barred the litigant from filing a subsequent lawsuit on a claim that was already held as time-barred. Towe v. Connors, 284 Ga. App. 320, 644 S.E.2d 176, 2007 Ga. App. LEXIS 294 (2007).

Because the alleged incident in a hospital occurred nearly five years before the complaint was filed, the claims involving a hospital incident were time-barred under O.C.G.A. § 9-3-33; thus, the district court did not abuse the court's discretion in dismissing the action against the state and several of the state's officials. Simon v. Georgia, 282 Fed. Appx. 739, 2008 U.S. App. LEXIS 13048 (11th Cir. 2008).

Resident's third automobile personal injury lawsuit against a former resident was properly dismissed because service of the resident's second lawsuit was not perfected in accordance with the Georgia Long-Arm Statute, O.C.G.A. § 9-10-91, and the period of limitations in O.C.G.A. § 9-3-33 ran before the third lawsuit (allegedly as a renewal of the second lawsuit under O.C.G.A. § 9-2-61) was filed. Coles v. Reese, 316 Ga. App. 545, 730 S.E.2d 33, 2012 Ga. App. LEXIS 605 (2012).

Trial court should have dismissed an employee's tort claims against a supervisor because an arbitration between them and their employer was not a proceeding that could be renewed under O.C.G.A. § 9-2-61(a), and the claims were untimely under O.C.G.A. § 9-3-33 since the claims were not filed within six months of the dismissal or discontinuation of the employee's earlier federal action. Green v. Flanagan, 317 Ga. App. 152, 730 S.E.2d 161, 2012 Ga. App. LEXIS 634 (2012), cert. denied, No. S12C1993, 2013 Ga. LEXIS 282 (Ga. Mar. 18, 2013).

Many of the actions cited by an employee as supporting the employee's intentional infliction of emotional distress claims related to failure to promote the employee were barred by Georgia's two-year statute of limitations at O.C.G.A. § 9-3-33; the statute's four-year period related to consortium claims. Scott v. Rite Aid of Ga., Inc., 918 F. Supp. 2d 1292, 2013 U.S. Dist. LEXIS 7606 (M.D. Ga. 2013).

Conclusion that the personal injury claimant was guilty of laches was upheld based on a finding that the claimant first attempted to serve the opposing party five days before the expiration of the two-year statute of limitations for personal injury actions, the opposing party was not served until a month after the initial attempt, and the claimant failed to explain how the claimant determined the opposing party's last address. Walker v. Culpepper, 321 Ga. App. 629, 742 S.E.2d 144, 2013 Ga. App. LEXIS 358 (2013), overruled in part, Giles v. State Farm Mut. Ins. Co., 330 Ga. App. 314, 765 S.E.2d 413, 2014 Ga. App. LEXIS 717 (2014).

Trial court properly dismissed the employee's claims for defamation, intentional infliction of emotional distress, and negligent retention as barred by the statute of limitations because the limitations periods were only one or two years, the complaint was not filed until nearly four years after the employee was terminated, and the statute of limitations was not tolled due to fraudulent concealment, which the employee knew about when the employee filed the employee's federal action, more than two years earlier. Clemons v. Delta Airlines, Inc., 338 Ga. App. 844, 790 S.E.2d 814, 2016 Ga. App. LEXIS 497 (2016), cert. denied, No. S17C0519, 2017 Ga. LEXIS 427 (Ga. May 15, 2017), cert. denied, 138 S. Ct. 657, 199 L. Ed. 2d 532, 2018 U.S. LEXIS 457 (2018).

Insurance subrogation actions. — Under O.C.G.A. § 33-7-11(f), in a subrogation action by an insurer to recover

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personal injury payments made to its insured, the insurer is bound by the two-year limitation of O.C.G.A. § 9-3-33, not the 20-year limitation of O.C.G.A. § 9-3-22. Whirl v. Safeco Ins. Co., 241 Ga. App. 654, 527 S.E.2d 262, 1999 Ga. App. LEXIS 1683 (1999), cert. denied, No. S00C0682, 2000 Ga. LEXIS 437 (Ga. May 26, 2000).

Negligence of court clerk. — Action brought to recover damages from superior court clerk for negligent failure to send record in appeal case to Supreme Court within time required by law was an action to recover damages for conversion of personal property, not an action for injury to the person under this section. Singletary v. GMAC, 73 F.2d 453, 1934 U.S. App. LEXIS 2730 (5th Cir. 1934).

Maritime injuries. — In action brought by shore worker as vicarious seaman to recover for maritime injuries caused by negligence or unseaworthiness of vessel, appropriate statute of limitations period is not this section, but rather three-year period under federal Jones Act (46 U.S.C. 688). Flowers v. Savannah Mach. & Foundry Co., 310 F.2d 135, 1962 U.S. App. LEXIS 3547 (5th Cir. 1962).

Application to mandamus claim. — After federal claims were dismissed in a former employee's action against a county employer, the employee's mandamus claims against a county official for reinstatement were not straightforward so as to allow the court to accept jurisdiction of state claims under 28 U.S.C. § 1367 because it was unclear whether ante litem notice was required under O.C.G.A. § 36-11-1 and whether a one-year limitations of O.C.G.A. § 9-3-33 applied to the mandamus claim. Toma v. Columbia County, No. CV 106-145, 2007 U.S. Dist. LEXIS 30096 (S.D. Ga. Apr. 20, 2007).

Application to 42 U.S.C. § 1983 claims. — Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1938, 85 L. E. 2d 254 (1985), requires the retroactive application of the two-year limitations period set forth in O.C.G.A. § 9-3-33 for personal injuries to all 42 U.S.C. § 1983 claims in Georgia. Williams v. City of Atlanta, 794 F.2d 624, 1986 U.S. App. LEXIS 27436 (11th Cir. 1986); Day v. Brown, 207 Ga. App. 134, 427 S.E.2d 104, 1993 Ga. App. LEXIS 98 (1993).

Georgia two-year limitations period for personal injuries under O.C.G.A. § 9-3-33 applies to 42 U.S.C. § 1983 claims arising in Georgia, but state tolling provisions apply to § 1983 claims as well. Camps v. City of Warner Robins, 822 F. Supp. 724, 1993 U.S. Dist. LEXIS 7079 (M.D. Ga. 1993).

In an employment discrimination case in which a former employee's initial complaint was dismissed without prejudice because the former employee had not effected service within 120 days, a district court's dismissal of the former employee's 42 U.S.C. §§ 1983 and 1985 claims in a second complaint was affirmed because the claims were not timely under O.C.G.A. § 9-3-33, the Georgia statute borrowed for 42 U.S.C. §§ 1983 and 1985 claims. Since the former employee's initial complaint had been dismissed by court order granting the defendants' motions, the former employee's initial suit was void and incapable of renewal under O.C.G.A. § 9-2-61. Miller v. Georgia, 223 Fed. Appx. 842, 2007 U.S. App. LEXIS 6218 (11th Cir. 2007).

In a 42 U.S.C. § 1983 case in which a death row inmate challenged Georgia's three-drug lethal injection method, the complaint was untimely; the complaint was governed by the two-year statute of limitations found in O.C.G.A. § 9-3-33, and the inmate's claim accrued in 2001 when the General Assembly adopted lethal injection as Georgia's method of execution for death sentences as found in O.C.G.A. § 17-10-38. Alderman v. Donald, 293 Fed. Appx. 693, 2008 U.S. App. LEXIS 19072 (11th Cir.), cert. denied, 554 U.S. 943, 129 S. Ct. 27, 171 L. Ed. 2d 930, 2008 U.S. LEXIS 5428 (2008).

Detainee's 42 U.S.C. § 1983 claims against six unnamed deputies were dismissed under Fed. R. Civ. P. 4(n) when more than two years after bringing suit and more than four years after the detainee's alleged injury occurred, the detainee failed to substitute named parties as defendants, and thus, the two-year limitations period in O.C.G.A. § 9-3-33 for 42 U.S.C. § 1983 claims expired. Williams v. Barrett, 287 Fed. Appx. 768, 2008 U.S. App. LEXIS 15329 (11th Cir. 2008).

Appeal from denial of a prisoner's 42 U.S.C. § 1983 claim alleging Eighth Amendment violations was frivolous because all of the prisoner's claims were barred by the two-year statute of limitations set forth in O.C.G.A. § 9-3-33. Kellat v. Douglas County, No. 10-15713-D, 2011 U.S. App. LEXIS 26442 (11th Cir. Apr. 7, 2011).

In a 42 U.S.C. § 1983 case in which a pro se inmate appealed a district court's adverse ruling on the inmate's deliberate indifference claim, that claim was untimely under O.C.G.A. § 9-3-33 and the inmate did not meet the standard in O.C.G.A. § 9-3-90(a) to toll the limitations period. Though the inmate undoubtedly had mental problems both before and after the assault in prison, under medication the inmate was able to manage the ordinary affairs of the inmate's life. Thompson v. Corr. Corp. of Am., 485 Fed. Appx. 345, 2012 U.S. App. LEXIS 12274 (11th Cir. 2012).

Application to Bivens claims. — Two-year personal injury limitations period applied to claims for damages for malicious prosecution and various constitutional violations under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Kelly v. Serna, 87 F.3d 1235, 1996 U.S. App. LEXIS 16633 (11th Cir. 1996).

Claims for damages for malicious prosecution and various constitutional violations under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) accrued on the date plaintiff's convictions were reversed. Kelly v. Serna, 87 F.3d 1235, 1996 U.S. App. LEXIS 16633 (11th Cir. 1996).

Injuries to Person

Two-year limitation of action for wrongful death is public policy of this state, which bars institution of such litigation after lapse of this period; this period cannot be extended by legislatures of foreign states. Taylor v. Murray, 231 Ga. 852, 204 S.E.2d 747, 1974 Ga. LEXIS 1259 (1974).

Injury to person is injury to physical body of the person. Dalrymple v. Brunswick Coca-Cola Bottling Co., 51 Ga. App. 754, 181 S.E. 597, 1935 Ga. App. LEXIS 464 (1935).

Personal injuries are not confined to injuries to body. Hutcherson v. Durden, 113 Ga. 987, 39 S.E. 495, 1901 Ga. LEXIS 443 (1901).

Personal injuries include all actionable injuries to individual. — Injuries to the person, within meaning of this section, are not confined to physical injuries, but rather to all actionable injuries to the individual personally, as distinguished from injuries to the individual's property or property rights. Carter v. Seaboard Coast Line R.R., 392 F. Supp. 494, 1974 U.S. Dist. LEXIS 6564 (S.D. Ga. 1974).

Phrase "injuries to the person" includes not only injuries to physical body, but every other injury for which an action may be brought done to the individual and not to the individual's property; pain and suffering, medical expenses, and lost earnings are part of injury to the person. Sharpe v. Seaboard Coast Line R.R., 528 F.2d 546, 1976 U.S. App. LEXIS 12456 (5th Cir. 1976).

District court properly dismissed an inmate's civil rights action sua sponte as theft-based claims arising from allegations that corrections officials, inter alia, conspired to harass the inmate and destroyed business and personal interests, were barred by the limitations period, the inmate did not assert that equitable tolling applied, and the statutory tolling provisions were inapplicable. Seibert v. Comm'r, Ga. Dep't of Corr., 680 Fed. Appx. 837, 2017 U.S. App. LEXIS 3247 (11th Cir. 2017).

Bivens action. — Two-year period of limitations set forth in O.C.G.A. § 9-3-33 applies to a so-called Bivens action alleging conduct by federal agents in violation of a person's constitutional rights. S.W. Daniel, Inc. v. Urrea, 715 F. Supp. 1082, 1989 U.S. Dist. LEXIS 10852 (N.D. Ga. 1989).

Monetary loss or damage resulting from injury must be recovered within two years, not four. Leggett v. Benton Bros. Drayage & Storage Co., 138 Ga. App. 761, 227 S.E.2d 397, 1976 Ga. App. LEXIS 2646 (1976).

Injury to one's health is an injury to the person, as are any resulting monetary damages. Dalrymple v. Brunswick

Injuries to Person (Cont'd)

Coca-Cola Bottling Co., 51 Ga. App. 754, 181 S.E. 597, 1935 Ga. App. LEXIS 464 (1935).

Claim for injury to earning capacity is claim for injury to the person, and therefore the statute of limitation is two years. Leggett v. Benton Bros. Drayage & Storage Co., 138 Ga. App. 761, 227 S.E.2d 397, 1976 Ga. App. LEXIS 2646 (1976).

Applicable statute of limitation for lost wages arising out of personal injury done to the plaintiff is two years. Leggett v. Benton Bros. Drayage & Storage Co., 138 Ga. App. 761, 227 S.E.2d 397, 1976 Ga. App. LEXIS 2646 (1976).

Battery resulting from unauthorized operation. — Statute of limitations for battery resulting from an unauthorized operation is the two-year statute of limitations for injuries to the person and the four-year statute of limitations for loss of consortium. Gowen v. Carpenter, 189 Ga. App. 477, 376 S.E.2d 384, 1988 Ga. App. LEXIS 1455 (1988); Gowen v. Cady, 189 Ga. App. 473, 376 S.E.2d 390, 1988 Ga. App. LEXIS 1454 (1988).

Civil rights actions. — Two-year limitation in actions for injuries to persons is applicable to civil rights actions. Jones v. Bales, 58 F.R.D. 453, 1972 U.S. Dist. LEXIS 12766 (D. Ga. 1972), aff'd, 480 F.2d 805, 1973 U.S. App. LEXIS 11519 (5th Cir. 1973).

Invasion of privacy claim was governed by the two-year statute of limitation for injury to the person, and not by the one-year statute of limitation for injury to reputation. Hudson v. Montcalm Publishing Corp., 190 Ga. App. 629, 379 S.E.2d 572, 1989 Ga. App. LEXIS 377 (1989).

Invasion of privacy and intrusion on seclusion claims were untimely as to a program that was activated on the plaintiffs' computer more than two years before the complaint was filed. As to other alleged conduct, a voluntarily dismissed class action did not toll a subsequent class action based on the same conduct, and Georgia law did not apply to information allegedly gathered outside Georgia. Krise v. Sei/Aaron's, Inc., No. 1:14-CV-1209-TWT, 2017 U.S. Dist. LEXIS 133818 (N.D. Ga. Aug. 18, 2017).

Federal civil rights actions. — O.C.G.A. § 9-3-33 provides a two-year limitations period for "actions for injuries to the person," and is the statute of limitations that applies to 42 U.S.C. § 1983 actions heard by federal district courts sitting in Georgia. Sadiqq v. Bramlett, 559 F. Supp. 362, 1983 U.S. Dist. LEXIS 18795 (N.D. Ga. 1983).

Since the federal civil rights statute, 42 U.S.C. § 1983, does not contain its own statute of limitations, it is well settled that the period of limitations to be used is the most analogous one provided by state law. The applicable limitations period for first amendment and due process claims is not the six-month period provided by O.C.G.A. § 45-19-36 for filing an administrative complaint for unlawful discrimination committed by a public employer; the most analogous limitations period provided by Georgia law for these claims appears to be either the one provided by O.C.G.A. § 9-3-22 (enforcement of statutory rights) or the one provided by O.C.G.A. § 9-3-33 (injuries to person or reputation). Cook v. Ashmore, 579 F. Supp. 78, 1984 U.S. Dist. LEXIS 20170 (N.D. Ga. 1984).

Georgia's two year limitations period for actions for injuries to the person (including wrongful death) is also applicable to plaintiff's claims under 42 U.S.C. § 1983. Robinette v. Johnston, 637 F. Supp. 922, 1986 U.S. Dist. LEXIS 24057 (M.D. Ga. 1986).

Proper limitations period for all federal civil rights actions under 42 U.S.C. § 1983 in Georgia is the two-year limitations period set forth in O.C.G.A. § 9-3-33. Mullinax v. McElhenney, 817 F.2d 711, 1987 U.S. App. LEXIS 6687 (11th Cir. 1987).

Two-year limitation set forth in O.C.G.A. § 9-3-33 applies to an action under 42 U.S.C. § 1983. Byrd v. City of Atlanta, 683 F. Supp. 804, 1988 U.S. Dist. LEXIS 2676 (N.D. Ga. 1988).

Two-year personal injury limitations period applied to a claim against the state and a county alleging racial discrimination in the siting and permitting of a solid

waste landfill under 42 U.S.C. §§ 1983, 1985 and 2000d. Rozar v. Mullis, 85 F.3d 556, 1996 U.S. App. LEXIS 14607 (11th Cir. 1996).

Georgia Tort Claims Act does not expand the state's exposure for federal civil rights actions beyond that provided in O.C.G.A. § 9-3-33. Doe #102 v. Department of Cors., 268 Ga. 582, 492 S.E.2d 516.

Employment discrimination action under 42 U.S.C. § 1981 was time-barred because the last discriminatory act did not occur within two years of the date plaintiff filed the complaint. Welch v. Delta Air Lines, 978 F. Supp. 1133, 1997 U.S. Dist. LEXIS 15030 (N.D. Ga. 1997).

Parent's intervention in an action under 42 U.S.C. § 1983 for damages for the wrongful death of a child was barred because the parent filed the parent's motion more than two years after the parent's cause of action accrued. Miracle by Miracle v. Spooner, 978 F. Supp. 1161, 1997 U.S. Dist. LEXIS 16150 (N.D. Ga. 1997).

Appellants' § 1983 action alleging constitutional claims against a school district arising out of the wife's termination was a tort action and, thus, the district court properly held that it was barred by the two year statute of limitations in O.C.G.A. § 9-3-33 and, as the § 1983 claim was the only basis for federal question jurisdiction, it properly dismissed state contract and tort claims. Because appeal would be frivolous, appellants' motion for in forma pauperis status was denied. Falls-Miller v. Savannah-Chatham Cty. Pub. Sch. Bd., No. 20-14594-HH, 2021 U.S. App. LEXIS 9750 (11th Cir. Apr. 2, 2021).

Relation back of civil rights claim based on alleged conspiracy between defendants and judge. — Federal civil rights claim grounded on allegations of a malicious conspiracy between the defendants and the judge who issued a restraining order, brought three years after the accrual of the cause of action and after the original claim for breach of contract, tortious interference with contractual rights, and indemnity, did not relate back and was barred by the statute of limitations. Henson v. American Family Corp., 171 Ga. App. 724, 321 S.E.2d 205, 1984 Ga. App. LEXIS 3002 (1984).

Tortious communication of disease, such as tuberculosis of the lungs, by one person to another by causing an individual to work with a person suffering from the disease, is an injury to the person, and any monetary loss or damages flowing therefrom are recoverable as damages flowing from an injury to the person; hence, right of action accrues immediately upon communication of the disease. Dalrymple v. Brunswick Coca-Cola Bottling Co., 51 Ga. App. 754, 181 S.E. 597, 1935 Ga. App. LEXIS 464 (1935).

Action for damages brought by administrator under former Code 1933, §§ 105-1309 and 105-1310 (see now O.C.G.A. § 51-4-5) to recover for benefit of dependent next of kin of deceased is action for injury done to the person, and must be brought within two-year period of limitation prescribed by former Code 1933, § 3-1004 (see now O.C.G.A. § 9-3-33). Patellis v. King, 52 Ga. App. 118, 182 S.E. 808, 1935 Ga. App. LEXIS 73 (1935).

Malicious notice of intent to sue. — When the defendant maliciously sent the plaintiff, who did not owe it anything, notice of intention to sue in June, 1937, thereby frightening the plaintiff, making the plaintiff nervous, and causing a nervous breakdown which was completed in September, 1939, resulting in permanent impairment of the plaintiff's health, and action was not brought until June, 1941, cause of action, if any, was barred by the statute of limitations. Fraser v. Atlanta Title & Trust Co., 66 Ga. App. 630, 19 S.E.2d 38, 1942 Ga. App. LEXIS 254 (1942).

Malicious prosecution, abuse of process, false arrest and imprisonment. — Actions for malicious prosecution, malicious abuse of legal process, for false arrest or false imprisonment, or for malicious use of civil process are all actions for damages for injuries to the person of the party complainant, and under this section are not barred until two years after they arise. McCullough v. Atlantic Ref. Co., 50 Ga. App. 237, 177 S.E. 601, 1934 Ga. App. LEXIS 717 (1934) (see now O.C.G.A. § 9-3-33).

Action for malicious use of civil process is action for injury to the person, rather than one for injury to the reputation, and

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therefore is not barred under this section until two years after the cause of action accrues. Securities Inv. Co. v. Bennett, 117 Ga. App. 415, 160 S.E.2d 602, 1968 Ga. App. LEXIS 1109 (1968).

Action filed by administrator for damages from malicious arrest and prosecution of intestate is subject to two year statute of limitation in this section. Nevels v. Detroiter Mobile Homes, 124 Ga. App. 112, 183 S.E.2d 77, 1971 Ga. App. LEXIS 832 (1971).

False imprisonment is injury to the person that must be brought within two years of release from imprisonment. Meyers v. Glover, 152 Ga. App. 679, 263 S.E.2d 539, 1979 Ga. App. LEXIS 3005 (1979), overruled, McCord v. Jones, 168 Ga. App. 891, 311 S.E.2d 209, 1983 Ga. App. LEXIS 2947 (1983).

Statute of limitation for malicious prosecution is two years. Brown v. Quarles, 154 Ga. App. 350, 268 S.E.2d 403, 1980 Ga. App. LEXIS 2160 (1980).

Suit for malicious prosecution must be brought within two years after the underlying criminal prosecution is ended in plaintiff's favor. Daniel v. Georgia R.R. Bank & Trust Co., 255 Ga. 29, 334 S.E.2d 659, 1985 Ga. LEXIS 848 (1985).

Malicious prosecution action resulting from incarceration on warrants charging the plaintiff with writing bad checks accrued when the statute of limitations on the criminal charges expired without the plaintiff having been prosecuted, not when the warrants were "dismissed" by the district attorney's office. Banta v. Quik-Thrift Food Stores, Inc., 187 Ga. App. 250, 370 S.E.2d 3, 1988 Ga. App. LEXIS 646 (1988).

Action for false imprisonment must be brought within two years of its accrual, which is from the release from imprisonment. Reese v. Clayton County, 185 Ga. App. 207, 363 S.E.2d 618, 1987 Ga. App. LEXIS 2474 (1987); Campbell v. Hyatt Regency, 193 Ga. App. 542, 388 S.E.2d 341, 1989 Ga. App. LEXIS 1537 (1989).

False imprisonment is an intentional tort. The action must be brought within two years of its accrual, which is from the release from imprisonment. Collier v. Evans, 199 Ga. App. 763, 406 S.E.2d 90, 1991 Ga. App. LEXIS 649 (1991).

Plaintiffs' malicious prosecution claim was not time barred by the applicable two-year statute of limitations because that claim did not accrue until the charges against the plaintiffs were dropped, which was within the two-year limitations period; the plaintiffs' claim for false imprisonment was time barred because the plaintiffs were no longer falsely imprisoned after the defendants obtained an arrest warrant, which was more than two years prior to the plaintiffs filing their complaint, and the plaintiffs did not suffer a continuing tort of false imprisonment once the plaintiffs were held pursuant to the warrant. Black v. Wigington, No. 1:12-CV-03365-RWS, 2015 U.S. Dist. LEXIS 13003 (N.D. Ga. Feb. 4, 2015), aff'd in part and rev'd in part, 811 F.3d 1259, 2016 U.S. App. LEXIS 1057 (11th Cir. 2016).

Plaintiff's false arrest complaint against the defendants, an officer and a city, was untimely because the plaintiff's claim for false arrest accrued on May 18, 2011, which was when a magistrate judge reviewed the plaintiff's charges to fix the amount of the bond and the plaintiff was released on bail, the plaintiff had two years from May 18, 2011, when the plaintiff started being held pursuant to legal process, to commence an action for false arrest, and the plaintiff waited more than two years, until July 19, 2013, to file the complaint. White v. Hiers, 652 Fed. Appx. 784, 2016 U.S. App. LEXIS 10402 (11th Cir. 2016).

Abusive litigation. — In a suit seeking damages for abusive litigation, when the action complained of was reduced to judgment in 1984, and the instant action was not filed until 1988, the trial court correctly found that the action for abusive litigation was time barred. Walker v. McLarty, 199 Ga. App. 460, 405 S.E.2d 294, 1991 Ga. App. LEXIS 540 (1991), cert. denied, No. S91C1038, 1991 Ga. LEXIS 746 (Ga. May 15, 1991). But see Graves v. State, 269 Ga. 772, 504 S.E.2d 679 (reversing Graves v. State, 227 Ga. App. 628, 490 S.E.2d 111, 1997 Ga. App. LEXIS 874 (1997)).

Interference with right to testify. — Action for recovery of damages for interference with the plaintiff's right to testify

as witness is one for injuries to the person and must be commenced within two years of alleged interference. Carter v. Seaboard Coast Line R.R., 392 F. Supp. 494, 1974 U.S. Dist. LEXIS 6564 (S.D. Ga. 1974).

Wrongful death. — Action for damages for homicide instituted by administrator of deceased to recover for benefit of dependent brother of deceased is an action for injury done to the person, and must be brought within two years from time of injury. King v. Patellis, 181 Ga. 157, 181 S.E. 667, 1935 Ga. LEXIS 48 (1935).

Action by wife to recover damages for negligent homicide of husband is action for injury done to the person, and must be brought within two years after the date of the husband's death. Ivester v. Southern Ry., 61 Ga. App. 364, 6 S.E.2d 214, 1939 Ga. App. LEXIS 298 (1939); Odom v. Atlanta & W.P.R.R., 208 Ga. 45, 64 S.E.2d 889, 1951 Ga. LEXIS 530 (1951).

Uninsured motorist case. — Trial court erroneously dismissed the insured party's uninsured motorist action against the insurer; the insured party, by attempting service twice, showed due diligence under O.C.G.A. § 33-7-11(e) in determining that the defendant, who allegedly struck the insured party, had either departed from the state or could not, after due diligence, be found within the state, and the insured party made all three requests for service by publication before the statute of limitations under O.C.G.A. § 9-3-33 expired, and the latter two requests were pending for decision by the trial court for more than three months in violation of O.C.G.A. § 15-6-21(b). Luca v. State Farm Mut. Auto. Ins. Co., 281 Ga. App. 658, 637 S.E.2d 86, 2006 Ga. App. LEXIS 1195 (2006).

Traffic violation pending, which tolled limitations period. — Summary judgment in favor of the defendant was reversed because the plaintiff met the plaintiff's burden of producing evidence that the two year limitation period applicable to the plaintiff's tort suit had not run because the limitation was tolled as the plaintiff established that the prosecution of the defendant for the traffic violation remained pending in municipal court until November 18, 2014, which was less than two years before the lawsuit was filed. Williams v. Durden, 347 Ga. App. 363, 819 S.E.2d 524, 2018 Ga. App. LEXIS 569 (2018).

Injuries due to seller's negligence. — This section is applicable when personal injuries arise due to the seller's negligence. Cleveland Lumber Co. v. Proctor & Schwartz, Inc., 397 F. Supp. 1088, 1975 U.S. Dist. LEXIS 14052 (N.D. Ga. 1975).

When cause of action for medical malpractice arose prior to July 1, 1977, O.C.G.A. § 9-3-33 applied rather than O.C.G.A. § 9-3-71. Morgan v. Carter, 157 Ga. App. 218, 276 S.E.2d 889, 1981 Ga. App. LEXIS 1712 (1981).

This section does not apply when action against common carrier is upon contract to safely carry even though breach alleged resulted in injuries to the person for which damages are sought to be recovered. Patterson v. Augusta & S.R.R., 94 Ga. 140, 21 S.E. 283, 1894 Ga. LEXIS 31 (1894).

Pregnancy as injury in negligent sterilization action. — After the mother sued a doctor for alleged negligent sterilization, the pregnancy was the injury, and the general tort statute of limitations did not begin to run until the occurrence of this injury. Shessel v. Stroup, 253 Ga. 56, 316 S.E.2d 155, 1984 Ga. LEXIS 803 (1984), superseded by statute as stated in Quinn v. Stafford, 257 Ga. 608, 362 S.E.2d 49, 1987 Ga. LEXIS 995 (1987).

Applies to action on theory of strict liability. — There is no reason to differentiate between actions for personal injuries brought under a theory of strict liability as opposed to negligence for purposes of applying O.C.G.A. § 9-3-33. Since O.C.G.A. § 51-1-11(b) must be strictly construed, the 1978 amendment thereof, which provides that strict product liability actions must be brought within ten years from sale or use, was not intended to preclude the application of a general statute of limitations, such as § 9-3-33, which would otherwise apply, or to suggest that no general statute of limitations applied to strict products liability actions under § 51-1-11(b) prior to the 1978 amendment. Daniel v. American Optical Corp., 251 Ga. 166, 304 S.E.2d 383, 1983 Ga. LEXIS 759 (1983).

Time of discovery of injury caused by intrauterine device. — In an action

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brought against the manufacturer of an intrauterine device by a user for personal injuries sustained, a genuine issue of material fact existed as to when the user knew or with reasonable diligence should have discovered the causal relationship between her injuries and the manufacturer's alleged misconduct, so a federal district court erred in granting summary judgment for the manufacturer on the ground that the action was barred by O.C.G.A. § 9-3-33. Ballew v. A.H. Robins Co., 688 F.2d 1325, 1982 U.S. App. LEXIS 26068 (11th Cir. 1982).

Recording of telephone conversations. — Two-year statute of limitations applicable to injuries to the person, rather than four-year limitation applicable to property damage, is applied to cause of action for invasion of privacy arising out of recordings of telephone conversations. Jones v. Hudgins, 163 Ga. App. 793, 295 S.E.2d 119, 1982 Ga. App. LEXIS 2652 (1982).

Medical expenses constitute damage flowing from personal injury, and are thus subject to the two-year limitation period for personal injury claims set forth in O.C.G.A. § 9-3-33; to hold otherwise would enable litigants to circumvent the limitation period for personal injuries by declaring that the damages being sought constituted property claims. Epps v. Hin, 255 Ga. App. 370, 565 S.E.2d 577, 2002 Ga. App. LEXIS 631 (2002).

Intentional termination of life support a wrongful death claim, not a malpractice claim. — Trial court properly refused to dismiss a plaintiff's claim asserting tortious termination of life support based on the defendant's argument that it was really a medical malpractice claim and, therefore, required an expert medical affidavit under O.C.G.A. § 9-11-9.1; because such a claim is a suit for wrongful death, not medical malpractice, no expert medical affidavit was necessary. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823, 2007 Ga. App. LEXIS 1269 (2007), cert. denied, No. S08C0710, 2008 Ga. LEXIS 477 (Ga. May 19, 2008), overruled in part, Harrison v. McAfee, 338 Ga. App. 393, 788 S.E.2d 872, 2016 Ga. App. LEXIS 417 (2016).

Because the four-year time limit does not apply to loss of consortium claims arising out of medical malpractice, and the plaintiffs only have two years in which to file the plaintiffs' claims for loss of consortium arising out of medical malpractice, the spouse's loss of consortium claim was time barred as the claim was filed more than two years after the patient's injury. Beamon v. Mahadevan, 329 Ga. App. 685, 766 S.E.2d 98, 2014 Ga. App. LEXIS 763 (2014).

Dental malpractice. — Trial court erred by granting a dentist summary judgment in a dental malpractice suit as being filed outside the two-year limitations period because the court erred by ruling that the patient's consultation with an oral surgeon working with the dentist ended the tolling caused by the dentist's fraudulent concealment of the cause of action. MacDowell v. Gallant, 323 Ga. App. 61, 744 S.E.2d 836, 2013 Ga. App. LEXIS 502 (2013), aff'd, 295 Ga. 329, 759 S.E.2d 818, 2014 Ga. LEXIS 490 (2014).

Sexual abuse by priest. — In a case in which the plaintiff allegedly suffered childhood sexual abuse while serving as an altar boy, the trial court did not err in dismissing the plaintiff's respondeat-superior claim because the suppression of information about whether the defendants knew the abusive priest was dangerous in the 1970s could not have hindered an attempt to hold the defendants vicariously liable for the priest's conduct once the plaintiff reached the age of majority in the 1980s. Doe v. St. Joseph's Catholic Church, 313 Ga. 558, 870 S.E.2d 365, 2022 Ga. LEXIS 59 (2022).

In a sexual abuse by a priest case, the plaintiff's negligent supervision, training, and retention, negligent failure to warn and provide adequate security, breach of fiduciary duty, and fraudulent misrepresentation and concealment claims were improperly dismissed as the plaintiff adequately pled actual fraud for purposes of tolling as the plaintiff could possibly establish the existence of a confidential relationship between the plaintiff and the defendants, and that the defendants' alleged fraudulent concealment about the abusive priest debarred or deterred the plaintiff from discovering the plaintiff's

causes of action; and the plaintiff could show that the plaintiff exercised reasonable diligence to discover the defendants' fraud. Doe v. St. Joseph's Catholic Church, 313 Ga. 558, 870 S.E.2d 365, 2022 Ga. LEXIS 59 (2022).

Injuries to Reputation

Actions for injuries to reputation must be brought within one year from date of alleged defamatory acts, regardless of whether or not the plaintiff had knowledge of act or acts at the time of their occurrence. Davis v. Hospital Auth., 154 Ga. App. 654, 269 S.E.2d 867, 1980 Ga. App. LEXIS 2328 (1980); Jacobs v. Shaw, 219 Ga. App. 425, 465 S.E.2d 460, 1995 Ga. App. LEXIS 1048 (1995), overruled in part, Infinite Energy, Inc. v. Pardue, 310 Ga. App. 355, 713 S.E.2d 456, 2011 Ga. App. LEXIS 570 (2011); Lively v. McDaniel, 240 Ga. App. 132, 522 S.E.2d 711.

Since actions for injuries to the reputation must be brought within one year from the date of the alleged defamation, regardless of whether or not the plaintiff had knowledge of the act at the time of its occurrence, summary judgment was correctly granted against the plaintiff when the complaint was not filed until more than one year after the incident. Brewer v. Schacht, 235 Ga. App. 313, 509 S.E.2d 378.

Conspiracy to defame action against a police officer was properly dismissed on statute of limitations grounds as: (1) under O.C.G.A. § 51-5-3, a libel was published as soon as it was communicated, and the claim accrued no later than the date of the officer's last communication with the newspaper defendants; (2) there was no evidence that the officer directed or procured the reporters to record and publish the officer's comments; (3) under O.C.G.A. § 9-3-33, a party had one year from the date that a slanderous statement was uttered or published to bring suit; (4) case law did not support the teenager's claim that the limitation period for conspiracy to defame ran from the date of the publication of the articles; and (5) an invasion of privacy claim was not an injury to the teenager's person and was not subject to the two-year limitation period in O.C.G.A. § 9-3-33 since the interest protected was clearly that of reputation. Torrance v. Morris Publ'g Group, LLC, 281 Ga. App. 563, 636 S.E.2d 740, 2006 Ga. App. LEXIS 1172 (2006), cert. denied, No. S07C0213, 2007 Ga. LEXIS 160 (Ga. Feb. 5, 2007).

Trial court did not err in entering judgment in favor of a company on a debtor's libel claim because the debtor's claim was untimely under O.C.G.A. § 9-3-33; the debtor's libel claim was based upon the company's allegations in a deficiency claim against the debtor, which was filed in January 2007, and the company's subsequent failure to dismiss the claim after the debt was discharged in bankruptcy in March 2008, and the debtor first asserted the claim in September 2009. Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878, 2011 Ga. App. LEXIS 32 (2011).

Many of the defendant's social media posts were not actionable as some were only opinions or subjective assessments as to which reasonable minds could differ, rather than statements of fact that could be proven false; and O.C.G.A. § 9-3-33 barred any claim for libel based on posts published more than one year before the plaintiffs filed their action. N. Atlanta Golf Operations, LLC v. Ward, 363 Ga. App. 259, 870 S.E.2d 814, 2022 Ga. App. LEXIS 148 (2022).

Day of receipt, not day of writing, controls. — Action for defamation occurred when a letter containing allegedly defamatory statements was received, not when the letter was written. Clark v. Clark, 969 F. Supp. 1319, 1997 U.S. Dist. LEXIS 9410 (S.D. Ga. 1997).

Claim for slander or conspiracy to slander, whether for personal damage or damage to a business reputation, remained a claim for injury to reputation, subject to the one-year statute of limitation. Barnwell v. Barnett & Co., 222 Ga. App. 694, 476 S.E.2d 1.

Accrual of right. — As to allegation of public disclosure resulting in injury to reputation, right of action for injury to reputation accrues when act by which reputation is injured occurs. Jones v. Hudgins, 163 Ga. App. 793, 295 S.E.2d 119, 1982 Ga. App. LEXIS 2652 (1982).

Injuries to Reputation (Cont'd)

Claims for slander, libel, and conspiracy to libel and slander involve injuries to the reputation, not injuries to the person, and are subject to the one-year statute of limitation. Lee v. Gore, 221 Ga. App. 632, 472 S.E.2d 164.

One asphalt testing company was entitled to summary judgment as to a defamation claim because the claim was barred by the limitations period of O.C.G.A. § 9-3-33 and the characterization of the claim as one for "injurious falsehood" was not a viable claim in that plaintiffs failed to plead special damages. Douglas Asphalt Co. v. Qore, Inc., No. CV206-229, 2009 U.S. Dist. LEXIS 11002 (S.D. Ga. Feb. 13, 2009), aff'd in part, 657 F.3d 1146, 2011 U.S. App. LEXIS 19266 (11th Cir. 2011).

Admissibility of statements otherwise not actionable as defamation. — In an action by a former employee against an employer for defamation and invasion of privacy, statements made more than one year before suit was filed were not actionable as defamation, but the statements might be admissible to explain the underlying circumstances and defamatory nature of an announcement of plaintiff's termination made less than one year before the suit. Zielinski v. Clorox Co., 215 Ga. App. 97, 450 S.E.2d 222, 1994 Ga. App. LEXIS 1126 (1994), cert. denied, No. S95C0360, 1995 Ga. LEXIS 299 (Ga. Feb. 20, 1995).

Wrongful dishonor of checks. — Action for wrongful dishonor of checks sounds in tort, and the statute of limitations for a wrongful dishonor claim would certainly be no greater than two years and quite possibly no greater than one year. Associated Writers Guild of Am., Inc. v. First Nat'l Bank, 195 Ga. App. 820, 395 S.E.2d 23, 1990 Ga. App. LEXIS 698 (1990).

Ignorance of commission of libel will not toll this section. Irvin v. Bentley, 18 Ga. App. 662, 90 S.E. 359, 1916 Ga. App. LEXIS 1178 (1916).

Claim for defamation barred. — Former employee's defamation claim was barred by the statute of limitations because the claim was filed more than one year after the challenged action occurred. Garcia v. Shaw Indus., Inc., 321 Ga. App. 48, 741 S.E.2d 285, 2013 Ga. App. LEXIS 337 (2013).

Debtor's claim for reputation damages resulting from a wrongful foreclosure was time barred because the claim was brought more than one year after the date of the foreclosure and, even if an allegedly evasive answer by the lender's counsel was enough to warrant an equitable tolling, it was not enough to resurrect a limitations period that had already run. McDaniel v. SunTrust Bank (In re McDaniel), 523 B.R. 895, 2014 Bankr. LEXIS 5111 (Bankr. M.D. Ga. 2014).

Loss of Consortium

Four year limitation for claims for loss of consortium is an exception, and additional claims not specifically excepted in this section are not excepted by virtue of having been brought in conjunction with an excepted claim. Central of Ga. Ry. v. Harbin, 132 Ga. App. 65, 207 S.E.2d 597, 1974 Ga. App. LEXIS 1601 (1974).

Claim for loss of consortium does not extend the period during which damages may be asserted for physical injuries to the person. Branton v. Draper Corp., 185 Ga. App. 820, 366 S.E.2d 206, 1988 Ga. App. LEXIS 51 (1988).

Statute of limitations and loss of consortium claim. — Trial court erred in granting the defendant's motion for summary judgment on the loss of consortium claims based on expiration of the statute of limitation, when the statute of limitation had not yet expired on the plaintiffs' loss of consortium claims. Babb v. Cook, 203 Ga. App. 437, 417 S.E.2d 63, 1992 Ga. App. LEXIS 444 (1992), overruled, Farrie v. McCall, 256 Ga. App. 446, 568 S.E.2d 603, 2002 Ga. App. LEXIS 926 (2002), overruled in part, Giles v. State Farm Mut. Ins. Co., 330 Ga. App. 314, 765 S.E.2d 413, 2014 Ga. App. LEXIS 717 (2014).

Running of the statute of limitations period for a personal injury claim does not bar a derivative loss of consortium claim. Whitten v. Richards, 240 Ga. App. 719, 523 S.E.2d 906; Epps v. Hin, 255 Ga. App. 370, 565 S.E.2d 577, 2002 Ga. App. LEXIS 631 (2002).

Since the patient and husband did not plead a loss of consortium claim in their original complaint filed against the psychologist and clinic, and since the statute of limitation for that cause of action had expired by the time the patient's and husband's refiled complaint was filed, the loss of consortium claim was time barred. Blier v. Greene, 263 Ga. App. 35, 587 S.E.2d 190, 2003 Ga. App. LEXIS 1009 (2003), cert. denied, No. S04C0114, 2004 Ga. LEXIS 102 (Ga. Jan. 20, 2004), cert. denied, No. S04C0106, 2004 Ga. LEXIS 103 (Ga. Jan. 20, 2004).

Because a husband and wife failed to show what efforts they took in exercising due diligence in serving a driver close to the running of the relevant statute of limitations under O.C.G.A. § 9-3-33, their personal injury claim was properly dismissed, but the wife's loss of consortium claim survived. Parker v. Silviano, 284 Ga. App. 278, 643 S.E.2d 819, 2007 Ga. App. LEXIS 308 (2007).

Running of Limitations

Appointment of a temporary administrator.— Appointment of a temporary administrator did not result in the representation of the estate for purposes of tolling; consequently, the statute of limitation as to the estate claims remained tolled from the mother's death until the administrator was named the permanent administrator, less than two years before the current action. Somani v. Cannon, 363 Ga. App. 610, 872 S.E.2d 9, 2022 Ga. App. LEXIS 182 (2022).

Section runs from accrual of right of action. — Point from which statute of limitations began to run under former Code 1933, § 3-1004, (see now O.C.G.A. § 9-3-33) was when right of action accrued, not when the act or omission occurred, as would be the case under Ga. L. 1976, p. 1363, § 1 (see now O.C.G.A. § 9-3-71). Simons v. Conn, 151 Ga. App. 525, 260 S.E.2d 402, 1979 Ga. App. LEXIS 2621 (1979), superseded by statute as stated in Hart v. Eldridge, 158 Ga. App. 834, 282 S.E.2d 369, 1981 Ga. App. LEXIS 2436 (1981).

Test to be applied in determining when the statute of limitations begins to run against an action sounding in tort is in whether the act causing the damage is in and of itself an invasion of some right of the plaintiff, and thus constitutes a legal injury and gives rise to a cause of action. If the act is of itself not unlawful in this sense, and a recovery is sought only on account of damage subsequently accruing from and consequent upon the act, the cause of action accrues and the statute begins to run only when the damage is sustained; but if the act causing such subsequent damage is of itself unlawful in the sense that it constitutes a legal injury to the plaintiff, and is thus a completed wrong, the cause of action accrues and the statute begins to run from the time the act is committed, however slight the actual damage then may be. Fox v. Ravinia Club, Inc., 202 Ga. App. 260, 414 S.E.2d 243, 1991 Ga. App. LEXIS 1741 (1991), cert. denied, No. S92C0426, 1992 Ga. LEXIS 91 (Ga. Feb. 4, 1992).

Plaintiff's claims for personal injuries were in excess of two years old and therefore barred by O.C.G.A. § 9-3-33. Although the plaintiff cannot specify when the medical condition appeared, the plaintiff possessed sufficient information during the pendency of the two prior cases to have notice of the claim for personal injury asserted in this action. Newton v. Southern Wood Piedmont Co., 163 F.R.D. 625, 1995 U.S. Dist. LEXIS 14552 (S.D. Ga. 1995), aff'd, 95 F.3d 59, 1996 U.S. App. LEXIS 20147 (11th Cir. 1996).

Businessman's Bivens action against a former Drug Enforcement Agency (DEA) researcher, in which the business alleged a violation of rights under U.S. Const., amend. 4 and 5 rights, was time barred under O.C.G.A. § 9-3-33 because the businessman's suit was filed more than two years after the researcher was indicted for leaking DEA records about the businessman to a newspaper; in accordance with the federal discovery rule, the claims accrued when the indictment issued, as the indictment, coupled with information that the businessman already possessed about the researcher's involvement, gave the businessman constructive knowledge of the researcher's involvement. Ashcroft v. Randel, 391 F. Supp. 2d 1214, 2005 U.S. Dist. LEXIS 22712 (N.D. Ga. 2005).

In an inmate's 42 U.S.C. § 1983 suit asserting violations of the inmate's U.S.

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Const., amend. 1 rights due to the withholding of some of the inmate's mail, the prison employees, on the basis of the two-year limitations period in O.C.G.A. § 9-3-33, were entitled to summary judgment as to those claims that were based on incidents that occurred more than two years before the inmate filed suit; the prison employees' content-based denial of publications that were sent to the inmate constituted discrete acts that triggered the limitations period at the time each act occurred, rather than constituting a continuing violation. Daker v. Ferrero, 506 F. Supp. 2d 1295, 2007 U.S. Dist. LEXIS 62668 (N.D. Ga. 2007).

Content-based denial of a publication to an inmate and the failure to provide an adequate post-denial procedure are both discrete acts that trigger the two-year limitations period in O.C.G.A. § 9-3-33 with regard to the inmate's 42 U.S.C. § 1983 claims. Daker v. Ferrero, 506 F. Supp. 2d 1295, 2007 U.S. Dist. LEXIS 62668 (N.D. Ga. 2007).

All of a former public employee's 42 U.S.C. § 1983 federal claims were barred by the two-year statute of limitations, under O.C.G.A. § 9-3-33 because: (1) to the extent that the employee raised a substantive due process claim based on a property interest in continued employment with the employer, the employee knew of all of the relevant facts as to that claim when the employee resigned on March 5, 2007; (2) as to the employee's claims that the employee's reputation was damaged in violation of the employee's due process rights and that the employee was entitled to a name clearing hearing, the employee was aware of all of the relevant facts, at the latest, on January 25, 2008, by which time the employee knew of the termination letter and disciplinary action recommendation form; (3) the employee's argument that the employee was unaware that the employee was actually terminated until 2009 was without merit because the employee resigned in lieu of termination; and (4) the employee's constructive discharge claim was untimely because the employee was aware of the circumstances surrounding the employee's resignation as of March 5, 2007, the date that the employee resigned. Bell v. Metro. Atlanta RTA, 521 Fed. Appx. 862, 2013 U.S. App. LEXIS 11584 (11th Cir. 2013).

Changes made in 2013 were not substantial changes to Georgia's execution protocol and the defendant's method-of-execution claim accrued in October 2001 and must have been filed by October 2003 to be timely; the defendant's federal complaint challenging lethal injection, filed on May 12, 2017, was over ten years too late. Ledford v. Comm'r, Ga. Dep't of Corr., 856 F.3d 1312, 2017 U.S. App. LEXIS 8554 (11th Cir. 2017).

No tolling despite handicapped and disabled plaintiffs. — Summary judgment was properly granted to the superintendent of schools in a case brought by the parents of handicapped and disabled children allegedly sexually molested by a special education teacher because the statute of limitations provided for in O.C.G.A. § 9-3-33 had expired as parents, as next friends for the children, had filed suit on a specific date against the school district and such date barred the subsequent, later filing of a complaint against the superintendent after the statute of limitations period had expired. Harper v. Patterson, 270 Ga. App. 437, 606 S.E.2d 887, 2004 Ga. App. LEXIS 1500 (2004), cert. denied, No. S05C0551, 2005 Ga. LEXIS 275 (Ga. Mar. 28, 2005).

Using mental incapacity to toll statute of limitations. — In an arrestee's suit alleging state tort claims and a federal claim of deliberate indifference to constitutional rights, it was error to dismiss the complaint as untimely because the arrestee's allegation of mental incapacity under the tolling provisions was sufficient to withstand a motion to dismiss on statute-of-limitations grounds since the arrestee's allegation that, when the arrestee was released from jail, the arrestee was of such unsound mind that the arrestee was unable to carry on the arrestee's ordinary life affairs was sufficient. Meyer v. Gwinnett County, 636 Fed. Appx. 487, 2016 U.S. App. LEXIS 253 (11th Cir. 2016).

Notice to a municipality. — Trial court erred by dismissing an arrestee's

suit against a city alleging false arrest and other claims as being time-barred for not being filed within the two-year limitation period established in O.C.G.A. § 9-3-33, because the arrestee established that the arrestee had provided a timely ante litem notice, pursuant to O.C.G.A. § 36-33-5(b), to the city and had properly included evidence of the notice in the record as an exhibit to the appellate brief. Simon v. City of Atlanta, 287 Ga. App. 119, 650 S.E.2d 783, 2007 Ga. App. LEXIS 895 (2007).

Fraudulent concealment. — Claim for fraudulent concealment had to be asserted within two years of October 2002 in order to not be barred by the two-year statute of limitations in O.C.G.A. § 9-3-33. Therefore, since the concealment claim was not asserted until a January 2005 due process hearing request was filed, then the concealment claim was time-barred, and the school board's motion to dismiss was properly granted. DeKalb County Sch. Dist. v. J.W.M., 445 F. Supp. 2d 1371, 2006 U.S. Dist. LEXIS 58912 (N.D. Ga. 2006).

When could plaintiff maintain action to successful result. — When question is raised as to whether action is barred by statute of limitations, true test to determine when cause of action accrued is to ascertain time when the plaintiff could first have maintained action to a successful result. Cheney v. Syntex Labs., Inc., 277 F. Supp. 386, 1967 U.S. Dist. LEXIS 7473 (N.D. Ga. 1967).

True test to determine when cause of action has accrued is to ascertain time when the plaintiff could first maintain an action to a successful result. Crawford v. McDonald, 125 Ga. App. 289, 187 S.E.2d 542, 1972 Ga. App. LEXIS 1301 (1972); Cleveland Lumber Co. v. Proctor & Schwartz, Inc., 397 F. Supp. 1088, 1975 U.S. Dist. LEXIS 14052 (N.D. Ga. 1975).

If act causing subsequent damage is of itself unlawful, in sense that it constitutes legal injury to the plaintiff and is thus a completed wrong, a cause of action accrues and the statute begins to run from the time act is committed, however slight the actual damage then may be. Barrett v. Jackson, 44 Ga. App. 611, 162 S.E. 308, 1932 Ga. App. LEXIS 422 (1932); Fraser v. Atlanta Title & Trust Co., 66 Ga. App. 630, 19 S.E.2d 38, 1942 Ga. App. LEXIS 254 (1942).

Test to be applied in determining when statute of limitations begins to run against an action sounding in tort is whether an act causing damage is in and of itself an invasion of some right of the plaintiff, and thus constitutes legal injury and gives rise to the cause of action. Barrett v. Jackson, 44 Ga. App. 611, 162 S.E. 308, 1932 Ga. App. LEXIS 422 (1932); Fraser v. Atlanta Title & Trust Co., 66 Ga. App. 630, 19 S.E.2d 38, 1942 Ga. App. LEXIS 254 (1942).

If act is of itself not unlawful, and recovery is sought only on account of damage subsequently accruing from and consequent upon such act, a cause of action accrues and the statute begins to run only when damage is sustained. Barrett v. Jackson, 44 Ga. App. 611, 162 S.E. 308, 1932 Ga. App. LEXIS 422 (1932); Fraser v. Atlanta Title & Trust Co., 66 Ga. App. 630, 19 S.E.2d 38, 1942 Ga. App. LEXIS 254 (1942).

Running of statute from date of tortious conduct. — Statute of limitation begins to run on date of tortious conduct, and continues to run until its running effects a bar to any action based upon that misconduct. Rakestraw v. Berenson, 153 Ga. App. 513, 266 S.E.2d 249, 1980 Ga. App. LEXIS 1875 (1980).

Statute of limitations for challenge to Georgia Sex Offender Registry Act. — In an action challenging the respondents' continued enforcement of the Georgia Sex Offender Registry Act, O.C.G.A. § 42-1-12 et seq., the court held that the two-year limitation period under O.C.G.A. § 9-3-33 for personal injury claims applied to claims for violations of the federal constitution involving injuries to individual rights and because the petition sought a determination only as to whether the petitioner was required to comply with the Act in the future, the causes of action had not yet accrued and were not time-barred. Gardei v. Conway, 313 Ga. 132, 868 S.E.2d 775, 2022 Ga. LEXIS 15 (2022).

In tort claim, failure to timely serve did not require dismissal with prejudice. — In a personal injury case arising from a car wreck, the trial court erred by

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dismissing the plaintiff's complaint with prejudice for failure to timely serve the defendant because dismissal for insufficiency of service of process was a finding by the trial court that service was not perfected in a reasonable and diligent manner within the prescribed statute of limitation but not a ruling that plaintiff's action was, in fact, barred by the running of the statute of limitation. Griffin v. Stewart, 362 Ga. App. 669, 870 S.E.2d 3, 2022 Ga. App. LEXIS 85 (2022).

Running of period in tort claim. — Trial court did not err in granting defendants' motions for summary judgment on the tort claim; the appellant testified in deposition that the last occurrence of the alleged sexual abuse was on April 30, 1990, and the suit was filed November 3, 1992; this suit was not brought within two years after the cause of action accrued. Long v. Marino, 212 Ga. App. 113, 441 S.E.2d 475, 1994 Ga. App. LEXIS 136 (1994).

Tort claims against a church and conference arising out of a sexual relationship between the plaintiff and a minister were time barred because the claims against the minister were not filed until three years after the minister left the church and there was insufficient evidence of the plaintiff's incompetency to toll the running of the statute. Alpharetta First United Methodist Church v. Stewart, 221 Ga. App. 748, 472 S.E.2d 532.

Because a customer did not file a 42 U.S.C. § 1981 racial discrimination claim against the restaurant owner until over three years after the incident, the claims asserted in an individual capacity were time-barred by O.C.G.A. § 9-3-33. Higginbotham v. E.H., Inc., No. CV204-208, 2005 U.S. Dist. LEXIS 35181 (S.D. Ga. Oct. 20, 2005).

Because the two-year statute of limitations under either O.C.G.A. § 9-3-33, the personal injury statute, or O.C.G.A. § 9-3-71, the medical malpractice statute, ran on the claims of negligence asserted by the plaintiffs against a veterinarian based on the death of the plaintiffs' pet kitten, the trial court properly granted the veterinarian's motion for summary judgment as to those claims. Langley v. Shannon, 278 Ga. App. 173, 628 S.E.2d 608, 2006 Ga. App. LEXIS 271 (2006).

Trial court's denial of summary judgment to a hotel limited liability corporation (LLC) in a personal injury action by an injured patron was error, as the action was originally brought against a different entity, the patron attempted to add the LLC and then dismissed that action and brought a new action after expiration of the limitations period under O.C.G.A. § 9-3-33 against the LLC based on the renewal statute pursuant to O.C.G.A. § 9-2-61, but the patron never sought or obtained court permission to add the LLC as a party, as required by O.C.G.A. §§ 9-11-15(a) and 9-11-21; as the amendment to add the LLC was more than a correction of a misnomer because the two named defendants were separate entities, O.C.G.A. § 9-11-10(a) was inapplicable and leave of court was required in order to add the LLC. Valdosta Hotel Props., LLC v. White, 278 Ga. App. 206, 628 S.E.2d 642, 2006 Ga. App. LEXIS 289 (2006), cert. denied, No. S06C1296, 2006 Ga. LEXIS 425 (Ga. June 12, 2006).

Trial court's dismissal of a driver's negligence lawsuit filed against an insured's insurer did not deprive the driver of any Seventh Amendment right to a jury trial or right of access to the courts under Ga. Const. 1983, Art. I, Sec. I, Para. XII, given that the Seventh Amendment did not apply to suits in state courts and Ga. Const. 1983, Art. I, Sec. I, Para. XII dealt with a litigant's choice of either self-representation or representation by counsel, not access to the courts; however, the driver's action was properly dismissed as time-barred under O.C.G.A. § 9-3-33. Crane v. Lazaro, 281 Ga. App. 127, 635 S.E.2d 319, 2006 Ga. App. LEXIS 946 (2006), cert. denied, No. S07C0006, 2006 Ga. LEXIS 907 (Ga. Oct. 30, 2006), cert. dismissed, 549 U.S. 1200, 127 S. Ct. 1278, 167 L. Ed. 2d 69, 2007 U.S. LEXIS 1335 (2007).

Because a personal injury plaintiff failed to file an action against an uninsured/underinsured motorist insurer within the applicable statutory period, and the action was not subject to renewal, as the magistrate court's determined that service was made by an unauthorized per-

son, thus rendering the original action void, the insurer was entitled to dismissal. Lewis v. Waller, 282 Ga. App. 8, 637 S.E.2d 505, 2006 Ga. App. LEXIS 1288 (2006).

Child's tort claims against a parent for alleged child abuse were time-barred by O.C.G.A. § 9-3-33; a continuing tort theory did not apply to the child's post-traumatic stress disorder claim because even if the child had not discovered the full impact of the alleged harm until nearly 27 years after the injury, the child's exposure to the alleged acts ceased over two years before the child filed suit. Kirkland v. Kirkland, 285 Ga. App. 238, 645 S.E.2d 626, 2007 Ga. App. LEXIS 438 (2007), cert. denied, No. S07C1385, 2007 Ga. LEXIS 646 (Ga. Sept. 10, 2007), cert. denied, 552 U.S. 1312, 128 S. Ct. 1898, 170 L. Ed. 2d 749, 2008 U.S. LEXIS 3112 (2008); 552 U.S. 1312, 128 S. Ct. 1898, 170 L. Ed. 2d 749 (2008).

In a personal injury suit arising from the slip and fall by the injured party, because the trial court dismissed the injured party's first action as void for failure to perfect service, the second action could not amount to a renewal action under O.C.G.A. § 9-2-61(a); further, given that the second complaint disclosed on its face that the action was time-barred, it was correctly dismissed pursuant to O.C.G.A. § 9-3-33. Baxley v. Baldwin, 287 Ga. App. 245, 651 S.E.2d 172, 2007 Ga. App. LEXIS 923 (2007).

Because the plaintiff father's claims for false arrest, false imprisonment, and malicious prosecution against the defendants, his ex-wife and her new husband, were filed nearly 20 years after the arrest, those claims were time-barred under O.C.G.A. § 9-3-33 since there was no explanation of why the claims could not have been brought sooner. Brown v. Lewis, 361 Fed. Appx. 51, 2010 U.S. App. LEXIS 744 (11th Cir.), cert. denied, 561 U.S. 1027, 130 S. Ct. 3521, 177 L. Ed. 2d 1094, 2010 U.S. LEXIS 5442 (2010).

In this product liability action, genuine issues of material fact existed as to when several plaintiffs' product liability claims accrued since: (1) there was evidence that one plaintiff did not suspect that the plaintiff's suburethral sling might be defective until the summer of 2007, when the plaintiff's husband read an article about product liability lawsuits regarding the defendant; and (2) a reasonable fact finder could conclude that a second plaintiff did not suspect that the sling might be defective until after the January 2007 excision, when a doctor found an infection in the mesh and the doctor's physician assistant told the plaintiff that there was a problem with the sling. In re Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig., 711 F. Supp. 2d 1348, 2010 U.S. Dist. LEXIS 39672 (M.D. Ga. 2010).

Court of appeals affirmed a district court's judgment dismissing an action which an arrestee filed, pursuant to 42 U.S.C. § 1983, against a police officer and others because the action was filed more than two years after the arrestee was allegedly injured while being arrested, and the claim was untimely under O.C.G.A. § 9-3-33. The court rejected the arrestee's claims that the arrestee's lawsuit was timely under Georgia's renewal statute, O.C.G.A. § 9-2-61(a), and Fed. R. Civ. P. 15(c) based on the filing of an earlier lawsuit against the same police officer and the defendants who were not named in this second lawsuit less than two years after the arrestee was arrested because the claims in the original lawsuit were dismissed on the merits. Oduok v. Phillips, 154 Fed. Appx. 878, 2005 U.S. App. LEXIS 24958 (11th Cir. 2005), cert. denied, 549 U.S. 849, 127 S. Ct. 114, 166 L. Ed. 2d 84, 2006 U.S. LEXIS 6633 (2006).

Former police officer's claims of negligence, intentional infliction of emotional distress, and due process violations arising from the officer's resignation were time-barred as the claims accrued more than two years before the officer filed suit. Flowers v. Fulton Cnty. Sch. Sys., 654 Fed. Appx. 396, 2016 U.S. App. LEXIS 10234 (11th Cir. 2016).

Plaintiff's contradictory testimony regarding accident date construed against plaintiff. — In a customer's claim against a satellite television provider alleging that the customer was injured when the customer tripped and fell on wires in the customer's home, the trial court erred in denying summary judg-

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ment because in the customer's deposition, the customer stated that the accident occurred in August 2015, more than two years before the customer filed suit. Although the customer's later affidavit contradicted this testimony and gave another date, the discrepancy was unexplained and therefore construed against the customer. DirecTV, LLC v. White, 355 Ga. App. 404, 844 S.E.2d 289, 2020 Ga. App. LEXIS 323 (2020), cert. denied, No. S20C1567, 2021 Ga. LEXIS 111 (Ga. Mar. 1, 2021).

Trial court did not err by dismissing the inmate's action against the court clerk based on the statute of limitations because more than two years before the inmate filed the complaint, the clerk had already updated the notice of the discharge order to the Georgia Crime Information Center. This was the latest time at which the inmate's purported tort action accrued because the inmate had long since been automatically discharged and could have maintained an action to a successful result, therefore, by the time the inmate raised the inmate's tort claims, the applicable two-year limitation period had lapsed. Seibert v. Alexander, 351 Ga. App. 446, 829 S.E.2d 473, 2019 Ga. App. LEXIS 440 (2019), cert. denied, No. S20C0017, 2020 Ga. LEXIS 323 (Ga. Apr. 6, 2020).

Running of period in malicious prosecution action. — Two-year period of limitations on a malicious prosecution action began to run when the magistrate dismissed the arrest warrant against the plaintiff. Waters v. Walton, 225 Ga. App. 119, 483 S.E.2d 133.

Former probationer did not timely file a malicious-prosecution claim alleging a wrongful arrest and detention for violation of probation after the probation had ended; the former probationer knew on the date of arrest that the probation already had been completed, and although favorable termination occurred only upon release from custody, the claim accrued on the date of arrest because a probation-revocation hearing is not a criminal prosecution for the purposes of a malicious-prosecution claim. Smith v. Mitchell, 856 Fed. Appx. 248, 2021 U.S. App. LEXIS 10021 (11th Cir. 2021).

Accrual of action at infliction of personal injury. — Right of action for tort accrues immediately upon infliction of injury. Dowling v. Lester, 74 Ga. App. 290, 39 S.E.2d 576, 1946 Ga. App. LEXIS 521 (1946).

With respect to personal injuries generally, right of action accrues to the plaintiff as of instant injuries are inflicted, and the statute of limitations begins to run from that instant. Burns v. Brickle, 106 Ga. App. 150, 126 S.E.2d 633, 1962 Ga. App. LEXIS 654 (1962).

Post-petition personal injury settlement. — Court was not in a position to deny either a request for the appointment of a debtor's attorney in a post-petition personal injury action or approval of a settlement because the statute of limitations under O.C.G.A. § 9-3-33 might prevent the debtor from bringing the case through another attorney; thus, if the settlement were not approved, the claim might be rendered worthless. In re Atkins, No. 01-40125-JDW, 2005 Bankr. LEXIS 3141 (Bankr. S.D. Ga. Dec. 23, 2005).

Extension of statute of limitations in 1985. — O.C.G.A. § 1-3-1(d)(3), as amended in 1985, governs O.C.G.A. § 9-3-33, thereby extending the statute of limitations for personal injury actions to two years and one day. Gardner v. Hyster Co., 785 F. Supp. 161, 1992 U.S. Dist. LEXIS 2146 (M.D. Ga. 1992).

When time elapses between commission of act and infliction of injury which first puts recipient on notice, the latter date will mark time from which statute of limitations runs. Piedmont Pharmacy, Inc. v. Patmore, 144 Ga. App. 160, 240 S.E.2d 888, 1977 Ga. App. LEXIS 2620 (1977).

Failure to exercise reasonable diligence in pursuing claims after discovery of personal injury. — In personal injury action when the plaintiffs suffered acute neurological symptoms shortly after the defendant treated their home for termites in 1977 and 1978, and they ultimately asked the defendant to cease applying the pesticides in 1978 and

expressed their dissatisfaction to the defendant by letter in 1978, stating that they were becoming ill as a result of the pest control treatments, so that it is evident that by 1978 the plaintiffs believed they were suffering adverse physical reactions as a result of the treatments, but did not undertake to investigate the situation further until the winter of 1981-1982, the trial court was authorized to conclude that even though the plaintiffs' personal injury claims were subject to the "discovery rule," the claims were barred as a result of their failure to exercise reasonable diligence in pursuing the claims. Boyd v. Orkin Exterminating Co., 191 Ga. App. 38, 381 S.E.2d 295, 1989 Ga. App. LEXIS 1426 (1989).

There was no abuse of discretion in granting the motion to dismiss the complaint because the victim failed to meet the victim's burden of proving that the victim exercised the greatest possible diligence in serving the individual with the complaint after the statute of limitations had run; the victim provided no explanation for the month-long delay in serving the individual after learning on January 11, 2002, that the individual worked and resided in Fort Worth, Texas. Neely v. Jones, 271 Ga. App. 487, 610 S.E.2d 133, 2005 Ga. App. LEXIS 88 (2005), overruled in part, Giles v. State Farm Mut. Ins. Co., 330 Ga. App. 314, 765 S.E.2d 413, 2014 Ga. App. LEXIS 717 (2014).

In a personal injury lawsuit, because, as a matter of law, an injured individual failed to carry the burden of showing that reasonable diligence was used in attempting to serve the complaint, the trial court abused he court'sdiscretion in denying a motion to dismiss the complaint; moreover, despite the individual's attempt to argue to the contrary, the applicable test was whether the plaintiff exercised due diligence, not whether the defendant suffered harm from the delay in service of process. Duffy v. Lyles, 281 Ga. App. 377, 636 S.E.2d 91, 2006 Ga. App. LEXIS 1108 (2006), overruled in part, Giles v. State Farm Mut. Ins. Co., 330 Ga. App. 314, 765 S.E.2d 413, 2014 Ga. App. LEXIS 717 (2014).

Accrual with occurrence of resultant damage. — On tort claim for personal injury, statute of limitations generally begins to run at time damage caused by tortious act occurs, at which time the tort is complete. Everhart v. Rich's, Inc., 229 Ga. 798, 194 S.E.2d 425, 1972 Ga. LEXIS 777 (1972).

Running of limitation from breach of duty. — In action for personal injuries based upon alleged negligence of the defendant, the statute of limitations commences to run from the breach of duty, not from the time when the extent of the resulting injury is ascertained. Brewer v. Southern Gas Corp., 90 Ga. App. 81, 82 S.E.2d 171, 1954 Ga. App. LEXIS 639 (1954); Lankford v. Trust Co. Bank, 141 Ga. App. 639, 234 S.E.2d 179, 1977 Ga. App. LEXIS 2028 (1977).

Right of action has inception from time there has been breach of duty; and this would entitle the party to file an action for breach, without regard to whether any actual damage had in fact resulted. Cheney v. Syntex Labs., Inc., 277 F. Supp. 386, 1967 U.S. Dist. LEXIS 7473 (N.D. Ga. 1967).

Cause of action has its inception at time there has been a breach of duty which entitles party to file action for the breach, without regard to whether any actual damage has in fact resulted. Cleveland Lumber Co. v. Proctor & Schwartz, Inc., 397 F. Supp. 1088, 1975 U.S. Dist. LEXIS 14052 (N.D. Ga. 1975).

Failure to serve complaint prior to expiration. — Trial court abused the court's discretion by denying the defendant's motion to dismiss given the plaintiff's complete failure to account for the three-month delay between filing the complaint and serving the defendant, during which the statute of limitations expired. UHS of Peachford v. Brady, 361 Ga. App. 290, 864 S.E.2d 129, 2021 Ga. App. LEXIS 474 (2021).

Accrual of wrongful death action at time of death. — In case of a wrongful death, action does not accrue until death occurs, even if death does not occur until many months or years after the tortious act which caused it. Burns v. Brickle, 106 Ga. App. 150, 126 S.E.2d 633, 1962 Ga. App. LEXIS 654 (1962).

Wrongful death medical malpractice suit was timely because it was filed exactly two years after the decedent's death.

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Kitchens v. Brusman, 280 Ga. App. 163, 633 S.E.2d 585, 2006 Ga. App. LEXIS 781 (2006).

Discovery rule inapplicable to wrongful death action. — "Discovery rule", which provides that the right of action does not "accrue" until the injured person discovers the cause of his or her injury, does not apply to a wrongful death action alleging a failure to warn. Miles v. Ashland Chem. Co., 261 Ga. 726, 410 S.E.2d 290, 1991 Ga. LEXIS 1009, modified, No. S91Q0739 (Ga. 1991).

Wrongful death claim for intentional termination of patient's life support tolled due to infancy of patient's child. — Two year statute of limitations for wrongful death applied to a suit alleging tortious termination of life support of a parent and that limitations period was tolled based on the infancy of the parent's child, who was born to the parent prior to the defendant terminating the parent's life support. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823, 2007 Ga. App. LEXIS 1269 (2007), cert. denied, No. S08C0710, 2008 Ga. LEXIS 477 (Ga. May 19, 2008), overruled in part, Harrison v. McAfee, 338 Ga. App. 393, 788 S.E.2d 872, 2016 Ga. App. LEXIS 417 (2016).

Accrual of cause for failure to warn. — Cause of action accrues for breach of duty owed to another, e.g., failure to warn of existence of hazard capable of producing injury, when exposure to the hazard first produces ascertainable injury; however, such failure is a continuing tort, and statute of limitations does not commence to run under these circumstances until such time as continued tortious act producing injury is eliminated, e.g., by appropriate warning in respect to the hazard. Everhart v. Rich's, Inc., 229 Ga. 798, 194 S.E.2d 425, 1972 Ga. LEXIS 777 (1972).

When failure to warn of possible adverse result is made basis of action, such failure is actionable and continuing until victim is warned, discovery is made, or the victim should in exercise of ordinary care have otherwise learned of it. Marbut v. P.P.G. Indus., Inc., 148 Ga. App. 721, 252 S.E.2d 628, 1979 Ga. App. LEXIS 1631 (1979).

Accrual of cause for malicious use of process. — Cause of action for malicious use of civil process does not accrue, and the statute of limitation under this section does not begin to run, until action on which process issued has been finally terminated in favor of the defendant. Securities Inv. Co. v. Bennett, 117 Ga. App. 415, 160 S.E.2d 602, 1968 Ga. App. LEXIS 1109 (1968).

Questions of law and fact distinguished. — If sole question is one as to length of time which has elapsed between accrual of right and institution of action, question as to whether action is barred is one of law. Cleveland Lumber Co. v. Proctor & Schwartz, Inc., 397 F. Supp. 1088, 1975 U.S. Dist. LEXIS 14052 (N.D. Ga. 1975).

Question solely as to length of time which has elapsed between accrual of right and institution of action, and hence as to whether action is barred, would be one of law; but when there are facts involving a continuing tort and excuses of delay in discovering injury, the question becomes one of mixed law and fact, and is a proper question for determination by a jury. Piedmont Pharmacy, Inc. v. Patmore, 144 Ga. App. 160, 240 S.E.2d 888, 1977 Ga. App. LEXIS 2620 (1977).

Plaintiff cannot extend limitation merely by suing for last of series of consequences at time when right of action for first consequence is barred. Cheney v. Syntex Labs., Inc., 277 F. Supp. 386, 1967 U.S. Dist. LEXIS 7473 (N.D. Ga. 1967).

Mere ignorance of facts constituting cause of action does not prevent running of statute of limitations. Barrett v. Jackson, 44 Ga. App. 611, 162 S.E. 308, 1932 Ga. App. LEXIS 422 (1932); Peacock v. Retail Credit Co., 302 F. Supp. 418, 1969 U.S. Dist. LEXIS 9860 (N.D. Ga. 1969), aff'd, 429 F.2d 31, 1970 U.S. App. LEXIS 8345 (5th Cir. 1970); Crawford v. McDonald, 125 Ga. App. 289, 187 S.E.2d 542, 1972 Ga. App. LEXIS 1301 (1972).

Statute may be tolled when ordinary care exercised. — When injury resulting from tortious act is not immedi-

ately apparent, statute of limitation is tolled so long as the victim could not, in exercise of ordinary care, have learned of it, and when the failure to warn of such possible result is made basis of action, such failure is actionable and continuing until the victim is warned, discovery is made, or the victim should in the exercise of ordinary care have otherwise learned of it. Forgay v. Tucker, 128 Ga. App. 497, 197 S.E.2d 492, 1973 Ga. App. LEXIS 1529 (1973).

When injury resulting from tortious act is not immediately apparent, the statute of limitation is tolled so long as the victim could not in exercise of ordinary care have learned of it. Piedmont Pharmacy, Inc. v. Patmore, 144 Ga. App. 160, 240 S.E.2d 888, 1977 Ga. App. LEXIS 2620 (1977); Simons v. Conn, 151 Ga. App. 525, 260 S.E.2d 402, 1979 Ga. App. LEXIS 2621 (1979), superseded by statute as stated in Hart v. Eldridge, 158 Ga. App. 834, 282 S.E.2d 369, 1981 Ga. App. LEXIS 2436 (1981).

Cause of action does not accrue and the statute of limitation does not run against a plaintiff until the plaintiff knew or through the exercise of reasonable diligence should have discovered not only the nature of the plaintiff's injury but also the causal connection between the injury and the alleged negligent conduct of the defendant. King v. Seitzingers, Inc., 160 Ga. App. 318, 287 S.E.2d 252, 1981 Ga. App. LEXIS 2977 (1981).

Trial court erred in holding that the two-year statute of limitations barred the plaintiff's personal injury action, since the evidence was insufficient to show that the plaintiff knew or had reason to know of the causal connection between the injury and the alleged negligent conduct of the defendants at the time the plaintiff filed an earlier workers' compensation claim alleging asbestosis. Welch v. Celotex Corp., 951 F.2d 1235, 1992 U.S. App. LEXIS 908 (11th Cir. 1992).

Continuing tort doctrine tolled running of the statute of limitations. — Tenant's action against the leasing agent of the tenant's apartment complex alleging that the tenant was injured over a period of almost three years by soot emitted from the apartment's heating system was not time-barred by O.C.G.A. § 9-3-33 because the continuing tort theory tolled the running of the statute of limitations to within two years before the action was filed; because there was evidence that the tenant's exposure to the hazard was not eliminated more than two years before the action was filed, the agent's motion for a directed verdict on that ground was properly denied. Ambling Mgmt. Co. v. Purdy, 283 Ga. App. 21, 640 S.E.2d 620, 2006 Ga. App. LEXIS 1478 (2006), cert. denied, No. S07C0621, 2007 Ga. LEXIS 265 (Ga. Mar. 26, 2007).

Plaintiff's attorney's emergency cancer surgery and the plaintiff's attorney's attempt at a timely filing by mail, lost by the postal service or the clerk, did not constitute excusable neglect which would operate to extend the statute of limitations. Lackey v. Crittenden, 217 Ga. App. 432, 457 S.E.2d 701, 1995 Ga. App. LEXIS 471 (1995).

Plaintiff must exercise reasonable diligence to learn of existence of cause of action. Crawford v. McDonald, 125 Ga. App. 289, 187 S.E.2d 542, 1972 Ga. App. LEXIS 1301 (1972).

Failure to exercise greatest possible diligence. — Although a personal injury litigant hired a "skip tracer," and received the report the next day, because that litigant neglected to attempt to move for an order for service by publication until almost two weeks later, and did not secure the order until over a month after that, and, there was no evidence of any contact between the litigant during the interim, the trial court did not err in finding that the litigant did not exercise the greatest possible diligence; moreover, a finding that the litigant exercised the requisite due diligence to authorize service by publication did not compel a finding that the litigant exercised the greatest possible diligence in serving the opposing party personally three months after the opposing party filed an answer, and nearly four months after the statute of limitation had run. Green v. Cimafranca, 288 Ga. App. 16, 653 S.E.2d 782, 2007 Ga. App. LEXIS 1132 (2007), overruled in part, Giles v. State Farm Mut. Ins. Co., 330 Ga. App. 314, 765 S.E.2d 413, 2014 Ga. App. LEXIS 717 (2014).

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Based on sufficient evidence that a resident stood idle for six months after learning of the difficulties in serving a nonresident, the resident's personal injury complaint was properly dismissed on grounds that the resident failed to exercise due diligence in effectuating service of process; hence, the statute of limitations under O.C.G.A. § 9-3-33 was not tolled. Livingston v. Taylor, 284 Ga. App. 638, 644 S.E.2d 483, 2007 Ga. App. LEXIS 368 (2007).

Plaintiff's lawsuit was properly dismissed as the plaintiff failed to exercise the greatest possible diligence in perfecting service as the statute of limitation ran on November 7, 2019, the defendant filed a pleading asserting a service defense on that date, and the defendant was not served until April 10, 2020; the plaintiff did not have a good explanation for why the plaintiff did not attempt to serve the defendant at a residence that a private-investigation company found until April 10, 2020, while service was attempted at three other addresses; and, when the statute of limitations expired and the defendant asserted a service defense, the plaintiff waited five months before attempting service at the one address that had not been tried. Fluellen v. Davis, 362 Ga. App. 512, 869 S.E.2d 169, 2022 Ga. App. LEXIS 61 (2022).

Fraud which would have been discovered if usual and reasonable diligence had been exercised is not a good reply to statute of limitations. Crawford v. McDonald, 125 Ga. App. 289, 187 S.E.2d 542, 1972 Ga. App. LEXIS 1301 (1972).

When fraud tolls statute. — In order for fraud to toll statute of limitations, it must have effect of deterring plaintiff from bringing action. Wolfe v. Virusky, 306 F. Supp. 519, 1969 U.S. Dist. LEXIS 8805 (S.D. Ga. 1969).

Fraud not alleged or cited in record. — Former psychiatric inmate's pro se complaint alleging civil rights and other violations was properly dismissed based on expiration of the two-year statute of limitation of O.C.G.A. § 9-3-33. Although the inmate claimed that the statute of limitations was tolled by fraud, the inmate did not allege fraud or cite to evidence of fraud in the record, and the inmate did not show the existence of a 20-year statute of limitations. White v. City of Atlanta Police Dep't, 289 Ga. App. 575, 657 S.E.2d 545, 2008 Ga. App. LEXIS 70 (2008).

Limitation period was not tolled throughout defendants' alleged absence from the state, when there was no showing that the defendants could not have been served with process pursuant to the long-arm statute. Towns v. Brown, 177 Ga. App. 504, 339 S.E.2d 926, 1986 Ga. App. LEXIS 1464 (1986).

Limitation period was not tolled throughout defendant's alleged absence from the state. Long v. Marino, 212 Ga. App. 113, 441 S.E.2d 475, 1994 Ga. App. LEXIS 136 (1994).

Limitation period was not tolled based on defendant's relocation outside the state when service was possible under the long-arm statute and service had been perfected in three actions brought by the plaintiff. Worley v. Pierce, 211 Ga. App. 863, 440 S.E.2d 749, 1994 Ga. App. LEXIS 96 (1994).

Limitation period not tolled because plaintiff failed to demonstrate diligence in attempting to obtain service. — Defendant's motion to dismiss the plaintiff's personal injury complaint should have been granted because service occurred after the two-year statute of limitations under O.C.G.A. § 9-3-33 expired, and the limitation period was not tolled because the record was devoid of evidence that the plaintiff made any attempt to personally serve the defendant for more than two years after the trial court's order granting the motion for service by publication; in the event that service occurred after the expiration of the statute of limitations, the limitation period under O.C.G.A. § 9-3-33 was tolled only if the plaintiff diligently attempted to make service. Dunn v. Kirsten, 273 Ga. App. 27, 614 S.E.2d 156, 2005 Ga. App. LEXIS 398 (2005), overruled in part, Cohen v. Allstate Ins. Co., 277 Ga. App. 437, 626 S.E.2d 628, 2006 Ga. App. LEXIS 121 (2006), but see Cohen v. Allstate Ins. Co., 277 Ga. App. 437, 626 S.E.2d 628, 2006 Ga. App. LEXIS 121 (2006), overruled in part, Ragan v.

Mallow, 319 Ga. App. 443, 744 S.E.2d 337, 2012 Ga. App. LEXIS 1061 (2012).

Settlement representation does not toll running of limitations. — Any representations by the defendant to the plaintiff that the defendant intended to settle the claim, resulting in the plaintiff not filing suit until after the running of the statute of limitations, would not, even if true, constitute such fraud as would toll the running of the statute. Drohan v. Carriage Carpet Mills, 175 Ga. App. 717, 334 S.E.2d 219, 1985 Ga. App. LEXIS 2148 (1985).

Settlement negotiations with insurer. — In an action arising from an automobile collision, the fact that the defendant's insurer led the plaintiff to believe through settlement negotiations that the plaintiff's claim would be paid without a suit, the defendant was not barred from asserting the statute of limitations as a defense. Howe v. Groover, 219 Ga. App. 112, 464 S.E.2d 240, 1995 Ga. App. LEXIS 966 (1995).

Doctrine of continuing tort tolls statute of limitations. Piedmont Pharmacy, Inc. v. Patmore, 144 Ga. App. 160, 240 S.E.2d 888, 1977 Ga. App. LEXIS 2620 (1977); Bitterman v. Emory Univ., 175 Ga. App. 348, 333 S.E.2d 378, 1985 Ga. App. LEXIS 2093 (1985).

Doctrine of continuing tort is directly analogous to tolling of statute of limitations because of fraud; in both instances, running of the statute is delayed until discovery of the injury, if the delay in discovery is not occasioned by failure of the plaintiff to exercise ordinary care as to continuing tort or reasonable diligence as to fraud. Piedmont Pharmacy, Inc. v. Patmore, 144 Ga. App. 160, 240 S.E.2d 888, 1977 Ga. App. LEXIS 2620 (1977).

Theory of continuing tort extends to those factual situations where any negligent or tortious act is of a continuing nature and produces injury in varying degrees over a period of time. Everhart v. Rich's, Inc., 229 Ga. 798, 194 S.E.2d 425, 1972 Ga. LEXIS 777 (1972).

In continuing tort, cause of action does not accrue so as to cause the statute of limitation to run until a plaintiff discovers or with reasonable diligence should have discovered that the plaintiff was injured. King v. Seitzingers, Inc., 160 Ga. App. 318, 287 S.E.2d 252, 1981 Ga. App. LEXIS 2977 (1981).

O.C.G.A § 9-3-33, under the continuous tort doctrine, did not bar a former inmate's negligence claim against two court clerks, based on their alleged failure to communicate the inmate's sentence to the Department of Corrections, as the clerks' violation of their continuing duty to communicate the inmate's sentence to the Department resulted in continuous injury in the form of an ever-increasing illegal confinement that was not eliminated until the inmate was released from prison; hence, the trial court erred in finding that the claim was time-barred. Hicks v. McGee, 283 Ga. App. 678, 642 S.E.2d 379, 2007 Ga. App. LEXIS 172 (2007), cert. denied, No. S07C0951, 2007 Ga. LEXIS 512 (Ga. June 25, 2007).

Continuing tort doctrine inapplicable. — Cause of action for intentional infliction of emotional distress, based on sexual harassment, accrued at the time the acts of harassment were committed, and the continuing tort doctrine was inapplicable since the plaintiff was fully aware of the tortious acts allegedly committed by the defendants and could have filed the plaintiff's suit within the two-year limitations period. Smith v. Tandy Corp., 738 F. Supp. 521, 1990 U.S. Dist. LEXIS 6622 (S.D. Ga. 1990).

Former Code 1933, §§ 3-801 and 3-802 (see now O.C.G.A. §§ 9-3-90 and 9-3-91), relating to disabilities, toll the running of limitations under former Code 1933, § 3-1004 (see now O.C.G.A. § 9-3-33). Lacy v. Ferrence, 222 Ga. 635, 151 S.E.2d 763, 1966 Ga. LEXIS 583 (1966).

Two-year statute of limitation tolled by workers' compensation proceeding. — When an employee instituted a proceeding pursuant to the Workers' Compensation Act for injuries sustained when a forklift turned over on the employee, and the employee's claim for workers' compensation benefits was successful initially and on appeal, but was reversed by the Court of Appeals, the two-year statute of limitation on the employee's personal injury action against the former

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employer was tolled for the period during which the employee pursued the employee's workers' compensation remedy. Butler v. Glen Oak's Turf, Inc., 196 Ga. App. 98, 395 S.E.2d 277, 1990 Ga. App. LEXIS 815 (1990).

Pendency of grievance procedure brought against professor by university was not a basis for tolling the one-year limitation period applicable to the professor's libel and slander action against individual employees of the university. Jahannes v. Mitchell, 220 Ga. App. 102, 469 S.E.2d 255.

Hospitalization or imprisonment. — Neither hospitalization nor appellant's subsequent imprisonment effected a tolling of the statute of limitations pursuant to O.C.G.A. §§ 9-3-90 and 9-3-91. Lawson v. Glover, 957 F.2d 801, 1987 U.S. App. LEXIS 15695 (11th Cir. 1987).

Fact that last day is Sunday will not prevent bar of this section from attaching. Brown v. Emerson Brick Co., 15 Ga. App. 332, 83 S.E. 160, 1914 Ga. App. LEXIS 95 (1914); Davis v. Hill, 113 Ga. App. 280, 147 S.E.2d 868, 1966 Ga. App. LEXIS 1037 (1966), overruled, Lowe v. Pue, 150 Ga. App. 234, 257 S.E.2d 209, 1979 Ga. App. LEXIS 2129 (1979).

Statute of limitations for personal injury claims is not extended by fact that last day for bringing suit falls on Saturday or Sunday. Kight v. Watts, 150 Ga. App. 694, 258 S.E.2d 323, 1979 Ga. App. LEXIS 2250 (1979).

Action timely filed in federal court. — Although fact that final day of limitation period fell on Sunday did not allow an extra day, receipt of complaint by deputy clerk of federal court in post office box in early morning hours on Saturday constituted sufficient filing of action prior to midnight of the following day, notwithstanding fact that clerk did not open box till Monday. Johansson v. Towson, 177 F. Supp. 729, 1959 U.S. Dist. LEXIS 3208 (M.D. Ga. 1959) (case based in part on Federal Rules of Civil Procedure).

Extension of limitations for cross-claims. — Ga. L. 1967, p. 226, § 37 (see now O.C.G.A. § 9-3-97), providing for extension of limitation period with respect to counterclaims and cross-claims until last day upon which answer or other defensive pleadings should have been filed, did not operate to extend period of limitation prescribed by former Code 1933, § 3-1004 (see now O.C.G.A. § 9-3-33), which was otherwise applicable to cross-claims. Champion v. Wells, 139 Ga. App. 759, 229 S.E.2d 479, 1976 Ga. App. LEXIS 1977 (1976).

Appointment of receiver for foreign corporation does not affect running of this section. Cain v. Seaboard Air-Line Ry., 138 Ga. 96, 74 S.E. 764, 1912 Ga. LEXIS 209 (1912).

Action for negligently causing arrest accrues at time of arrest. — Assuming, but without deciding, that a defendant may be liable for negligently causing the arrest of another, the court found that if such a cause of action existed against one who did not take out the warrant, but nevertheless caused the arrest of another, the statute of limitations commenced to run at the time of the arrest. Daniel v. Georgia R.R. Bank & Trust Co., 255 Ga. 29, 334 S.E.2d 659, 1985 Ga. LEXIS 848 (1985).

Running of limitation for injury claim does not bar loss of consortium claim. — When a suit for personal injuries is filed and the spouse joins in the suit demanding judgment for loss of consortium, even though the court later determines the plaintiffs have not been diligent in obtaining service upon the defendant following the running of the statute of limitations on the personal injury claim, it is error to dismiss the entire complaint when the statute of limitations does not bar the action for loss of consortium. Elwell v. Haney, 169 Ga. App. 481, 313 S.E.2d 499, 1984 Ga. App. LEXIS 1600 (1984).

Limitation period for actions based on loss of consortium is four years and the fact that the two-year limitation period may have run on the plaintiff's action for personal injuries due to lack of diligence in perfecting service was of no consequence with respect to the viability of the derivative action for loss of consortium. Huntington v. Fishman, 212 Ga. App. 27, 441 S.E.2d 444, 1994 Ga. App. LEXIS 123 (1994).

Deputy capacity's as deputy versus individual capacity. — Deputy in an

individual capacity was not substantially identical to the deputy in a capacity as deputy sheriff; thus, a passenger's action against the deputy in the capacity as deputy sheriff was barred by the statute of limitations. Soley v. Dodson, 256 Ga. App. 770, 569 S.E.2d 870, 2002 Ga. App. LEXIS 887 (2002), cert. denied, No. S02C1861, 2002 Ga. LEXIS 951 (Ga. Oct. 16, 2002).

Employee's claim against employer for intentional infliction of emotional distress was barred by the statute of limitations because the employee's alleged cause of action accrued when employee resigned from the employee's position more than two years earlier and thus ceased to suffer further damages. Adams v. Emory Univ. Clinic, 179 Ga. App. 620, 347 S.E.2d 670, 1986 Ga. App. LEXIS 2653 (1986).

Action for intentional infliction of emotional distress, tortious misconduct, and negligent hiring was barred when the last acts of harassment against the plaintiff occurred more than two years prior to the filing of the action. Risner v. R.L. Daniel & Assocs, P.C., 231 Ga. App. 750, 500 S.E.2d 634.

Plaintiff's claims of tortious conduct on the part of other employees were barred by O.C.G.A. § 9-3-33 since the plaintiff's complaint failed to describe incidents occurring during the period at issue that might give rise to a continuing tort violation. Williams v. Lear Operations Corp., 73 F. Supp. 2d 1377, 1999 U.S. Dist. LEXIS 17522 (N.D. Ga. 1999).

Former employer was granted summary judgment on a former employee's state law claim of intentional or negligent infliction of emotional distress because the final alleged injury that the employee sustained was a termination; however, the lawsuit was not filed until more than three years later, and thus the employee's state law claim against the employer was time barred under the two-year statute of limitations of O.C.G.A. § 9-3-33. Brown v. Seminole Marine, Inc., No. 6:03-cv-47, 2005 U.S. Dist. LEXIS 20797 (M.D. Ga. Sept. 9, 2005).

Relation back of assault and battery amendment to complaint. — Assault and battery claim added to plaintiff's medical malpractice complaint was not time barred since it could not be said that the alleged malpractice and alleged unauthorized touching involved in the operation arose from different facts and, therefore, the amendment related back to the original complaint. Smith v. Wilfong, 218 Ga. App. 503, 462 S.E.2d 163, 1995 Ga. App. LEXIS 763 (1995), cert. denied, No. S96C0039, 1995 Ga. LEXIS 1223 (Ga. Dec. 1, 1995).

Requirements of publication not met. — Trial court erred in holding that service by publication was sufficient to provide the defendant with fair notice of personal injury suit so as to confer the court with in personam jurisdiction as the complaint did not fall into an exception to in personam jurisdiction as the complaint acknowledged that the defendant departed from Ware County, Georgia, which led to the conclusion that Ware County was not the county of residence and the defendant was not within the court's jurisdiction. Henderson v. James, 350 Ga. App. 361, 829 S.E.2d 429, 2019 Ga. App. LEXIS 303 (2019).

Denial of service by publication was error. — In a personal injury suit arising from a motor vehicle accident, the trial court erred in denying the plaintiff's motion for service by publication and dismissing the action because the appellate court could not determine which standard the trial court applied in determining due diligence as to service. Humphries v. Weekly, 360 Ga. App. 59, 860 S.E.2d 619, 2021 Ga. App. LEXIS 311 (2021).

Failure to perfect service of process in a renewal action. — Passenger's personal injury action against a driver renewed pursuant to O.C.G.A. § 9-2-61 was dismissed for failure to perfect service of process against the driver due to lack of diligence. Although the passenger attempted to serve the driver for several months, the passenger then allowed 72 days to elapse before making another attempt. The court rejected the passenger's contention that O.C.G.A. § 33-7-11, providing for personal service after service of publication while allowing litigation against an uninsured motorist carrier to proceed, allowed for an additional 12 months after service by publication. Williams v. Patterson, 306 Ga. App. 624, 703

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S.E.2d 74, 2010 Ga. App. LEXIS 999 (2010).

Failure to perfect service promptly. — When service is made after the expiration of the applicable statute of limitation, the timely filing of the complaint tolls the statute only if the plaintiff shows that the plaintiff acted in a reasonable and diligent manner in attempting to ensure that proper service was made as quickly as possible. Brown v. Bailey, 180 Ga. App. 555, 349 S.E.2d 792, 1986 Ga. App. LEXIS 2221 (1986); Ingram v. Grose, 180 Ga. App. 647, 350 S.E.2d 289, 1986 Ga. App. LEXIS 2248 (1986).

Although timely filed, action was dismissed because of plaintiff's failure to perfect service of the complaint promptly since the statute of limitations had run. Robinette v. Johnston, 637 F. Supp. 922, 1986 U.S. Dist. LEXIS 24057 (M.D. Ga. 1986).

Being unaware of the concept that service of process has anything to do with the tolling of the statute of limitations, as opposed to the filing of the complaint, is not an adequate justification for delay so that service would relate back to the date of filing. Robinette v. Johnston, 637 F. Supp. 922, 1986 U.S. Dist. LEXIS 24057 (M.D. Ga. 1986).

Even though defendant gave an incorrect address at the accident scene, the plaintiff's filing of a complaint did not toll the statute when the plaintiff did not initiate a search for the defendant until after "the return of no service" over two years later. Lawrence v. Noltimier, 213 Ga. App. 628, 445 S.E.2d 378, 1994 Ga. App. LEXIS 678 (1994).

Owners' personal injury and property damages action against a manufacturer, which concerned a fire in January 30, 2000, was barred by the two- and four-year statutes of limitations, because the owners failed to timely perfect service, as required by O.C.G.A. § 9-11-4(c), until February 23, 2004, which was more than five days after the owners filed a renewed complaint under O.C.G.A. § 9-2-61(a) on October 28, 2003. Johnson v. Am. Meter Co., 412 F. Supp. 2d 1260, 2004 U.S. Dist. LEXIS 29142 (N.D. Ga. 2004).

Because an insured did not serve a copy of an underinsured motorist complaint upon the insurer within the two year statute of limitations in O.C.G.A. § 9-3-33 or within 90 days of receiving the discovery responses indicating that the vehicle that hit the insured's vehicle was underinsured, the insured did not satisfy the service requirement of O.C.G.A. § 33-7-11(d). Calhoun v. Gov't Emples. Ins. Co., 296 Ga. App. 622, 675 S.E.2d 523, 2009 Ga. App. LEXIS 291 (2009).

Motorist sued a driver over injuries allegedly sustained in an auto accident. As the motorist took no steps whatsoever to perfect service for approximately four months after the limitations period of O.C.G.A. § 9-3-33 lapsed, the motorist did not act diligently; therefore, service of process did not relate back to the original filing date. McCullers v. Harrell, 298 Ga. App. 798, 681 S.E.2d 237, 2009 Ga. App. LEXIS 792 (2009), cert. denied, No. S09C1914, 2010 Ga. LEXIS 55 (Ga. Jan. 12, 2010), overruled in part, Giles v. State Farm Mut. Ins. Co., 330 Ga. App. 314, 765 S.E.2d 413, 2014 Ga. App. LEXIS 717 (2014).

Evidence was sufficient to support the court's judgment dismissing the appellant's complaint against the appellee for failure to perfect service of process because the appellant failed to serve the appellee within five days of the two-year statute of limitations, O.C.G.A. § 9-3-33; the appellee proffered evidence that: (1) the appellee did not reside in the town where service was allegedly made at the time service was attempted; (2) the appellee's brother resided at that address during the relevant time period; and (3) the appellee's brother advised the appellee of appellant's complaint after being provided with a copy of the complaint by the process server; and (4) the appellee also presented evidence from the appellee's landlord confirming that the appellee had lived at a different residence. Jones v. Lopez-Herrera, 308 Ga. App. 81, 706 S.E.2d 609, 2011 Ga. App. LEXIS 126 (2011).

Four month delay in service. — In an action against the defendant, a Kentucky resident, to recover damages arising from a motor vehicle accident under the

Georgia Nonresident Motorist Act (NRMA), O.C.G.A. § 40-12-1 et seq., the trial court granted the defendant's motion to dismiss as the statute of limitation had expired, and the plaintiff had failed to effect service upon the defendant by certified mail under O.C.G.A. § 40-12-2 of the NRMA because the plaintiff knew where the defendant resided at the time of the accident, and the plaintiff confirmed that the defendant was registered to vote at that address on the same day that the plaintiff filed the complaint, but the plaintiff made no attempt to serve the defendant at that address until nearly four months after the statute of limitation expired. Covault v. Harris, 337 Ga. App. 301, 787 S.E.2d 272, 2016 Ga. App. LEXIS 319 (2016).

Service of an uninsured motorist carrier within five business days after the date of filing of the complaint, in an action for personal injuries, related back to the date of filing as a matter of law for statute of limitation purposes. Williams v. Colonial Ins. Co., 199 Ga. App. 760, 406 S.E.2d 99, 1991 Ga. App. LEXIS 661 (1991), overruled in part, Giles v. State Farm Mut. Ins. Co., 330 Ga. App. 314, 765 S.E.2d 413, 2014 Ga. App. LEXIS 717 (2014).

Time computation method mandated by § 1-3-1. — When injured employee initiated action against heater manufacturer within the two-year period contemplated by O.C.G.A. § 9-3-33 by bringing it on the second anniversary of the injury, using the computation method mandated by O.C.G.A. § 1-3-1(d)(3), the complaint was timely and improperly dismissed by the trial court. Davis v. Desa Int'l, Inc., 209 Ga. App. 318, 433 S.E.2d 410, 1993 Ga. App. LEXIS 874 (1993).

Natural gas marketer's defamation complaint was timely filed because the complaint was filed on the first anniversary of the date of publication; O.C.G.A. § 1-3-1(d)(3) applies to the one-year statute of limitation for injuries to the reputation found in O.C.G.A. § 9-3-33, so that the first day shall not be counted in determining whether a claim is timely filed. Infinite Energy, Inc. v. Pardue, 310 Ga. App. 355, 713 S.E.2d 456, 2011 Ga. App. LEXIS 570 (2011).

Time computation statute amendment not retroactive. — Because the 1985 amendment to O.C.G.A. § 1-3-1(d)(3), relating to computation of time, effective July 1, 1985, was silent on the question of retroactive application, it had no application to a personal injury case when the period of limitations would have run on June 29, 1985, under the law prior to the amendment. Loveless v. Grooms, 180 Ga. App. 424, 349 S.E.2d 281, 1986 Ga. App. LEXIS 2177 (1986).

Nonholiday closings of clerk's office. — Claim is timely filed when it is delivered to the official receptacle of the clerk's office prior to the expiration of the statute of limitations, but because of an unofficial closing of the clerk's office on a nonholiday the claim is not picked-up and marked as being received until one day after the expiration date. Lavan v. Philips, 184 Ga. App. 573, 362 S.E.2d 138, 1987 Ga. App. LEXIS 2333 (1987).

Tolling of civil rights action. — Two-year limitations period under O.C.G.A. § 9-3-33 for a federal civil rights action is not tolled during the period in which a plaintiff appeals an employment termination decision to the county merit council. Ivey v. DeKalb County Dep't of Pub. Safety, 668 F. Supp. 1579, 1987 U.S. Dist. LEXIS 8306 (N.D. Ga. 1987).

Arrestee's claim of unlawful arrest was not preserved under the Heck rule, which tolled 42 U.S.C. § 1983 claims that, if successful, might imply the invalidity of a conviction, because that rule was not applicable in the pre-conviction context; thus, the arrestee's claim was time barred under O.C.G.A. § 9-3-33 since it was filed three years after arrest. Watts v. Epps, 475 F. Supp. 2d 1367, 2007 U.S. Dist. LEXIS 13384 (N.D. Ga. 2007).

State prisoner's 42 U.S.C. § 1983 claims related to the validity of a conviction on a guilty plea were properly dismissed under 28 U.S.C. §§ 1915A and 1915(e)(2) as Heck-barred, and the other claims were time-barred by the two-year limitations period of O.C.G.A. § 9-3-33 because a pending habeas petition did not create extraordinary circumstances to equitably toll the limitations period for the § 1983 claims. Salas v. Pierce, 297 Fed. Appx. 874, 2008 U.S. App. LEXIS 22075 (11th Cir. 2008).

Prisoner's 42 U.S.C. § 1983 action was timely filed under Georgia's two-year stat-

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ute of limitations because the statute of limitations was equitably tolled while the prisoner complied with the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), and pursued administrative remedies prior to filing suit, and the prisoner filed suit within two years after exhausting PLRA's mandatory administrative review process. Dunn v. Hart, No. CV513-131, 2015 U.S. Dist. LEXIS 28490 (S.D. Ga. Mar. 9, 2015).

Tolling not shown. — When plaintiff federal prisoner knew of defendant state's forfeiture action in 1995, but filed a 42 U.S.C. § 1983 civil rights action alleging Fifth Amendment due process violations to recover the seized property seven years after O.C.G.A. § 9-3-33's two-year statute of limitations period expired, and no state court exhaustion was required, the suit was time-barred. Berry v. Keller, 157 Fed. Appx. 227, 2005 U.S. App. LEXIS 26917 (11th Cir. 2005).

Couple had not shown that the statute of limitation on their personal injury claim against a second driver was tolled under O.C.G.A. § 9-3-99; the second driver, who had been cited for making an improper lane change, had paid the fine, and the couple had not provided any citation to the record to support their claim that the second driver remained subject to prosecution. McGhee v. Jones, 287 Ga. App. 345, 652 S.E.2d 163, 2007 Ga. App. LEXIS 967 (2007).

Plaintiffs, residents, sued the defendants, a chemical plant and a laboratory, alleging the plaintiffs were injured due to chemical fires at the laboratory's facility. As the plaintiffs failed to meet their burden to establish that O.C.G.A. § 9-3-33, the statute of limitations on the adult plaintiffs' personal injury claims, was tolled, the defendants were properly granted summary judgment on those claims. Smith v. Chemtura Corp., 297 Ga. App. 287, 676 S.E.2d 756, 2009 Ga. App. LEXIS 311 (2009).

There was no dispute that the defendant testing company transmitted the last of the test results on asphalt composition that the company provided to the Georgia Department of Transportation on November 22, 2004, and so plaintiff asphalt company had one year from that date to file the plaintiff's claim. The plaintiff did not file a complaint until October 10, 2006, almost a year too late. Douglas Asphalt Co. v. QORE, Inc., 657 F.3d 1146, 2011 U.S. App. LEXIS 19266 (11th Cir. 2011).

Tenant failed to show mental incapacity sufficient, under O.C.G.A. §§ 9-3-90(a) and 9-3-91, to toll the statute of limitations in O.C.G.A. § 9-3-33 because the tenant's own testimony indicated that, with the exception of a two-week period of hospitalization, the tenant was able to manage the ordinary affairs of life following a tragic sexual assault; accordingly, the landlord was entitled to summary judgment on the tenant's premises-liability action. Martin v. Herrington Mill, LP, 316 Ga. App. 696, 730 S.E.2d 164, 2012 Ga. App. LEXIS 635 (2012).

In a case in which a district court dismissed a tenant's claims under the Americans with Disabilities Act (ADA) and the Rehabilitation Act as time-barred based upon the two-year statute of limitations in O.C.G.A. § 9-3-33, the tenant conceded that the complaint was filed more than two years after the last act of discrimination and unsuccessfully argued that the complaint was timely because the tenant was entitled to equitable tolling. The district court did not err in concluding that the tenant failed to show extraordinary circumstances justifying equitable tolling; contrary to the tenant's suggestion, nothing in the pleadings indicated that the U.S. Department of Housing and Urban Development misled the tenant into allowing the statute of limitations for the ADA and Rehabilitation Act claims to expire. Hunt v. Ga. Dep't of Cmty. Affairs, 490 Fed. Appx. 196, 2012 U.S. App. LEXIS 19535 (11th Cir. 2012).

Fraud not shown, thus no tolling. — Claim for pain and suffering was time barred under O.C.G.A. § 9-3-33 because O.C.G.A. § 9-3-96 failed to provide any tolling based on fraud since the very act of hiring a hit man to commit murder was not a separate and distinct fraud to support a finding of fraudulent concealment or actual fraud in and of itself in favor of

the administrator of the victim's estate. Rai v. Reid, 294 Ga. 270, 751 S.E.2d 821, 2013 Ga. LEXIS 1002 (2013).

Reinstatement of civil rights action permitted. — Plaintiff was allowed to reinstate an original 42 U.S.C. § 1983 complaint under Fed. R. Civ. P. 60(b) because of excusable neglect due to the fact that the renewal statute of O.C.G.A. § 9-2-61 was inapplicable to reinstate a second action barred by the limitations period of O.C.G.A. § 9-3-33, adequate grounds for relief were demonstrated, and no prejudice was shown. Highsmith v. Thomas, No. CV506-99, No. CV507-04, 2007 U.S. Dist. LEXIS 28964 (S.D. Ga. Apr. 18, 2007).

Action not subject to renewal. — Because an insured who brought a personal injury suit against an alleged tortfeasor had never personally served the alleged tortfeasor when the original action was filed, the action was not valid prior to dismissal and thus was not subject to renewal under O.C.G.A. § 9-2-61. Accordingly, the present action was time-barred under O.C.G.A. § 9-3-33. Williams v. Hunter, 291 Ga. App. 731, 662 S.E.2d 810, 2008 Ga. App. LEXIS 625 (2008).

Personal injury claim against a driver that was filed as a renewal action under O.C.G.A. § 9-2-61(a) was subject to summary judgment based on the statute of limitations, O.C.G.A. § 9-3-33; because the plaintiffs did not perfect service on the driver in the prior suit, and the statute had run, the plaintiffs could not renew the suit. The statute was not tolled under O.C.G.A. § 9-3-99 because the time for prosecuting the driver for following too closely had expired, and there had been no prosecution. Jenkins v. Keown, 351 Ga. App. 428, 830 S.E.2d 498, 2019 Ga. App. LEXIS 407 (2019).

Relation back of amendments to complaint. — When plaintiff's original complaint, based on 42 U.S.C. § 1983 violations, was filed within two years after the injury, and the plaintiff asserted a First Amendment claim in an amendment, even though the First Amendment expression arose out of the plaintiff's prior activities, the plaintiff's claim for violation of such right arose out of the defendant's acts which were the basis of the § 1983 claim and related back to the date of the original complaint. Blue Ridge Mt. Fisheries, Inc. v. Department of Natural Resources, 217 Ga. App. 89, 456 S.E.2d 651, 1995 Ga. App. LEXIS 350 (1995), cert. denied, No. S95C1198, 1995 Ga. LEXIS 1238 (Ga. Dec. 1, 1995).

Trial court properly granted the alleged tortfeasor's motion to dismiss since the injured party waited until almost two months after the expiration of the statute of limitations pursuant to O.C.G.A. § 9-3-33 and some eight months after discovering the alleged tortfeasor's correct address to properly serve the alleged tortfeasor. Hardy v. Lucio, 259 Ga. App. 543, 578 S.E.2d 224, 2003 Ga. App. LEXIS 183 (2003).

Parking lot owner was entitled to dismissal of a plaintiff's negligence action arising from a January 19, 2005, incident because the amended complaint filed June 7, 2007, adding the owner as a defendant did not relate back under O.C.G.A. § 9-11-15(c) and, thus, was barred by the statute of limitations because the mere fact that the owner's attorney worked in the same firm as the original defendants' attorney did not impute knowledge of the lawsuit to the owner. LAZ Parking/Georgia, Inc. v. Jones, 294 Ga. App. 122, 668 S.E.2d 547, 2008 Ga. App. LEXIS 1115 (2008).

Parents' suit alleging civil rights violations based on the alleged denial of an appropriate independent educational evaluation of their child was time-barred under the two year limitations period applicable to 42 U.S.C. § 1983 actions filed in Georgia because on the date that the limitations period had expired, the parents' first amended complaint had been dismissed, and the amended complaint did not replace or supersede the original complaint, and since the § 1983 claims in the original complaint had been dismissed, there remained nothing for the amendment to relate back to under Fed. R. Civ. P. 15(c). S.C. v. Cobb County Sch. Dist., No. 1:06-CV-2658-CC, 2011 U.S. Dist. LEXIS 156278 (N.D. Ga. Aug. 10, 2011).

Claim of imputed simple negligence against a hospital in the second amended complaint (SAC) related back to the date of the original complaint, and the new

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claim was not barred by the applicable two-year statute of limitation because the facts alleged in the SAC occurred at the same time as certain facts in the original complaint, near the end of the three-and-a-half hour time frame of the treatment preceding the plaintiff's alleged injury, the facts occurred at the exact same location, and involved the same general subject matter — the negligent treatment of the plaintiff's dangerously unstable spine; and the allegations were part of the same events that led up to the same ultimate injury for which the plaintiff was seeking damages. Tenet HealthSystem GB, Inc. v. Thomas, 304 Ga. 86, 816 S.E.2d 627, 2018 Ga. LEXIS 461 (2018).

Claim time-barred for failure to add party. — In an injured party's direct action against an insurer, because the injured party failed to seek leave of court to add the insurer's insured as a party, and the relation back doctrine did not apply, the insurer and the insured were properly dismissed from the injured party's lawsuit; thus, the claim against the insured was time-barred. Crane v. State Farm Ins. Co., 278 Ga. App. 655, 629 S.E.2d 424, 2006 Ga. App. LEXIS 266 (2006), cert. denied, No. S06C1374, 2006 Ga. LEXIS 544 (Ga. July 13, 2006), cert. denied, 549 U.S. 1080, 127 S. Ct. 728, 166 L. Ed. 2d 566, 2006 U.S. LEXIS 9295 (2006).

Dismissal proper when statute of limitations not expired. — *Unpublished decision:* Prisoner's 42 U.S.C. § 1983 action was properly dismissed under Fed. R. Civ. P. 41(b) because the prisoner was ordered to complete certain forms and was told that failure to comply would result in a dismissal. Because the prisoner did not comply within five months and the dismissal was without prejudice before the two year statute of limitations under O.C.G.A. § 9-3-33 had expired, there was no abuse of discretion. Sanders v. Barrett, No. 05-12660, 2005 U.S. App. LEXIS 22496 (11th Cir. Oct. 17, 2005).

Appointment of a temporary administrator. — Appointment of a temporary administrator did not result in the representation of the estate for purposes of tolling; consequently, the statute of limitation as to the estate claims remained tolled from the mother's death until the administrator was named the permanent administrator, less than two years before the current action. Somani v. Cannon, 363 Ga. App. 610, 872 S.E.2d 9, 2022 Ga. App. LEXIS 182 (2022).

OPINIONS OF THE ATTORNEY GENERAL

Commissioner of Offender Rehabilitation should maintain all records related to possible tort actions for at least two years after a possible tort occurs. 1972 Op. Att'y Gen. No. 72-75.

RESEARCH REFERENCES

Am. Jur. 2d.

41 Am. Jur. 2d, Husband and Wife, §§ 7, 196 et seq. 50 Am. Jur. 2d, Libel and Slander, § 397 et seq. 51 Am. Jur. 2d, Limitation of Actions, §§ 121 et seq., 147 et seq.

Am. Jur. Proof of Facts.

Slander of Title, 7 POF2d 133.

Discovery Date in Medical Malpractice Litigation, 26 POF3d 185.

C.J.S.

54 C.J.S., Limitations of Actions, §§ 115, 225 et seq.

ALR.

Subsequent denial of liability following promise or negotiations as affecting contractual limitation for action upon insurance policy, 3 A.L.R. 218.

Right of one who has acted for another to recover for damage to reputation or business in consequence of the latter's failure to keep his engagements with third persons, 42 A.L.R. 1094.

When statute of limitations commences to run against action against one who has

misrepresented or exceeded his authority to contract for another, 64 A.L.R. 1194.

Provision of death statute as to time of bringing action as a condition of the right of action or as a mere statute of limitations, 67 A.L.R. 1070.

Delay in procuring appointment of personal representative of deceased or of person causing his death in event of latter's death, as extending period for bringing an action for death, 70 A.L.R. 472.

Complaint or declaration which fails to allege that action for wrongful death was brought within statutory period, or affirmatively shows that it was not, as subject to demurrer, 107 A.L.R. 1048.

Action by one person for consequential damages on account of injury to another as one for bodily or personal injury within statute of limitations, 108 A.L.R. 525.

Expiration of time within which action could have been brought on original cause of action, if not released, as bar to action which seeks to avoid release because of fraud or mistake and recover on original cause or for loss of value of original cause, 120 A.L.R. 1500.

Statute of limitations applicable to action for slander of title, 131 A.L.R. 837.

Exceptions attaching to limitation prescribed by death statutes or survival statutes allowing recovery of damages for death, 132 A.L.R. 292.

Amendment of complaint or declaration by setting up death statute after expiration of period to which action is limited by the death statute or by the statute of limitations, 134 A.L.R. 779.

Action for "injury to person" in statutes relating to notice or limitation as including actions ex contractu, 157 A.L.R. 763.

Workmen's compensation: time and jurisdiction for review, reopening, modification, or reinstatement of award or agreement, 165 A.L.R. 9.

Limitation applicable to action for personal injury as affecting action for death resulting from injury, 167 A.L.R. 894.

When statute of limitations begins to run against action for loss of services or consortium, 173 A.L.R. 750.

When limitation period begins to run against cause of action or claim for contracting of disease, 11 A.L.R.2d 277.

Action by passenger against carrier for personal injuries as based on contract or on tort, with respect to application of statutes of limitation, 20 A.L.R.2d 331.

Statute of limitations applicable to action, by way of subrogation or the like, by employer or insurance carrier against third person for injury to employee, 41 A.L.R.2d 1044.

When statute of limitations begins to run against action for false imprisonment or false arrest, 49 A.L.R.2d 922.

Death action against municipal corporation as subject to statute of limitations governing wrongful death actions or that governing actions against a municipality for injury to person or property, 53 A.L.R.2d 1068.

What statute of limitations, in the absence of an express provision as to such tort, governs an action for malicious prosecution, 70 A.L.R.2d 1088.

Scope of limitation statutes specifically governing assault and battery, 90 A.L.R.2d 1230.

Time limitations on nonstatutory actions for maritime personal injuries, 91 A.L.R.2d 1417.

When statute of limitations begins to run against action for abuse of process, 1 A.L.R.3d 953.

What 12-month period constitutes "year" or "calendar year" as used in public enactment, contract, or other written instrument, 5 A.L.R.3d 584.

What statute of limitations governs action for malicious use of process or abuse of process, in the absence of an express provision for such tort, 10 A.L.R.3d 533.

Accrual of cause of action and tolling of limitation period of § 6 of the Federal Employers' Liability Act (45 USC § 56), 16 A.L.R.3d 637.

Spouse's or parent's right to recover punitive damages in connection with recovery of damages for medical expenses or loss of services or consortium arising from personal injury to other spouse or to child, 25 A.L.R.3d 1416.

What constitutes "publication" of libel in order to start running of period of limitations, 42 A.L.R.3d 807.

Tolling or interruption of running of statute of limitations pending appointment of executor or administrator for tortfeasor in personal injury or death action, 47 A.L.R.3d 179.

Waiver or loss of right of privacy, 57 A.L.R.3d 16.

When statute of limitations commences to run against claim for contribution or indemnity based on tort, 57 A.L.R.3d 867.

What statute of limitations applies to action for contribution against joint tortfeasors, 57 A.L.R.3d 927.

Effect of injured employee's proceeding for workmen's compensation benefits on running of statute of limitations governing action for personal injury arising from same incident, 71 A.L.R.3d 849.

Tort claim against which period of statute of limitations has run as subject of setoff, counterclaim, cross bill, or cross action in tort action arising out of same accident or incident, 72 A.L.R.3d 1065.

Measure and elements of damages in wife's action for loss of consortium, 74 A.L.R.3d 805.

Minority of surviving children as tolling limitation period in state wrongful death action, 85 A.L.R.3d 162.

Products liability: what statute of limitations governs actions based on strict liability in tort, 91 A.L.R.3d 455.

When does statute of limitations begin to run upon an action by subrogated insurer against third-party tortfeasor, 91 A.L.R.3d 844.

Statute of limitations: running of statute of limitations on products liability claim against manufacturer as affected by plaintiff's lack of knowledge of defect allegedly causing personal injury or disease, 91 A.L.R.3d 991.

When statute of limitations begins to run as to cause of action for development of latent industrial or occupational disease, 1 A.L.R.4th 117.

What statute of limitations governs damage action against attorney for malpractice, 2 A.L.R.4th 284.

Recovery for loss of consortium for injury occurring prior to marriage, 5 A.L.R.4th 300.

Actual notice or knowledge by governmental body or officer of injury or incident resulting in injury as constituting required claim or notice of claim for injury — modern status, 7 A.L.R.4th 1063.

What statute of limitations applies to actions for personal injuries based on breach of implied warranty under UCC provisions governing sales, 20 A.L.R.4th 915.

Limitation of actions: invasion of right of privacy, 33 A.L.R.4th 479.

When statute of limitations commences to run on automobile no-fault insurance personal injury claim, 36 A.L.R.4th 357.

Action for loss of consortium based on nonmarital cohabitation, 40 A.L.R.4th 553.

Validity, construction, and application, in nonstatutory personal injury actions, of state statute providing for borrowing of statute of limitations of another state, 41 A.L.R.4th 1025.

Time of discovery as affecting running of statute of limitations in wrongful death action, 49 A.L.R.4th 972.

Application of "discovery rule" to postpone running of limitations against action for damages from assault, 88 A.L.R.4th 1063.

Causes of action governed by limitations period in UCC § 2-725, 49 A.L.R.5th 1.

Attorney malpractice — tolling of other exceptions to running of statute of limitations, 87 A.L.R.5th 473.

Insurance agents or brokers as professionals or nonprofessionals for purposes of malpractice statutes of limitations, 121 A.L.R.5th 365.

Application of relation back doctrine permitting change in party after statute of limitations has run in state court action — motor vehicle accident or injury cases: individual drivers, parents, owners or lessors, and passengers, 97 A.L.R.6th 375.

Application of relation-back doctrine permitting change in party after statute of limitations has run in state court action — motor vehicle accident or injury cases: corporations, municipalities, insurers, and employers, 98 A.L.R.6th 93.

Application of relation-back doctrine permitting change in party after statute of limitations has run in state court action — motor vehicle accident or injury cases: estates, and other or unspecified parties, 99 A.L.R.6th 1.

Tort liability of physician or hospital in connection with organ or tissue transplant procedures, 38 A.L.R.7th Art. 5.

9-3-33.1. Actions for childhood sexual abuse.

(a)(1) As used in this subsection, the term "childhood sexual abuse" means any act committed by the defendant against the plaintiff which occurred when the plaintiff was under 18 years of age and which would be in violation of:

(A) Rape, as prohibited in Code Section 16-6-1;

(B) Sodomy or aggravated sodomy, as prohibited in Code Section 16-6-2;

(C) Statutory rape, as prohibited in Code Section 16-6-3;

(D) Child molestation or aggravated child molestation, as prohibited in Code Section 16-6-4;

(E) Enticing a child for indecent purposes, as prohibited in Code Section 16-6-5;

(F) Pandering, as prohibited in Code Section 16-6-12;

(G) Reserved;

(H) Solicitation of sodomy, as prohibited in Code Section 16-6-15;

(I) Incest, as prohibited in Code Section 16-6-22;

(J) Sexual battery, as prohibited in Code Section 16-6-22.1; or

(K) Aggravated sexual battery, as prohibited in Code Section 16-6-22.2.

(2) Notwithstanding Code Section 9-3-33 and except as provided in subsection (d) of this Code section as it existed on June 30, 2017, any civil action for recovery of damages suffered as a result of childhood sexual abuse committed before July 1, 2015, shall be commenced on or before the date the plaintiff attains the age of 23 years.

(b)(1) As used in this subsection, the term "childhood sexual abuse" means any act committed by the defendant against the plaintiff which occurred when the plaintiff was under 18 years of age and which would be in violation of:

(A) Trafficking a person for sexual servitude, as prohibited in Code Section 16-5-46;

(B) Rape, as prohibited in Code Section 16-6-1;

(C) Statutory rape, as prohibited in Code Section 16-6-3, if the defendant was 21 years of age or older at the time of the act;

(D) Aggravated sodomy, as prohibited in Code Section 16-6-2;

(E) Child molestation or aggravated child molestation, as prohibited in Code Section 16-6-4, unless the violation would be subject to punishment as provided in paragraph (2) of subsection (b) of Code Section 16-6-4 or paragraph (2) of subsection (d) of Code Section 16-6-4;

(F) Enticing a child for indecent purposes, as prohibited in Code Section 16-6-5, unless the violation would be subject to punishment as provided in subsection (c) of Code Section 16-6-5;

(G) Incest, as prohibited in Code Section 16-6-22;

(H) Aggravated sexual battery, as prohibited in Code Section 16-6-22.2; or

(I) Part 2 of Article 3 of Chapter 12 of Title 16.

(2)(A) Notwithstanding Code Section 9-3-33, any civil action for recovery of damages suffered as a result of childhood sexual abuse committed on or after July 1, 2015, shall be commenced:

(i) On or before the date the plaintiff attains the age of 23 years; or

(ii) Within two years from the date that the plaintiff knew or had reason to know of such abuse and that such abuse resulted in injury to the plaintiff as established by competent medical or psychological evidence.

(B) When a plaintiff's civil action is filed after the plaintiff attains the age of 23 years but within two years from the date that the plaintiff knew or had reason to know of such abuse and that such abuse resulted in injury to the plaintiff, the court shall determine from admissible evidence in a pretrial finding when the discovery of the alleged childhood sexual abuse occurred. The pretrial finding required under this subparagraph shall be made within six months of the filing of the civil action.

(c)(1) As used in this subsection, the term:

(A) "Entity" means an institution, agency, firm, business, corporation, or other public or private legal entity.

(B) "Person" means the individual alleged to have committed the act of childhood sexual abuse.

(2) If a civil action for recovery of damages suffered as a result of childhood sexual abuse is commenced pursuant to division (b)(2)(A)(i) of this Code section and if the person was a volunteer or employee of an entity that owed a duty of care to the plaintiff, or the person and

the plaintiff were engaged in some activity over which such entity had control, damages against such entity shall be awarded under this Code section only if by a preponderance of the evidence there is a finding of negligence on the part of such entity.

(3) If a civil action for recovery of damages suffered as a result of childhood sexual abuse is commenced pursuant to division (b)(2)(A)(ii) of this Code section and if the person was a volunteer or employee of an entity that owed a duty of care to the plaintiff, or the person and the plaintiff were engaged in some activity over which such entity had control, damages against such entity shall be awarded under this Code section only if by a preponderance of the evidence there is a finding that there was gross negligence on the part of such entity, that the entity knew or should have known of the alleged conduct giving rise to the civil action and such entity failed to take remedial action.

History.

Code 1981, § 9-3-33.1, enacted by Ga. L. 1992, p. 2473, § 1; Ga. L. 2015, p. 675, § 2-2/SB 8; Ga. L. 2015, p. 689, § 2/HB 17; Ga. L. 2018, p. 1112, § 9/SB 365; Ga. L. 2019, p. 74, § 2-1/SB 158.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2015, the amendment of paragraph (b)(2) of this Code section by Ga. L. 2015, p. 675, § 2-2/SB 8, was treated as impliedly repealed and superseded by Ga. L. 2015, p. 689, § 2/HB 17, due to irreconcilable conflict.

Editor's notes.

Ga. L. 1992, p. 2473, § 2, not codified by the General Assembly, provides: "No action for childhood sexual abuse which, prior to July 1, 1992, has been barred by the provisions of Title 9, relating to actions, shall be revived by this Act."

Ga. L. 2015, p. 675, § 1-1/SB 8, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Safe Harbor/Rachel's Law Act.'"

Ga. L. 2015, p. 675, § 1-2/SB 8, not codified by the General Assembly, provides: "(a) The General Assembly finds that arresting, prosecuting, and incarcerating victimized children serves to retraumatize children and increases their feelings of low self-esteem, making the process of recovery more difficult. The General Assembly acknowledges that both federal and state laws recognize that sexually exploited children are the victims of crime and should be treated as victims. The General Assembly finds that sexually exploited children deserve the protection of child welfare services, including family support, crisis intervention, counseling, and emergency housing services. The General Assembly finds that it is necessary and appropriate to adopt uniform and reasonable assessments and regulations to help address the deleterious secondary effects, including but not limited to, prostitution and sexual exploitation of children, associated with adult entertainment establishments that allow the sale, possession, or consumption of alcohol on premises and that provide to their patrons performances and interaction involving various forms of nudity. The General Assembly finds that a correlation exists between adult live entertainment establishments and the sexual exploitation of children. The General Assembly finds that adult live entertainment establishments present a point of access for children to come into contact with individuals seeking to sexually exploit children. The General Assembly further finds that individuals seeking to exploit children utilize adult live entertainment establishments as a means of locating children for the purpose of sexual exploitation. The General Assembly acknowledges that many local governments in this state and in other states found deleterious secondary effects of adult entertainment establish-

ments are exacerbated by the sale, possession, or consumption of alcohol in such establishments.

"(b) The purpose of this Act is to protect a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in place in this state. The purpose and intended effect of this Act in imposing assessments and regulations on adult entertainment establishments is not to impose a restriction on the content or reasonable access to any materials or performances protected by the First Amendment of the United States Constitution or Article I, Section I, Paragraph V of the Constitution of this state."

Ga. L. 2015, p. 689, § 1/HB 17, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Hidden Predator Act.'"

Former subsection (d) was repealed on its own terms effective July 1, 2017.

Ga. L. 2019, p. 74, § 1-1/SB 158, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Anti-Human Trafficking Protective Response Act.'"

Ga. L. 2019, p. 74, § 3-1/SB 158, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2019, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2019, shall be governed by the statute in effect at the time of such offense, and any resulting conviction shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction."

Law reviews.

For note on 1992 enactment of this Code section, see 9 Ga. St. U.L. Rev. 154 (1992).

For article on the 2015 amendment of this Code section, see 32 Ga. St. U. L. Rev. 43 (2015).

For note, "I Tolled You I Had More Time!: The Future of Tolling Looks Bright for Crime Victims, as the Georgia Court of Appeals Establishes New Meaning of O.C.G.A. § 9-3-99," see 68 Mercer L. Rev. 557 (2017).

JUDICIAL DECISIONS

Substantive law to be applied. — In the daughter's revived civil claims for childhood sexual abuse against her parents under O.C.G.A. § 9-3-33.1, as the continuing tort theory did not apply, the substantive law of Quebec applied to those torts that were completed there, and the substantive law of Georgia applied to torts committed in Georgia. Harvey v. Merchan, 311 Ga. 811, 860 S.E.2d 561, 2021 Ga. LEXIS 469 (2021).

Action time-barred. — In the six plaintiffs' lawsuit alleging sexual abuse by two scoutmasters, whose troop meetings were hosted on the churches' property from the 1950s to the 1980s, the plaintiffs' claims against the churches were time-barred because O.C.G.A. § 9-3-33.1 was a statute of repose that could not be tolled; the deadline for filing an action was a plaintiff's 23rd birthday; and the plaintiffs did not file their lawsuits before their 23rd birthdays. McArthur v. Beech Haven Baptist Church of Athens, 361 Ga. App. 877, 864 S.E.2d 189, 2021 Ga. App. LEXIS 517 (2021).

Acts occurring outside of Georgia. — Daughter could pursue a cause of action for childhood sexual abuse acts that occurred in Quebec as well as Georgia, because this statute's definition of childhood sexual abuse was broad enough to cover acts that occurred outside of Georgia because, applying O.C.G.A. § 9-3-33.1 to acts that occurred in Quebec would not create a substantive cause of action unrecognized under Quebec law, as the former revival provision of § 9-3-33.1 was simply a procedural rule governing the limitations period for causes of action based on childhood sexual abuse already recognized under the law. Harvey v. Merchan, 311 Ga. 811, 860 S.E.2d 561, 2021 Ga. LEXIS 469 (2021).

RESEARCH REFERENCES

Am. Jur. Trials. —
When Clergy Fail Their Flock: Litigating the Clergy Sexual Abuse Case, 91 Am. Jur. Trials 151.

ALR.
Running of limitations against action for civil damages for sexual abuse of child, 9 A.L.R.5th 321.

9-3-34. Article not applicable to malpractice.

This article shall not apply to actions for medical malpractice as defined in Code Section 9-3-70.

History.
Code 1933, § 3-718, enacted by Ga. L. 1976, p. 1363, § 2.

JUDICIAL DECISIONS

O.C.G.A. § 9-3-34 does not violate equal protection when applied to loss of consortium actions arising out of medical malpractice. Perry v. Atlanta Hosp. & Medical Ctr., 255 Ga. 431, 339 S.E.2d 264, 1986 Ga. LEXIS 544 (1986).

Loss of consortium claim arising out of medical malpractice. — Because the four-year time limit does not apply to loss of consortium claims arising out of medical malpractice, and the plaintiffs only have two years in which to file the plaintiffs' claims for loss of consortium arising out of medical malpractice, the spouse's loss of consortium claim was time barred as the claim was filed more than two years after the patient's injury. Beamon v. Mahadevan, 329 Ga. App. 685, 766 S.E.2d 98, 2014 Ga. App. LEXIS 763 (2014).

9-3-35. Actions by creditor seeking relief under Uniform Voidable Transactions Act.

An action by a creditor seeking relief under the provisions of Article 4 of Chapter 2 of Title 18, known as the "Uniform Voidable Transactions Act," shall be brought within the applicable period set out in Code Section 18-2-79.

History.
Code 1981, § 9-3-35, enacted by Ga. L. 2002, p. 141, § 1; Ga. L. 2015, p. 996, § 4B-1/SB 65.

Editor's notes.
Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides:

"(a) This Act shall be known and may be cited as the 'Debtor Creditor Uniform Law Modernization Act of 2015.'

"(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships."

Ga. L. 2015, p. 996, § 7-1/SB 65, not codified by the General Assembly, provides in part: "(d) The amendments made by Parts 4A and 4B of this Act shall:

"(1) Apply to a transfer made or obligation incurred on or after July 1, 2015;

"(2) Not apply to a transfer made or obligation incurred before July 1, 2015;

"(3) Not apply to a right of action that has accrued before July 1, 2015; and

"(4) For purposes of this subsection, a transfer is made and an obligation is incurred at the time provided in Code Section 18-7-76."

RESEARCH REFERENCES

ALR.
Uniform Voidable Transactions Act, 50 A.L.R.7th Art. 5.

9-3-36. Limitations on claims arising before decedent's death.

(a) In no event may claims against a decedent's estate that arose before the death of the decedent be brought more than six years after the date of the decedent's death.

(b) Subsection (a) of this Code section is intended to create a six-year statute of ultimate repose and abrogation.

(c) Nothing in this Code section shall be construed as placing a limitation on the time for commencing a proceeding to enforce any mortgage, pledge, or other lien upon property owned by a decedent immediately prior to the decedent's death.

History.
Code 1981, § 9-3-36, enacted by Ga. L. 2020, p. 377, § 2-3/HB 865.

Effective date.
This Code section became effective January 1, 2021.

JUDICIAL DECISIONS

Sexual abuse by priest. — In a case in which the plaintiff allegedly suffered childhood sexual abuse while serving as an altar boy, the trial court did not err in dismissing the plaintiff's respondeat-superior claim because the suppression of information about whether the defendants knew the abusive priest was dangerous in the 1970s could not have hindered an attempt to hold the defendants vicariously liable for the priest's conduct once the plaintiff reached the age of majority in the 1980s. Doe v. St. Joseph's Catholic Church, 313 Ga. 558, 870 S.E.2d 365, 2022 Ga. LEXIS 59 (2022).

In a sexual abuse by a priest case, the plaintiff's negligent supervision, training, and retention, negligent failure to warn and provide adequate security, breach of fiduciary duty, and fraudulent misrepresentation and concealment claims were improperly dismissed as the plaintiff adequately pled actual fraud for purposes of tolling as the plaintiff could possibly establish the existence of a confidential relationship between the plaintiff and the defendants, and that the defendants' alleged fraudulent concealment about the abusive priest debarred or deterred the plaintiff from discovering the plaintiff's causes of action; and the plaintiff could show that the plaintiff exercised reasonable diligence to discover the defendants' fraud. Doe v. St. Joseph's Catholic Church, 313 Ga. 558, 870 S.E.2d 365, 2022 Ga. LEXIS 59 (2022).

ARTICLE 3

LIMITATIONS ON RECOVERY FOR DEFICIENCIES CONNECTED WITH IMPROVEMENTS TO REALTY AND RESULTING INJURIES

JUDICIAL DECISIONS

Immunity of O.C.G.A. § 9-3-50 et seq., should not be extended to manufacturers. Northbrook Excess & Surplus Ins. Co. v. J.G. Wilson Corp., 250 Ga. 691, 300 S.E.2d 507, 1983 Ga. LEXIS 605 (1983).

9-3-50. Definitions.

As used in this article, the term:

(1) "Person" means an individual, corporation, partnership, business trust, unincorporated organization, association, or joint-stock company.

(2) "Substantial completion" means the date when construction was sufficiently completed, in accordance with the contract as modified by any change order agreed to by the parties, so that the owner could occupy the project for the use for which it was intended.

History.
Ga. L. 1968, p. 127, §§ 5, 6.

JUDICIAL DECISIONS

Substantial completion meant action time barred. — Trial court erred in denying a developer's motion for summary judgment on the homeowners' claim for negligent construction because the developer presented testimony that the sale of the last townhouse closed on December 8, 2004, and that on the date of closing, construction of the townhouses was substantially complete; thus, O.C.G.A. § 9-3-51, the statute of repose, barred any action filed after December 8, 2012, and the homeowners filed the homeowners' suit two months after that date. Ashton Atlanta Residential, LLC v. Ajibola, 331 Ga. App. 231, 770 S.E.2d 311, 2015 Ga. App. LEXIS 133 (2015).

RESEARCH REFERENCES

Am. Jur. 2d.
13 Am. Jur. 2d, Building and Construction Contracts, § 110 et seq. 51 Am. Jur. 2d, Limitation of Actions, §§ 108 et seq., 137 et seq.

C.J.S.
17B C.J.S., Contracts, §§ 670 et seq, 806 et seq.

ALR.
What constitutes "improvement to real property" for purposes of statute of repose or statute of limitations, 122 A.L.R.5th 1.

9-3-51. Limitations on recovery for deficiency in planning, supervising, or constructing improvement to realty or for resulting injuries to property or person.

(a) No action to recover damages:

(1) For any deficiency in the survey or plat, planning, design, specifications, supervision or observation of construction, or construction of an improvement to real property;

(2) For injury to property, real or personal, arising out of any such deficiency; or

(3) For injury to the person or for wrongful death arising out of any such deficiency

shall be brought against any person performing or furnishing the survey or plat, design, planning, supervision or observation of construction, or construction of such an improvement more than eight years after substantial completion of such an improvement.

(b) Notwithstanding subsection (a) of this Code section, in the case of such an injury to property or the person or such an injury causing wrongful death, which injury occurred during the seventh or eighth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within two years after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than ten years after the substantial completion of construction of such an improvement.

(c) This Code section shall not apply to actions for breach of contract, including, but not limited to, actions for breach of express contractual warranties.

History.

Ga. L. 1968, p. 127, §§ 1, 2; Ga. L. 2020, p. 37, § 1/SB 451.

Editor's notes.

Ga. L. 2020, p. 37, § 2/SB 451, not codified by the General Assembly, provides that: "This Act shall apply to causes of action which have accrued on or after January 1, 1968."

Law reviews.

For article discussing architect liability for product design and supervision of construction, and the statute of limitations, see 14 Ga. St. B.J. 164 (1978).

For survey article on torts, see 34 Mercer L. Rev. 271 (1982).

For note, "The Effect of Georgia's Architectural Statutes of Limitations on Real and Personal Property Claims for Negligent Construction," see 7 Ga. St. U.L. Rev. 137 (1990).

For annual survey of construction law, see 43 Mercer L. Rev. 141 (1991).

For annual survey of construction law, see 62 Mercer L. Rev. 71 (2010).

For article, "Construction Law," see 63 Mercer L. Rev. 107 (2011).

For article with annual survey on construction law, see 73 Mercer L. Rev. 59 (2021).

JUDICIAL DECISIONS

Analysis

General Consideration
Application

General Consideration

Constitutionality. — Separate classification and treatment of architects, engineers, and contractors by O.C.G.A. § 9-3-51 from owners, tenants, and manufacturers is reasonable and not arbitrary. Mullis v. Southern Co. Servs., 250 Ga. 90, 296 S.E.2d 579, 1982 Ga. LEXIS 1014 (1982).

O.C.G.A. § 9-3-51 does not violate Ga. Const. 1976, Art. III, Sec. VII, Para. IV (see now Ga. Const. 1983, Art. III, Sec. V, Para. III), in that it definitely relates to and has a natural connection with the main object of the legislation and with what is expressed in the title. Mullis v. Southern Co. Servs., 250 Ga. 90, 296 S.E.2d 579, 1982 Ga. LEXIS 1014 (1982).

O.C.G.A. § 9-3-51 does not violate Ga. Const. 1983, Art. I, Sec. I, Para. XII, relating to a person's right to self-representation. Nelms v. Georgian Manor Condominium Ass'n, 253 Ga. 410, 321 S.E.2d 330, 1984 Ga. LEXIS 959 (1984).

Effect upon § 9-3-30. — O.C.G.A. § 9-3-51 does not establish a new eight-year statute of limitation in place of the four-year statute that applies under O.C.G.A. § 9-3-30. Howard v. McFarland, 237 Ga. App. 483, 515 S.E.2d 629.

O.C.G.A. § 9-3-30(a) governed homebuyers' claims for negligent construction, breach of warranty, and negligent misrepresentation against homebuilders and a company that manufactured stucco that was used in construction, but whereas the buyers' cause of action against the builders did not begin to run until the buyers purchased the home, the buyers' cause of action against the manufacturer began to run when the home was substantially completed and because that date was more than four years before the buyers' filed suit, the buyers' claim against the manufacturer was barred. Colormatch Exteriors, Inc. v. Hickey, 275 Ga. 249, 569 S.E.2d 495, 2002 Ga. LEXIS 479 (2002).

This section was intended to establish an outside time limit which would commence upon substantial completion of an improvement to real property, within which preexisting statutes of limitations would continue to operate. Benning Constr. Co. v. Lakeshore Plaza Enters., Inc., 240 Ga. 426, 241 S.E.2d 184, 1977 Ga. LEXIS 1515 (1977); Landon v. Williams Bros. Concrete Co., 149 Ga. App. 699, 256 S.E.2d 99, 1979 Ga. App. LEXIS 1992 (1979); R.L. Sanders Roofing Co. v. Miller, 153 Ga. App. 225, 264 S.E.2d 731, 1980 Ga. App. LEXIS 1759 (1980) (see now O.C.G.A. § 9-3-51).

Construction with § 9-3-30. — O.C.G.A. § 9-3-51 is a statute of ultimate repose and does not extend the four-year limitation period of O.C.G.A. § 9-3-30 covering an action for damages to realty. Armstrong v. Royal Lakes Assocs., 232 Ga. App. 643, 502 S.E.2d 758.

Only improvements to real property controlled by section. — This section is applicable only to improvements to real property. Turner v. Marable-Pirkle, Inc., 238 Ga. 517, 233 S.E.2d 773, 1977 Ga. LEXIS 1083 (1977).

O.C.G.A. § 9-3-51 had no application to a claim that a landowner negligently maintained a grate installed by a contractor on its property. England v. Beers Constr. Co., 224 Ga. App. 44, 479 S.E.2d 420.

Section not retroactive. — Statute of limitation in this section cannot be construed to have retroactive application. Jaro, Inc. v. Shields, 123 Ga. App. 391, 181 S.E.2d 110, 1971 Ga. App. LEXIS 1236 (1971).

Application of this section to cause of action which had not accrued or vested at time of enactment of section in 1968 is not a retrospective application. U-Haul Co. v. Abreu & Robeson, Inc., 156 Ga. App. 72, 274 S.E.2d 26, 1980 Ga. App. LEXIS 2882 (1980), aff'd, 247 Ga. 565, 277 S.E.2d 497, 1981 Ga. LEXIS 787 (1981).

No statements tolling statute of limitations. — Trial court's rulings that

General Consideration (Cont'd)

there was no genuine issue of material fact showing that the defendants made any statements sufficient to toll the statute of limitation as a matter of law were affirmed since the plaintiff did not exercise due diligence, and the statute of limitation had run on the plaintiff's claim for breach of contract per se, even if such a claim existed. Southern States Chemical v. Tampa Tank & Welding, 359 Ga. App. 731, 858 S.E.2d 72, 2021 Ga. App. LEXIS 169 (2021).

Immunity of O.C.G.A. § 9-3-50 et seq., should not be extended to manufacturers. Northbrook Excess & Surplus Ins. Co. v. J.G. Wilson Corp., 250 Ga. 691, 300 S.E.2d 507, 1983 Ga. LEXIS 605 (1983).

Defendant was not a mere manufacturer but a designer within the contemplation of O.C.G.A. § 9-3-51 since allegedly defective doors were designed by the defendant's engineering and design department to fit specifications and architectural drawings presented by the owner and since the doors were not only designed by the defendant but were custom designed and made for the plaintiff's use. Northbrook Excess & Surplus Ins. Co. v. J.G. Wilson Corp., 250 Ga. 691, 300 S.E.2d 507, 1983 Ga. LEXIS 605 (1983).

Limitation of O.C.G.A. § 9-3-51 applies regardless of when injury occurs or, indeed, whether a cause of action has accrued at all prior to the expiration of the period. Atlanta Gas Light Co. v. City of Atlanta, 160 Ga. App. 396, 287 S.E.2d 229, 1981 Ga. App. LEXIS 2984 (1981).

"Discovery rule" inapplicable. — Tolling of a period of limitation by the discovery rule is confined to cases involving bodily harm. Fort Oglethorpe Assocs. II v. Hails Constr. Co., 196 Ga. App. 663, 396 S.E.2d 585, 1990 Ga. App. LEXIS 1011 (1990), cert. denied, No. S90C1669, 1990 Ga. LEXIS 552 (Ga. Oct. 4, 1990).

Third-party claim for indemnification is an "action" covered under subsection (a) of O.C.G.A. § 9-3-51, and in view of the fact that the claim was not filed within two years of the date of injury, as required by subsection (b) of O.C.G.A. § 9-3-51, it was not timely filed. Gwinnett Place Assocs. v. Pharr Eng'g, Inc., 215 Ga. App. 53, 449 S.E.2d 889, 1994 Ga. App. LEXIS 1125 (1994).

Application

Installation of company-owned gas line not improvement within section. — Installation of an underground gas line by a utility company for the transmission of natural gas, when the ownership of the line continues in the company, is not such an improvement to real estate as is contemplated by O.C.G.A. § 9-3-51. Atlanta Gas Light Co. v. City of Atlanta, 160 Ga. App. 396, 287 S.E.2d 229, 1981 Ga. App. LEXIS 2984 (1981).

Burial of construction debris on an undeveloped lot could not be considered an improvement to real property for purposes of O.C.G.A. § 9-3-51. Armstrong v. Royal Lakes Assocs., 232 Ga. App. 643, 502 S.E.2d 758.

Power plant's electrical system qualified as an improvement to real property within meaning of O.C.G.A. § 9-3-51 when it consisted of a complex system of buildings and electrical components covering acres and acres of land, and in addition, was essential to the purpose of the realty, i.e., the generation and distribution of electrical power and as a result, clearly enhanced the value of the realty. Mullis v. Southern Co. Servs., 250 Ga. 90, 296 S.E.2d 579, 1982 Ga. LEXIS 1014 (1982).

Erection of power pole and placing of necessary equipment thereon for transmission of electricity is not such an improvement to real estate as was contemplated by this section. Turner v. Marable-Pirkle, Inc., 238 Ga. 517, 233 S.E.2d 773, 1977 Ga. LEXIS 1083 (1977).

Changing of light bulbs. — Genuine issue of material fact existed, precluding summary judgment, as to whether a scoreboard on the property owner's softball field constituted the improvement to real property necessary to trigger the statute of repose of O.C.G.A. § 9-3-51(a) regarding the advertising agency employee's claim for injuries allegedly sustained when the employee was thrown from the scoreboard due to its defective wiring as the employee changed light bulbs on it. Kull v. Six Flags over Ga. II, L.P., 254 Ga.

App. 897, 564 S.E.2d 747, 2002 Ga. App. LEXIS 438 (2002), rev'd on other grounds, 276 Ga. 210, 576 S.E.2d 880, 2003 Ga. LEXIS 120 (2003).

Elevator constituted improvement to realty. — Elevator, specially designed and manufactured for installation in the plaintiff's home and installed there as an integral part of the home pursuant to the defendant's specifications, was an improvement to real property within the contemplation of O.C.G.A. § 9-3-51. Beall v. Inclinator Co., 182 Ga. App. 664, 356 S.E.2d 899, 1987 Ga. App. LEXIS 1768 (1987).

Work done constituted improvement. — Georgia's eight-year statute of repose for improvements to real property, O.C.G.A. § 9-3-51, barred a claim against an installer of asbestos at a paper mill where a claimant worked because the installation and removal of old insulation constituted an improvement to real property under the realty statute of repose, and the dust and debris associated with the improvement to real property was covered by O.C.G.A. § 9-3-51(a). Toole v. Georgia-Pacific, LLC, No. A10A2179, 2011 Ga. App. LEXIS 810 (Ga. Ct. App. Jan. 19, 2011), cert. denied, No. S11C1137, 2011 Ga. LEXIS 572 (Ga. July 11, 2011).

Fireplace constituted improvement to realty. — Action for loss of real and personal property in a fire allegedly caused by a fireplace defect was barred because the fireplace was an improvement to real property within the meaning of O.C.G.A. § 9-3-51, and suit was not initiated until after eight years from the date of substantial completion thereof. Hanna v. McWilliams, 213 Ga. App. 648, 446 S.E.2d 741, 1994 Ga. App. LEXIS 762 (1994).

Improvement that works properly cannot be deemed as having a "deficiency." — Because O.C.G.A. § 9-3-51 specifically applies to "deficiencies" in the design or construction of an improvement to real property that causes personal injury or property damage, it follows that, while an improvement that works properly and does not cause any damage arguably "adds value" to the property, it could not be deemed as having a "deficiency"; because it caused no damage, no cause of action would arise from its use, and, therefore, the statute would not apply in such a case. Wilhelm v. Houston County, 310 Ga. App. 506, 713 S.E.2d 660, 2011 Ga. App. LEXIS 533 (2011), cert. denied, No. S11C1745, 2012 Ga. LEXIS 219 (Ga. Feb. 27, 2012).

Interlock device that was an integral part of a chlorine circulation system installed in a pool was an improvement to real property for purposes of O.C.G.A. § 9-3-51. Standard Fire Ins. Co. v. Kent & Assocs., 232 Ga. App. 419, 501 S.E.2d 858.

Contractor's contribution action against subcontractors could be maintained without a prior judgment. — Trial court erred in dismissing a contractor's independent suit against several subcontractors for contribution and indemnity. Under O.C.G.A. § 51-12-32, the contractor was not required to suffer a judgment against it in an underlying suit before pursuing its right of contribution, and the contractor needed to protect its rights before expiration of the construction statute of repose, O.C.G.A. § 9-3-51. R. Larry Phillips Constr. Co. v. Muscogee Glass, 302 Ga. App. 611, 691 S.E.2d 372, 2010 Ga. App. LEXIS 194 (2010), cert. denied, No. S10C1094, 2010 Ga. LEXIS 587 (Ga. July 12, 2010), cert. denied, No. S10C1105, 2010 Ga. LEXIS 568 (Ga. July 12, 2010).

Company's suit against contractor for indemnification not barred. — Power company sued a former contractor seeking indemnification under the parties' contracts for litigation expenses the company incurred in a wrongful death suit filed by the estate of the contractor's former employee. The company's suit was not barred by O.C.G.A, § 9-3-51 as the suit did not allege that the contractor's construction was deficient, and the indemnification provisions did not require such a showing. Nat'l Serv. Indus. v. Ga. Power Co., 294 Ga. App. 810, 670 S.E.2d 444, 2008 Ga. App. LEXIS 1177 (2008), cert. denied, No. S09C0517, 2009 Ga. LEXIS 236 (Ga. Apr. 20, 2009).

Defective construction action time barred. — Action against builder of a house based on alleged defective construction of the house was time barred since

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the homeowner did not acquire title to the house until after the tort and contract statutes of limitation had expired, and the homeowner was not allowed to revive those causes of action; neither the discovery rule nor the continuing tort theory applied to actions involving only damage to real property, and since all representations allegedly made by the builder took place after the statutes of limitation had expired, equitable estoppel did not toll the running. Bauer v. Weeks, 267 Ga. App. 617, 600 S.E.2d 700, 2004 Ga. App. LEXIS 733 (2004).

According to a purchaser, the acts of a county, the county health department, and builders that resulted in the problems the purchaser experienced were not just related to the "construction of an improvement to real property," the improvements were essential to such construction and occurred prior to the substantial completion of the improvement; accordingly, any cause of action for damage to real property that resulted from the deficiencies in such construction was subject to the eight-year statute of repose in O.C.G.A. § 9-3-51. Wilhelm v. Houston County, 310 Ga. App. 506, 713 S.E.2d 660, 2011 Ga. App. LEXIS 533 (2011), cert. denied, No. S11C1745, 2012 Ga. LEXIS 219 (Ga. Feb. 27, 2012).

Purchaser's claims against a county, the county health department, and builders were barred by the statute of repose, O.C.G.A. § 9-3-51, because the purchaser's house and the septic system were completed before the purchaser moved in, but the purchaser did not file suit for damages allegedly resulting from construction defects in the septic system and/or the development of the property until more than nine years later. Wilhelm v. Houston County, 310 Ga. App. 506, 713 S.E.2d 660, 2011 Ga. App. LEXIS 533 (2011), cert. denied, No. S11C1745, 2012 Ga. LEXIS 219 (Ga. Feb. 27, 2012).

Trial court erred in denying a developer's motion for summary judgment on the homeowners' claim for negligent construction because the developer presented testimony that the sale of the last townhouse closed on December 8, 2004, and that on the date of closing, construction of the townhouses was substantially complete; thus, O.C.G.A. § 9-3-51, the statute of repose, barred any action filed after December 8, 2012, and the homeowners filed the homeowners' suit two months after that date. Ashton Atlanta Residential, LLC v. Ajibola, 331 Ga. App. 231, 770 S.E.2d 311, 2015 Ga. App. LEXIS 133 (2015).

Claims barred after expiration of eight-year repose period regardless of builder's alleged fraud in construction. — Because a homeowner was injured in a deck collapse after the eight-year statute of repose period of O.C.G.A. § 9-3-51(a) had expired, it was irrelevant whether the builder had fraudulently covered up its allegedly negligent construction of the deck at the time it was built 11 years earlier. The owner's action for injuries was barred. Rosenberg v. Falling Water, Inc., 302 Ga. App. 78, 690 S.E.2d 183, 2009 Ga. App. LEXIS 1447 (2009), aff'd, 289 Ga. 57, 709 S.E.2d 227, 2011 Ga. LEXIS 249 (2011).

Court of appeals properly affirmed the trial court's grant of summary judgment to a contractor in a homeowner's action to recover damages for injuries the homeowner sustained when a deck collapsed because the homeowner's right to file suit never accrued since the homeowner was not personally injured until years after the statute of repose time period expired; the injuries the homeowner sustained occurred more than a decade after the home had been substantially completed by the contractor, and the contractor took no action to prevent the homeowner from discovering a cause for the injuries or to dissuade the homeowner from filing suit with respect to the injuries, even if such a cause of action existed. Rosenberg v. Falling Water, Inc., 289 Ga. 57, 709 S.E.2d 227, 2011 Ga. LEXIS 249 (2011).

Planning and design claim barred. — Engineering firm was properly granted summary judgment in the driver's negligent planning and design action because the eight-year statute of repose in O.C.G.A. § 9-3-51 applied when the road was "an improvement to real property" in that the road was permanent in nature and added value to the property by allowing the public to efficiently traverse the

county. Feldman v. Arcadis US, Inc., 316 Ga. App. 158, 728 S.E.2d 792, 2012 Ga. App. LEXIS 505 (2012).

Failure to warn claim barred. — Trial court properly granted summary judgment to a general contractor in a personal injury action by a minor, arising from the minor's fall through a window that had been installed in a pub by the contractor, as the claim was barred by the expiration of the period contained in O.C.G.A. § 9-3-51; there was no exception for a failure to warn. Taylor v. S & W Dev., Inc., 279 Ga. App. 744, 632 S.E.2d 700, 2006 Ga. App. LEXIS 693 (2006).

Nuisance claim barred by statute of repose. — Purchaser's nuisance claims against a county, the county health department, and builders were barred by the statute of repose, O.C.G.A. § 9-3-51, because the purchaser could not maintain a nuisance action under the facts asserted in the plaintiff's complaint; a plaintiff cannot maintain a nuisance claim that is based upon damage to a house resulting from a defect constructed into the house that was concealed from the plaintiff by the builder and/or the seller because, instead, the applicable causes of action are fraud against the seller and/or negligent construction against the builder. Wilhelm v. Houston County, 310 Ga. App. 506, 713 S.E.2d 660, 2011 Ga. App. LEXIS 533 (2011), cert. denied, No. S11C1745, 2012 Ga. LEXIS 219 (Ga. Feb. 27, 2012).

RESEARCH REFERENCES

Am. Jur. 2d.

13 Am. Jur. 2d, Building and Construction Contracts, § 110 et seq. 51 Am. Jur. 2d, Limitation of Actions, §§ 108 et seq., 137 et seq.

Am. Jur. Proof of Facts.

Improper or Defective Wiring as Cause of Fire, 47 POF2d 451.

C.J.S.

54 C.J.S., Limitation of Actions, § 82 et seq.

ALR.

Provision of death statute as to time of bringing action as a condition of the right of action or as a mere statute of limitations, 67 A.L.R. 1070.

Complaint or declaration which fails to allege that action for wrongful death was brought within statutory period, or affirmatively shows that it was not, as subject to demurrer, 107 A.L.R. 1048.

Exceptions attaching to limitation prescribed by death statutes or survival statutes allowing recovery of damages for death, 132 A.L.R. 292.

Amendment of complaint or declaration by setting up death statute after expiration of period to which action is limited by the death statute or by the statute of limitations, 134 A.L.R. 779.

Time for which statute of limitations begins to run against cause of action for wrongful death, 97 A.L.R.2d 1151.

Construction and operation of parking-space provision in shopping-center lease, 56 A.L.R.3d 596.

Right to amend pending personal injury action by including action for wrongful death after statute of limitations has run against independent death action, 71 A.L.R.3d 933.

When statute of limitations begins to run on negligent design claim against architect, 90 A.L.R.3d 507.

Products liability: what statute of limitations governs actions based on strict liability in tort, 91 A.L.R.3d 455.

Validity and construction, as to claim alleging design defects, of statute imposing time limitations upon action against architect or engineer for injury or death arising out of defective or unsafe condition of improvement to real property, 93 A.L.R.3d 1242.

Statutes of limitation: actions by purchasers or contractees against vendors or contractors involving defects in houses or other buildings caused by soil instability, 12 A.L.R.4th 866.

Time of discovery as affecting running of statute of limitations in wrongful death action, 49 A.L.R.4th 972.

What constitutes "improvement to real property" for purposes of statute of repose or statute of limitations, 122 A.L.R.5th 1.

Fraud, misrepresentation, or deception as estopping reliance on nonmedical malpractice statutes of repose, 98 A.L.R.6th 417.

9-3-52. Limitation not available to owner or tenant.

The limitation prescribed by this article shall not be asserted as a defense by any person who would otherwise be entitled to its benefits but who is in actual possession or control, as owner, tenant, or otherwise, of such an improvement at the time any deficiency of such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

History.
Ga. L. 1968, p. 127, § 4.

JUDICIAL DECISIONS

Employing contractor had at least equal knowledge of specific hazard. — In a mesothelioma case, the grant of summary judgment to defendant hospital was upheld because plaintiff's employing contractor had at least equal knowledge of the specific hazard posed by exposure to asbestos at defendant hospital and full knowledge by the independent contractor of the dangers was sufficient to discharge the landowner's duty to its invitees. Sinyard v. Ga. Power Co., 363 Ga. App. 195, 871 S.E.2d 45, 2022 Ga. App. LEXIS 138 (2022).

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Limitation of Actions, §§ 108 et seq., 137 et seq.
C.J.S.
53 C.J.S., Limitation of Actions, §§ 82 et seq., 105.
ALR.
Validity and construction, as to claim alleging design defects, of statute imposing time limitations upon action against architect or engineer for injury or death arising out of defective or unsafe condition of improvement to real property, 93 A.L.R.3d 1242.

9-3-53. Period of limitations not extended.

Nothing in this article shall extend the period of limitations prescribed by the law of this state for the bringing of any action or shall postpone the time as of which a cause of action accrues.

History.
Ga. L. 1968, p. 127, § 3.
Law reviews.
For article discussing architect liability for product design and supervision of construction, and the statute of limitations, see 14 Ga. St. B.J. 164 (1978).

RESEARCH REFERENCES

ALR.
Validity and construction, as to claim alleging design defects, of statute imposing time limitations upon action against architect or engineer for injury or death arising out of defective or unsafe condition of improvement to real property, 93 A.L.R.3d 1242.

ARTICLE 4
LIMITATIONS FOR MALPRACTICE ACTIONS

Cross references.

Obtaining of discovery generally, § 9-11-26 et seq.

Declaration that action in tort lies for failure of medical practitioner to exercise reasonable degree of care and skill, § 51-1-27.

Law reviews.

For article, "Res Ipsa Loquitur and Medical Malpractice in Georgia: A Reassessment," see 17 Ga. L. Rev. 33 (1982).

For annual survey of tort law, see 35 Mercer L. Rev. 291 (1983).

For article, "Medical Malpractice and the Statute of Limitations: An Update on the Discovery Rule," see 22 Ga. St. B.J. 60 (1985).

For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

For article, "When Do State Laws Determine ERISA Plan Benefit Rights?," see 47 J. Marshall L. Rev. 145 (2014).

JUDICIAL DECISIONS

Separate classification of medical malpractice actions is rational exercise of legislative power. Hamby v. Neurological Assocs., P.C., 243 Ga. 698, 256 S.E.2d 378, 1979 Ga. LEXIS 1034 (1979); Eubanks v. Ferrier, 245 Ga. 763, 267 S.E.2d 230, 1980 Ga. LEXIS 929 (1980); Allrid v. Emory Univ., 249 Ga. 35, 285 S.E.2d 521, 1982 Ga. LEXIS 1111 (1982).

There is a rational basis for different treatment of loss of consortium actions arising out of medical malpractice, insofar as limitation of actions is concerned. Hamby v. Neurological Assocs., P.C., 243 Ga. 698, 256 S.E.2d 378, 1979 Ga. LEXIS 1034 (1979).

RESEARCH REFERENCES

ALR.

What constitutes physician-patient relationship for malpractice purposes, 17 A.L.R.4th 132.

Medical malpractice: instrument breaking in course of surgery or treatment, 20 A.L.R.4th 1179.

Medical malpractice: statute of limitations in wrongful death action based on medical malpractice, 70 A.L.R.4th 535.

Medical malpractice: when limitations period begins to run on claim for optometrist's malpractice, 70 A.L.R.4th 600.

Medical malpractice: physician's admission of negligence as establishing standard of care and breach of that standard, 42 A.L.R.5th 1.

Effect of fraudulent or negligent concealment of patient's cause of action on timeliness of action under medical malpractice statute of repose, 19 A.L.R.6th 475.

Medical Malpractice Claims Involving Instances of Sepsis or Septic Shock: Standard of Care, Sufficiency of Evidence of Causation, Expert Testimony and Evidence, Affidavits of Merit, and Additional Evidentiary and Discovery Matters, 62 A.L.R.7th 2.

Medical Malpractice Claims Involving Instances of Sepsis or Septic Shock: Negligence, Damages, Jury Instructions, Vicarious Liability, Statutes of Limitation, Arbitration, and Other Considerations, 72 A.L.R.7th 4.

9-3-70. "Action for medical malpractice" defined.

As used in this article, the term "action for medical malpractice"

means any claim for damages resulting from the death of or injury to any person arising out of:

(1) Health, medical, dental, or surgical service, diagnosis, prescription, treatment, or care rendered by a person authorized by law to perform such service or by any person acting under the supervision and control of the lawfully authorized person; or

(2) Care or service rendered by any public or private hospital, nursing home, clinic, hospital authority, facility, or institution, or by any officer, agent, or employee thereof acting within the scope of his employment.

History.

Code 1933, § 3-1101, enacted by Ga. L. 1976, p. 1363, § 1.

Law reviews.

For annual survey on torts, see 36 Mercer L. Rev. 327 (1984).

For note, "You Can't Get There from Here — Questioning the Erosion of ERISA Preemption in Medical Malpractice Actions Against HMOs," see 30 Ga. L. Rev. 1023 (1996).

For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

For article, "When Do State Laws Determine ERISA Plan Benefit Rights?," see 47 J. Marshall L. Rev. 145 (2014).

JUDICIAL DECISIONS

Action for wrongful death can be premised upon an allegation of medical malpractice. Allrid v. Emory Univ., 166 Ga. App. 130, 303 S.E.2d 486, 1983 Ga. App. LEXIS 2079, aff'd, 251 Ga. 367, 306 S.E.2d 905, 1983 Ga. LEXIS 793 (1983).

Intentional termination of life support a wrongful death claim, not a malpractice claim. — Trial court properly refused to dismiss a plaintiff's claim asserting tortious termination of life support based on the defendant's argument that it was really a medical malpractice claim and, therefore, required an expert medical affidavit under O.C.G.A. § 9-11-9.1; because such a claim is a suit for wrongful death, not medical malpractice, no expert medical affidavit was necessary. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823, 2007 Ga. App. LEXIS 1269 (2007), cert. denied, No. S08C0710, 2008 Ga. LEXIS 477 (Ga. May 19, 2008), overruled in part, Harrison v. McAfee, 338 Ga. App. 393, 788 S.E.2d 872, 2016 Ga. App. LEXIS 417 (2016).

Actions against parties other than physicians authorized. — Georgia law historically has allowed medical malpractice suits against parties other than physicians. Allrid v. Emory Univ., 166 Ga. App. 130, 303 S.E.2d 486, 1983 Ga. App. LEXIS 2079, aff'd, 251 Ga. 367, 306 S.E.2d 905, 1983 Ga. LEXIS 793 (1983).

Doctor was a person authorized by federal law to perform medical services under O.C.G.A. § 9-3-70, even if the device had not been approved as used. Knight v. Sturm, 212 Ga. App. 391, 442 S.E.2d 255, 1994 Ga. App. LEXIS 256 (1994), cert. denied, No. S94C1022, 1994 Ga. LEXIS 693 (Ga. Apr. 28, 1994).

Actions against pharmacist. — Action based upon the conduct of a pharmacist in dispensing medication upon a doctor's prescription constitutes an "action for medical malpractice" within the meaning of O.C.G.A. § 9-3-70. Robinson v. Williamson, 245 Ga. App. 17, 537 S.E.2d 159, 2000 Ga. App. LEXIS 895 (2000), cert. denied, No. S00C1805, 2001 Ga. LEXIS 95 (Ga. Jan. 19, 2001).

Actions against infertility clinic. — Under O.C.G.A. § 9-3-70, in a married couple's suit based on an infertility clinic's failure to preserve sperm, claims against two employees of the clinic were claims for professional negligence, not for ordinary

negligence, and thus were time-barred under O.C.G.A. § 9-3-71(a); the employees were involved in the process of thawing and using the husband's sperm in order to fertilize the wife's eggs, and the employees performed these technical functions within the scope of their employment and under the supervision of licensed medical doctors. Baskette v. Atlanta Ctr. for Reprod. Med., LLC, 285 Ga. App. 876, 648 S.E.2d 100, 2007 Ga. App. LEXIS 593 (2007), cert. denied, No. S07C1618, 2008 Ga. LEXIS 103 (Ga. Jan. 7, 2008).

Actions against privately operated prisons. — Former federal inmate's argument alleging that the Bivens decision should be extended to the inmate's Eighth Amendment claim against private prison employees because the affidavit requirement of O.C.G.A. § 9-11-9.1(a) made recovery only theoretical under state law failed; not only did the complaint not allege a claim for medical malpractice as defined by O.C.G.A. § 9-3-70, but even if it did the inmate stood in the same shoes as anyone else in Georgia filing a professional malpractice claim and was subject to no stricter rules than the rest of Georgia's residents. Alba v. Montford, 517 F.3d 1249, 2008 U.S. App. LEXIS 3749 (11th Cir.), cert. denied, 555 U.S. 1051, 129 S. Ct. 632, 172 L. Ed. 2d 619, 2008 U.S. LEXIS 8777 (2008).

Actions against day facility. — A court must look to the substance of an action against a medical professional, hospital, or health care facility in determining whether the action is one for professional or simple negligence. Therefore, in a suit for simple negligence, negligence per se, wrongful death, intentional infliction of emotional distress, breach of contract, and negligent supervision and training, summary judgment was improperly granted to the defendants because the plaintiffs were not required to establish that the plaintiffs' expert met the requirements of O.C.G.A. § 24-7-702(c)(2)(D) as the plaintiffs' suit was not a medical malpractice action as the facility where the plaintiffs' son collapsed was a day facility that provided education, life skills, job assistance, and rehabilitation services to people with mental and physical disabilities, and the individual defendants listed in the case were non-medical personnel and personal care givers. Blake v. KES, Inc., 336 Ga. App. 43, 783 S.E.2d 432, 2016 Ga. App. LEXIS 110 (2016).

Claims for emotional pain and distress sounded in professional malpractice and were subject to the five-year statute of repose. Thompson v. Long, 225 Ga. App. 719, 484 S.E.2d 666.

Cause of action for battery exists when objected-to treatment is performed without the consent of, or after withdrawal of consent by, the patient; there is no authority for holding that a medical consent form signed for one operation or treatment is valid for another operation later and elsewhere. Joiner v. Lee, 197 Ga. App. 754, 399 S.E.2d 516, 1990 Ga. App. LEXIS 1496 (1990).

O.C.G.A. § 9-3-70 is not applicable to action for injury to a corpse. — Bauer v. North Fulton Med. Ctr., Inc., 241 Ga. App. 568, 527 S.E.2d 240, 1999 Ga. App. LEXIS 1673 (1999).

No cause of action found. — Patient could not bring a professional liability claim for damages against a family doctor for interference with the patient's marriage, loss of affection, or depression and anxiety that resulted from the doctor having an affair with the patient's wife because O.C.G.A. § 51-1-17 abolished tort claims for adultery. The claim was not an action for medical malpractice under O.C.G.A. § 9-3-70 because the patient failed to allege an error of professional skill or judgment with regard to the doctor's care. Witcher v. McGauley, 316 Ga. App. 574, 730 S.E.2d 56, 2012 Ga. App. LEXIS 615 (2012), cert. denied, No. S12C1782, 2012 Ga. LEXIS 871 (Ga. Nov. 5, 2012).

Exclusive remedy under Workers' Compensation Act. — There is no controlling authority for the premise that an employee injured as a result of medical malpractice may, consistent with the exclusive remedy provision of the Workers' Compensation Act, O.C.G.A. § 34-9-11, bring a medical malpractice action against a certified athletic trainer. McLeod v. Blase, 290 Ga. App. 337, 659 S.E.2d 727, 2008 Ga. App. LEXIS 313 (2008).

Nonprofit blood bank. — Suit alleging that a nonprofit blood bank was negligent in collecting and supplying human blood—including screening volunteer blood donors and testing blood for the presence of human immunodeficiency virus (HIV)—was an action for medical malpractice under O.C.G.A. § 9-3-70. Bradway v. American Nat'l Red Cross, 263 Ga. 19, 426 S.E.2d 849, 1993 Ga. LEXIS 273 (1993).

Failure to inform patient of HIV results. — Patient's claim against a doctor and hospital for failure to report the positive results of the patient's HIV test to the patient as required under O.C.G.A. § 31-22-9.2 was a classic medical malpractice claim under O.C.G.A. § 9-3-70, despite the patient's claim that it was ordinary negligence; because the claim was brought eight years after the test, the claim was barred by the five-year statute of repose, O.C.G.A. § 9-3-71(b). Remand was required for consideration of equitable estoppel. Piedmont Hospital, Inc. v. D. M., 335 Ga. App. 442, 779 S.E.2d 36, 2015 Ga. App. LEXIS 775 (2015), cert. denied, No. S16C0676, 2016 Ga. LEXIS 328 (Ga. Apr. 26, 2016).

O.C.G.A. § 9-3-70 applies to actions against hospitals for negligent retention. — Parents' claim against a hospital for negligent retention of a physician was subject to the statute of limitations for medical malpractice because the claim was predicated on the doctor's skill, or lack thereof, and damages were predicated upon proof that substandard care caused injuries. Ray v. Scottish Rite Children's Med. Ctr., Inc., 251 Ga. App. 798, 555 S.E.2d 166, 2001 Ga. App. LEXIS 1150 (2001).

Statute of limitations. — Five-year medical malpractice statute of repose did not bar patient and husband's claims in refiled action for sexual assault, battery, and loss of consortium claims as the refiled complaint alleged those claims arose out of a non-consensual touching of the patient and not out of the provision of professional services to the patient, but those claims were nevertheless barred because they were not raised in the original action and were time barred under their own applicable limitations period by the time they were filed as part of the refiled complaint. Blier v. Greene, 263 Ga. App. 35, 587 S.E.2d 190, 2003 Ga. App. LEXIS 1009 (2003), cert. denied, No. S04C0114, 2004 Ga. LEXIS 102 (Ga. Jan. 20, 2004), cert. denied, No. S04C0106, 2004 Ga. LEXIS 103 (Ga. Jan. 20, 2004).

Trial court erred in denying partial summary judgment on a patient's medical malpractice and ordinary negligence claims, when, given evidence that the patient suffered an injury arising out of the misdiagnosis in January of 1999, when the patient was first seen by the doctor manifesting continuous symptoms of a moderate B-12 deficiency and the doctor failed to make the diagnosis and provide treatment, and the patient failed to file an action within the two years; but, because the patient's ordinary negligence and breach of fiduciary duty claims were essentially malpractice claims, subject to the same limitations period, summary judgment as to these claims was upheld. Stafford-Fox v. Jenkins, 282 Ga. App. 667, 639 S.E.2d 610, 2006 Ga. App. LEXIS 1513 (2006).

Claim of medical malpractice time barred. — Trial court properly struck, as time barred, the breach of fiduciary duty claim because the gravamen of that claim was the doctor's alleged failure to correctly read the patient's ultrasound and the failure to diagnose the patient's medical condition, amounting to a claim of negligence that went to the propriety of the doctor's exercise of medical skill and judgment, a medical malpractice as contemplated by O.C.G.A. §§ 9-3-70 and 9-3-71(b). Johnson v. Jones, 327 Ga. App. 371, 759 S.E.2d 252, 2014 Ga. App. LEXIS 340 (2014).

RESEARCH REFERENCES

Am. Jur. 2d.

61 Am. Jur. 2d, Physicians, Surgeons, and Other Healers, §§ 285 et seq., 298 et seq.

Am. Jur. Proof of Facts.

Hospital's Failure to Supervise Private Physician Using Hospital Facilities, 6 POF2d 647.

Hospital Liability for Negligent Selection of Staff Physician, 14 POF3d 433.

Hospital Liability for Negligent Retention of Staff Physician, 15 POF3d 181.

Liability of Physician for Improper Referral of Patients to a Medical Care Facility in Which Physician Has a Financial Interest, 61 POF3d 245.

C.J.S.

70 C.J.S., Physicians, Surgeons, and Other Health Care Providers, §§ 58 et seq., 152 et seq.

ALR.

Malpractice: treatment of fractures or dislocations, 54 A.L.R.2d 200.

Malpractice: diagnosis of fractures or dislocations, 54 A.L.R.2d 273.

Statute of limitations relating to medical malpractice actions as applicable to actions against unlicensed practitioner, 70 A.L.R.2d 114.

Malpractice in diagnosis or treatment of tuberculosis, 75 A.L.R.2d 814.

Malpractice in treatment and surgery of the ear, 76 A.L.R.2d 783.

Physician's or surgeon's malpractice in connection with diagnosis or treatment of rectal or anal disease, 5 A.L.R.3d 916.

Malpractice: physician's failure to advise patient to consult specialist or one qualified in a method of treatment which physician is not qualified to give, 35 A.L.R.3d 349.

Malpractice: questions of consent in connection with treatment of genital or urinary organs, 89 A.L.R.3d 32.

Malpractice: liability of anesthetist for injuries from spinal anesthetics, 90 A.L.R.3d 775.

Promotional efforts directed toward prescribing physician as affecting prescription drug manufacturer's liability for product-caused injury, 94 A.L.R.3d 1080.

Medical malpractice: instruction as to exercise or use of injured member, 99 A.L.R.3d 901.

Modern status of "locality rule" in malpractice action against physician who is not a specialist, 99 A.L.R.3d 1133.

Physician's liability for causing patient to become addicted to drugs, 16 A.L.R.4th 999.

Medical malpractice: liability for failure of physician to inform patient of alternative modes of diagnosis or treatment, 38 A.L.R.4th 900.

Recovery by patient on whom surgery or other treatment was performed by one other than physician whom patient believed would perform it, 39 A.L.R.4th 1034.

What nonpatient claims against doctors, hospitals, or similar health care providers are not subject to statutes specifically governing actions and damages for medical malpractice, 88 A.L.R.4th 358.

Liability of physician, nurse, or hospital for failure to contact physician or to keep physician sufficiently informed concerning status of mother during pregnancy, labor, and childbirth, 3 A.L.R.5th 123.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by inadequate attendance or monitoring of patient during and after pregnancy, labor, and delivery, 3 A.L.R.5th 146.

Malpractice in treatment of skin disease, disorder, blemish, or scar, 19 A.L.R.5th 563.

Liability of health maintenance organizations (HMOs) for negligence of member physicians, 51 A.L.R.5th 271.

Hospital liability as to diagnosis and care of patients in emergency room, 58 A.L.R.5th 613.

Coverage of professional-liability or indemnity policy for sexual contact with patients by physicians, surgeons, and other healers, 60 A.L.R.5th 239.

Medical-malpractice countersuits, 61 A.L.R.5th 307.

Liability of hospital or medical practitioner under doctrine of strict liability in tort, or breach of warranty, for harm caused by drug, medical instrument, or similar device used in treating patient, 65 A.L.R.5th 357.

Timeliness of action under medical malpractice statute of repose, aside from effect of fraudulent concealment of patient's cause of action, 14 A.L.R.6th 301.

Medical Malpractice: Brain, 52 A.L.R.7th 1.

9-3-71. General limitation.

(a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.

(b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.

(c) Subsection (a) of this Code section is intended to create a two-year statute of limitations. Subsection (b) of this Code section is intended to create a five-year statute of ultimate repose and abrogation.

(d) Nothing contained in subsection (a) or (b) of this Code section shall be construed to repeal Code Section 9-3-73, which shall be deemed to apply either to the applicable statutes of limitation or repose.

History.

Code 1933, § 3-1102, enacted by Ga. L. 1976, p. 1363, § 1; Ga. L. 1985, p. 556, § 1.

Cross references.

Tolling of limitations for medical malpractice, § 9-3-97.1.

Editor's notes.

Ga. L. 1985, p. 556, § 3, not codified by the General Assembly, provides: "No action for medical malpractice which, prior to July 1, 1985, has been barred by the provisions of Title 9, relating to actions, shall be revived by this Act. No action for medical malpractice which would be barred before July 1, 1986, by the provisions of this Act but which would not be so barred by the provisions of Title 9 in force immediately prior to July 1, 1985, shall be barred until July 1, 1986."

Law reviews.

For comment on Parker v. Vaughan, 124 Ga. App. 300, 183 S.E.2d 605 (1971), see 8 Ga. St. B.J. 244 (1971), and 23 Mercer L. Rev. 697 (1972).

For comment on statutes of limitations in medical malpractice actions in Georgia, see 33 Mercer L. Rev. 377 (1981).

For survey article on torts, see 34 Mercer L. Rev. 271 (1982).

For annual survey on torts, see 36 Mercer L. Rev. 327 (1984).

For case note, "Lynch v. Waters: Tolling Georgia's Statute of Limitations for Medical Malpractice," see 38 Mercer L. Rev. 1493 (1987).

For annual survey article on the law of torts, see 45 Mercer L. Rev. 403 (1993).

For annual survey article discussing trial practice and procedure, see 52 Mercer L. Rev. 447 (2000).

For survey article on trial practice and procedure for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 439 (2003).

For annual survey of evidence law, see 56 Mercer L. Rev. 235 (2004).

For survey article on tort law, see 60 Mercer L. Rev. 375 (2008).

For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008).

For article, "Misdiagnosis Law in Georgia: Where Are We Now?," see 16 (No. 5) Ga. St. B.J. 14 (2011).

For annual survey of tort laws, see 67 Mercer L. Rev. 237 (2015).

JUDICIAL DECISIONS

Analysis

General Consideration
Procedural Requirements
Application of Timing Principles
Specific Actions
Decisions Under § 9-3-33

General Consideration

Venue for dissolved corporate entity. — Trial court erred in denying the defendants' motion to dismiss and in finding that venue was proper in DeKalb County, Georgia, because while it was undisputed that the cause of action arose in DeKalb County, by March 2013, when plaintiff filed the renewal suit, the defending orthopedic practice had been administratively dissolved and no longer had an office or transacted business there; thus, venue was where the practice last maintained the practice's registered office prior to dissolution, which was in Fulton County. Ross v. Waters, 332 Ga. App. 623, 774 S.E.2d 195, 2015 Ga. App. LEXIS 371 (2015).

Constitutionality of statute of repose. — Five-year statute of repose on medical malpractice actions is rationally related to a legitimate end of government and does not violate equal protection guarantees. Craven v. Lowndes County Hosp. Auth., 263 Ga. 656, 437 S.E.2d 308 (1993).

Statute of repose for medical malpractice claims is rationally related to a legitimate legislative attempt to reduce the uncertainties and costs related to malpractice litigation long after the medical services have been rendered and does not violate equal protection guarantees. Hanflik v. Ratchford, 848 F. Supp. 1539, 1994 U.S. Dist. LEXIS 4980 (N.D. Ga. 1994), aff'd, 56 F.3d 1391, 1995 U.S. App. LEXIS 14382 (11th Cir. 1995).

Statute of repose for medical malpractice suits under O.C.G.A. § 9-3-71(b) did not violate the equal protection clauses of the federal or Georgia Constitutions. There was a rational basis for treating medical malpractice differently from other forms of professional malpractice and for the five-year repose period itself, based on the considerations that uncertainty over the causes of illness and injury made it difficult for insurers to adequately assess premiums and that the passage of time made it more difficult to determine the cause of injury. Nichols v. Gross, 282 Ga. 811, 653 S.E.2d 747, 2007 Ga. LEXIS 871 (2007).

Constitutionality as applied to cases in which injury occurs more than two years after act or omission. — Since all general tort claims survive until there is injury, but those medical malpractice claims in which the injury occurs more than two years after the negligent act do not, all who are similarly situated are not treated alike. Since there is no substantial relation in this classification to the object of a limitation statute, prior to its amendment in 1985, O.C.G.A. § 9-3-71 was an unconstitutional denial of equal protection as applied to personal injury cases in which the injury occurs more than two years after the negligent or wrongful act or omission. Shessel v. Stroup, 253 Ga. 56, 316 S.E.2d 155, 1984 Ga. LEXIS 803 (1984), superseded by statute as stated in Quinn v. Stafford, 257 Ga. 608, 362 S.E.2d 49, 1987 Ga. LEXIS 995 (1987).

Constitutionality as applied to wrongful death. — Since there is no rational basis for a limitation scheme which permits medical malpractice wrongful death action if patient dies within two years of defendant's negligent act but which bars wrongful death action if patient lives for two years after defendant's negligent act, when the defendant is a doctor, but not in other wrongful death cases, prior to its amendment in 1985, O.C.G.A. § 9-3-71 was unconstitutional as applied to actions for wrongful death. Clark v. Singer, 250 Ga. 470, 298 S.E.2d 484, 1983 Ga. LEXIS 993 (1983), super-

General Consideration (Cont'd)

seded by statute as stated in Quinn v. Stafford, 257 Ga. 608, 362 S.E.2d 49, 1987 Ga. LEXIS 995 (1987).

Construction with § 9-3-73. — In a medical malpractice action, because the trial court erroneously applied the five-year statute of repose contained in O.C.G.A. § 9-3-71(b), and not O.C.G.A. § 9-3-73, in finding that the parents' amended negligence complaint against certain doctors and nurses was time-barred, the trial court erred in entering summary judgment against the parents; further, the trial court also erred in finding that the doctors and nurses were rendering care to only the mother, and not the mother and the newborn child. Johnson v. Thompson, 286 Ga. App. 810, 650 S.E.2d 322, 2007 Ga. App. LEXIS 799 (2007), cert. denied, No. S07C1840, 2008 Ga. LEXIS 90 (Ga. Jan. 7, 2008).

While wrongful death medical malpractice distinction unconstitutional, "foreign object" medical malpractice distinction constitutional. — Allrid v. Emory Univ., 166 Ga. App. 130, 303 S.E.2d 486 (1983), which holds that the distinction between "foreign object" cases and all other medical malpractice cases does not violate equal protection, and Clark v. Singer, 250 Ga. 470, 298 S.E.2d 484 (1983), which holds that the distinction between medical malpractice wrongful death cases and all other wrongful death cases and all other wrongful death cases violates equal protection, reach different results, but the two opinions are not inconsistent. Allrid v. Emory Univ., 251 Ga. 367, 306 S.E.2d 905, 1983 Ga. LEXIS 793 (1983) (see O.C.G.A. § 9-3-72 and notes thereto).

Continuous treatment doctrine did not apply. — Statute of repose, O.C.G.A. § 9-3-71(b), barred a medical malpractice action against appellants, a doctor and the doctor's professional corporation, for failing to follow-up on a patient's medication and treatment, leading to the patient's death, as the action was filed more than five years after the alleged negligence started to occur and the continuous treatment doctrine did not apply in Georgia to push forward the date for commencing the action; therefore, the trial court should have granted appellants' motion in limine to exclude evidence of malpractice that occurred more than five years before the complaint was filed. Eyzaguirre v. Baker, 260 Ga. App. 53, 579 S.E.2d 47, 2003 Ga. App. LEXIS 252 (2003), cert. denied, No. S03C1010, 2003 Ga. LEXIS 563 (Ga. June 9, 2003).

Georgia Court of Appeals erred in holding that, if a plaintiff in a misdiagnosis case presents with additional or significantly increased symptoms of the same misdiagnosed disease, the medical malpractice statute of limitations and statute of repose do not bar the plaintiff's claims. Such holding adopted a variant of the previously rejected continuing treatment doctrine and presented a reinterpretation of the term injury set forth in O.C.G.A. § 9-3-71(a). Kaminer v. Canas, 282 Ga. 830, 653 S.E.2d 691, 2007 Ga. LEXIS 790 (2007), cert. denied, 553 U.S. 1065, 128 S. Ct. 2503, 171 L. Ed. 2d 786, 2008 U.S. LEXIS 4378 (2008).

Trial court properly rejected a patient's claim that because the patient's injuries resulted from the physicians' failure to treat the patient's breast cancer, the statute of limitations began to run on the date of the cancer diagnosis as the patient's claim was a variant of the continuous treatment theory, which had been resoundingly rejected by the Georgia Supreme Court. Harrison v. Daly, 268 Ga. App. 280, 601 S.E.2d 771, 2004 Ga. App. LEXIS 891 (2004).

On appeal from the grant of summary judgment in favor of a dentist in a patient's medical malpractice action, summary judgment was upheld based on the expiration of the statute of limitation and rejection of the continuous treatment doctrine by the Supreme Court of Georgia and because the exception for a subsequent injury did not apply. Bousset v. Walker, 285 Ga. App. 102, 645 S.E.2d 593, 2007 Ga. App. LEXIS 427 (2007).

Separate acts of professional negligence. — Because a medical malpractice complaint alleged that within the five-year period prior to the filing of the complaint, three doctors committed separate acts of professional negligence in, inter alia, failing to warn a patient about devel-

oping overwhelming post-splen-ectomy infection, those subsequent negligent acts causing new injuries were subject to separate periods of repose under O.C.G.A. § 9-3-71; subsection (b) of § 9-3-71 did not limit the number of separate negligent acts that could act as a trigger. Schramm v. Lyon, 285 Ga. 72, 673 S.E.2d 241, 2009 Ga. LEXIS 62 (2009).

Amended (1985) version of O.C.G.A. § 9-3-71 applied to an action filed after its effective date for alleged negligent treatment which occurred in 1984. Hunter v. Johnson, 259 Ga. 21, 376 S.E.2d 371, 1989 Ga. LEXIS 89 (1989).

Separate classification of medical malpractice actions is rational exercise of legislative power, as is different treatment of loss of consortium arising out of medical malpractice, insofar as limitation of actions is concerned. Hamby v. Neurological Assocs., P.C., 243 Ga. 698, 256 S.E.2d 378, 1979 Ga. LEXIS 1034 (1979); Perry v. Atlanta Hosp. & Medical Ctr., 255 Ga. 431, 339 S.E.2d 264, 1986 Ga. LEXIS 544 (1986); Brooks v. Meriwether Mem'l Hosp. Auth., 246 Ga. App. 14, 539 S.E.2d 518, 2000 Ga. App. LEXIS 1131 (2000).

This section applies to actions against hospitals for malpractice. St. Joseph's Hosp. v. Mattair, 239 Ga. 674, 238 S.E.2d 366, 1977 Ga. LEXIS 1292 (1977).

O.C.G.A. § 9-3-71 is applicable against non-profit blood banks. — See Bradway v. American Nat'l Red Cross, 263 Ga. 19, 426 S.E.2d 849, 1993 Ga. LEXIS 273 (1993).

Limitation of this section applies whether action is in tort or contract. St. Joseph's Hosp. v. Mattair, 239 Ga. 674, 238 S.E.2d 366, 1977 Ga. LEXIS 1292 (1977).

O.C.G.A. § 9-3-71 does not apply to a claim for breach of contract which is not grounded in a malpractice claim. Ballard v. Rappaport, 168 Ga. App. 671, 310 S.E.2d 4, 1983 Ga. App. LEXIS 2886 (1983).

Subsection (a) of O.C.G.A. § 9-3-71 was applicable to claims which were based not on medical malpractice, but rather on fraudulent representations, fraudulent concealment of material information, breach of express and implied warranties, and breach of contract. Knight v. Sturm, 212 Ga. App. 391, 442 S.E.2d 255, 1994 Ga. App. LEXIS 256 (1994), cert. denied, No. S94C1022, 1994 Ga. LEXIS 693 (Ga. Apr. 28, 1994).

Because the evidence presented on appeal adequately showed that the decedent estate's claim filed by the personal representative under O.C.G.A. § 51-4-5 was filed two months after the two-year statute of limitation under O.C.G.A. § 9-3-71(a) expired, despite the application of O.C.G.A. § 9-3-92, the trial court properly dismissed the claim as time-barred. Goodman v. Satilla Health Servs., 290 Ga. App. 6, 658 S.E.2d 792, 2008 Ga. App. LEXIS 233 (2008).

Subsection (b) of O.C.G.A. § 9-3-73, subjecting persons who are legally incompetent because of mental retardation or mental illness to periods of limitation for medical malpractice actions, required that action be brought within two years of its effective date. Kumar v. Hall, 262 Ga. 639, 423 S.E.2d 653, 1992 Ga. LEXIS 997 (1992).

Term "legally incompetent because of mental retardation or mental illness" includes those suffering from brain injury; thus, the tolling provisions of O.C.G.A. § 9-3-90 do not apply even when such mental incapacity exists. Robinson v. Williamson, 245 Ga. App. 17, 537 S.E.2d 159, 2000 Ga. App. LEXIS 895 (2000), cert. denied, No. S00C1805, 2001 Ga. LEXIS 95 (Ga. Jan. 19, 2001).

Retroactive application of statute of repose. — Subsection (b) of O.C.G.A. § 9-3-71 may be retrospectively applied without violating either the state or federal constitutions. Hanflik v. Ratchford, 848 F. Supp. 1539, 1994 U.S. Dist. LEXIS 4980 (N.D. Ga. 1994), aff'd, 56 F.3d 1391, 1995 U.S. App. LEXIS 14382 (11th Cir. 1995).

New injury exception is not predicated on a patient's discovery of a physician's negligence as the trigger for commencement of the statute of limitations is the date that the patient received the new injury, which is determined to be an occurrence of symptoms following an asymptomatic period. Amu v. Barnes, 283 Ga. 549, 662 S.E.2d 113, 2008 Ga. LEXIS 437 (2008).

General Consideration (Cont'd)

Subsequent injury exception. — In a medical malpractice action, because the subsequent injury exception did not disregard O.C.G.A. § 9-3-71(a), but rather attempted to reconcile the statute's "date of injury" language with the fact that it was often difficult or impossible in the misdiagnosis context to calculate precisely when a new injury arose, the trial court committed no error in applying the subsequent injury exception in the case; furthermore, contrary to the doctor's characterization, the subsequent injury exception did not simply create a discovery rule in violation of § 9-3-71(a). Amu v. Barnes, 286 Ga. App. 725, 650 S.E.2d 288, 2007 Ga. App. LEXIS 739 (2007), aff'd, 283 Ga. 549, 662 S.E.2d 113, 2008 Ga. LEXIS 437 (2008).

In a negligent misdiagnosis case, the trial and appellate courts properly determined that the two year statute of limitations set forth in O.C.G.A. § 9-3-71(a) had not run on plaintiff's claim for the injury of colon cancer that resulted from the misdiagnosis of a hemorrhoid condition made by a doctor as the cancer was a new injury that did not exist at the time of the original misdiagnosis. Amu v. Barnes, 283 Ga. 549, 662 S.E.2d 113, 2008 Ga. LEXIS 437 (2008).

In a medical malpractice case based on a doctors' failure to diagnose a patient's cancer, which later metastasized, the doctors failed to establish as a matter of law that the patient's "new injury" occurred and manifested itself more than two years before the suit was filed; thus, the doctors were not entitled to summary judgment on grounds that the suit was time-barred under O.C.G.A. § 9-3-71(a). O.C.G.A. § 9-3-71(a)'s two-year statute of limitations commences the date the patient first experiences symptoms of a "new injury" following a symptom-free period, not on the date the patient "discovers" either the injury or the doctor's negligence. Cleaveland v. Gannon, 284 Ga. 376, 667 S.E.2d 366, 2008 Ga. LEXIS 755 (2008).

Court of appeals erred by utilizing the "new injury" exception to the general rule for determining commencement of the limitations period under O.C.G.A. § 9-3-71(a) in negligent misdiagnosis cases because a patient's medical malpractice action against a doctor and a medical practice did not involve a misdiagnosis, and the court of appeals expressly found that the action was not a misdiagnosis case, but it treated the matter as a "new injury" case, which was a concept specific to the jurisprudence of misdiagnosis cases and was limited to misdiagnosis cases involving a very discreet set of circumstances; even if the "new injury" exception to misdiagnosis cases was applicable, the matter would still not be a "new injury" case because the patient was diagnosed with prostate cancer, was treated for prostate cancer, and still had prostate cancer. McCord v. Lee, 286 Ga. 179, 684 S.E.2d 658, 2009 Ga. LEXIS 639 (2009).

Court's duty to verify statute of limitations. — Dismissal of minor's wrongful death claims with prejudice was upheld because the trial court judge approved the consent order based on representations of both parties, and the father failed to cite any legal authority to support the assertion that the trial court had an independent duty to verify the parties' joint statement that the statute of limitation had run on the minor's claims against the defendants. Parrish v. St. Joseph's/Candler Health Sys., Inc., 364 Ga. App. 228, 874 S.E.2d 413, 2022 Ga. App. LEXIS 288 (2022), overruled in part, Hamon v. Connell, 315 Ga. 760, 883 S.E.2d 785, 2023 Ga. LEXIS 24 (2023).

Legislature can constitutionally provide for retrospective application of this remedial statute provided a time be fixed subsequent to the passage of the statute which allows citizens affected by it a reasonable time to protect their rights. Allrid v. Emory Univ., 249 Ga. 35, 285 S.E.2d 521, 1982 Ga. LEXIS 1111 (1982).

There was no question of retroactive application of the statute of repose since the statute, having been enacted in 1985, was in effect at the time the 1989 action was filed. Sievers v. Espy, 264 Ga. 118, 442 S.E.2d 232, 1994 Ga. LEXIS 288 (1994).

This section does not operate to bar actions filed before July 1, 1976. St.

Joseph's Hosp. v. Mattair, 239 Ga. 674, 238 S.E.2d 366, 1977 Ga. LEXIS 1292 (1977).

Judgment on pleadings when complaint time barred. — In a medical malpractice action, when the averments in the complaint clearly showed that the negligent or wrongful act or omission occurred in March 1984 and the complaint was not filed until June 1995, the complaint was barred by O.C.G.A. § 9-3-71(b) (five-year limitation period) and the court did not err by granting judgment on the pleadings to the defendants. Braden v. Bell, 222 Ga. App. 144, 473 S.E.2d 523.

Malpractice action may be brought in tort or contract against hospital or physician. St. Joseph's Hosp. v. Mattair, 239 Ga. 674, 238 S.E.2d 366, 1977 Ga. LEXIS 1292 (1977).

Intentional termination of life support a wrongful death claim, not a malpractice claim. — Trial court properly refused to dismiss a plaintiff's claim asserting tortious termination of life support based on the defendant's argument that it was really a medical malpractice claim and, therefore, required an expert medical affidavit under O.C.G.A. § 9-11-9.1; because such a claim is a suit for wrongful death, not medical malpractice, no expert medical affidavit was necessary. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823, 2007 Ga. App. LEXIS 1269 (2007), cert. denied, No. S08C0710, 2008 Ga. LEXIS 477 (Ga. May 19, 2008), overruled in part, Harrison v. McAfee, 338 Ga. App. 393, 788 S.E.2d 872, 2016 Ga. App. LEXIS 417 (2016).

Two year statute of limitations for wrongful death applied to a suit alleging tortious termination of life support of a parent, and that limitations period was tolled based on the infancy of the parent's child, who was born to the parent prior to the defendant terminating the parent's life support. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823, 2007 Ga. App. LEXIS 1269 (2007), cert. denied, No. S08C0710, 2008 Ga. LEXIS 477 (Ga. May 19, 2008), overruled in part, Harrison v. McAfee, 338 Ga. App. 393, 788 S.E.2d 872, 2016 Ga. App. LEXIS 417 (2016).

Procedural Requirements

Plaintiff's failure to file an expert affidavit with the original complaint barred the plaintiff's claim for professional malpractice, filed three years after the statute of limitation expired, because O.C.G.A. § 9-11-9.1 mandates that the plaintiff's failure to file an affidavit with the original complaint could not be cured through the filing of an amended complaint which included an affidavit. Upson County Hosp., Inc. v. Head, 246 Ga. App. 386, 540 S.E.2d 626, 2000 Ga. App. LEXIS 1230 (2000).

Wrongful death claim added via amendment to timely complaint. — When a patient and the patient's spouse filed a medical malpractice complaint, which the spouse amended after the patient's death to add a wrongful death claim, the wrongful death claim was not barred by the statute of repose as the wrongful death claim did not initiate legal proceedings, but was filed as an amendment to a pending suit that timely asserted other claims arising out of the same alleged malpractice; this result was consistent with the legislative purpose of the statute of repose set forth in O.C.G.A. § 9-3-73(f), as the original medical malpractice allegations had been brought less than two years after the alleged negligence, and the wrongful death claim was based on the same alleged acts and omissions as the earlier claims. Wesley Chapel Foot & Ankle Ctr., LLC v. Johnson, 286 Ga. App. 881, 650 S.E.2d 387, 2007 Ga. App. LEXIS 834 (2007), cert. denied, No. S07C1879, 2007 Ga. LEXIS 820 (Ga. Oct. 29, 2007).

Vicarious liability allegations for negligence in medical action. — Trial court properly concluded that original and renewal complaints satisfied Georgia's forgiving notice-pleading requirements with respect to a vicarious liability claim against a medical center and doctor for negligence because the complaints specifically identified the doctor as an agent or employee of the center acting within the scope of employment or agency, such that the doctor's acts and omissions were imputed to the center, which was vicariously

Procedural Requirements (Cont'd)

liable for the resulting injuries and harm to the plaintiff. Trabue v. Atlanta Women's Specialists, LLC, 349 Ga. App. 223, 825 S.E.2d 586, 2019 Ga. App. LEXIS 140 (2019), aff'd, 310 Ga. 331, 850 S.E.2d 748, 2020 Ga. LEXIS 764 (2020).

Questions for jury. — Whether an act or acts will constitute fraud so as to have the effect of tolling the statute of limitations is a proper question for a jury to decide. Johnson v. Gamwell, 165 Ga. App. 425, 301 S.E.2d 492, 1983 Ga. App. LEXIS 1894 (1983).

Question of the actual existence of fraud for failure on the part of a physician to disclose problems following an operation, as well as the question of plaintiffs' diligence in discovering the injury and the fraudulent concealment, are for the jury. Quattlebaum v. Cowart, 182 Ga. App. 473, 356 S.E.2d 91, 1987 Ga. App. LEXIS 1708 (1987).

Application of Timing Principles

Accrual of action. — Statute of limitations begins to run from the time the patient has knowledge, or through the exercise of ordinary care could have learned of the existence of the tort to the patient. Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653, 1981 Ga. App. LEXIS 2011 (1981).

Statute of limitations would not begin to run if the defendant-physician had assured the plaintiff-patient that the injuries which had manifested themselves were only slight or only temporary and assured the plaintiff-patient that the plaintiff-patient would eventually be all right, thereby inducing the plaintiff to refrain from making any further inquiry into the plaintiff-patient's condition. Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653, 1981 Ga. App. LEXIS 2011 (1981).

Fact that the plaintiff did not know the medical cause of the plaintiff's suffering did not affect the application of O.C.G.A. § 9-3-71 shince the plaintiff's own evidence established that the injury had occurred and had physically manifested itself to the plaintiff more that two years before the plaintiff brought a malpractice suit. Henry v. Medical Ctr., Inc., 216 Ga. App. 893, 456 S.E.2d 216.

Trial court properly granted summary judgment to the doctor in the patient's medical malpractice action as the action was untimely under O.C.G.A. § 9-3-71(a); the limitation period started to run at the date the patient consulted a different doctor, but the action was not filed within two years of that date. Lorelli v. Sood, 259 Ga. App. 166, 575 S.E.2d 921, 2002 Ga. App. LEXIS 1603 (2002).

Statute of repose in a medical malpractice claim ran from the date the negligent or wrongful act or omission occurred without regard to when the injury arising from the negligent act or omission occurred or was discovered; thus, a malpractice claim filed more than five years after the date on which the last negligent or wrongful act or omission attributable to the doctor and the medical center could have occurred was time barred. Christian v. Atha, 267 Ga. App. 186, 598 S.E.2d 895, 2004 Ga. App. LEXIS 565 (2004), cert. denied, No. S04C1525, 2004 Ga. LEXIS 699 (Ga. Sept. 7, 2004).

Because a podiatrist did not meet the burden under O.C.G.A. § 9-11-8(c) of proving the affirmative defense of the two-year time bar under O.C.G.A. § 9-3-71(a) in a patient's medical malpractice action, the trial court did not err in denying the podiatrist's request for summary judgment, as factual issues remained regarding when the patient's injury occurred and when the patient should have known about the patient's own injury; although the podiatrist had properly diagnosed the patient's condition and the lawsuit was brought within two years of the actual diagnosis, the podiatrist claimed that a few months prior, the podiatrist's notes had changed based on new complaints by the patient, which should have been the time that the limitations period commenced. Sidlow v. Lewis, 271 Ga. App. 112, 608 S.E.2d 703, 2004 Ga. App. LEXIS 1589 (2004), cert. denied, No. S05C0715, 2005 Ga. LEXIS 361 (Ga. May 9, 2005).

Absent fraud, O.C.G.A. § 9-3-71 imposed an absolute limit on the time within which a case may have been filed; since nothing in the record showed that a doctor

ever knew that the treatment or advice to a patient was in error, nor was there any evidence that the doctor fraudulently withheld such information from the patient, the patient's malpractice case filed 12 years after the doctor's alleged negligence was time-barred. Waycross Urology Clinic, P.C. v. Johnson, 279 Ga. App. 195, 630 S.E.2d 807, 2006 Ga. App. LEXIS 497 (2006), cert. denied, No. S06C1597, 2006 Ga. LEXIS 736 (Ga. Sept. 8, 2006).

Trial court erred in denying partial summary judgment on a patient's medical malpractice and ordinary negligence claims, when, given evidence that the patient suffered an injury arising out of the misdiagnosis in January of 1999, when the patient was first seen by the doctor manifesting continuous symptoms of a moderate B-12 deficiency and the doctor failed to make the diagnosis and provide treatment, and the patient failed to file an action within the two years; but, because the patient's ordinary negligence and breach of fiduciary duty claims were essentially malpractice claims, subject to the same limitations period, summary judgment as to these claims was upheld. Stafford-Fox v. Jenkins, 282 Ga. App. 667, 639 S.E.2d 610, 2006 Ga. App. LEXIS 1513 (2006).

In a medical malpractice action, because the undisputed evidence showed that both the personal injury claims and a later-added wrongful death claim were timely filed, both in terms of O.C.G.A. § 9-3-71 and the relevant statute of repose, the doctors sued were properly denied summary judgment as to those claims. Cleaveland v. Gannon, 288 Ga. App. 875, 655 S.E.2d 662, 2007 Ga. App. LEXIS 1277 (2007), aff'd, 284 Ga. 376, 667 S.E.2d 366, 2008 Ga. LEXIS 755 (2008).

Temporary administrator of estate impacted statute of repose. — For summary judgment purposes, a decedent's symptoms which occurred nearly two years after a doctor's alleged misdiagnosis, but less than two years before the decedent's death, were a new or subsequent injury; because the decedent's husband was only appointed temporary administrator of the decedent's estate, the limitation period was tolled under O.C.G.A. § 9-3-92, and thus summary judgment ruling that the estate's claim for pain and suffering was untimely was error. Kitchens v. Brusman, 280 Ga. App. 163, 633 S.E.2d 585, 2006 Ga. App. LEXIS 781 (2006).

Unrepresented estate statute did not toll statute of repose. — Pursuant to a question certified by the federal appellate court, the Supreme Court of Georgia finds that since the tolling of the ultimate statute of repose for medical malpractice cases is not required by O.C.G.A. § 9-3-71(d) or O.C.G.A. § 9-3-73(a) and it would contravene the mandatory language of O.C.G.A. § 9-3-71(b), the unrepresented estate statute, O.C.G.A. § 9-3-92, does not toll the statute of repose during the time that the estate of a claimant is unrepresented; thus, the district court properly dismissed the state court medical malpractice claims brought by the administrator of the estate of the claimant because the claims were time-barred and could not be extended by O.C.G.A. § 9-3-92. Simmons v. United States, 421 F.3d 1199, 2005 U.S. App. LEXIS 18157 (11th Cir. 2005).

Amending complaint to change named plaintiff not initiation. — Decedent's sibling, as the purported representative of the decedent's spouse, filed a wrongful death suit against medical providers within five years of the alleged negligent acts and, within a reasonable time after the providers objected to the sibling's standing, filed a motion to amend the complaint to name the decedent's spouse as the real party in interest. As the proposed amendment did not "initiate" a new claim, the medical malpractice statute of repose, O.C.G.A. § 9-3-71(b), did not prevent amendment of the complaint even though the motion to amend was filed more than five years after the alleged negligence. Rooks v. Tenet Health Sys. GB, Inc., 292 Ga. App. 477, 664 S.E.2d 861, 2008 Ga. App. LEXIS 797 (2008), cert. denied, No. S08C1935, 2008 Ga. LEXIS 892 (Ga. Oct. 27, 2008), cert. denied, No. S08C1919, 2008 Ga. LEXIS 895 (Ga. Oct. 27, 2008).

Addition of party not warranted. — Request by a deceased patient's widow to add the treating physician's employer to the widow's medical malpractice action

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was properly denied as the widow failed to show that the employer had notice of the institution of the lawsuit prior to the expiration of the statute of limitations; notice to the hospital and the physician of the institution of litigation did not constitute notice to the employer, even though they were all insured by the same carrier. Hunter v. Emory-Adventist, Inc., 323 Ga. App. 537, 746 S.E.2d 734, 2013 Ga. App. LEXIS 666 (2013).

Medical malpractice statute of repose, O.C.G.A. § 9-3-71(b), prevented a plaintiff from amending the complaint in a pending medical malpractice action to add an individual party. Preferred Women's Healthcare, LLC v. Sain, 348 Ga. App. 481, 823 S.E.2d 569, 2019 Ga. App. LEXIS 30 (2019), cert. denied, No. S19C0773, 2019 Ga. LEXIS 687 (Ga. Oct. 7, 2019).

Accrual of action for wrongful death. — Statute of limitations for wrongful death action emanating from medical malpractice begins to run from date of death, not from date of the negligent act or omission of practitioner. Clark v. Singer, 250 Ga. 470, 298 S.E.2d 484, 1983 Ga. LEXIS 993 (1983), superseded by statute as stated in Quinn v. Stafford, 257 Ga. 608, 362 S.E.2d 49, 1987 Ga. LEXIS 995 (1987).

When a patient and the patient's spouse filed a medical malpractice complaint which the spouse amended after the patient's death to add a wrongful death claim, the wrongful death claim was not barred by the statute of limitations as it had been filed within two years of the patient's death. Wesley Chapel Foot & Ankle Ctr., LLC v. Johnson, 286 Ga. App. 881, 650 S.E.2d 387, 2007 Ga. App. LEXIS 834 (2007), cert. denied, No. S07C1879, 2007 Ga. LEXIS 820 (Ga. Oct. 29, 2007).

In medical malpractice personal injury case, cause of action accrues when exposure to the hazard first produces ascertainable injury. Allrid v. Emory Univ., 249 Ga. 35, 285 S.E.2d 521, 1982 Ga. LEXIS 1111 (1982).

Absent a showing of fraud, the statute of limitations concerning medical malpractice will begin to run at the time of the malpractice, or when evidence of such malpractice is reasonably apparent to the victim, and a suit brought substantially later than the time allowed for by the statute of limitation will be barred. Shved v. Daly, 174 Ga. App. 209, 329 S.E.2d 536, 1985 Ga. App. LEXIS 2704 (1985).

Medical malpractice action was time-barred. — Patient was suffering from poisoning from an antibiotic with symptoms including substantial renal damage and nausea by May 15, 2002, which was the proximate result of either the physician's course of treatment with the drug, the physician's failure to recognize the toxic condition and symptoms resulting from that treatment, or both; the fact that the patient did not know the cause of the patient's symptoms did not lead to a different result. Smith v. Harris, 294 Ga. App. 333, 670 S.E.2d 136, 2008 Ga. App. LEXIS 1179 (2008), cert. denied, No. S09C0428, 2009 Ga. LEXIS 328 (Ga. June 8, 2009).

Trial court did not err when the court held that the medical malpractice allegations of the original complaint were barred by O.C.G.A. § 9-3-71(b) as the alleged negligence occurred nine to ten years before the complaint was filed, and the parents' claim that the defendants should be estopped from asserting a statute-of-repose defense due to fraud was not supported by any evidence. Macfarlan v. Atlanta Gastroenterology Assocs., 317 Ga. App. 887, 732 S.E.2d 292, 2012 Ga. App. LEXIS 782 (2012), cert. denied, No. S13C0313, 2013 Ga. LEXIS 136 (Ga. Feb. 4, 2013).

Patient's medical malpractice action was time barred by the two-year statute of limitations because it was the initial October 2007 surgery, in which the patient allegedly received negligent treatment, that gave rise to the patient's cause of action, not the March 2009 surgery to correct the 2007 surgery; the patient's injury from the negligent treatment began manifesting itself from March to June 2008, thus, by March to June 2008 at least, the patient had suffered an injury and could have maintained a malpractice action to a successful result by showing a breach of the standard of care by the first surgeon. Beamon v. Mahadevan, 329 Ga.

App. 685, 766 S.E.2d 98, 2014 Ga. App. LEXIS 763 (2014).

Although the parents' amended complaint related back to the filing date of their original complaint, February 10, 2015, the parents' claims, which were subject to the two-year general medical malpractice statute of limitation, were time barred and could not be revived because the parents had until October 25, 2013, to file a lawsuit for the parents' individual claims; and the underlying lawsuit was filed more than a year after the expiration of the applicable two-year statute of limitation. Swallows v. Adams-Pickett, 344 Ga. App. 647, 811 S.E.2d 445, 2018 Ga. App. LEXIS 106 (2018), cert. denied, No. S18C0922, 2018 Ga. LEXIS 558 (Ga. Aug. 20, 2018).

In a medical malpractice lawsuit, the defendants' motion for a partial summary judgment on all claims for damages that the parents incurred on behalf of their minor child was granted as those claims were barred by the two-year statute of limitation because the five-year statute of limitation extension applied only to the claims of the minor child and did not apply to the parents' claims; thus, any of the parents' claims for damages for their minor child's medical expenses, and the parents' ancillary claims such as their own loss of income, were subject to the two-year statute of limitation applicable to medical malpractice actions generally, and were barred. Swallows v. Adams-Pickett, 344 Ga. App. 647, 811 S.E.2d 445, 2018 Ga. App. LEXIS 106 (2018), cert. denied, No. S18C0922, 2018 Ga. LEXIS 558 (Ga. Aug. 20, 2018).

Patient's medical malpractice claims were barred by the two-year statute of limitations because the claims were brought more than two years after the patient developed marks on the patient's thighs allegedly caused by the cream prescribed by the doctor and more than two years after the doctor's misdiagnosis of the cause for those marks. Polis v. Ling, 346 Ga. App. 185, 816 S.E.2d 93, 2018 Ga. App. LEXIS 347 (2018).

Trial court did not err in granting summary judgment in favor of the doctor on the ground that the plaintiff's medical-malpractice action was barred by the applicable five-year statute of repose because the date of treatment was October 2005 and the action was not filed until May 2018; and the doctor was not equitably estopped from asserting the statute of repose as nothing in the record supported a finding that the doctor committed a separate act of fraud after the doctor's alleged failure to communicate the CT scan results to the plaintiff, or that the doctor intentionally intended to induce the plaintiff to act or refrain from acting. Smith v. Kayfan, 364 Ga. App. 651, 874 S.E.2d 465, 2022 Ga. App. LEXIS 295 (2022).

True test to determine when cause of action for medical malpractice accrued is to ascertain the time when the plaintiff could first have maintained the plaintiff's action to a successful result. Allrid v. Emory Univ., 249 Ga. 35, 285 S.E.2d 521, 1982 Ga. LEXIS 1111 (1982).

Continuing tort theory inapplicable. — Application of a medical malpractice plaintiff's contention that the continuing tort theory applied so as, in essence, to extend the date when the statute of limitation began to run would appear to thwart the legislative intent of the 1985 amendment. Crawford v. Spencer, 217 Ga. App. 446, 457 S.E.2d 711, 1995 Ga. App. LEXIS 476 (1995), cert. denied, No. S95C1448, 1995 Ga. LEXIS 1024 (Ga. Sept. 11, 1995), overruled in part, Williams v. Young, M.D., P.C., 247 Ga. App. 337, 543 S.E.2d 737, 2000 Ga. App. LEXIS 1440 (2000); Charter Peachford Behavioral Health Sys. v. Kohout, 233 Ga. App. 452, 504 S.E.2d 514.

In misdiagnosis cases, the misdiagnosis itself is the "injury" and not the subsequent discovery of the proper diagnosis. Surgery Assocs. v. Kearby, 199 Ga. App. 716, 405 S.E.2d 723, 1991 Ga. App. LEXIS 598 (1991), cert. denied, No. S91C1170, 1991 Ga. LEXIS 793 (Ga. June 27, 1991).

As a general rule, in most misdiagnosis cases, the injury begins immediately upon the misdiagnosis due to the pain, suffering, or economic loss sustained by the patient from the time of the misdiagnosis until the medical problem is properly diagnosed and treated. The misdiagnosis itself is the injury and not the subsequent

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discovery of the proper diagnosis; thus, the fact that the patient did not know the medical cause of the patient's suffering does not affect the applicability of the statute of limitations. Ford v. Dove, 218 Ga. App. 828, 463 S.E.2d 351, 1995 Ga. App. LEXIS 898 (1995), cert. denied, No. S96C0298, 1996 Ga. LEXIS 276 (Ga. Jan. 26, 1996), overruled in part, Ezor v. Thompson, 241 Ga. App. 275, 526 S.E.2d 609, 1999 Ga. App. LEXIS 1616 (1999), overruled in part, Williams v. Young, M.D., P.C., 247 Ga. App. 337, 543 S.E.2d 737, 2000 Ga. App. LEXIS 1440 (2000).

Injuries from a misdiagnosis of multiple personality disorder were injuries that occurred and became manifested at the time of defendants' acts or omissions prior to the running of the statute. Charter Peachford Behavioral Health Sys. v. Kohout, 233 Ga. App. 452, 504 S.E.2d 514.

Trial court erred in granting summary judgment to a dentist and the dental practices in a medical malpractice action, based on misdiagnosis, as the dental defendants failed to meet their burden pursuant to O.C.G.A. § 9-11-8(c) of showing undisputed evidence that the affirmative defense of the two-year limitations period of O.C.G.A. § 9-3-71(a) barred the action. Brown v. Coast Dental of Ga., P.C., 275 Ga. App. 761, 622 S.E.2d 34, 2005 Ga. App. LEXIS 1110 (2005).

Although a patient was not diagnosed with drug-induced tardive dyskinesia based on the patient's doctor's prescription of a drug for reflux until May 2005, and the patient's complaint was filed within two years of that date, the relevant date was the date of injury, or when the patient first exhibited symptoms, which was in the summer of 2004. Therefore, the patient's claims were time barred under O.C.G.A. § 9-3-71(a). Deen v. Pounds, 312 Ga. App. 207, 718 S.E.2d 68, 2011 Ga. App. LEXIS 924 (2011).

Non-relating new claim. — When the patient's new claim focused on the doctor's actions during and after surgery while the original complaint focused on the doctor's action prior to surgery, the alleged acts of negligence occurred at different times, involving separate and distinct conducts, such that the patient's new claim did not arise out of the same conduct, transaction, or occurrence as the claims in the original complaint, rendering the claim barred by the applicable limitations period of O.C.G.A. § 9-3-71. Moore v. Baker, 989 F.2d 1129, 1993 U.S. App. LEXIS 9943 (11th Cir. 1993).

Suit by injured minor after reaching majority. — Provision of subsection (b) of O.C.G.A. § 9-3-73 that all minors who have attained the age of five years shall be subject to periods of limitation for actions for medical malpractice applies not only to suits brought on behalf of a minor, but also to suits brought personally by an injured minor upon reaching majority. Barnes v. Sabatino, 205 Ga. App. 774, 423 S.E.2d 686 (1992).

Date of wrongful or negligent act controls. — In an action for medical malpractice, the controlling factor is the date of the negligent or wrongful act and not the date on which the plaintiff should have, or did in fact, discover the negligence. Faser v. Sears, Roebuck & Co., 674 F.2d 856, 1982 U.S. App. LEXIS 19641 (11th Cir. 1982); Jones v. Lamon, 206 Ga. App. 842, 426 S.E.2d 657, 1992 Ga. App. LEXIS 1814 (1992).

When a misdiagnosis results in subsequent injury that is difficult or impossible to date precisely, the statute of limitations runs from the date symptoms attributable to the new injury are manifest to the plaintiff. Walker v. Melton, 227 Ga. App. 149, 489 S.E.2d 63.

"Period of limitation" in O.C.G.A. § 9-11-9.1 includes the statute of limitations in O.C.G.A. § 9-3-71(a) and the statute of repose in O.C.G.A. § 9-3-71(b). Cochran v. Bowers, 274 Ga. App. 449, 617 S.E.2d 563, 2005 Ga. App. LEXIS 81 (2005).

Doctor's motion to dismiss a widow's suit was properly denied as the "period of limitation" in O.C.G.A. § 9-11-9.1 referred to the statute of limitations in O.C.G.A. § 9-3-71(a) and the statute of repose in O.C.G.A. § 9-3-71(b); the appellate court would not delve into the factual basis for the widow's statement that the widow believed that the period of limitations was about to end as the doctor might

have claimed that the statute of limitations period ran from the doctor's misdiagnosis of the patient. Cochran v. Bowers, 274 Ga. App. 449, 617 S.E.2d 563, 2005 Ga. App. LEXIS 81 (2005).

Injury occurring outside time period not actionable. — Subsection (b) of O.C.G.A. § 9-3-71 bars an action from being brought more than five years from the negligent act or omission; if the injury occurs outside that period, it is not actionable. Braden v. Bell, 222 Ga. App. 144, 473 S.E.2d 523.

In order to toll the statute of limitations it is necessary for the patient to present evidence raising an issue of fraud or misrepresentation on the part of the doctor. Hamilton v. Mitchell, 165 Ga. App. 717, 302 S.E.2d 589, 1983 Ga. App. LEXIS 1997 (1983).

If facts exist which would toll the statute of limitations, the plaintiff has the burden of setting forth and supporting these facts. Wade v. Thomasville Orthopedic Clinic, Inc., 167 Ga. App. 278, 306 S.E.2d 366, 1983 Ga. App. LEXIS 2430 (1983).

Even if evidence of fraud exists, the statute of limitations is not tolled if the plaintiff knew all facts necessary to show malpractice before the running of the period of limitation. Hendrix v. Schrecengost, 183 Ga. App. 201, 358 S.E.2d 486, 1987 Ga. App. LEXIS 1915 (1987); Lasoya v. Sunay, 193 Ga. App. 814, 389 S.E.2d 339, 1989 Ga. App. LEXIS 1680 (1989).

Trial court did not err in denying a doctor's motion to dismiss an administrator's professional negligence claim because the new professional negligence claim related back to the date of the original complaint and was not barred by the two-year statute of limitation as both the original complaint and the amended complaint set forth allegations based upon the decedent's surgery, emergency room visit, and discharge relating to the care received from the doctor following the laparoscopic gallbladder surgery the doctor performed. Jensen v. Engler, 317 Ga. App. 879, 733 S.E.2d 52, 2012 Ga. App. LEXIS 832 (2012), cert. denied, No. S13C0296, 2013 Ga. LEXIS 115 (Ga. Feb. 4, 2013).

No renewal refiling for reposed action. — In a medical malpractice suit reposed under O.C.G.A. § 9-3-71, a plaintiff cannot voluntarily dismiss a suit and refile that suit within the six-month renewal period of O.C.G.A. § 9-2-61(a) since a reposed action is deemed destroyed. Wright v. Robinson, 262 Ga. 844, 426 S.E.2d 870, 1993 Ga. LEXIS 312 (1993); Burns v. Radiology Assocs., 214 Ga. App. 76, 446 S.E.2d 788, 1994 Ga. App. LEXIS 774 (1994); Hanflik v. Ratchford, 848 F. Supp. 1539, 1994 U.S. Dist. LEXIS 4980 (N.D. Ga. 1994), aff'd, 56 F.3d 1391, 1995 U.S. App. LEXIS 14382 (11th Cir. 1995); Thompson v. Long, 225 Ga. App. 719, 484 S.E.2d 666.

Medical malpractice statute of repose attaches when an action filed within the statute of limitations is voluntarily dismissed and refiled more than five years after the alleged injury. Miller v. Vitner, 249 Ga. App. 17, 546 S.E.2d 917, 2001 Ga. App. LEXIS 359 (2001), cert. denied, No. S01C1107, 2001 Ga. LEXIS 715 (Ga. Sept. 7, 2001).

Executrix's medical malpractice claim against a doctor was properly dismissed as, even if the action was refiled in accordance with O.C.G.A. § 9-2-61, the suit was barred by the statute of repose under O.C.G.A. § 9-3-71(b) as the suit was filed seven years after the patient's death. Adams v. Griffis, 275 Ga. App. 364, 620 S.E.2d 575, 2005 Ga. App. LEXIS 873 (2005).

Because the children of a decedent refiled their complaint against the operators of a nursing home more than five years after the death of their mother or the alleged wrongful acts occurred, their claims were subject to dismissal under the statute of repose of O.C.G.A. § 9-3-71(b). Carr v. Kindred Healthcare Operating, Inc., 293 Ga. App. 80, 666 S.E.2d 401, 2008 Ga. App. LEXIS 784 (2008).

Because dismissal of a medical malpractice suit for failure to comply with the expert affidavit requirements rendered the suit void and incapable of being renewed under O.C.G.A. § 9-2-61, and the two-year limitation period in O.C.G.A. § 9-3-71(a) had expired, the suit was properly dismissed. Hendrix v. Fulton DeKalb Hosp. Auth., 330 Ga. App. 833, 769 S.E.2d 575, 2015 Ga. App. LEXIS 69 (2015).

If a defendant physician is guilty of fraud, the two-year statute of limita-

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tions under O.C.G.A. § 9-3-71 is tolled until discovery of the fraud. Johnson v. Gamwell, 165 Ga. App. 425, 301 S.E.2d 492, 1983 Ga. App. LEXIS 1894 (1983).

If fraud by which a patient is deterred from bringing a timely action under O.C.G.A. § 9-3-71 is involved, the two-year limitation is tolled until discovery of the fraud by O.C.G.A. § 9-3-96. Wade v. Thomasville Orthopedic Clinic, Inc., 167 Ga. App. 278, 306 S.E.2d 366, 1983 Ga. App. LEXIS 2430 (1983).

Statute tolled by physician's fraud. — Physician-patient relationship is a confidential one, and silence or failure to disclose what should be said or disclosed can amount to fraud which tolls the statute of limitations, but a fraud count must allege more than misdiagnosis to withstand a motion for judgment on the pleadings. Lynch v. Waters, 256 Ga. 389, 349 S.E.2d 456, 1986 Ga. LEXIS 891 (1986).

Statute of repose should not be applied to relieve a defendant of liability for injuries caused by negligence concealed by the defendant's fraud, lest it provide an incentive for a doctor to conceal the doctor's negligence with the assurance that in five years the doctor will be insulated from liability. Beck v. Dennis, 215 Ga. App. 728, 452 S.E.2d 205, 1994 Ga. App. LEXIS 1347 (1994), cert. denied, No. S95C0637, 1995 Ga. LEXIS 551 (Ga. Apr. 6, 1995), overruled in part, Abend v. Klaudt, 243 Ga. App. 271, 531 S.E.2d 722, 2000 Ga. App. LEXIS 368 (2000).

Since the defendant physician knew that the physician had left a piece of packing in plaintiff's nose and that it could cause problems, yet the physician failed to inform the plaintiff or anyone else, an issue of fact was created regarding fraudulent concealment which would estop the defendant from relying on the statute of repose. Beck v. Dennis, 215 Ga. App. 728, 452 S.E.2d 205, 1994 Ga. App. LEXIS 1347 (1994), cert. denied, No. S95C0637, 1995 Ga. LEXIS 551 (Ga. Apr. 6, 1995), overruled in part, Abend v. Klaudt, 243 Ga. App. 271, 531 S.E.2d 722, 2000 Ga. App. LEXIS 368 (2000).

Fraud sufficient to toll the statute must be actual rather than constructive, except when there exists a confidential relationship between the parties, such as that between physician and patient. Wade v. Thomasville Orthopedic Clinic, Inc., 167 Ga. App. 278, 306 S.E.2d 366, 1983 Ga. App. LEXIS 2430 (1983).

Allegation sufficient to raise issue of fraud. — Plaintiff's action against a hair restoration service claiming that the service had intentionally misrepresented the number of procedures required to correct plaintiff's hair loss problem was a fraud claim which was not subject to the two-year medical malpractice statute of limitation. Boggs v. Bosley Medical Inst., Inc., 228 Ga. App. 598, 492 S.E.2d 264.

Evidence that a nurse-midwife, hospital, and medical practice deliberately misrepresented and withheld information concerning a baby's condition before and just after the baby's birth was sufficient to create a jury question as to whether they committed fraud sufficient to toll the statute of limitations and estop the application of the statute of repose, O.C.G.A. § 9-3-71(a), pursuant to O.C.G.A. § 9-3-96. Wilson v. Obstetrics & Gynecology of Atlanta, P.C., 304 Ga. App. 300, 696 S.E.2d 339, 2010 Ga. App. LEXIS 475 (2010), cert. denied, No. S10C1642, 2010 Ga. LEXIS 802 (Ga. Oct. 18, 2010), cert. denied, No. S10C1641, 2010 Ga. LEXIS 791 (Ga. Oct. 18, 2010).

Allegation insufficient to raise issue of fraud. — Allegation that the plaintiff's condition was misdiagnosed on September 4, 1979, and that the physician continued to treat the plaintiff until March 18, 1980, when the plaintiff ordered X-rays which revealed the misdiagnosis, was insufficient to raise an issue of fraud so as to toll the statute of limitations as misdiagnosis only raises an issue of negligence and not fraud. Johnson v. Gamwell, 165 Ga. App. 425, 301 S.E.2d 492, 1983 Ga. App. LEXIS 1894 (1983).

Fraud did not toll the statute in an action based on misdiagnosis of multiple personality disorder, with childhood sexual abuse, since the plaintiff knew the facts of the plaintiff's past, knew about the diagnosis and treatment, and chose to believe and act upon such opinions and allow treatment. Charter Peachford Behavioral Health Sys. v. Kohout, 233 Ga. App. 452, 504 S.E.2d 514.

Since the plaintiff knew his wife died of a heart attack, a doctor's attribution of the cause to a heart murmur rather than cardiomyopathy did not constitute sufficient evidence of fraud to create a jury question on whether the defendant was equitably estopped from raising the defense of the statute of repose. Hutcherson v. Obstetric & Gynecologic Assocs., 247 Ga. App. 685, 543 S.E.2d 805, 2000 Ga. App. LEXIS 1473 (2000).

Summary judgment pursuant to O.C.G.A. § 9-11-56 was properly granted to physicians in a patient and spouse's medical malpractice action against them, wherein the patient claimed that the patient had sustained radiation damage to the patient's arm which the doctors did not reveal until the expiration of the limitations period of O.C.G.A. § 9-3-71(a); however, the record revealed that the physicians had repeatedly informed the patient that such damage was one of the possible causes of the patient's arm pain and there was no fraud found on their part which would have extended the time period pursuant to O.C.G.A. § 9-3-96. Price v. Currie, 260 Ga. App. 526, 580 S.E.2d 299, 2003 Ga. App. LEXIS 421 (2003).

Plaintiffs' malpractice claims were not tolled by O.C.G.A. § 9-3-96 and thus were time-barred by O.C.G.A. § 9-3-71; plaintiffs, whose vision had deteriorated after laser surgery, had not shown that the defendants' alleged fraud prevented them from knowing of their claims at the time when each consulted other specialists about their vision problems. Gibson v. Thompson, 283 Ga. App. 705, 642 S.E.2d 366, 2007 Ga. App. LEXIS 162 (2007).

Trial court's order denying dismissal of a fraud claim in a medical malpractice action against a doctor, upon a motion which the trial court treated as one for summary judgment when it considered material beyond the pleadings, was reversed, as there was no evidence that the doctor knew or even suspected that the patient had a pancreatic tumor, or that the doctor withheld information regarding it; thus, the doctrine of equitable estoppel did not apply and the fraud claim was barred by the statute of repose, O.C.G.A. § 9-3-71(b). Balotin v. Simpson, 286 Ga. App. 772, 650 S.E.2d 253, 2007 Ga. App. LEXIS 499 (2007), cert. denied, No. S07C1913, 2007 Ga. LEXIS 803 (Ga. Oct. 29, 2007).

Trial court did not err in granting a doctor's motion for judgment on the pleadings on the ground that a patient failed to file a medical malpractice complaint within the two-year period of limitation for medical malpractice claims pursuant to O.C.G.A. § 9-3-71(a) because the limitation period did not remain tolled due to the doctor's alleged fraudulent statements; the doctor's assertion that the doctor had not done anything wrong did not prevent the patient from asking any of the doctors that treated the patient over the next several months about what could have caused a needle to break in the patient's cheek. Pryce v. Rhodes, 316 Ga. App. 523, 729 S.E.2d 641, 2012 Ga. App. LEXIS 603 (2012), cert. denied, No. S12C1785, 2013 Ga. LEXIS 223 (Ga. Mar. 4, 2013).

Negligence suit barred by either of the two statutes of limitation applicable to medical malpractice cases, O.C.G.A. §§ 9-3-71 and 9-3-72. See Bevel v. Routledge, 168 Ga. App. 89, 308 S.E.2d 207, 1983 Ga. App. LEXIS 2689 (1983).

Misdiagnosis claim time-barred. — In a medical malpractice claim for alleged misdiagnosis of radiological results, although the defendant's misdiagnosis allowed the plaintiff's pain and suffering condition to continue, the injury was deemed to be the misdiagnosis itself, rather than any injury occurring subsequent to the misdiagnosis, thereby barring the claim as untimely under O.C.G.A. § 9-3-71. Stone v. Radiology Servs., 206 Ga. App. 851, 426 S.E.2d 663, 1992 Ga. App. LEXIS 1809 (1992), cert. denied, No. S93C0582, 1993 Ga. LEXIS 298 (Ga. Mar. 18, 1993).

Patient's cause of action for medical malpractice related to a doctor's failure to diagnose dislocated bones in the patient's foot accrued when the misdiagnosis occurred, not from when the doctor's treatment of the patient ended and not from when the patient discovered that the doctor's diagnosis was wrong; since the action was filed more than two years after the misdiagnosis, it was not filed within the applicable two-year statute of limitation

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in O.C.G.A. § 9-3-71(a) and was barred. Williams v. Young, 258 Ga. App. 821, 575 S.E.2d 648, 2002 Ga. App. LEXIS 1474 (2002), cert. denied, 542 U.S. 904, 124 S. Ct. 2838, 159 L. Ed. 2d 267, 2004 U.S. LEXIS 4196 (2004).

Trial court properly held that a patient's medical malpractice suit was barred by the two-year statute of limitations set forth in O.C.G.A. § 9-3-71(a), which began to run at the time of the alleged misdiagnosis, when a doctor advised the patient not to follow a surgeon's instructions on follow-up care on lumps in her breast; the case did not fall within the limited exception for subsequent injury cases, as the patient's symptoms worsened over time. Harrison v. Daly, 268 Ga. App. 280, 601 S.E.2d 771, 2004 Ga. App. LEXIS 891 (2004).

Prescription drug negligence action time-barred. — Even assuming negligent acts involving drug prescriptions constituted a continuing tort over 18 years, when the plaintiff knew of, or through reasonable diligence should have discovered, the injury and the cause of the injury before five years preceding the filing of the action, it was barred by the statute of repose. Waters v. Rosenbloom, 268 Ga. 482, 490 S.E.2d 73.

Plaintiff's bankruptcy does not toll statute. — Because the pendency of a patient's bankruptcy petition did not operate to toll the medical malpractice statute of repose, the trial court properly dismissed the suit for failing to state a claim upon which relief could be granted. Flott v. Southeast Permanente Med. Group, Inc., 288 Ga. App. 730, 655 S.E.2d 242, 2007 Ga. App. LEXIS 1213 (2007), cert. dismissed, No. S08C0676, 2008 Ga. LEXIS 387 (Ga. Apr. 21, 2008).

New and separate acts of negligence. — In a medical malpractice suit, a trial court erred by dismissing three doctors who were seen by the patient five years prior to the date the suit was filed because, in applying the statute of repose, O.C.G.A. § 9-3-71(b), the patient properly asserted that each doctor committed a new and separate act of negligence each time the doctors saw the patient. Lyon v. Schramm, 291 Ga. App. 48, 661 S.E.2d 178, 2008 Ga. App. LEXIS 381 (2008), aff'd, 285 Ga. 72, 673 S.E.2d 241, 2009 Ga. LEXIS 62 (2009).

Failure to serve complaint prior to expiration. — Trial court abused the court's discretion in denying the defendant's motion to dismiss given the plaintiff's complete failure to account for the three-month delay between filing the complaint and serving the defendant, during which the statutes of limitation expired. UHS of Peachford v. Brady, 361 Ga. App. 290, 864 S.E.2d 129, 2021 Ga. App. LEXIS 474 (2021).

Substitution of real party in interest did not bar action. — Although an estate's malpractice action was not initially brought by the real party in interest — the estate's administrator — the administrator was timely substituted as the plaintiff in the action by amendment which, under O.C.G.A. § 9-11-17(a), had the same effect as if the action had been commenced by the real party in interest. Thus, the suit was not time-barred by O.C.G.A. § 9-3-71(b)'s five-year repose period, and a doctor and health care facilities were not entitled to summary judgment. Memar v. Styblo, 293 Ga. App. 528, 667 S.E.2d 388, 2008 Ga. App. LEXIS 995 (2008).

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Foreign object medical malpractice action. — Five-year statute of repose in subsection (b) of O.C.G.A. § 9-3-71 does not bar a foreign object medical malpractice action timely filed within the one-year period set forth in O.C.G.A. § 9-3-72. Abend v. Klaudt, 243 Ga. App. 271, 531 S.E.2d 722, 2000 Ga. App. LEXIS 368 (2000), cert. denied, No. S00C1335, 2000 Ga. LEXIS 716 (Ga. Sept. 29, 2000), overruled in part, Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251, 2013 Ga. App. LEXIS 225 (2013).

In a medical malpractice action, it is for a jury to determine whether a patient by exercising ordinary care should have learned on December 7, 2005, or on December 9, 2005, that a foreign object had been left in the patient's body during the performance of surgery in 2001 and the

decision of the jury would govern whether the statute of limitations in O.C.G.A. § 9-3-71 or O.C.G.A. § 9-3-72 controlled. Monfort v. Colquitt County Hosp. Auth., 288 Ga. App. 202, 653 S.E.2d 535, 2007 Ga. App. LEXIS 1167 (2007), cert. denied, No. S08C0463, 2008 Ga. LEXIS 225 (Ga. Feb. 25, 2008).

By requiring in O.C.G.A. § 9-3-72 that a patient who claims a foreign object was negligently left in the patient's body must file an action within one year after the negligent act or omission is discovered, the Georgia General Assembly has adopted the continuing tort rule; therefore, based upon the plain language and the legislative intent of O.C.G.A. § 9-3-72, the Georgia Court of Appeals overrules both Pogue v. Goodman, 282 Ga. App. 385 (638 S.E.2d 824) (2006) and Shannon v. Thornton, 155 Ga. App. 670 (272 S.E.2d 535) (1980) as these cases improperly limit the statute's application. Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251, 2013 Ga. App. LEXIS 225 (2013).

Georgia Court of Appeals has reinterpreted the exception under O.C.G.A. § 9-3-72 to the one-year limitation period in medical malpractice cases for foreign objects left in the body to apply whether the object was left intentionally or unintentionally; thus, a trial court erred in granting summary judgment to a dentist who left a cotton pellet in a patient's tooth as the claim was not time barred. Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251, 2013 Ga. App. LEXIS 225 (2013).

Applicability to "foreign object" cases. — O.C.G.A. §§ 9-3-71 and 9-3-72 was applicable to any action based upon an act of malpractice involving the placing of a foreign object in a patient's body. Hamrick v. Ray, 171 Ga. App. 60, 318 S.E.2d 790, 1984 Ga. App. LEXIS 2100 (1984), overruled in part, Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251, 2013 Ga. App. LEXIS 225 (2013).

When the defendant physician made a conscious decision in the exercise of the physician's professional judgment to leave a foreign object in the patient's leg, the patient's claim rested on defendant's professional diagnostic judgment or discretion, and the two-year statute of limitations found in O.C.G.A. § 9-3-71 applies, rather than the one-year statute of limitations found in O.C.G.A. § 9-3-72. Whiddon v. Spivey, 194 Ga. App. 587, 391 S.E.2d 421, 1990 Ga. App. LEXIS 284, aff'd, 260 Ga. 502, 397 S.E.2d 117, 1990 Ga. LEXIS 390 (1990).

Inadvertent or intentional leaving of object in body. — No language in O.C.G.A. § 9-3-72 limits the statute's application to only those foreign objects left inadvertently as such an interpretation of the statute would allow a defendant-doctor to unilaterally bar a plaintiff's claim, that has already fallen outside of the general limitation period, merely by asserting that the physician left the foreign object in the patient's body intentionally, no matter how absurd the assertion. Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251, 2013 Ga. App. LEXIS 225 (2013).

Application to negligence action against veterinarian. — Because the two-year statute of limitations under either O.C.G.A. § 9-3-33, the personal injury statute, or O.C.G.A. § 9-3-71, the medical malpractice statute, had run on the claims of negligence asserted by the plaintiffs against a veterinarian based on the death of the plaintiffs' pet kitten, the trial court properly granted the veterinarian's motion for summary judgment as to those claims. Langley v. Shannon, 278 Ga. App. 173, 628 S.E.2d 608, 2006 Ga. App. LEXIS 271 (2006).

Prescribing unsuitable medication. — In a case involving alleged negligence by a physician in prescribing unsuitable medication, the limitation period began to run when the plaintiff was aware of the plaintiff's injury, even though the plaintiff did not know the medical cause of the plaintiff's suffering. Crawford v. Spencer, 217 Ga. App. 446, 457 S.E.2d 711, 1995 Ga. App. LEXIS 476 (1995), cert. denied, No. S95C1448, 1995 Ga. LEXIS 1024 (Ga. Sept. 11, 1995), overruled in part, Williams v. Young, M.D., P.C., 247 Ga. App. 337, 543 S.E.2d 737, 2000 Ga. App. LEXIS 1440 (2000).

New brain injury. — Trial court did not err in determining that there was evidence that the patient plaintiff incurred a new injury after suffering a massive stroke and permanent brain damage

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on April 7, 2010, and in concluding that the two-year limitation period under O.C.G.A. § 9-3-71(a) could begin to run on that date, which rendered the plaintiffs' malpractice action timely. Hosp. Auth. v. Fender, 342 Ga. App. 13, 802 S.E.2d 346, 2017 Ga. App. LEXIS 309 (2017), cert. denied, No. S17C1924, 2017 Ga. LEXIS 990 (Ga. Dec. 11, 2017), cert. denied, No. S17C1923, 2017 Ga. LEXIS 992 (Ga. Dec. 11, 2017), overruled in part, Quynn v. Hulsey, 310 Ga. 473, 850 S.E.2d 725, 2020 Ga. LEXIS 761 (2020), overruled in part as stated in Miller v. Polk, 363 Ga. App. 771, 872 S.E.2d 754, 2022 Ga. App. LEXIS 218 (2022).

No "new injury". — In a malpractice action brought against a doctor by a husband and wife, there was no "new injury" in April, 2001, and the action was barred by the two-year statute of limitation because the misdiagnosis and mistreatment in January, 2001, were the cause of the injury for which the husband sought recovery. Burt v. James, 276 Ga. App. 370, 623 S.E.2d 223, 2005 Ga. App. LEXIS 1255 (2005), cert. denied, No. S06C0518, 2006 Ga. LEXIS 185 (Ga. Feb. 27, 2006).

Failure to diagnose and treat. — Patient's medical malpractice claim, for a failure to diagnose and treat, was not time-barred under O.C.G.A. § 9-3-71(a) because a jury issue existed as to when the patient's cancer developed and metastasized and whether the patient had any cancer symptoms more than two years before filing suit. Ward v. Bergen, 277 Ga. App. 256, 626 S.E.2d 224, 2006 Ga. App. LEXIS 65 (2006), cert. denied, No. S06C0961, 2006 Ga. LEXIS 372 (Ga. May 18, 2006).

Misdiagnosis claims. — In most misdiagnosis cases, the injury begins immediately upon the misdiagnosis due to pain, suffering, or economic loss sustained by the patient from the time of the misdiagnosis until the medical problem is properly diagnosed and treated, with the misdiagnosis itself being the injury and not the subsequent discovery of the proper diagnosis. In most misdiagnosis cases, the two-year statute of limitations and the five-year statute of repose begins to run simultaneously on the date that the doctor negligently failed to diagnose the condition and, thereby, injured the patient. Kaminer v. Canas, 282 Ga. 830, 653 S.E.2d 691, 2007 Ga. LEXIS 790 (2007), cert. denied, 553 U.S. 1065, 128 S. Ct. 2503, 171 L. Ed. 2d 786, 2008 U.S. LEXIS 4378 (2008).

Patient's claim for misdiagnosis of the patient's condition, which the patient originally alleged was a result of the doctor's negligence during surgery, was not barred by the two-year statute of limitation, O.C.G.A. § 9-3-71(a); although the surgery itself occurred more than two years before the patient filed suit, the patient's misdiagnosis complaint was filed within two years of the date the doctor failed to diagnose a surgery-related injury during a follow-up visit. Smith v. Danson, 334 Ga. App. 865, 780 S.E.2d 481, 2015 Ga. App. LEXIS 734 (2015).

Trial court erred in granting summary judgment based on a finding that the patient's claims of misdiagnosis were barred by the two-year statute of limitations for medical malpractice actions because the question of the cause of the intervening symptoms the patient experienced was a question for the jury given the contradicting expert testimony presented on the issue. Adams v. McDonald, 346 Ga. App. 464, 816 S.E.2d 454, 2018 Ga. App. LEXIS 401 (2018).

Failure to inform patient of HIV results. — Patient's claim against a doctor and hospital for failure to report the positive results of the patient's HIV test to the patient as required under O.C.G.A. § 31-22-9.2 was a classic medical malpractice claim, despite the patient's claim that it was ordinary negligence; because the claim was brought eight years after the test, the claim was barred by the five-year statute of repose, O.C.G.A. § 9-3-71(b). Remand was required for consideration of equitable estoppel. Piedmont Hospital, Inc. v. D. M., 335 Ga. App. 442, 779 S.E.2d 36, 2015 Ga. App. LEXIS 775 (2015), cert. denied, No. S16C0676, 2016 Ga. LEXIS 328 (Ga. Apr. 26, 2016).

Death following surgery. — When the last act of alleged negligence occurred on September 26, 2001, when a patient underwent surgery, and the patient died

of the resulting complications in 2005, the statute of repose under O.C.G.A. § 9-3-71(b) barred any claims that were not filed by September 26, 2006. The statute of repose did not violate due process or equal protection; furthermore, the right to file the cause of action had accrued before the statute of repose barred filing the claim. Bush v. Sreeram, 298 Ga. App. 68, 679 S.E.2d 87, 2009 Ga. App. LEXIS 556 (2009).

Negligent care of elderly claims. — Daughter's claims against a nursing home for the negligent care of her mother were barred by the two-year statute of limitations, O.C.G.A. § 9-3-71(a), because the daughter was aware of her mother's frequent injuries at the nursing home over the years that she spent there. Dove v. Ty Cobb Healthcare Sys., 305 Ga. App. 13, 699 S.E.2d 355, 2010 Ga. App. LEXIS 662 (2010).

Battery claim. — Five year statute of repose contained in O.C.G.A. § 9-3-71 applied to a battery claim based on the defendant's alleged failure to obtain the plaintiff's consent to the injection pursuant to O.C.G.A. § 31-9-6.1. Blackwell v. Goodwin, 236 Ga. App. 861, 513 S.E.2d 542.

Five-year medical malpractice statute of repose did not bar patient and husband's claims in refiled action for sexual assault, battery, and loss of consortium claims as the refiled complaint alleged those claims arose out of a non-consensual touching of the patient and not out of the provision of professional services to the patient, but those claims were nevertheless barred because the claims were not raised in the original action and were time barred under their own applicable limitations period by the time the claims were filed as part of the refiled complaint. Blier v. Greene, 263 Ga. App. 35, 587 S.E.2d 190, 2003 Ga. App. LEXIS 1009 (2003), cert. denied, No. S04C0114, 2004 Ga. LEXIS 102 (Ga. Jan. 20, 2004), cert. denied, No. S04C0106, 2004 Ga. LEXIS 103 (Ga. Jan. 20, 2004).

Malpractice action against dentist. — When a dentist informed a patient, beyond the two-year period of limitations but within the five-year period of repose set forth in O.C.G.A. § 9-3-71, that dental work previously done by the dentist would have to be redone, and a malpractice action was filed more than five years after the alleged negligent act occurred, such action was precluded by the statute of repose codified in subsection (b) of O.C.G.A. § 9-3-71. Schmidt v. Parnes, 194 Ga. App. 622, 391 S.E.2d 459, 1990 Ga. App. LEXIS 257 (1990).

Two-year limitation begins to run on the date a diagnosis was received, rather than from the time symptoms were experienced and complained of to physicians. Bryant v. Crider, 209 Ga. App. 623, 434 S.E.2d 161, 1993 Ga. App. LEXIS 944 (1993).

In a medical malpractice action against a hospital and physician for injury to an infant patient, the cause of action accrued, for limitations purposes, when the parents and patient discovered that the alleged negligence of the hospital and physicians caused the injuries, rather than when the alleged negligence was first discovered. Crowe v. Humana, 263 Ga. 833, 439 S.E.2d 654, 1994 Ga. LEXIS 75 (1994).

Plaintiff discovered or became aware of the injury no later than March 16, 1989, when the plaintiff's doctor informed the plaintiff that the silicone needed to be surgically removed because of the knots on the plaintiff's face, which knots actually manifested themselves two or three months earlier than that date, consequently, the limitation period began to run at the latest by that date. Knight v. Sturm, 212 Ga. App. 391, 442 S.E.2d 255, 1994 Ga. App. LEXIS 256 (1994), cert. denied, No. S94C1022, 1994 Ga. LEXIS 693 (Ga. Apr. 28, 1994).

Cause of action following implant of device. — Doctor's negligence occurred as early as January, 1997, when a doctor failed to find that mesh which was left in a patient's abdomen was the cause of the infection, not in July, 1998, when the doctor last saw the patient, and because the patient filed a lawsuit more than two years after the doctor misdiagnosed the cause of the problem, the patient's action against the doctor was barred by O.C.G.A. § 9-3-71(a). Brahn v. Young, 265 Ga. App. 705, 595 S.E.2d 553, 2004 Ga. App. LEXIS 233 (2004), cert. denied, No. S04C1165, 2004 Ga. LEXIS 498 (Ga. June 7, 2004).

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Contribution action. — Claim for contribution maintainable under a 20-year statute of limitations, based on an earlier medical malpractice action and alleging that x-ray studies were negligently interpreted by the defendant radiologist, was barred by the five-year statute of repose for medical malpractice cases. Krasaeath v. Parker, 212 Ga. App. 525, 441 S.E.2d 868, 1994 Ga. App. LEXIS 287 (1994), cert. denied, No. S94C1072, 1994 Ga. LEXIS 705 (Ga. May 13, 1994).

Failure to diagnose kidney cancer. — Doctors were sued for malpractice due to the doctors' failure to diagnose a patient's kidney cancer, which metastasized and killed the patient. As the doctors had the burden of proof as to the doctor's statute of limitations defense, the doctors could not obtain summary judgment based on controverted opinion testimony as to when the patient's cancer metastasized. Cleaveland v. Gannon, 284 Ga. 376, 667 S.E.2d 366, 2008 Ga. LEXIS 755 (2008).

Failure to inform of mammogram results. — When a physician failed to inform a patient of mammogram results indicating the possibility of cancer, the patient's action filed more than two years from the date of the mammogram, but within one year from the time she began experiencing pain in her breast, was timely. Staples v. Bhatti, 220 Ga. App. 404, 469 S.E.2d 490.

Failure to diagnose gall stones. — When a patient sued a physician for failing to diagnose and notify the patient of the presence of gall stones in the patient's system, the statute of limitations began to run when the physician examined the patient or when an ultrasound report became available to the physician, and not when the patient's condition was subsequently diagnosed by another physician. Daughtry v. Cohen, 187 Ga. App. 253, 370 S.E.2d 18, 1988 Ga. App. LEXIS 630 (1988).

Failure to notify of a Food and Drug Administration notice. — Patient's claim based on the physician's failure to notify the patient of a Food and Drug Administration (FDA) notice regarding problems with a temporo-mandibular implant accrued on the date the patient received the notice from the physician, not when the physician received the FDA notice. Screven v. Drs. Gruskin & Lucas, 227 Ga. App. 756, 490 S.E.2d 422.

Failure to preserve sperm. — Couple's suit based on an infertility clinic's failure to preserve sperm was time-barred under O.C.G.A. § 9-3-71(a); the limitations period began running on the date all of the sperm was used, not on the date of discovery, and because the claim involved a decision as to whether to use a fertilization method that would not have used all of the sperm, the claim was for professional, not ordinary, negligence. Baskette v. Atlanta Ctr. for Reprod. Med., LLC, 285 Ga. App. 876, 648 S.E.2d 100, 2007 Ga. App. LEXIS 593 (2007), cert. denied, No. S07C1618, 2008 Ga. LEXIS 103 (Ga. Jan. 7, 2008).

Under O.C.G.A. § 9-3-70, in a married couple's suit based on an infertility clinic's failure to preserve sperm, claims against two employees of the clinic were claims for professional negligence, not for ordinary negligence, and thus were time-barred under O.C.G.A. § 9-3-71(a); the employees were involved in the process of thawing and using the husband's sperm in order to fertilize the wife's eggs, and the employees performed these technical functions within the scope of their employment and under the supervision of licensed medical doctors. Baskette v. Atlanta Ctr. for Reprod. Med., LLC, 285 Ga. App. 876, 648 S.E.2d 100, 2007 Ga. App. LEXIS 593 (2007), cert. denied, No. S07C1618, 2008 Ga. LEXIS 103 (Ga. Jan. 7, 2008).

Negligent hiring, retention, supervision and entrustment. — Plaintiff's claims against an endoscopy center for negligent hiring, retention, supervision and entrustment were subject to the five year statute of repose because the claims arose out of the actions of a nurse employed by the center in administering an injection to the plaintiff. Blackwell v. Goodwin, 236 Ga. App. 861, 513 S.E.2d 542.

Executrix's negligent supervision and retention claim against a hospital was properly dismissed as, even if the action

was refiled in accordance with O.C.G.A. § 9-2-61, the suit was barred by the statute of repose under O.C.G.A. § 9-3-71(b) as the suit was filed seven years after the patient's death; the claim ultimately rested on whether a doctor's substandard medical care caused the patient's injury and was, therefore, considered to be a medical malpractice claim for purposes of the statute of repose. Adams v. Griffis, 275 Ga. App. 364, 620 S.E.2d 575, 2005 Ga. App. LEXIS 873 (2005).

Minor's wrongful death claim dismissed with prejudice. — Dismissal of minor's wrongful death claims with prejudice was upheld because the trial court judge approved a consent order based on representations of both parties, and the father failed to cite any legal authority to support an assertion that the trial court had an independent duty to verify the parties' joint statement that the statute of limitation had run on the minor's claims against the defendants. Parrish v. St. Joseph's/Candler Health Sys., Inc., 364 Ga. App. 228, 874 S.E.2d 413, 2022 Ga. App. LEXIS 288 (2022), overruled in part, Hamon v. Connell, 315 Ga. 760, 883 S.E.2d 785, 2023 Ga. LEXIS 24 (2023).

Negligence and misdiagnosis claim time barred. — Dental malpractice action alleging negligence from placement of bridge and misdiagnosis of a cyst in the plaintiff's jaw was barred since the injury, commencing the two-year statute of limitations, occurred when the defendant placed the bridge without diagnosing the cyst, and the defendant's alleged continuing failures to correct the defendant's previous misdiagnosis were not additional acts of negligence or continuing tort tolling the statute. Frankel v. Clark, 213 Ga. App. 222, 444 S.E.2d 147, 1994 Ga. App. LEXIS 528 (1994).

Malpractice action based on misdiagnosis of kidney cancer, when evidence established that the decedent's injury had occurred and the decedent had physically manifested symptoms of kidney cancer more than two years before the suit was filed, was barred by the statute of limitations, and the fact that the decedent did not know the medical cause of the decedent's suffering did not affect the application of the statute. Ford v. Dove, 218 Ga. App. 828, 463 S.E.2d 351, 1995 Ga. App. LEXIS 898 (1995), cert. denied, No. S96C0298, 1996 Ga. LEXIS 276 (Ga. Jan. 26, 1996), overruled in part, Ezor v. Thompson, 241 Ga. App. 275, 526 S.E.2d 609, 1999 Ga. App. LEXIS 1616 (1999), overruled in part, Williams v. Young, M.D., P.C., 247 Ga. App. 337, 543 S.E.2d 737, 2000 Ga. App. LEXIS 1440 (2000).

Medical malpractice action by the plaintiffs, a patient and the patient's parents, against the defendants, an orthodontist and an orthodontic corporation, for misdiagnosis and mistreatment in relation to the patient's treatment for an overbite was time-barred under O.C.G.A. § 9-3-71 even though it was filed within two years after the plaintiffs allegedly learned that the defendants' treatment approach did not effectively address the patient's real problem because: (1) the action was filed more than two years after the patient last saw the orthodontist; (2) the limitation period ran from the date of misdiagnosis, not from the discovery of the proper diagnosis; (3) there was no evidence of a new injury subsequent to the date of medical treatment; and (4) the plaintiffs failed to offer adequate evidence to create a fact issue on the plaintiffs claim that fraud tolled the running of the limitation period as the plaintiffs produced no evidence that the defendants fraudulently misrepresented or withheld the results of the treatment. Kane v. Shoup, 260 Ga. App. 723, 580 S.E.2d 555, 2003 Ga. App. LEXIS 310 (2003), cert. denied, No. S03C1194, 2003 Ga. LEXIS 652 (Ga. July 14, 2003).

Medical malpractice suit was barred by the O.C.G.A. § 9-3-71(b) five year statute of repose because the alleged misdiagnosis and failure to treat the decedent's cardiovascular risk factors occurred more than seven years before the widow filed suit, and the new condition exception did not apply since the risk factors existed at the start of the treatment. Howell v. Zottoli, 302 Ga. App. 477, 691 S.E.2d 564, 2010 Ga. App. LEXIS 166 (2010).

Trial court properly struck, as time barred, the breach of fiduciary duty claim because the gravamen of that claim was the doctor's alleged failure to correctly read the patient's ultrasound and the failure to diagnose the patient's medical con-

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dition, amounting to a claim of negligence that went to the propriety of the doctor's exercise of medical skill and judgment, a medical malpractice claim as contemplated by O.C.G.A. §§ 9-3-70 and 9-3-71(b). Johnson v. Jones, 327 Ga. App. 371, 759 S.E.2d 252, 2014 Ga. App. LEXIS 340 (2014).

Trial court erred in denying a hospital's motion to dismiss an amended complaint because the complaint was filed outside the statute of limitations, O.C.G.A. § 9-3-71(a); the complaint did not relate back to the filing of the original complaint because there was no evidence that the hospital received timely notice of the action as required by O.C.G.A. § 9-11-15(c). St. Francis Health, LLC v. Weng, 354 Ga. App. 310, 840 S.E.2d 712, 2020 Ga. App. LEXIS 163 (2020).

Dentist's failure to inform patient of impacted tooth. — Facts raised an issue of fraud for jury determination which, if found, would estop a dentist from raising the defense of the statute of repose, when it was alleged that the dentist failed to inform the patient of an impacted tooth and that the dentist stated that the patient's pain was caused by bone slivers. Hill v. Fordham, 186 Ga. App. 354, 367 S.E.2d 128, 1988 Ga. App. LEXIS 366 (1988).

Experience of symptoms in dental malpractice claim. — Dental patient's malpractice suit filed on January 24, 2003, was time-barred under O.C.G.A. § 9-3-71(a); although the patient had complained of pain and sensitivity at an appointment on January 25, 2001, the patient admitted experiencing those symptoms from the time bridges had been installed on January 3, 2001, and logic indicated that the patient had symptoms before the January 25 appointment. Brown v. Coast Dental of Ga., P.C., 284 Ga. App. 244, 643 S.E.2d 740, 2007 Ga. App. LEXIS 128 (2007), cert. denied, No. S07C1098, 2007 Ga. LEXIS 496 (Ga. June 25, 2007).

Contamination of blood. — Action for medical malpractice brought more than five years after the allegedly wrongful transmission of AIDS-contaminated blood was barred by the provision of ultimate repose contained in subsection (b) of O.C.G.A. § 9-3-71. Bieling v. Battle, 209 Ga. App. 874, 434 S.E.2d 719, 1993 Ga. App. LEXIS 1021 (1993), modified, No. A93A0693 (Ga. Ct. App. 1993), cert. denied, No. S93C1798, 1993 Ga. LEXIS 1056 (Ga. Oct. 29, 1993), overruled in part, Southern States Chemical v. Tampa Tank & Welding, No. S23A0273, 2023 Ga. LEXIS 115 (Ga. May 31, 2023).

Pharmacist subject to statute. — Georgia statute of limitations for medical malpractice is applicable to an action brought against a pharmacist notwithstanding the fact that a pharmacist is not engaged in the practice of medicine. Faser v. Sears, Roebuck & Co., 674 F.2d 856, 1982 U.S. App. LEXIS 19641 (11th Cir. 1982).

Action based upon the conduct of a pharmacist in dispensing medication upon a doctor's prescription constitutes an "action for medical malpractice" within the meaning of O.C.G.A. § 9-3-70. Robinson v. Williamson, 245 Ga. App. 17, 537 S.E.2d 159, 2000 Ga. App. LEXIS 895 (2000), cert. denied, No. S00C1805, 2001 Ga. LEXIS 95 (Ga. Jan. 19, 2001).

Applicability to optometrist. — Statute setting limitation and repose for medical malpractice actions applied to alleged professional negligence by an optometrist. Zechmann v. Thigpen, 210 Ga. App. 726, 437 S.E.2d 475, 1993 Ga. App. LEXIS 1335 (1993), cert. denied, No. S94C0215, 1994 Ga. LEXIS 159 (Ga. Jan. 21, 1994).

Cause of action against an optometrist involving misdiagnosis of a disease which led to glaucoma and enucleation of the plaintiff's eye accrued at the time of the first manifestation of glaucoma, not at time of the misdiagnosis four years earlier, and, thus, the action was not barred by the statute of limitations. Zechmann v. Thigpen, 210 Ga. App. 726, 437 S.E.2d 475, 1993 Ga. App. LEXIS 1335 (1993), cert. denied, No. S94C0215, 1994 Ga. LEXIS 159 (Ga. Jan. 21, 1994).

Physician's intentional acts. — Plaintiff's claims based on defendant physician's intentional acts were medical malpractice claims barred by the five-year statute of repose. Thompson v. Long, 225 Ga. App. 719, 484 S.E.2d 666.

Claims for emotional pain and distress sounded in professional malpractice and were subject to the five-year statute of repose. Thompson v. Long, 225 Ga. App. 719, 484 S.E.2d 666.

Dental malpractice. — Trial court erred by granting a dentist summary judgment in a dental malpractice suit as being filed outside the two-year limitations period because the court erred by ruling that the patient's consultation with an oral surgeon working with the dentist ended the tolling caused by the dentist's fraudulent concealment of the cause of action. MacDowell v. Gallant, 323 Ga. App. 61, 744 S.E.2d 836, 2013 Ga. App. LEXIS 502 (2013), aff'd, 295 Ga. 329, 759 S.E.2d 818, 2014 Ga. LEXIS 490 (2014).

Appellate court properly reversed the grant of summary judgment to a dentist because the statutory period of limitation was tolled where the second dentist the patient consulted provided professional services to the patient jointly with the first. Gallant v. MacDowell, 295 Ga. 329, 759 S.E.2d 818, 2014 Ga. LEXIS 490 (2014).

Although an oral surgeon told a dental patient that the reconstruction process was taking too long and that the patient's reconstruction was too narrow, material issues of fact remained as to whether the surgeon's communications gave the patient actual notice of the dentist's malpractice and fraudulent concealment for purposes of the statute of limitations. MacDowell v. Gallant, 344 Ga. App. 856, 811 S.E.2d 513, 2018 Ga. App. LEXIS 144 (2018), cert. denied, No. S18C0963, 2018 Ga. LEXIS 626 (Ga. Aug. 27, 2018).

Decisions Under § 9-3-33

Editor's notes. — The following decisions were decided under Code Section 9-3-33 prior to applicability of this section.

Failure to inform as fraud tolling statute. — Physician has duty to inform patient of nature and character of any operation that is performed, and when the physician goes beyond the physician's authority and conceals such fact from the patient, the physician's failure to inform the patient constitutes fraud on the patient and tolls the statute of limitation. Crawford v. McDonald, 125 Ga. App. 289, 187 S.E.2d 542, 1972 Ga. App. LEXIS 1301 (1972).

When statute runs when fraud involved. — In malpractice action involving fraud, statute of limitations commences to run when patient either learns of fraudulently concealed fact or in exercise of diligence should have become aware thereof. Wolfe v. Virusky, 306 F. Supp. 519, 1969 U.S. Dist. LEXIS 8805 (S.D. Ga. 1969).

Effect of intentionally inducing patient to refrain from inquiry. — Action for malpractice was not barred by statute of limitations even though the plaintiff knew of the injury immediately after the operation since the defendants, who stood in confidential relationship with the plaintiff, knowingly and intentionally induced the plaintiff to refrain from making further inquiry as to the plaintiff's condition, which was in fact permanent and which was known to be permanent. Colvin v. Warren, 44 Ga. App. 825, 163 S.E. 268, 1932 Ga. App. LEXIS 539 (1932).

Negligent misdiagnosis of broken back. — Under former Code 1933, § 3-1004 (see now O.C.G.A. § 9-3-33), plaintiff's right of action for negligent misdiagnosis of a broken back did not accrue until the plaintiff's discovery thereof in October 1975, assuming that in the exercise of ordinary care the plaintiff could not have discovered the injury earlier. Simons v. Conn, 151 Ga. App. 525, 260 S.E.2d 402, 1979 Ga. App. LEXIS 2621 (1979), superseded by statute as stated in Hart v. Eldridge, 158 Ga. App. 834, 282 S.E.2d 369, 1981 Ga. App. LEXIS 2436 (1981).

When surgeon negligently leaves a foreign object in the body of patient, there exists a continuing tort so long as such object remains undetected, and the statute of limitations does not begin to run on the cause of action until its presence is known to the patient or until the patient, by the exercise of ordinary care, could have learned of it. Parker v. Vaughan, 124 Ga. App. 300, 183 S.E.2d 605, 1971 Ga. App. LEXIS 902 (1971) (for comments, see 8 Ga. St. B.J. 244 (1971), and 23 Mercer L. Rev. 697 (1972)).

RESEARCH REFERENCES

Am. Jur. 2d.

61 Am. Jur. 2d, Physicians, Surgeons, and Other Healers, § 298 et seq.

Am. Jur. Pleading and Practice Forms.

19B Am. Jur. Pleading and Practice Forms, Physicians, Surgeons, and Other Healers, § 783.

Am. Jur. Proof of Facts.

Discovery Date in Medical Malpractice Litigation, 26 POF3d 185.

C.J.S.

54 C.J.S., Limitations of Actions, § 249 et seq. 70 C.J.S., Physicians, Surgeons, and Other Health Care Providers, § 74.

ALR.

When statute of limitations commences to run against actions against physicians, surgeons, or dentists for malpractice, 74 A.L.R. 1317; 144 A.L.R. 209, 80 A.L.R.2d 368; 70 A.L.R.3d 7.

Statute of limitations applicable to malpractice action against physician, surgeon, dentist, or similar practitioner, 80 A.L.R.2d 320; 70 A.L.R.4th 535.

When statute of limitations commences to run against malpractice action against physician, surgeon, dentist, or similar practitioner, 80 A.L.R.2d 368; 70 A.L.R.3d 7.

Applicability, to negligence action against hospital, of statute of limitations applicable to malpractice and related actions against physicians, surgeons, or the like, 89 A.L.R.2d 1180.

Applicability, in action against nurse in her professional capacity, of statute of limitations applicable to malpractice, 8 A.L.R.3d 1336.

When statute of limitations commences to run against malpractice action based on leaving foreign substance in patient's body, 70 A.L.R.3d 7.

When statute of limitations begins to run against malpractice action in connection with sterilization or birth control procedures, 93 A.L.R.3d 218.

Medical malpractice statutes of limitation minority provisions, 62 A.L.R.4th 758; 71 A.L.R.5th 307.

Medical malpractice: who are "health care providers," or the like, whose actions fall within statutes specifically governing actions and damages for medical malpractice, 12 A.L.R.5th 1.

Medical malpractice: negligent catheterization, 31 A.L.R.5th 1.

Medical-malpractice countersuits, 61 A.L.R.5th 307.

Timeliness of action under medical malpractice statute of repose, aside from effect of fraudulent concealment of patient's cause of action, 14 A.L.R.6th 301.

When statute of limitations begins to run in case of dental malpractice, 17 A.L.R.6th 159.

Effect of fraudulent or negligent concealment of patient's cause of action on timeliness of action under medical malpractice statute of repose, 19 A.L.R.6th 475.

Application of relation back doctrine permitting change in party after statute of limitations has run in state court action — products liability cases, 93 A.L.R.6th 463.

Application of relation back doctrine permitting change in party after statute of limitations has run in state court action — wrongful death cases, 94 A.L.R.6th 111.

Application of relation back doctrine permitting change in party after statute of limitations has run in state court action — medical malpractice cases against physicians and other individual health care providers, 95 A.L.R.6th 85.

Application of relation-back doctrine permitting change in party after statute of limitations has run in state court action — medical malpractice cases in actions involving hospitals, clinics, and the like, 100 A.L.R.6th 139.

Estoppel to Assert Statute of Limitations or Statute of Repose in Action for Malpractice of Health Care Provider, 45 A.L.R.7th Art. 3.

9-3-72. Foreign objects left in body.

The limitations of Code Section 9-3-71 shall not apply where a foreign object has been left in a patient's body, but in such a case an action shall

be brought within one year after the negligent or wrongful act or omission is discovered. For the purposes of this Code section, the term "foreign object" shall not include a chemical compound, fixation device, or prosthetic aid or device.

History.

Code 1933, § 3-1103, enacted by Ga. L. 1976, p. 1363, § 1; Ga. L. 1985, p. 556, § 2.

Cross references.

Tolling of limitations for medical malpractice, § 9-3-97.1.

Editor's notes.

Ga. L. 1985, p. 556, § 3, not codified by the General Assembly, provides: "No action for medical malpractice which, prior to July 1, 1985, has been barred by the provisions of Title 9, relating to actions, shall be revived by this Act. No action for medical malpractice which would be barred before July 1, 1986, by the provisions of this Act but which would not be so barred by the provisions of Title 9 in force immediately prior to July 1, 1985, shall be barred until July 1, 1986."

Law reviews.

For article surveying judicial and legislative developments in Georgia's tort laws, see 31 Mercer L. Rev. 229 (1979).

For comment on statutes of limitations in medical malpractice actions in Georgia, see 33 Mercer L. Rev. 377 (1981).

For survey article on torts, see 34 Mercer L. Rev. 271 (1982).

For survey article on tort law, see 60 Mercer L. Rev. 375 (2008).

For annual survey on torts, see 65 Mercer L. Rev. 265 (2013).

For note, "Forty-Eight States are Probably Not Wrong: An Argument for Modernizing Georgia's Legal Malpractice Statute of Limitations," see 33 Ga. St. U.L. Rev. 805 (2017).

JUDICIAL DECISIONS

Applicability of § 9-3-71. — When the defendant physician made a conscious decision in the exercise of the physician's professional judgment to leave a foreign object in the patient's leg, the patient's claim rested on the defendant's professional diagnostic judgment or discretion, and the two-year statute of limitations found in O.C.G.A. § 9-3-71 applies, rather than the one-year statute of limitations found in O.C.G.A. § 9-3-72. Whiddon v. Spivey, 194 Ga. App. 587, 391 S.E.2d 421, 1990 Ga. App. LEXIS 284, aff'd, 260 Ga. 502, 397 S.E.2d 117, 1990 Ga. LEXIS 390 (1990).

O.C.G.A. § 9-3-72 does not shorten the limitation period provided for in O.C.G.A. § 9-3-71. Spivey v. Whiddon, 260 Ga. 502, 397 S.E.2d 117, 1990 Ga. LEXIS 390 (1990).

Five-year statute of repose in O.C.G.A. § 9-3-71(b) does not bar a foreign object medical malpractice action timely filed within the one-year period set forth in O.C.G.A. § 9-3-72. Abend v. Klaudt, 243 Ga. App. 271, 531 S.E.2d 722, 2000 Ga. App. LEXIS 368 (2000), cert. denied, No. S00C1335, 2000 Ga. LEXIS 716 (Ga. Sept. 29, 2000), overruled in part, Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251, 2013 Ga. App. LEXIS 225 (2013).

In a medical malpractice action, it is for a jury to determine whether a patient by exercising ordinary care should have learned on December 7, 2005, or on December 9, 2005, that a foreign object had been left in the patient's body during the performance of surgery in 2001 and the decision of the jury would govern whether the statute of limitations in O.C.G.A. § 9-3-71 or O.C.G.A. § 9-3-72 controlled. Monfort v. Colquitt County Hosp. Auth., 288 Ga. App. 202, 653 S.E.2d 535, 2007 Ga. App. LEXIS 1167 (2007), cert. denied, No. S08C0463, 2008 Ga. LEXIS 225 (Ga. Feb. 25, 2008).

Purpose of legislature in making distinction between two types of medical malpractice was to allow the plaintiff's claim which did not rest on professional diagnostic judgment or discretion to survive until actual discovery of the wrong-

doing, as in such situations danger of belated, false, or frivolous claims is eliminated. Dalbey v. Banks, 245 Ga. 162, 264 S.E.2d 4, 1980 Ga. LEXIS 726 (1980); Allrid v. Emory Univ., 249 Ga. 35, 285 S.E.2d 521, 1982 Ga. LEXIS 1111 (1982).

Purpose of O.C.G.A. § 9-3-72 is to insure that a claim not be barred within an unjust period. The legislature never intended the statute to shorten the time within which a cause of action may be asserted. Spivey v. Whiddon, 260 Ga. 502, 397 S.E.2d 117, 1990 Ga. LEXIS 390 (1990).

Intentional or unintentional actions. — Georgia Court of Appeals has reinterpreted the exception under O.C.G.A. § 9-3-72 to the one-year limitation period in medical malpractice cases for foreign objects left in the body to apply whether the object was left intentionally or unintentionally; thus, a trial court erred in granting summary judgment to a dentist who left a cotton pellet in a patient's tooth as the claim was not time barred. Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251, 2013 Ga. App. LEXIS 225 (2013).

Classification created by O.C.G.A. § 9-3-72 bears fair and substantial relation to object of the legislation. Allrid v. Emory Univ., 249 Ga. 35, 285 S.E.2d 521, 1982 Ga. LEXIS 1111 (1982).

This section is a legislative adoption of doctrine of continuing tort. Childers v. Tauber, 148 Ga. App. 157, 250 S.E.2d 787, 1978 Ga. App. LEXIS 3061 (1978).

By requiring in O.C.G.A. § 9-3-72 that a patient who claims a foreign object was negligently left in the patient's body must file an action within one year after the negligent act or omission is discovered, the Georgia General Assembly has adopted the continuing tort rule; therefore, based upon the plain language and the legislative intent of O.C.G.A. § 9-3-72, the Georgia Court of Appeals overrules both Pogue v. Goodman, 282 Ga. App. 385 (638 S.E.2d 824) (2006) and Shannon v. Thornton, 155 Ga. App. 670 (272 S.E.2d 535) (1980) as those cases improperly limit the statute's application. Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251, 2013 Ga. App. LEXIS 225 (2013).

This section refers to objects placed in a patient's body during some medical procedure in such fashion that the physician may be charged with knowledge that the object is lodged there. Clark v. Memorial Hosp., 145 Ga. App. 305, 243 S.E.2d 695, 1978 Ga. App. LEXIS 1961 (1978); Dalbey v. Banks, 245 Ga. 162, 264 S.E.2d 4, 1980 Ga. LEXIS 726 (1980).

Suture allegedly left in plaintiff's ureter after hysterectomy was a "foreign object" within the contemplation of O.C.G.A. § 9-3-72. Ivey v. Scoggins, 163 Ga. App. 741, 295 S.E.2d 164, 1982 Ga. App. LEXIS 2634 (1982).

Bulldog clamp. — Sutures, pins, plates, and dental bridges would, for example, ordinarily be considered fixation devices; they are intended to remain within the body after surgery to serve a medical purpose. A bulldog clamp, on the other hand, is an arterial clamp used during surgery to occlude the vein graft temporarily, and it ought to be removed at the conclusion of the operation. Hence, a bulldog clamp unintentionally left in the body following surgery is a "foreign object." Ringewald v. Crawford Long Mem. Hosp., 258 Ga. 302, 368 S.E.2d 490, 1988 Ga. LEXIS 242 (1988), overruled, Spivey v. Whiddon, 260 Ga. 502, 397 S.E.2d 117, 1990 Ga. LEXIS 390 (1990).

Failure to inform not a separate act of malpractice. — Failure to inform a patient of the presence of a foreign object left by the physician merely tolls the one-year statute of limitation until the time at which the patient discovers the presence of the object and does not constitute a separate act of malpractice. Hamrick v. Ray, 171 Ga. App. 60, 318 S.E.2d 790, 1984 Ga. App. LEXIS 2100 (1984), overruled in part, Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251, 2013 Ga. App. LEXIS 225 (2013).

Doctor's fraudulent concealment of object. — Doctor's alleged fraudulent concealment of a foreign object left in a patient's body does not constitute a separate act of malpractice not subject to the one-year statute of limitations in O.C.G.A. § 9-3-72; rather, failure to inform the patient of such object's presence merely tolls the one-year period until the time at which the patient discovers the presence

of the object. Karafotias v. Coyne, 184 Ga. App. 335, 361 S.E.2d 514, 1987 Ga. App. LEXIS 2263 (1987), overruled in part, Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251, 2013 Ga. App. LEXIS 225 (2013).

Acts covered by this section go beyond ordinary negligence. — When physician places foreign object in patient's body during treatment, the physician has actual knowledge of its presence, and the physician's failure to remove it goes beyond ordinary negligence so as to be classified by the legislature as a continuing tort which tolls the statute of limitations until the object is discovered. Dalbey v. Banks, 245 Ga. 162, 264 S.E.2d 4, 1980 Ga. LEXIS 726 (1980); Allrid v. Emory Univ., 249 Ga. 35, 285 S.E.2d 521, 1982 Ga. LEXIS 1111 (1982).

While this section established new time limitation period for a continuing tort, it left unchanged applicable standard concerning event which triggers running of limitation period. Childers v. Tauber, 148 Ga. App. 157, 250 S.E.2d 787, 1978 Ga. App. LEXIS 3061 (1978).

Limitation can only begin to run from time victim has knowledge, or through exercise of ordinary care could have learned, of existence of continuing tort. Childers v. Tauber, 148 Ga. App. 157, 250 S.E.2d 787, 1978 Ga. App. LEXIS 3061 (1978).

Even though the plaintiff became aware that the plaintiff was suffering from some kind of injury, the one-year limitation period of O.C.G.A. § 9-3-72 did not start to run until the plaintiff knew or by the exercise of ordinary care should have learned that a foreign object was in the plaintiff's body which was causing the injury. Abend v. Klaudt, 243 Ga. App. 271, 531 S.E.2d 722, 2000 Ga. App. LEXIS 368 (2000), cert. denied, No. S00C1335, 2000 Ga. LEXIS 716 (Ga. Sept. 29, 2000), overruled in part, Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251, 2013 Ga. App. LEXIS 225 (2013).

Negligence suit barred by either of the two statutes of limitation applicable to medical malpractice cases, O.C.G.A. §§ 9-3-71 and 9-3-72. Bevel v. Routledge, 168 Ga. App. 89, 308 S.E.2d 207, 1983 Ga. App. LEXIS 2689 (1983).

Dental bridge not covered by section. — Dental bridge is in the nature of a "fixation device or prosthetic aid or device" and, as such, is excluded by this section from consideration as a "foreign object." Shannon v. Thornton, 155 Ga. App. 670, 272 S.E.2d 535, 1980 Ga. App. LEXIS 2731 (1980), overruled, Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251, 2013 Ga. App. LEXIS 225 (2013).

Doctor's failure to remove particles of ceramic glass from patient's hand, which were not placed there by the doctor, is more akin to ordinary misdiagnosis and mistreatment covered by Ga. L. 1976, p. 1363, § 1 (see now O.C.G.A. § 9-3-71) than to cases covered by Ga. L. 1976, p. 1363, § 1 (see now O.C.G.A. § 9-3-72). Dalbey v. Banks, 245 Ga. 162, 264 S.E.2d 4, 1980 Ga. LEXIS 726 (1980).

When an object is purposely placed in a body it cannot be said to have been "left," which, in the context of this section, connotes a nonpurposeful act. Shannon v. Thornton, 155 Ga. App. 670, 272 S.E.2d 535, 1980 Ga. App. LEXIS 2731 (1980), overruled, Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251, 2013 Ga. App. LEXIS 225 (2013).

When an object was purposely placed in a body it was not a "foreign object" as contemplated by O.C.G.A. § 9-3-72, and the fact that it might have been negligently placed did not alter this finding; hence, absent evidence of a doctor's fraud or concealment of the placement, summary judgment in a patient's medical malpractice suit was properly granted to a doctor and a clinic as the applicable two-year statute of limitation had expired by the time the action was filed. Pogue v. Goodman, 282 Ga. App. 385, 638 S.E.2d 824, 2006 Ga. App. LEXIS 1396 (2006), overruled, Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251, 2013 Ga. App. LEXIS 225 (2013).

Inadvertent leaving of object not requirement. — No language in O.C.G.A. § 9-3-72 limits the statute's application to only those foreign objects left inadvertently as such an interpretation of the statute would allow a defendant-doctor to unilaterally bar a plaintiff's claim, that has already fallen outside of the general limitation period, merely by asserting that the doctor left the foreign object in the patient's body intentionally,

no matter how absurd the assertion. Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251, 2013 Ga. App. LEXIS 225 (2013).

RESEARCH REFERENCES

Am. Jur. 2d.

61 Am. Jur. 2d, Physicians, Surgeons, and Other Healers, § 304.

C.J.S.

70 C.J.S., Physicians, Surgeons, and Other Health Care Providers, § 121.

ALR.

Statute of limitations applicable to malpractice action against physician, surgeon, dentist, or similar practitioner, 80 A.L.R.2d 320; 70 A.L.R.4th 535.

When statute of limitations commences to run against malpractice action against physician, surgeon, dentist, or similar practitioner, 80 A.L.R.2d 368; 70 A.L.R.3d 7.

Malpractice: liability of physician, surgeon, anesthetist, or dentist for injury resulting from foreign object left in patient, 10 A.L.R.3d 9.

When statute of limitations commences to run against malpractice action based on leaving foreign substance in patient's body, 70 A.L.R.3d 7.

Medical malpractice: applicability of "foreign object" exception in medical malpractice statutes of limitations, 50 A.L.R.4th 250.

Timeliness of action under medical malpractice statute of repose, aside from effect of fraudulent concealment of patient's cause of action, 14 A.L.R.6th 301.

When statute of limitations begins to run in case of dental malpractice, 17 A.L.R.6th 159.

Effect of fraudulent or negligent concealment of patient's cause of action on timeliness of action under medical malpractice statute of repose, 19 A.L.R.6th 475.

Medical Malpractice: Dental Crowns or Bridges, 58 A.L.R.7th Art. 2.

9-3-73. Certain disabilities and exceptions applicable.

(a) Except as provided in this Code section, the disabilities and exceptions prescribed in Article 5 of this chapter in limiting actions on contracts shall be allowed and held applicable to actions, whether in tort or contract, for medical malpractice.

(b) Notwithstanding Article 5 of this chapter, all persons who are legally incompetent because of intellectual disability or mental illness and all minors who have attained the age of five years shall be subject to the periods of limitation for actions for medical malpractice provided in this article. A minor who has not attained the age of five years shall have two years from the date of such minor's fifth birthday within which to bring a medical malpractice action if the cause of action arose before such minor attained the age of five years.

(c) Notwithstanding subsections (a) and (b) of this Code section, in no event may an action for medical malpractice be brought by or on behalf of:

(1) A person who is legally incompetent because of intellectual disability or mental illness more than five years after the date on which the negligent or wrongful act or omission occurred; or

(2) A minor:

(A) After the tenth birthday of the minor if such minor was under the age of five years on the date on which the negligent or wrongful act or omission occurred; or

(B) After five years from the date on which the negligent or wrongful act or omission occurred if such minor was age five or older on the date of such act or omission.

(d) Subsection (b) of this Code section is intended to create a statute of limitations and subsection (c) of this Code section is intended to create a statute of repose.

(e) The limitations of subsections (b) and (c) of this Code section shall not apply where a foreign object has been left in a patient's body. Such cases shall be governed by Code Section 9-3-72.

(f) The findings of the General Assembly under this Code section include, without limitation, that a reasonable relationship exists between the provisions, goals, and classifications of this Code section and the rational, legitimate state objectives of providing quality health care, assuring the availability of physicians, preventing the curtailment of medical services, stabilizing insurance and medical costs, preventing stale medical malpractice claims, and providing for the public safety, health, and welfare as a whole.

(g) No action which, prior to July 1, 1987, has been barred by provisions relating to limitations of actions shall be revived by this article, as amended. No action which would be barred before July 1, 1987, by the provisions of this article, as amended, but which would not be so barred by the provisions of this article and Article 5 of this chapter in force immediately prior to July 1, 1987, shall be barred until July 1, 1989.

History.

Code 1933, § 3-1104, enacted by Ga. L. 1976, p. 1363, § 1; Ga. L. 1987, p. 887, § 2; Ga. L. 2015, p. 385, § 4-15/HB 252.

Editor's notes.

Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

Law reviews.

For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

JUDICIAL DECISIONS

Constitutionality. — The 1987 amendment to O.C.G.A. § 9-3-73 should be construed as constitutional, rational, and consistent with the intent of the legislature. It was clearly the legislative intent that medical malpractice claimants whose claims were affected by the amendment be given a grace period within which to bring suit. Mansfield v. Pannell, 261 Ga. 243, 404 S.E.2d 104, 1991 Ga. LEXIS 224 (1991); Crowe v. Humana, 263 Ga. 833, 439 S.E.2d 654, 1994 Ga. LEXIS 75 (1994).

Subsections (b) and (g) of O.C.G.A. § 9-3-73 should be construed as meaning that no action will be barred before two years from the effective date. The result of that construction is that no action will be

barred before July 1, 1989. Thus construed, the statute is constitutional. Mansfield v. Pannell, 261 Ga. 243, 404 S.E.2d 104, 1991 Ga. LEXIS 224 (1991); Kumar v. Hall, 262 Ga. 639, 423 S.E.2d 653, 1992 Ga. LEXIS 997 (1992).

The 1987 amendment of O.C.G.A. § 9-3-73, which altered the tolling provisions otherwise applicable to tort claims by injured minors in cases in which tort claims arose from health care professionals' malpractice, did not violate a brain-damaged childs' right to equal protection or right of access to the courts. Smith v. Cobb County-Kennestone Hosp. Auth., 262 Ga. 566, 423 S.E.2d 235, 1992 Ga. LEXIS 987 (1992); Crowe v. Humana, 263 Ga. 833, 439 S.E.2d 654, 1994 Ga. LEXIS 75 (1994).

Application of subsection (b) of O.C.G.A. § 9-3-73 to patient who was incompetent due to traumatic brain injury did not violate equal protection or due process. Kumar v. Hall, 262 Ga. 639, 423 S.E.2d 653, 1992 Ga. LEXIS 997 (1992).

Provision of O.C.G.A. § 9-3-73(b) making tolling unavailable for legally incompetent persons in medical malpractice cases does not violate the equal protection clause, U.S. Const., amend. 14. The legislature had a rational basis for distinguishing between the legally incompetent and parties who are permitted tolling: foreign object plaintiffs, unrepresented estates, and contribution plaintiffs. Deen v. Egleston, 597 F.3d 1223, 2010 U.S. App. LEXIS 4172 (11th Cir. 2010).

Construction with § 9-3-71. — In a medical malpractice action, because the trial court erroneously applied the five-year statute of repose contained in O.C.G.A. § 9-3-71(b), and not O.C.G.A. § 9-3-73, in finding that the parents' amended negligence complaint against certain doctors and nurses was time-barred, the trial court erred in entering summary judgment against the parents; further, the trial court also erred in finding that the doctors and nurses were rendering care to only the mother, and not the mother and the newborn child. Johnson v. Thompson, 286 Ga. App. 810, 650 S.E.2d 322, 2007 Ga. App. LEXIS 799 (2007), cert. denied, No. S07C1840, 2008 Ga. LEXIS 90 (Ga. Jan. 7, 2008).

Retroactivity of amendment. — The 1987 amendment of O.C.G.A. § 9-3-73 could be applied retroactively to cause of action which arose prior to amendment's effective date. Smith v. Cobb County-Kennestone Hosp. Auth., 262 Ga. 566, 423 S.E.2d 235, 1992 Ga. LEXIS 987 (1992); Crowe v. Humana, 263 Ga. 833, 439 S.E.2d 654, 1994 Ga. LEXIS 75 (1994).

Legislative purpose. — When a patient and the patient's spouse filed a medical malpractice complaint, which the spouse amended after the patient's death to add a wrongful death claim, the wrongful death claim was not barred by the statute of repose as the wrongful death claim did not initiate legal proceedings, but was filed as an amendment to a pending suit that timely asserted other claims arising out of the same alleged malpractice; this result was consistent with the legislative purpose of the statute of repose set forth in O.C.G.A. § 9-3-73(f), as the original medical malpractice allegations had been brought less than two years after the alleged negligence, and the wrongful death claim was based on the same alleged acts and omissions as the earlier claims. Wesley Chapel Foot & Ankle Ctr., LLC v. Johnson, 286 Ga. App. 881, 650 S.E.2d 387, 2007 Ga. App. LEXIS 834 (2007), cert. denied, No. S07C1879, 2007 Ga. LEXIS 820 (Ga. Oct. 29, 2007).

Minors. — Even though O.C.G.A. § 9-3-73 permits tolling the statute of limitations for disabilities in medical malpractice actions, under O.C.G.A. § 9-3-90 a minor child must wait until reaching the age of 18 before tolling the two-year limitations period under O.C.G.A. § 9-3-71 barring a medical malpractice action because under O.C.G.A. § 19-7-2 such actions are vested exclusively in the parents until the minor reaches 18. Rose v. Hamilton Medical Ctr., Inc., 184 Ga. App. 182, 361 S.E.2d 1, 1987 Ga. App. LEXIS 2175 (1987).

Right to recover the medical expenses of a minor is vested with the parents. Traylor v. Moyer, 199 Ga. App. 112, 404 S.E.2d 320, 1991 Ga. App. LEXIS 399 (1991).

Provisions of subsection (b) of O.C.G.A. § 9-3-73 pertaining to minors applies not only to suits brought on behalf of a minor, but also to suits brought personally by an

injured minor upon reaching majority. Barnes v. Sabatino, 205 Ga. App. 774, 423 S.E.2d 686 (1992).

In a medical malpractice action against a hospital and physician for injury to an infant patient, the cause of action accrued, for limitations purposes, when the parents and patient discovered that the alleged negligence of the hospital and physicians caused the injuries, rather than when the alleged negligence was first discovered. Crowe v. Humana, 263 Ga. 833, 439 S.E.2d 654, 1994 Ga. LEXIS 75 (1994).

Dismissal of minor's wrongful death claims with prejudice was upheld because trial court judge approved consent order based on representations of both parties, and father failed to cite any legal authority to support assertion that trial court had independent duty to verify the parties' joint statement that the statute of limitation had run on minor's claims against defendants. Parrish v. St. Joseph's/Candler Health Sys., Inc., 364 Ga. App. 228, 874 S.E.2d 413, 2022 Ga. App. LEXIS 288 (2022), overruled in part, Hamon v. Connell, 315 Ga. 760, 883 S.E.2d 785, 2023 Ga. LEXIS 24 (2023).

Parents. — In a medical malpractice lawsuit, the defendants' motion for a partial summary judgment on all claims for damages that the parents incurred on behalf of their minor child was granted as those claims were barred by the two-year statute of limitation because the five-year statute of limitation extension applied only to the claims of the minor child and did not apply to the parents' claims; thus, any of the parents' claims for damages for their minor child's medical expenses, and the parents' ancillary claims such as their own loss of income, were subject to the two-year statute of limitation applicable to medical malpractice actions generally, and were barred. Swallows v. Adams-Pickett, 344 Ga. App. 647, 811 S.E.2d 445, 2018 Ga. App. LEXIS 106 (2018), cert. denied, No. S18C0922, 2018 Ga. LEXIS 558 (Ga. Aug. 20, 2018).

Wrongful death claim for intentional termination of patient's life support tolled due to infancy of patient's child. — Two year statute of limitations for wrongful death applied to a suit alleging tortious termination of life support of a parent and that limitations period was tolled based on the infancy of the parent's child, who was born to the parent prior to the defendant terminating the parent's life support. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823, 2007 Ga. App. LEXIS 1269 (2007), cert. denied, No. S08C0710, 2008 Ga. LEXIS 477 (Ga. May 19, 2008), overruled in part, Harrison v. McAfee, 338 Ga. App. 393, 788 S.E.2d 872, 2016 Ga. App. LEXIS 417 (2016).

Applicability of subsection (b). — Statute of limitations embodied in subsection (b) of O.C.G.A. § 9-3-73 was intended to compel legally incompetent person to file suit within two years of its effective date. Kumar v. Hall, 262 Ga. 639, 423 S.E.2d 653, 1992 Ga. LEXIS 997 (1992).

Tolling provisions of O.C.G.A. § 9-3-90 during periods of legal incapacity does not apply in actions for medical malpractice. Dowling v. Lopez, 211 Ga. App. 578, 440 S.E.2d 205, 1993 Ga. App. LEXIS 1586 (1993), cert. denied, No. S94C0525, 1994 Ga. LEXIS 531 (Ga. Feb. 22, 1994).

In a medical malpractice action by parents and child against an obstetrician and a medical association, there was a material question of fact as to whether the failure of the defendants to inform the parents of the etiology of the child's condition, or the alleged intentional misrepresentation as to the cause of the child's problems, were sufficient to toll the statute of limitations as a matter of law. Bynum v. Gregory, 215 Ga. App. 431, 450 S.E.2d 840, 1994 Ga. App. LEXIS 1260 (1994), cert. denied, No. S95C0542, 1995 Ga. LEXIS 418 (Ga. Mar. 10, 1995).

Traumatic brain injury. — Term "legally incompetent because of mental retardation or mental illness" has the same meaning in subsection (b) of O.C.G.A. § 9-3-73 as in O.C.G.A. § 9-3-90 and applied to an action brought on behalf of a patient who was incompetent due to traumatic brain injury. Kumar v. Hall, 262 Ga. 639, 423 S.E.2d 653, 1992 Ga. LEXIS 997 (1992).

Term "legally incompetent because of mental retardation or mental illness" includes those suffering from brain injury; thus, the tolling provisions of O.C.G.A.

§ 9-3-90 do not apply even when such mental incapacity exists. Robinson v. Williamson, 245 Ga. App. 17, 537 S.E.2d 159, 2000 Ga. App. LEXIS 895 (2000), cert. denied, No. S00C1805, 2001 Ga. LEXIS 95 (Ga. Jan. 19, 2001).

Mental retardation or mental illness. — Even though the plaintiff may have been mentally ill, the plaintiff was not legally incompetent within the meaning of subsection (b) of O.C.G.A. § 9-3-73 when the plaintiff's testimony did not show that the plaintiff was incapable of carrying out the plaintiff's day-to-day life activities and making decisions. Charter Peachford Behavioral Health Sys. v. Kohout, 233 Ga. App. 452, 504 S.E.2d 514.

Applicability of subsection (g). — It was the intent of the legislature to enact subsection (g) of O.C.G.A. § 9-3-73 exactly as the subsection is drafted. Subsection (g) does not contain any express exceptions for actions which would not have been barred before July 1, 1987, but which would subsequently become barred within two years of the effective date of § 9-3-73, as amended in 1987. Mansfield v. Pannell, 194 Ga. App. 549, 390 S.E.2d 913, 1990 Ga. App. LEXIS 172 (1990).

When the complaint was filed after the effective date of the 1987 amendment of O.C.G.A. § 9-3-73, no issue of retroactivity was involved. Mansfield v. Pannell, 194 Ga. App. 549, 390 S.E.2d 913, 1990 Ga. App. LEXIS 172 (1990).

Applicability to optometrist. — Statute setting limitation and repose for medical malpractice actions applied to alleged professional negligence by an optometrist. Zechmann v. Thigpen, 210 Ga. App. 726, 437 S.E.2d 475, 1993 Ga. App. LEXIS 1335 (1993), cert. denied, No. S94C0215, 1994 Ga. LEXIS 159 (Ga. Jan. 21, 1994).

Applicability to statute of repose. — Pursuant to a question certified by the federal appellate court, the Supreme Court of Georgia finds that since the tolling of the ultimate statute of repose for medical malpractice cases is not required by O.C.G.A. § 9-3-71(d) or O.C.G.A. § 9-3-73(a) and it would contravene the mandatory language of O.C.G.A. § 9-3-71(b), the unrepresented estate statute, O.C.G.A. § 9-3-92, does not toll the statute of repose during the time that the estate of a claimant is unrepresented; thus, the district court properly dismissed the state court medical malpractice claims brought by the administrator of the estate of the claimant because the claims were time-barred and could not be extended by O.C.G.A. § 9-3-92. Simmons v. United States, 421 F.3d 1199, 2005 U.S. App. LEXIS 18157 (11th Cir. 2005).

In a medical malpractice action, because the undisputed evidence showed that both the personal injury claims and a later-added wrongful death claim were timely filed, both in terms of O.C.G.A. § 9-3-71 and the relevant statute of repose, the doctors sued were properly denied summary judgment as to those claims. Moreover, construction of the medical malpractice statute of repose was consistent with the stated purposes of preventing stale medical malpractice claims in recognition of the fact that time eroded evidence, memories, and the availability of witnesses. Cleaveland v. Gannon, 288 Ga. App. 875, 655 S.E.2d 662, 2007 Ga. App. LEXIS 1277 (2007), aff'd, 284 Ga. 376, 667 S.E.2d 366, 2008 Ga. LEXIS 755 (2008).

Computation of time of repose. — Time for ultimate repose is not computed from the time the cause of action arises, even in cases in which the injury is subsequent to the time of medical treatment, but rather it occurs in relation to the wrongful act or omission; thus, in an action against an optometrist involving misdiagnosis of a disease which led to glaucoma and enucleation of the plaintiff child's eye, the time for ultimate repose was calculated not from the time that glaucoma developed, but from the time misdiagnosis occurred, and the action was barred. Zechmann v. Thigpen, 210 Ga. App. 726, 437 S.E.2d 475, 1993 Ga. App. LEXIS 1335 (1993), cert. denied, No. S94C0215, 1994 Ga. LEXIS 159 (Ga. Jan. 21, 1994).

Fraud. — In a malpractice action against an optometrist, the statute of repose was not tolled when there was no evidence of fraudulent concealment by the defendant and it could not be presumed that the defendant withheld information fraudulently rather than negligently or

without fault; and, even if there was evidence of fraudulent concealment, the running of the period was not tolled since the plaintiff knew of the correct diagnosis and had time to file suit within such period. Zechmann v. Thigpen, 210 Ga. App. 726, 437 S.E.2d 475, 1993 Ga. App. LEXIS 1335 (1993), cert. denied, No. S94C0215, 1994 Ga. LEXIS 159 (Ga. Jan. 21, 1994).

In a medical malpractice action by parents and child against an obstetrician and a medical association, alleged conduct of the defendants in failing to inform the parents of the etiology of the child's condition, or the intentional misrepresentation as to the cause of the child's problems, went far beyond simple nondisclosure and would authorize a jury to conclude that they engaged in intentional, deliberate misrepresentation, or fraud, as opposed to a question of fact as to whether the plaintiff's action was barred by the statute of ultimate repose. Bynum v. Gregory, 215 Ga. App. 431, 450 S.E.2d 840, 1994 Ga. App. LEXIS 1260 (1994), cert. denied, No. S95C0542, 1995 Ga. LEXIS 418 (Ga. Mar. 10, 1995).

Equitable estoppel. — Fraud under O.C.G.A. § 9-3-96 does not toll the statute of repose; however, if the evidence of defendant's fraud or other conduct on which the plaintiff reasonably relied in forbearing the bringing of a lawsuit is found by the jury to exist, then the defendant is estopped from raising the defense of the statute of ultimate repose. Esener v. Kinsey, 240 Ga. App. 21, 522 S.E.2d 522.

RESEARCH REFERENCES

ALR.

Medical malpractice statutes of limitation minority provisions, 62 A.L.R.4th 758; 71 A.L.R.5th 307.

When is person, other than one claiming posttraumatic stress syndrome or memory repression, within coverage of statutory provision tolling running of limitations period on basis of mental disability, 23 A.L.R.6th 697.

Estoppel to Assert Statute of Limitations or Statute of Repose in Action for Malpractice of Health Care Provider, 45 A.L.R.7th Art. 3.

9-3-74. Barred actions not revived.

No action for medical malpractice which, prior to July 1, 1976, has been barred by the provisions of this chapter relating to actions shall be revived by this article.

History.

Code 1933, § 3-1105, enacted by Ga. L. 1976, p. 1363, § 1.

Law reviews.

For comment on statutes of limitations in medical malpractice actions in Georgia, see 33 Mercer L. Rev. 377 (1981).

For survey article on torts, see 34 Mercer L. Rev. 271 (1982).

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O.C.G.A. § 9-3-74 means that O.C.G.A. § 9-3-71 is effective beginning July 1, 1976, but that no action will be barred under its terms until July 1, 1977. Allrid v. Emory Univ., 249 Ga. 35, 285 S.E.2d 521, 1982 Ga. LEXIS 1111 (1982).

In effect, grace period provided in O.C.G.A. § 9-3-74 is not simply one year, but one year plus the number of years which have passed between the date of the alleged wrongful act and the effective date of O.C.G.A. § 9-3-71, and thus, the one year grace period provided in § 9-3-74 is reasonable. Allrid v. Emory Univ., 249 Ga. 35, 285 S.E.2d 521, 1982 Ga. LEXIS 1111 (1982).

RESEARCH REFERENCES

ALR.
Malpractice in diagnosis or treatment of tuberculosis, 75 A.L.R.2d 814.

ARTICLE 5
TOLLING OF LIMITATIONS

Cross references.
Tolling effect of filing of petition for order authorizing arbitration of medical malpractice claim, § 9-9-63.

Law reviews.
For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982).

RESEARCH REFERENCES

ALR.
Unaccepted offer to compromise debt as tolling or removing bar of statute of limitations, 12 A.L.R. 544.

Acknowledgment or payment to one of several obligees as tolling statute of limitations in favor of others, 40 A.L.R. 29.

Purchase subject to mortgage as removing or interrupting defense of statute of limitations as against mortgage, 48 A.L.R. 1320.

Tacking disabilities for purposes of the statute of limitations, 53 A.L.R. 1303.

Lack of partnership accounting as tolling statute of limitations against actions at law between partners, 77 A.L.R. 426.

Payment by assignee for benefit of creditors, receiver, or trustee in bankruptcy as tolling statute of limitations as to debtor, 98 A.L.R. 1012.

Substitution, or addition, as plaintiff, after limitation period, of assignee, or trustee in bankruptcy, in action commenced by assignor, or bankrupt, within limitation period, but after assignment or bankruptcy, 105 A.L.R. 610.

What informalities, irregularities, or defects in respect to the execution of a tax deed prevent the running of the statute of limitations or period of adverse possession, 113 A.L.R. 1343.

To whom must acknowledgment, new promise, or payment be made in order to toll statute of limitations after creditor's death, 117 A.L.R. 224.

When statute of limitation commences to run against action by attorney employed on contingent fee who was discharged or withdrew before determination of litigation or other event upon which his compensation was contingent, 118 A.L.R. 1281.

Provisional remedy prior to service of summons as stopping or interrupting running of statute of limitation, 119 A.L.R. 1221.

Duress or undue influence as tolling or suspending statute of limitations, 121 A.L.R. 1294.

Liquidation or other proceeding by government against bank or other corporation, as suspending statute of limitations as regards choses in action belonging to corporation, or stockholder's superadded liability, 122 A.L.R. 945.

Validity and construction of war enactments in United States suspending operation of statute of limitations, 137 A.L.R. 1440; 140 A.L.R. 1518.

War as suspending running of limitations in absence of specific statutory provision to that effect, 137 A.L.R. 1454; 140 A.L.R. 1518; 141 A.L.R. 1511.

Effect of war on litigation pending at the time of its outbreak, 154 A.L.R. 1447.

Realization on security as interrupting the statute of limitations, 165 A.L.R. 1400.

Ancillary proceedings as suspending or removing bar of statute of limitations as to judgment, 166 A.L.R. 767.

Change in party after statute of limitations has run, 8 A.L.R.2d 6.

Failure to comply with statute requiring one involved in automobile accident to stop or report as affecting question as to

suspension or tolling statute of limitation, 10 A.L.R.2d 564.

Tolling of statute of limitations where process is not served before expiration of limitation period, as affected by statutes defining commencement of action, or expressly relating to interruption of running of limitations, 27 A.L.R.2d 236.

Payment by one of two or more joint or joint and several debtors as suspending or tolling limitation, 74 A.L.R.2d 1287.

Timely suit to enforce policy as interrupting limitations against claimant's later suit or amended pleading to reform it, or vice versa, 92 A.L.R.2d 168.

Delay caused by other litigation as estopping reliance on statute of limitations, 45 A.L.R.3d 703.

Finding or return of indictment, or filing of information, as tolling limitation period, 18 A.L.R.4th 1202.

Post traumatic syndrome as tolling running of statute of limitations, 12 A.L.R.5th 546.

9-3-90. Individuals under disability or imprisoned when cause of action accrues.

(a) Individuals who are legally incompetent because of intellectual disability or mental illness, who are such when the cause of action accrues, shall be entitled to the same time after their disability is removed to bring an action as is prescribed for other persons.

(b) Except as otherwise provided in Code Section 9-3-33.1, individuals who are less than 18 years of age when a cause of action accrues shall be entitled to the same time after he or she reaches the age of 18 years to bring an action as is prescribed for other persons.

(c) No action accruing to an individual imprisoned at the time of its accrual which:

(1) Prior to July 1, 1984, has been barred by the provisions of this chapter shall be revived by this chapter, as amended; or

(2) Would be barred before July 1, 1984, by the provisions of this chapter, as amended, but which would not be so barred by the provisions of this chapter in force immediately prior to July 1, 1984, shall be barred until July 1, 1985.

History.

Laws 1805, Cobb's 1851 Digest, p. 564.; Laws 1806, Cobb's 1851 Digest, p. 565.; Laws 1817, Cobb's 1851 Digest, p. 567.; Ga. L. 1855-56, p. 233, § 19; Code 1863, § 2867; Code 1868, § 2875; Code 1873, § 2926; Code 1882, § 2926; Civil Code 1895, § 3779; Civil Code 1910, § 4374; Code 1933, § 3-801; Ga. L. 1984, p. 580, § 1; Ga. L. 2015, p. 385, § 4-15/HB 252; Ga. L. 2015, p. 675, § 2-3/SB 8; Ga. L. 2015, p. 689, § 3/HB 17.

Editor's notes.

Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

Ga. L. 2015, p. 675, § 1-1/SB 8, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Safe Harbor/Rachel's Law Act.'"

Ga. L. 2015, p. 675, § 1-2/SB 8, not codified by the General Assembly, provides that: "(a) The General Assembly finds that arresting, prosecuting, and incarcerating victimized children serves to retraumatize children and increases their feelings of low self-esteem, making the process of recovery more difficult. The General Assembly acknowledges that

both federal and state laws recognize that sexually exploited children are the victims of crime and should be treated as victims. The General Assembly finds that sexually exploited children deserve the protection of child welfare services, including family support, crisis intervention, counseling, and emergency housing services. The General Assembly finds that it is necessary and appropriate to adopt uniform and reasonable assessments and regulations to help address the deleterious secondary effects, including but not limited to, prostitution and sexual exploitation of children, associated with adult entertainment establishments that allow the sale, possession, or consumption of alcohol on premises and that provide to their patrons performances and interaction involving various forms of nudity. The General Assembly finds that a correlation exists between adult live entertainment establishments and the sexual exploitation of children. The General Assembly finds that adult live entertainment establishments present a point of access for children to come into contact with individuals seeking to sexually exploit children. The General Assembly further finds that individuals seeking to exploit children utilize adult live entertainment establishments as a means of locating children for the purpose of sexual exploitation. The General Assembly acknowledges that many local governments in this state and in other states found deleterious secondary effects of adult entertainment establishments are exacerbated by the sale, possession, or consumption of alcohol in such establishments.

"(b) The purpose of this Act is to protect a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in place in this state. The purpose and intended effect of this Act in imposing assessments and regulations on adult entertainment establishments is not to impose a restriction on the content or reasonable access to any materials or performances protected by the First Amendment of the United States Constitution or Article I, Section I, Paragraph V of the Constitution of this state."

Ga. L. 2015, p. 689, § 1/HB 17, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Hidden Predator Act.'"

Law reviews.

For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

For note, "Taking a Toll on the Equities: Governing the Effect of the PLRA'S Exhaustion Requirements on State Statutes of Limitations," 47 Ga. L. Rev. 1321 (2013).

For article on the 2015 amendment of this Code section, see 32 Ga. St. U. L. Rev. 43 (2015).

JUDICIAL DECISIONS

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General Provisions

Section not affected by Civil Practice Act. — Former Code 1933, § 3-801 (see now O.C.G.A. § 9-3-90) was not amended or repealed, directly or by implication, by the Civil Practice Act of 1966 (see now O.C.G.A. Ch. 11, T. 9). Shell v. Watts, 125 Ga. App. 542, 188 S.E.2d 269, 1972 Ga. App. LEXIS 1398, rev'd on other grounds, 229 Ga. 474, 192 S.E.2d 265, 1972 Ga. LEXIS 655 (1972).

Application to 42 U.S.C. § 1983 claims. — Georgia two-year limitations period for personal injuries under O.C.G.A. § 9-3-33 applies to 42 U.S.C § 1983 claims arising in Georgia, but state tolling provisions apply to § 1983 claims as well. Camps v. City of Warner

Robins, 822 F. Supp. 724, 1993 U.S. Dist. LEXIS 7079 (M.D. Ga. 1993).

Former Code 1933, § 3-801 (see now O.C.G.A. § 9-3-90) was made applicable to tort actions by former Code 1933, § 3-1005 (see now O.C.G.A. § 9-3-98). City of Atlanta v. Barrett, 102 Ga. App. 469, 116 S.E.2d 654, 1960 Ga. App. LEXIS 654 (1960); Lowe v. Pue, 150 Ga. App. 234, 257 S.E.2d 209, 1979 Ga. App. LEXIS 2129 (1979).

Right of action must be in disabled party before this section will apply. Grimsby v. Hudnell, 76 Ga. 378, 1886 Ga. LEXIS 45 (1886); Smith v. Turner, 112 Ga. 553, 37 S.E. 705 (1900).

When right to sue is in executor or other legal representative, legatees are bound by statute of limitations. Worthy v. Johnson, 10 Ga. 358, 1851 Ga. LEXIS 110 (1851).

Notice to municipality. — Six-month notice provision of former Code 1933, § 69-308 (see now O.C.G.A. § 36-33-5) was a statute of limitation to which tolling provisions of former Code 1933, § 3-801 (see now O.C.G.A. § 9-3-90) applied. Lowe v. Pue, 150 Ga. App. 234, 257 S.E.2d 209, 1979 Ga. App. LEXIS 2129 (1979); Jacobs v. Littleton, 241 Ga. App. 403, 525 S.E.2d 433.

Former Civil Code 1910, § 4374 (see now O.C.G.A. § 9-3-90) had no application to actions by informers which were barred by former Civil Code 1910, § 4370 (see now O.C.G.A. § 9-3-28). Atlanta & W.P.R.R. v. Coleman, 142 Ga. 94, 82 S.E. 499, 1914 Ga. LEXIS 599 (1914).

Burden of proving disability is upon person who alleges disability. Arnold v. Limeburger, 122 Ga. 72, 49 S.E. 812, 1905 Ga. LEXIS 117 (1905).

Unspecified debilitating mental condition impacting statue. — Trial court did not err in refusing to toll the statute of limitations after plaintiff contended by affidavit that the plaintiff suffered from an unspecified, debilitating mental condition lasting either 20 or 28 days following the accident was in direct contradiction to the plaintiff's deposition testimony. Walker v. Brannan, 243 Ga. App. 235, 533 S.E.2d 129, 2000 Ga. App. LEXIS 445 (2000).

Evidence of mental incapacity. — Physical pain and discomfort as described by the plaintiff was not the mental incapacity contemplated by O.C.G.A. § 9-3-90. Anglin v. Harris, 244 Ga. App. 140, 534 S.E.2d 874, 2000 Ga. App. LEXIS 651 (2000).

Brain injury. — As used in subsection (b) of O.C.G.A. § 9-3-73, the term "legally incompetent because of mental retardation or mental illness" includes those suffering from injury; thus, the tolling provisions of O.C.G.A. § 9-3-90 do not apply even when such mental incapacity exists. Robinson v. Williamson, 245 Ga. App. 17, 537 S.E.2d 159, 2000 Ga. App. LEXIS 895 (2000), cert. denied, No. S00C1805, 2001 Ga. LEXIS 95 (Ga. Jan. 19, 2001).

Minors

Privilege of infancy is personal. Jordan v. Thornton, 7 Ga. 517, 1849 Ga. LEXIS 173 (1849).

Tolling of statute of limitations. — Two year statute of limitations for wrongful death applied to a suit alleging tortious termination of life support of a parent and that limitations period was tolled based on the infancy of the parent's child, who was born to the parent prior to the defendant terminating the parent's life support. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823, 2007 Ga. App. LEXIS 1269 (2007), cert. denied, No. S08C0710, 2008 Ga. LEXIS 477 (Ga. May 19, 2008), overruled in part, Harrison v. McAfee, 338 Ga. App. 393, 788 S.E.2d 872, 2016 Ga. App. LEXIS 417 (2016).

Georgia Supreme Court upheld a $2.5 million wrongful death judgment because both the Court and the Georgia Court of Appeals have allowed other persons acting in a representative capacity to maintain a wrongful death action on behalf of a minor child when the surviving spouse declined to pursue the claim. Rai v. Reid, 294 Ga. 270, 751 S.E.2d 821, 2013 Ga. LEXIS 1002 (2013).

District court properly dismissed an inmate's civil rights action sua sponte as theft-based claims arising from allegations that corrections officials, inter alia, conspired to harass the inmate and destroyed business and personal interests, were barred by the limitations period, the inmate did not assert that equitable tolling applied, and the statutory tolling pro-

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visions were inapplicable. Seibert v. Comm'r, Ga. Dep't of Corr., 680 Fed. Appx. 837, 2017 U.S. App. LEXIS 3247 (11th Cir. 2017).

No tolling of statute of limitations. — Summary judgment was properly granted to the superintendent of schools in a case brought by the parents of handicapped and disabled children allegedly sexually molested by a special education teacher because the statute of limitations had expired as the parents, as next friends for the children, had filed suit on a specific date against the school district and such date barred the subsequent filing of a complaint against the superintendent after the statute of limitations period expired. Harper v. Patterson, 270 Ga. App. 437, 606 S.E.2d 887, 2004 Ga. App. LEXIS 1500 (2004), cert. denied, No. S05C0551, 2005 Ga. LEXIS 275 (Ga. Mar. 28, 2005).

Minor with legal title protected. — If legal title to land is vested in infant or is cast upon the infant by operation of law, the infant is protected during period of infancy from running of statute protecting acquisition of adverse interest. Outlaw v. Outlaw, 121 Ga. App. 284, 173 S.E.2d 459, 1970 Ga. App. LEXIS 1199 (1970).

Appointment of guardian does not operate to start statute of limitation running against minor or guardian when title to cause of action is in minor. Whalen v. Certain-Teed Prods. Corp., 108 Ga. App. 686, 134 S.E.2d 528, 1963 Ga. App. LEXIS 745 (1963); City of Barnesville v. Powell, 124 Ga. App. 132, 183 S.E.2d 55, 1971 Ga. App. LEXIS 842 (1971); Barnum v. Martin, 135 Ga. App. 712, 219 S.E.2d 341, 1975 Ga. App. LEXIS 1794 (1975).

Title to cause of action in minor. — When title to cause of action was in minor plaintiffs themselves, representation by another in any fiduciary capacity would not cause statute to run against the plaintiffs. Nelson v. Estill, 190 Ga. 235, 9 S.E.2d 73, 1940 Ga. LEXIS 443 (1940).

Statute will not run against minor represented in litigation by next friend or guardian ad litem. Barnum v. Martin, 135 Ga. App. 712, 219 S.E.2d 341, 1975 Ga. App. LEXIS 1794 (1975); Mitchell v. Hamilton, 228 Ga. App. 850, 493 S.E.2d 41.

Failure of guardian to protect interest of minor will not operate to the guardian's prejudice. Monroe v. Simmons, 86 Ga. 344, 12 S.E. 643, 1890 Ga. LEXIS 249 (1890).

Infancy of party did not prevent the infant from bringing an action and recovering judgment which would become dormant under former Civil Code 1895, §§ 3761, 3762 and 3763 (see now O.C.G.A. § 9-12-60). Williams v. Merritt, 109 Ga. 213, 34 S.E. 312, 1899 Ga. LEXIS 614 (1899).

Third-party complainant, a minor, was not barred by the statute of limitations from bringing third-party complaint, since under this section the minor could have waited until the minor's disabilities were removed to bring the minor's claim. Shell v. Watts, 125 Ga. App. 542, 188 S.E.2d 269, 1972 Ga. App. LEXIS 1398, rev'd on other grounds, 229 Ga. 474, 192 S.E.2d 265, 1972 Ga. LEXIS 655 (1972).

Law of forum state governs in determining when person comes of age, insofar as that date affects running of statute of limitation on claim which the minor asserts. Unnever v. Stephens, 142 Ga. App. 787, 236 S.E.2d 886, 1977 Ga. App. LEXIS 1397, aff'd, 240 Ga. 313, 242 S.E.2d 478, 1977 Ga. LEXIS 1488 (1977).

Disability of infancy is only removed when infant reaches lawful majority. Barnum v. Martin, 135 Ga. App. 712, 219 S.E.2d 341, 1975 Ga. App. LEXIS 1794 (1975).

Medical malpractice actions. — Even though O.C.G.A. § 9-3-90 permits tolling the statute of limitations for disabilities in medical malpractice actions, under § 9-3-90 a minor child must wait until reaching the age of 18 before tolling the two-year limitations period under O.C.G.A. § 9-3-71 barring a medical malpractice action because under O.C.G.A. § 19-7-2 such actions are vested exclusively in the parents until the minor reaches 18. Rose v. Hamilton Medical Ctr., Inc., 184 Ga. App. 182, 361 S.E.2d 1, 1987 Ga. App. LEXIS 2175 (1987).

Since the plaintiff was a minor at the time the plaintiff was injured, but attained the age of 18 before the effective date of the 1987 amendment to O.C.G.A. § 9-3-73, neither that Code section nor

O.C.G.A. § 9-3-71 applied. Any medical malpractice claim the minor had was governed by the provisions of O.C.G.A. § 9-3-90. Jones v. Bates, 261 Ga. 240, 403 S.E.2d 804, 1991 Ga. LEXIS 216 (1991).

Provision of subsection (b) of O.C.G.A. § 9-3-73 that all minors who have attained the age of five years shall be subject to periods of limitation for actions for medical malpractice applies not only to suits brought on behalf of a minor, but also to suits brought personally by an injured minor upon reaching majority. Barnes v. Sabatino, 205 Ga. App. 774, 423 S.E.2d 686 (1992).

Fraud alleged in complaint. — Action against an insurer arising from settlement of a minor's claim for personal injuries reached over 20 years ago was barred because the claim was not filed within three years of plaintiff's reaching majority and, even though the complaint alleged that the insurer committed fraud, the statute of limitation was not tolled because the plaintiff did not allege that such fraud deterred the action. Zepp v. Toporek, 211 Ga. App. 169, 438 S.E.2d 636, 1993 Ga. App. LEXIS 1482 (1993), cert. denied, No. S94C0364, 1994 Ga. LEXIS 233 (Ga. Jan. 27, 1994).

Physical disability. — Holding in City of Atlanta v. Barrett, 102 Ga. App. 469, 116 S.E.2d 654 (1960), that a plaintiff's allegation that the plaintiff was mentally and physically disabled was sufficient to invoke the tolling provisions of O.C.G.A. § 9-3-90, should not be construed as a holding that physical disability alone is sufficient to invoke the provisions. Whisnant v. Coots, 176 Ga. App. 724, 337 S.E.2d 766, 1985 Ga. App. LEXIS 2414 (1985).

Legal Incompetents

Using mental incapacity to toll statute of limitations. — Defendant is precluded from later using a claim of mental incapacity to toll the statute of limitations, since the defendant personally held out to both the defendant's counsel and to the court as being competent and represented that the defendant had the mental capacity to enter the defendant's plea. Foster v. Cohen, 203 Ga. App. 434, 417 S.E.2d 61, 1992 Ga. App. LEXIS 574 (1992).

In an arrestee's suit alleging state tort claims and a federal claim of deliberate indifference to constitutional rights, it was error to dismiss the complaint as untimely because the arrestee's allegation of mental incapacity under the tolling provisions was sufficient to withstand a motion to dismiss on statute-of-limitations grounds since the arrestee's allegation that, when the arrestee was released from jail, the arrestee was of such unsound mind that the arrestee was unable to carry on the arrestee's ordinary life affairs was sufficient. Meyer v. Gwinnett County, 636 Fed. Appx. 487, 2016 U.S. App. LEXIS 253 (11th Cir. 2016).

Genuine issue of material fact existed as to whether a former detainee, who brought claims arising from an arrest and detention for crimes the detainee claimed not to have committed, suffered mental incapacity sufficient to toll the statute of limitations during the three-week period following the detainee's release from jail; a jury could conclude that the detainee was able to work only because of prior familiarity with the tasks and mindless deference to coworkers and managers. Meyer v. Gwinnett Cty., 716 Fed. Appx. 857, 2017 U.S. App. LEXIS 22752 (11th Cir. 2017), writ denied, No. 19-12584-K, 2019 U.S. App. LEXIS 20517 (11th Cir. July 10, 2019).

Question of mental capacity is one of fact to be determined by a jury. Chapman v. Burks, 183 Ga. App. 103, 357 S.E.2d 832, 1987 Ga. App. LEXIS 1901 (1987).

Summary judgment for defendant was affirmed, on the basis that plaintiff 's action was barred by the statute of limitations, since the plaintiff did not "come forward" with any evidence contradicting the plaintiff's deposition testimony that, at all relevant times, the plaintiff had been capable of managing the plaintiff's own affairs. Branch v. Carr, 196 Ga. App. 534, 396 S.E.2d 276, 1990 Ga. App. LEXIS 955 (1990).

Traumatic brain injury. — Term "legally incompetent because of mental retardation or mental illness" has the same meaning in O.C.G.A. § 9-3-73(b) as in O.C.G.A. § 9-3-90 and applied to an action brought on behalf of a patient who

Legal Incompetents (Cont'd)

was incompetent due to a traumatic brain injury. Kumar v. Hall, 262 Ga. 639, 423 S.E.2d 653, 1992 Ga. LEXIS 997 (1992).

It cannot be held that statute would never run against illiterate or ignorant person. Jim Walter Corp. v. Ward, 245 Ga. 355, 265 S.E.2d 7, 1980 Ga. LEXIS 795 (1980).

Subsection (b) of O.C.G.A. § 9-3-73 subjecting persons who are legally incompetent because of mental retardation or mental illness to periods of limitation for medical malpractice actions required that action be brought within two years of its effective date. Kumar v. Hall, 262 Ga. 639, 423 S.E.2d 653, 1992 Ga. LEXIS 997 (1992).

Tolling provision of O.C.G.A. § 9-3-90 does not apply in actions for medical malpractice. Dowling v. Lopez, 211 Ga. App. 578, 440 S.E.2d 205, 1993 Ga. App. LEXIS 1586 (1993), cert. denied, No. S94C0525, 1994 Ga. LEXIS 531 (Ga. Feb. 22, 1994).

Weakness of mind sufficient to toll statute of limitations must be so pronounced as to amount to imbecility, or at least such as would prevent person from understanding nature of the person's act. Barnett v. Ashley, 89 Ga. App. 679, 81 S.E.2d 11, 1954 Ga. App. LEXIS 547 (1954).

Such unsoundness of mind or imbecility as to incapacitate one from managing ordinary business of life will authorize holding that claimant is "mentally incompetent," so as to toll limitation period until disability is removed. Lowe v. Pue, 150 Ga. App. 234, 257 S.E.2d 209, 1979 Ga. App. LEXIS 2129 (1979).

Inability to manage ordinary business of life. — Such a degree of unsoundness of mind or imbecility as to incapacitate one from managing ordinary business of life would authorize workers' compensation board to find that claimant was "mentally incompetent," and thus to find that statute of limitations was tolled until disability was removed. Royal Indem. Co. v. Agnew, 66 Ga. App. 377, 18 S.E.2d 57, 1941 Ga. App. LEXIS 214 (1941).

Mental retardation or mental illness. — Even though the plaintiff may have been mentally ill, the plaintiff was not legally incompetent within the meaning of O.C.G.A. § 9-3-73(b) since the plaintiff's testimony did not show that the plaintiff was incapable of carrying out the plaintiff's day-to-day life activities and making decisions. Charter Peachford Behavioral Health Sys. v. Kohout, 233 Ga. App. 452, 504 S.E.2d 514.

Test to be applied as to tolling of statute of limitation for mental incompetence is this: "Is his mind so unsound, or is he so weak in his mind, or so imbecile, no matter from what cause, that he cannot manage the ordinary affairs of life?" Mayor of Athens v. Schaeffer, 122 Ga. App. 729, 178 S.E.2d 764, 1970 Ga. App. LEXIS 1017 (1970).

Test for mental incapacity is not whether one did not manage one's own affairs, acquiescing in the management thereof by others, or whether one has merely managed one's affairs unsuccessfully or badly, the test is one of capacity — whether the individual, being of unsound mind, could not manage the ordinary affairs of one's life. Lawson v. Glover, 957 F.2d 801, 1987 U.S. App. LEXIS 15695 (11th Cir. 1987).

In addressing the issue of whether the statute of limitations has been tolled, the courts have consistently relied upon the testimony that was given by a plaintiff as to his or her own mental soundness or unsoundness. Branch v. Carr, 196 Ga. App. 534, 396 S.E.2d 276, 1990 Ga. App. LEXIS 955 (1990).

When as result of occurrence giving rise to cause of action, the person injured becomes mentally and physically incapacitated, so as to be incapable of acting for oneself in carrying on one's business and in prosecuting claim, and when no guardian is appointed for the person, the statute of limitations for the bringing of an action is tolled until such time as the person regains capacity to act personally or until such time as a guardian is appointed and acts for the person, or until such time as one bona fide acting for the person as next friend brings an action seeking recovery for an injury sustained. Cline v. Lever Bros. Co., 124 Ga. App. 22, 183 S.E.2d 63, 1971 Ga. App. LEXIS 795 (1971).

Plaintiff may establish a toll due to mental incapacity based on the claim that,

as a result of the occurrence giving rise to the cause of action, the plaintiff became mentally and physically incapacitated so as to be incapable of acting personally in carrying on the person's business and in prosecuting the person's claim. Lawson v. Glover, 957 F.2d 801, 1987 U.S. App. LEXIS 15695 (11th Cir. 1987).

In an action for injuries by a mentally incompetent plaintiff, the statute of limitations did not continue indefinitely and started to run upon entry into the case of the plaintiff's mother's next friend. Price v. Department of Transp., 214 Ga. App. 85, 446 S.E.2d 749, 1994 Ga. App. LEXIS 777 (1994), cert. denied, No. S94C1741, 1994 Ga. LEXIS 1147 (Ga. Oct. 28, 1994).

Grantor who did not have mental capacity to understand simple subjects or to transact any business during time in question would not have had sufficient mental capacity to undertake to maintain action for recovery of the grantor's property. Mullins v. Barrett, 204 Ga. 11, 48 S.E.2d 842, 1948 Ga. LEXIS 545 (1948).

Applicable statute of limitations arguably would not have barred husband of deed grantor from bringing action involving deed more than seven years after the cause of action arose since the husband was allegedly legally incompetent at all relevant times and that disability had not been removed, but the applicable statute of limitations was not similarly tolled as to the deed grantor, the wife of the husband, because the deed grantor was not legally incompetent. Pivic v. Pittard, 258 Ga. App. 675, 575 S.E.2d 4, 2002 Ga. App. LEXIS 1347 (2002), cert. denied, No. S03C0550, 2003 Ga. LEXIS 218 (Ga. Feb. 24, 2003).

Setting aside of divorce decree by incompetent wife. — Defendant wife, an incompetent, was not barred by laches from suing to have divorce decree, which was entered some seven years before, set aside for fraud. Lowery v. Browning, 212 Ga. 586, 94 S.E.2d 413, 1956 Ga. LEXIS 451 (1956).

Allegations of divorced husband that he was ill when decree was rendered and that such illness continued for about three years thereafter does not bring him within exception made for insane persons in this section. Wallace v. Eiselman, 219 Ga. 595, 134 S.E.2d 807, 1964 Ga. LEXIS 339 (1964).

Statutes of limitation begins to run against insane person from time of the person's restoration to sanity. Dicken v. Johnson, 7 Ga. 484, 1849 Ga. LEXIS 168 (1849); Brown v. Carmichael, 149 Ga. 548, 101 S.E. 124, 1919 Ga. LEXIS 317 (1919).

Allegation of incompetence. — Allegation that from time of injury to the present the claimant has been mentally incompetent is a sufficient allegation to permit proof that the claimant was incapable of acting personally under this section during the time in question. Lowe v. Pue, 150 Ga. App. 234, 257 S.E.2d 209, 1979 Ga. App. LEXIS 2129 (1979).

Plaintiff's averment of incompetency rebutted by deposition testimony. — Trial court did not err by concluding as a matter of law that the tolling statute did not apply, when the plaintiff's averment that the plaintiff was unable to function on a day-to-day basis throughout the seven and one half years since the plaintiff's cause of action arose was rebutted by the plaintiff's deposition testimony. Hickey v. Askren, 198 Ga. App. 718, 403 S.E.2d 225, 1991 Ga. App. LEXIS 249 (1991); Jacobs v. Littleton, 241 Ga. App. 403, 525 S.E.2d 433.

Plaintiff's contention that the time period for giving the ante litem notice was tolled by the plaintiff's mental incapacity was defeated by the plaintiff's deposition testimony demonstrating that the plaintiff was competent to and did manage the plaintiff's ordinary affairs of life. Carter v. Glenn, 243 Ga. App. 544, 533 S.E.2d 109, 2000 Ga. App. LEXIS 440 (2000).

Tolling of statute of limitations. — When record evinced factual question of legal incompetence because of mental disability arising after radiation treatment subsequent to surgery prior to which competence was undisputed, granting of summary judgment was improper as complaint was timely filed. Stone v. Radiology Servs., 206 Ga. App. 851, 426 S.E.2d 663, 1992 Ga. App. LEXIS 1809 (1992), cert. denied, No. S93C0582, 1993 Ga. LEXIS 298 (Ga. Mar. 18, 1993).

Tenant failed to show mental incapacity sufficient, under O.C.G.A. §§ 9-3-90(a) and 9-3-91, to toll the statute of limita-

Legal Incompetents (Cont'd)

tions in O.C.G.A. § 9-3-33 because the tenant's own testimony indicated that, with the exception of a two-week period of hospitalization, the tenant was able to manage the ordinary affairs of life following a tragic sexual assault; accordingly, the landlord was entitled to summary judgment on the tenant's premises-liability action. Martin v. Herrington Mill, LP, 316 Ga. App. 696, 730 S.E.2d 164, 2012 Ga. App. LEXIS 635 (2012).

Mental incompetent's fraud claim not expired. — When individual was adjudicated mentally incompetent in 1924, continued as such when the conveyance of the individual's property interest occurred in 1971, and remained so when a claim for fraud upon this conveyance was brought in 1985, the limitations periods of O.C.G.A. § 9-11-60(f) never began to run, and it was as if the transaction contested occurred the day before suit was filed. McLendon v. Georgia Kaolin Co., 813 F. Supp. 834, 1992 U.S. Dist. LEXIS 20793 (M.D. Ga. 1992).

Prisoners

Effect of 1984 amendment. — Prior to July 1, 1984, O.C.G.A. § 9-3-90 tolled the running of the statutes of limitation for "persons imprisoned"; the legislature, however, amended the statute, effective July 1, 1984, by deleting prisoners from the groups of people protected by the tolling provision. Phillips v. Adams, 210 Ga. App. 439, 436 S.E.2d 567, 1993 Ga. App. LEXIS 1212 (1993).

Prisoner not civilly dead. — Fact that defendant was serving penitentiary sentence did not render the prisoner civilly dead so as to prevent the prisoner from suing or being sued. Heard v. Caldwell, 364 F. Supp. 419, 1973 U.S. Dist. LEXIS 11679 (S.D. Ga. 1973).

Prisoner may sue and be sued. — Person who has been convicted of an offense against the United States and sentenced to a term in the federal penitentiary is not civilly dead while imprisoned, and may sue and be sued. Hardin v. Dodd, 176 Ga. 119, 167 S.E. 277, 1932 Ga. LEXIS 402 (1932).

While serving sentence in federal penitentiary, person can sue and be sued. Heard v. Caldwell, 364 F. Supp. 419, 1973 U.S. Dist. LEXIS 11679 (S.D. Ga. 1973).

Doctrine that prisoner cannot sue no longer exists in this state. Neel v. Rehberg, 577 F.2d 262, 1978 U.S. App. LEXIS 9931 (5th Cir. 1978).

Apart from prison discipline and restrictions imposed by statute, there is no inhibition to filing of civil actions by prisoners. Heard v. Caldwell, 364 F. Supp. 419, 1973 U.S. Dist. LEXIS 11679 (S.D. Ga. 1973).

Prisoner may maintain action for injuries received, even though at the time of receiving the injuries the prisoner was a felon and in confinement. Heard v. Caldwell, 364 F. Supp. 419, 1973 U.S. Dist. LEXIS 11679 (S.D. Ga. 1973).

Tort action by inmate against prison officials will lie under law of this state. Heard v. Caldwell, 364 F. Supp. 419, 1973 U.S. Dist. LEXIS 11679 (S.D. Ga. 1973).

Retroactivity provision construed. — Although the Georgia Supreme Court has yet to interpret the second sentence of subsection (b) of O.C.G.A. § 9-3-90, the court construed a similarly worded retroactivity provision in another statute of limitations as rendering the new statute of limitations applicable to all actions viable as of the effective date of the new statute, with a one year grace period for those actions that would become time-barred by the application of the new rule and the federal Court of Appeals concluded that subsection (b) should be similarly interpreted. Lawson v. Glover, 957 F.2d 801, 1987 U.S. App. LEXIS 15695 (11th Cir. 1987).

Tolling of statute of limitations. — Although prisoners are no longer prohibited from initiating legal actions and the reason for applying O.C.G.A. § 9-3-90 to prisoners may no longer exist, this clear and unambiguous statute tolling the statute of limitation for persons imprisoned must be applied until abrogated by the General Assembly. Cobb v. McDonald, 545 F. Supp. 1290, 1982 U.S. Dist. LEXIS 14438 (N.D. Ga. 1982) (But see 1984 amendment).

In a 42 U.S.C. § 1983 case in which a pro se inmate appealed a district court's adverse ruling on the inmate's deliberate

indifference claim, that claim was untimely under O.C.G.A. § 9-3-33 and the inmate did not meet the standard in O.C.G.A. § 9-3-90(a) to toll the limitations period. Though the inmate undoubtedly had mental problems both before and after the assault in prison, under medication the inmate was able to manage the ordinary affairs of the inmate's life. Thompson v. Corr. Corp. of Am., 485 Fed. Appx. 345, 2012 U.S. App. LEXIS 12274 (11th Cir. 2012).

Georgia law does not require a person confined (in a jail or prison) at the time a cause of action arises to file suit within the applicable statutory limitation period as O.C.G.A. § 9-3-90 tolls the statute of limitations. Turner v. Evans, 251 Ga. 486, 306 S.E.2d 921, 1983 Ga. LEXIS 855 (1983) (But see 1984 amendment).

O.C.G.A. § 9-3-90 tolls the statute of limitations for persons who are imprisoned. Turner v. Evans, 721 F.2d 341, 1983 U.S. App. LEXIS 14625 (11th Cir. 1983). (But see 1984 amendment).

O.C.G.A. § 9-3-90 did not apply to toll the limitation period for a federal inmate suing a federal prison official for an unconstitutional deprivation inflicted during the inmate's incarceration. Hawthorne v. Wells, 761 F.2d 1514, 1985 U.S. App. LEXIS 30150 (11th Cir. 1985) (decided prior to 1984 amendment).

Section 1983 suit by prisoner challenging the prisoner's conviction 12 years earlier was barred by a two-year statute of limitations when it was brought after the expiration of the one-year grace period provided by the 1984 amendment to O.C.G.A. § 9-3-90, which removed prisoners from the list of persons benefiting from the tolling provisions, during which grace period prisoners could bring actions which would otherwise be barred by the amended law. Giles v. Garwood, 853 F.2d 876, 1988 U.S. App. LEXIS 11839 (11th Cir. 1988), cert. denied, 489 U.S. 1030, 109 S. Ct. 1164, 103 L. Ed. 2d 222, 1989 U.S. LEXIS 732 (1989).

Confinement in alternative facility tolls statute of limitations. — If a plaintiff was involuntarily confined in a hospital or supportive living home, and this confinement resulted directly from the plaintiff's arrest, in that it was an alternative to the plaintiff otherwise having been placed in prison, it would appear that the plaintiff was "imprisoned" and the statute of limitation was tolled under the terms of O.C.G.A. § 9-3-90. Acker v. City of Elberton, 176 Ga. App. 580, 336 S.E.2d 842, 1985 Ga. App. LEXIS 2498 (1985), overruled in part, West v. City of Albany, 300 Ga. 743, 797 S.E.2d 809, 2017 Ga. LEXIS 177 (2017).

Imprisonment of defendant will not operate to advantage of plaintiff who had promissory note that was barred by former Civil Code 1910, § 4361 (see now O.C.G.A. § 9-3-24). Foster, Son & Harlan v. Whitten, 19 Ga. App. 549, 91 S.E. 918, 1917 Ga. App. LEXIS 231 (1917).

OPINIONS OF THE ATTORNEY GENERAL

Existence of infancy at time of accrual of cause under Ga. L. 1949, p. 1168, § 2 (see now O.C.G.A. § 15-21-50) will postpone commencement of running of period of limitation until infant reaches majority and fact that infant has a guardian who might sue in the infant's name did not prevent the infant in whom were the title and right of action from enjoying statutory benefit accorded the infant by virtue of the infant's disability. 1958-59 Ga. Op. Att'y Gen. 403.

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Limitation of Actions, §§ 197 et seq., 215 et seq.

C.J.S.

54 C.J.S., Limitations of Actions, §§ 154 et seq., 167 et seq.

ALR.

Infancy or incompetency of one on whom legal title devolved as interrupting adverse possession previously initiated, 65 A.L.R. 975.

Statute providing that an insane per-

son, minor, or other person under disability may bring suit within specified time after removal of disability as affecting right to bring action before disability removed, 109 A.L.R. 954.

Prescription or adverse possession against one under disability of infancy, coverture, or mental incompetency, 147 A.L.R. 236.

One wrongfully adjudged or committed as insane as within benefit of provision of statute of limitations allowing time to sue after removal of disability, 166 A.L.R. 960.

Proof of unadjudged incompetency which prevents running of statute of limitations, 9 A.L.R.2d 964.

Appointment of guardian for incompetent or for infant as affecting running of statute of limitations against ward, 86 A.L.R.2d 965.

Effect of infant's marriage after cause of action accrues on running of limitations as against him or her, 91 A.L.R.2d 1272.

Imprisonment of party to civil action as tolling statute of limitations, 77 A.L.R.3d 735.

Minority of surviving children as tolling limitation period in state wrongful death action, 85 A.L.R.3d 162.

Tolling of state statute of limitations in favor of one commencing action despite existing disability, 30 A.L.R.4th 1092.

Tolling of statute of limitation, on account of minority of injured child, as applicable to parent's or guardian's right of action arising out of same injury, 49 A.L.R.4th 216.

Wrongful death: surviving parent's minority as tolling limitation period on suit for child's wrongful death, 54 A.L.R.4th 362.

Medical malpractice statutes of limitation minority provisions, 62 A.L.R.4th 758; 71 A.L.R.5th 307.

Emotional or psychological "blocking" or repression as tolling running of statute of limitations, 11 A.L.R.5th 588.

Power of incompetent spouse's guardian or representative to sue for granting or vacation of divorce or annulment of marriage, or to make compromise or settlement in such suit, 32 A.L.R.5th 673.

Attorney malpractice — tolling or other exceptions to running of statute of limitations, 87 A.L.R.5th 473.

Effect of appointment of legal representative for person under mental disability on running of state statute of limitations against such person, 111 A.L.R.5th 159.

Effect of appointment of legal representative for minor on running of state statute of limitations against minor, 1 A.L.R.6th 407.

When is person, other than one claiming posttraumatic stress syndrome or memory repression, within coverage of statutory provision tolling running of limitations period on basis of mental disability, 23 A.L.R.6th 697.

9-3-91. Disabilities suffered after accrual of cause.

If any person suffers a disability specified in Code Section 9-3-90 after his right of action has accrued and the disability is not voluntarily caused or undertaken by the person claiming the benefit thereof, the limitation applicable to his cause of action shall cease to operate during the continuance of the disability.

History.

Laws 1817, Cobb's 1851 Digest, p. 567.; Ga. L. 1855-56, p. 233, § 20; Code 1863, § 2868; Code 1868, § 2876; Code 1873, § 2927; Code 1882, § 2927; Civil Code 1895, § 3780; Civil Code 1910, § 4375; Code 1933, § 3-802.

JUDICIAL DECISIONS

Only mental, not physical, disability tolls time limitations. Chapman v. Burks, 183 Ga. App. 103, 357 S.E.2d 832, 1987 Ga. App. LEXIS 1901 (1987).

In an arrestee's suit alleging state tort claims and a federal claim of deliberate indifference to constitutional rights, it was error to dismiss the complaint as untimely because the arrestee's allegation of mental incapacity under the tolling provisions was sufficient to withstand a motion to dismiss on statute-of-limitations grounds since the arrestee's allegation that, when the arrestee was released from jail, the arrestee was of such unsound mind that the arrestee was unable to carry on the arrestee's ordinary life affairs was sufficient. Meyer v. Gwinnett County, 636 Fed. Appx. 487, 2016 U.S. App. LEXIS 253 (11th Cir. 2016).

Toll due to mental incapacity established. — Plaintiff may establish a toll due to mental incapacity based on the claim that, as a result of the occurrence giving rise to the cause of action, the plaintiff became mentally and physically incapacitated so as to be incapable of acting personally in carrying on the plaintiff's business and in prosecuting the plaintiff's claim. Lawson v. Glover, 957 F.2d 801, 1987 U.S. App. LEXIS 15695 (11th Cir. 1987).

Toll due to mental incapacity not established. — Tenant failed to show mental incapacity sufficient, under O.C.G.A. §§ 9-3-90(a) and 9-3-91, to toll the statute of limitations in O.C.G.A. § 9-3-33 because the tenant's own testimony indicated that, with the exception of a two-week period of hospitalization, the tenant was able to manage the ordinary affairs of life following a tragic sexual assault; accordingly, the landlord was entitled to summary judgment on the tenant's premises-liability action. Martin v. Herrington Mill, LP, 316 Ga. App. 696, 730 S.E.2d 164, 2012 Ga. App. LEXIS 635 (2012).

Imprisonment of potential plaintiff. — This section provides that running of limitation statute is tolled during imprisonment of potential plaintiff. Jones v. Bales, 58 F.R.D. 453, 1972 U.S. Dist. LEXIS 12766 (D. Ga. 1972), aff'd, 480 F.2d 805, 1973 U.S. App. LEXIS 11519 (5th Cir. 1973).

Neither hospitalization nor subsequent imprisonment effected a tolling of the statute of limitations pursuant to O.C.G.A. §§ 9-3-90 and 9-3-91. Lawson v. Glover, 957 F.2d 801, 1987 U.S. App. LEXIS 15695 (11th Cir. 1987).

Equitable title acquired by infant. — Under this section, even though time may be running against an equitable title, if that title comes to an infant, time will cease to run against it during infancy. Executors of Everett v. Administrators of Whitfield, 27 Ga. 133, 1859 Ga. LEXIS 24 (1859).

Burden of proving disability. — Under this section, burden of proving disability rests upon person who alleges it, and in absence of evidence to the contrary, it will be presumed that person was laboring under no disability. Arnold v. Limeburger, 122 Ga. 72, 49 S.E. 812, 1905 Ga. LEXIS 117 (1905).

Trial court did not err in refusing to toll the statute of limitations when the plaintiff's contention by affidavit that the plaintiff suffered from an unspecified, debilitating mental condition lasting either 20 or 28 days following the accident was in direct contradiction to the plaintiff's deposition testimony. Walker v. Brannan, 243 Ga. App. 235, 533 S.E.2d 129, 2000 Ga. App. LEXIS 445 (2000).

Fact question as to mental incapacity. — Genuine issue of material fact existed as to whether a former detainee, who brought claims arising from an arrest and detention for crimes the detainee claimed not to have committed, suffered mental incapacity sufficient to toll the statute of limitations during the three-week period following the detainee's release from jail; a jury could conclude that the detainee was able to work only because of prior familiarity with the tasks and mindless deference to coworkers and managers. Meyer v. Gwinnett Cty., 716 Fed. Appx. 857, 2017 U.S. App. LEXIS 22752 (11th Cir. 2017), writ denied, No. 19-12584-K, 2019 U.S. App. LEXIS 20517 (11th Cir. July 10, 2019).

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Limitation of Actions, § 197 et seq.
C.J.S.
54 C.J.S., Limitations of Actions, § 154 et seq.
ALR.
Duress or undue influence as tolling or suspending statute of limitations, 121 A.L.R. 1294.
One wrongfully adjudged or committed as insane as within benefit of provision of statute of limitations allowing time to sue after removal of disability, 166 A.L.R. 960.
Proof of unadjudged incompetency which prevents running of statute of limitations, 9 A.L.R.2d 964.
Time of existence of mental incompetency which will prevent or suspend running of statute of limitations, 41 A.L.R.2d 726.
Appointment of guardian for incompetent or for infant as affecting running of statute of limitations against ward, 86 A.L.R.2d 965.
Effect of infant's marriage after cause of action accrues on running of limitations as against him or her, 91 A.L.R.2d 1272.
Imprisonment of party to civil actions as tolling statute of limitations, 77 A.L.R.3d 735.
Tolling of state statute of limitations in favor of one commencing action despite existing disability, 30 A.L.R.4th 1092.
Effect of appointment of legal representative for person under mental disability on running of state statute of limitations against such person, 111 A.L.R.5th 159.
When is person, other than one claiming posttraumatic stress syndrome or memory repression, within coverage of statutory provision tolling running of limitations period on basis of mental disability, 23 A.L.R.6th 697.

9-3-92. Five-year tolling for unrepresented estate — In favor of estate.

The time between the death of a person and the commencement of representation upon his estate or between the termination of one administration and the commencement of another shall not be counted against his estate in calculating any limitation applicable to the bringing of an action, provided that such time shall not exceed five years. At the expiration of the five years the limitation shall commence, even if the cause of action accrued after the person's death.

History.
Ga. L. 1855-56, p. 235, §§ 21, 40; Code 1863, § 2869; Code 1868, § 2877; Code 1873, § 2928; Code 1882, § 2928; Civil Code 1895, § 3781; Civil Code 1910, § 4376; Code 1933, § 3-803.

JUDICIAL DECISIONS

Tolling calculation is mandatory. — Tolling calculation was mandatory in every instance when the statute was applicable; the tolling provisions of O.C.G.A. § 9-3-92 are triggered by operation of law. Legum v. Crouch, 208 Ga. App. 185, 430 S.E.2d 360, 1993 Ga. App. LEXIS 480 (1993).

Catchline not determinative as to whether section mandatory. — Appellees who cited the descriptive heading or catchline of O.C.G.A. § 9-3-92 to assert that the tolling provision was not triggered by operation of law, but could only be invoked on a case-by-case basis and in benefit of the estate by its legal representative were in error. The descriptive heading or catchline immediately preceding the text of a Code section does not constitute a part of such statute and is not controlling regarding the construction or interpretation thereof. Legum v. Crouch,

208 Ga. App. 185, 430 S.E.2d 360, 1993 Ga. App. LEXIS 480 (1993).

This section can be invoked only by legal representative, and does not apply in favor of heirs at law who elect to sue in their own right. Lazenby v. Ware, 178 Ga. 463, 173 S.E. 86, 1934 Ga. LEXIS 78 (1934); Citizens & S. Nat'l Bank v. Mize, 56 Ga. App. 327, 192 S.E. 527, 1937 Ga. App. LEXIS 342 (1937); State Farm Fire & Cas. Co. v. Pace, 176 Ga. App. 737, 337 S.E.2d 401, 1985 Ga. App. LEXIS 2520 (1985).

Appointment of a temporary administrator. — Appointment of a temporary administrator did not result in the representation of the estate for purposes of tolling; consequently, the statute of limitation as to the estate claims remained tolled from the mother's death until the administrator was named the permanent administrator, less than two years before the current action. Somani v. Cannon, 363 Ga. App. 610, 872 S.E.2d 9, 2022 Ga. App. LEXIS 182 (2022).

Five years are allowed before statute of limitations begins to run against unrepresented estate; after that time, statute runs against it as in ordinary cases. Citizens & S. Nat'l Bank v. Mize, 56 Ga. App. 327, 192 S.E. 527, 1937 Ga. App. LEXIS 342 (1937).

While limitation statutes run against estates, when estates are unrepresented such statutes are tolled between death and appointment of representative or between representations for five years, provided representation is taken within that period of time. Harrison v. Holsenbeck, 208 Ga. 410, 67 S.E.2d 311, 1951 Ga. LEXIS 395 (1951).

After expiration of time fixed by this section, statute begins to run, regardless of whether any administration is had on estate or not. Smith v. Turner, 112 Ga. 533, 37 S.E. 705, 1900 Ga. LEXIS 235 (1900).

Former Code 1933, § 3-803 (see now O.C.G.A. § 9-3-92) had no application to action under § 51-4-5 brought by an administrator to recover damages for benefit of dependent next of kin of deceased, when action was one in which estate was nowise interested or concerned, but when interested parties are permitted merely to use name of administrator in bringing action. Patellis v. King, 52 Ga. App. 118, 182 S.E. 808, 1935 Ga. App. LEXIS 73 (1935).

Tolling not applicable to statute of repose. — Pursuant to a question certified by the federal appellate court, the Supreme Court of Georgia finds that since the tolling of the ultimate statute of repose for medical malpractice cases is not required by O.C.G.A. § 9-3-71(d) or O.C.G.A. § 9-3-73(a) and it would contravene the mandatory language of O.C.G.A. § 9-3-71(b), the unrepresented estate statute, O.C.G.A. § 9-3-92, does not toll the statute of repose during the time that the estate of a claimant is unrepresented; thus, the district court properly dismissed the state court medical malpractice claims brought by the administrator of the estate of the claimant because the claims were time-barred and could not be extended by O.C.G.A. § 9-3-92. Simmons v. United States, 421 F.3d 1199, 2005 U.S. App. LEXIS 18157 (11th Cir. 2005).

Statutory language not addressed to estates adjudicated "fully administered." — Language in O.C.G.A. § 9-3-92 tolling the running of the statute of limitation "between the termination of one administration and the commencement of another" is not addressed to those estates which have been adjudicated "fully administered," but instead applies in situations when one administration has come to an end — is terminated — but the estate has not been fully administered due, e.g., to the death, removal, substitution, or renunciation of the administrator or executor. Wilson v. Tara Ford, Inc., 200 Ga. App. 98, 406 S.E.2d 807, 1991 Ga. App. LEXIS 756 (1991).

Action by administrator in individual capacity. — O.C.G.A. § 9-3-92 does not apply to action for wrongful death by the administrator in an individual capacity when the estate has no interest. Childers v. Tauber, 160 Ga. App. 713, 288 S.E.2d 5, 1981 Ga. App. LEXIS 3180, 1981 Ga. App. LEXIS 3198 (1981).

No tolling because estate was not necessary party in challenging revocable trust. — Because a decedent died in May 2013, the two-year period in O.C.G.A. § 53-12-45(a) barred the niece's

challenge to the revocable trust asserted in January 2017; even if § 53-12-45(a) was a statute of limitations that could be tolled by fraud, the trustee did not act to conceal the trust's existence or contents. The statute was not tolled by the failure to appoint an estate representative because the estate was not a necessary party. Howell v. Bates, 350 Ga. App. 708, 830 S.E.2d 250, 2019 Ga. App. LEXIS 358 (2019).

Five year period of § 9-2-60, relating to dismissals for want of prosecution, was not a limitation within the meaning of former Code 1933, § 3-803 (see now O.C.G.A. § 9-3-92). Swint v. Smith, 219 Ga. 532, 134 S.E.2d 595, 1964 Ga. LEXIS 311 (1964).

Construction with O.C.G.A. § 9-3-71(a). — Because the evidence presented on appeal adequately showed that the decedent estate's claim filed by the personal representative under O.C.G.A. § 51-4-5 was filed two months after the two-year statute of limitation under O.C.G.A. § 9-3-71(a) expired, despite the application of O.C.G.A. § 9-3-92, the trial court properly dismissed the claim as time-barred. Goodman v. Satilla Health Servs., 290 Ga. App. 6, 658 S.E.2d 792, 2008 Ga. App. LEXIS 233 (2008).

Appointment of temporary administratrix is not "representation" on estate, within provisions of this section. Scott v. Atwell, 63 Ga. 764, 1879 Ga. LEXIS 334 (1879); Baumgartner v. McKinnon, 137 Ga. 165, 73 S.E. 518, 1911 Ga. LEXIS 341 (1911); Collins v. Henry, 155 Ga. 886, 118 S.E. 729, 1923 Ga. LEXIS 180 (1923).

Under Georgia law, the fact that an estate is unrepresented tolls the statute of limitations. Although a temporary administratrix may file an action for the collection of debts owed the decedent (O.C.G.A. § 53-7-103, pre-1988 probate Code), the temporary administrator is not considered a representative of the estate for the purposes of the tolling provision. Miller v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 572 F. Supp. 1180, 1983 U.S. Dist. LEXIS 13018 (N.D. Ga. 1983).

For summary judgment purposes, a decedent's symptoms which occurred nearly two years after a doctor's alleged misdiagnosis, but less than two years before the decedent's death, were a new or subsequent injury; because the decedent's husband was only appointed temporary administrator of the decedent's estate, the limitation period was tolled under O.C.G.A. § 9-3-92, and thus summary judgment ruling that the estate's claim for pain and suffering was untimely was error. Kitchens v. Brusman, 280 Ga. App. 163, 633 S.E.2d 585, 2006 Ga. App. LEXIS 781 (2006).

When entire estate is set apart as year's support and no appeal is taken from such judgment, there is no estate to be administered, no assets which administrator can reclaim, and no tolling of statute of limitations under this section. McLanahan v. Keith, 135 Ga. App. 117, 217 S.E.2d 420, 1975 Ga. App. LEXIS 1589 (1975) (see O.C.G.A. § 9-3-92).

Action on note under seal on which payees had died, having been brought within 20 years after period of five years which is not to be counted against unrepresented estate, was not barred as against administrator in whose name it was proceeding. Citizens & S. Nat'l Bank v. Mize, 56 Ga. App. 327, 192 S.E. 527, 1937 Ga. App. LEXIS 342 (1937).

Effect of abatement of letters of administration. — Appointment of administrator terminates bar of statute of limitations, but if letters of administrator are abated, statute will not run until there is another appointment of a qualified administrator. Garland v. Milling, 6 Ga. 310, 1849 Ga. LEXIS 44 (1849).

Difference in treatment with legally incompetent individuals. — Provision of O.C.G.A. § 9-3-73(b) making tolling unavailable for legally incompetent persons in medical malpractice cases does not violate the equal protection clause, U.S. Const., amend. 14. The legislature had a rational basis for distinguishing between the legally incompetent and parties who are permitted tolling: foreign object plaintiffs, unrepresented estates, and contribution plaintiffs. Deen v. Egleston, 597 F.3d 1223, 2010 U.S. App. LEXIS 4172 (11th Cir. 2010).

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Limitation of Actions, § 241, 242.

ALR.
Statutes of limitations or laches as bar to suit by heirs or next of kin to set aside conveyance or transfer by ancestor, 2 A.L.R. 447.

Suspension of contestable period of incontestable clause of life insurance policy pending appointment of personal representative of insured or of beneficiary, 157 A.L.R. 1204.

Running of statute of limitations as affected by doctrine of relation back of appointment of administrator, 3 A.L.R.3d 1234.

Statute of limitations: effect of delay in appointing administrator or other representative on cause of action accruing at or after death of person in whose favor it would have accrued, 28 A.L.R.3d 1141.

Tolling or interruption of running of statute of limitations pending appointment of executor or administrator for tortfeasor in personal injury or death action, 47 A.L.R.3d 179.

Claims for expenses of last sickness or for funeral expenses as within contemplation of statute requiring presentation of claims against decedent's estate, or limiting time for bringing action thereon, 17 A.L.R.4th 530.

9-3-93. Five-year tolling for unrepresented estate — In favor of creditors.

The time between the death of a person and the commencement of representation upon his estate or between the termination of one administration and the commencement of another shall not be counted against creditors of his estate, provided that such time does not exceed five years. At the expiration of the five years the limitation shall commence.

History.
Ga. L. 1882-83, p. 104, § 1; Civil Code 1895, § 3782; Civil Code 1910, § 4377; Code 1933, § 3-804.

Law reviews.
For survey article on torts, see 34 Mercer L. Rev. 271 (1982).

JUDICIAL DECISIONS

O.C.G.A. § 9-3-93 is made applicable to tort actions by O.C.G.A. § 9-3-98. Jefferson Pilot Fire & Cas. Co. v. Burger, 176 Ga. App. 471, 336 S.E.2d 591, 1985 Ga. App. LEXIS 2346 (1985).

Five year period of Ga. L. 1953, Nov.-Dec. Sess, p. 342, §§ 1 and 2 (see now O.C.G.A. § 9-2-60), relating to dismissals for want of prosecution, was not a limitation within the meaning of former Code 1933, § 3-804 (see now O.C.G.A. § 9-3-93). Swint v. Smith, 219 Ga. 532, 134 S.E.2d 595, 1964 Ga. LEXIS 311 (1964).

Partnership claim filed nine years after death of first partner was barred under this section. Roach v. Roach, 143 Ga. 486, 85 S.E. 703, 1915 Ga. LEXIS 494 (1915).

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Limitation of Actions, §§ 191 et seq., 222.

ALR.
Effect of statement of claim against decedent's estate regarding debt apparently

barred by the statute of limitations, 119 A.L.R. 426.

Application and limits of rule that death of person liable does not interrupt running of statute of limitations, 174 A.L.R. 1423.

Tolling or interruption of running of statute of limitations pending appointment of executor or administrator for tortfeasor in personal injury or death action, 47 A.L.R.3d 179.

9-3-94. Removal of defendant from state.

Unless otherwise provided by law, if a defendant removes from this state, the time of his absence from the state until he returns to reside shall not be counted or estimated in his favor.

History.

Laws 1805, Cobb's 1851 Digest, p. 564.; Laws 1806, Cobb's 1851 Digest, p. 565.; Laws 1817, Cobb's 1851 Digest, p. 567.; Laws 1839, Cobb's 1851 Digest, p. 568.; Ga. L. 1851-52, p. 239, § 1; Ga. L. 1855-56, p. 233, § 23; Code 1863, § 2870; Code 1868, § 2878; Code 1873, § 2929; Code 1882, § 2929; Civil Code 1895, § 3783; Civil Code 1910, § 4378; Code 1933, § 3-805.

JUDICIAL DECISIONS

This section is a statutory and not a judicial exception, based on invincible necessity. Weaver v. Davis, 2 Ga. App. 455, 58 S.E. 786, 1907 Ga. App. LEXIS 423 (1907).

Purpose of section. — Reason why law provides that time defendant is absent from state shall not be computed in the defendant's favor is that while the defendant is a nonresident the defendant cannot be sued in the courts of this state, and if time of the defendant's absence from state was permitted to be computed in the defendant's favor any defendant could remove beyond limits of state and thereby defeat valid actions against any defendant. Tift v. Bank of Tifton, 60 Ga. App. 563, 4 S.E.2d 495, 1939 Ga. App. LEXIS 86 (1939).

Basis for this saving provision is inability to bring action in this state because of temporary absence of debtor. Miller v. Rackley, 199 Ga. 370, 34 S.E.2d 438, 1945 Ga. LEXIS 312 (1945).

Defendant must have been citizen when debt was incurred. — To come within words of this section, the defendant must have been a citizen of this state at the time of accrual of debt and subsequently have removed from state. Pare v. Mahone, 32 Ga. 253, 1861 Ga. LEXIS 169 (1861); Miller v. Rackley, 199 Ga. 370, 34 S.E.2d 438, 1945 Ga. LEXIS 312 (1945).

Residence of debtor. — There is no saving in favor of creditor under this section for nonresidence of debtor, if debtor never resided here. Bishop v. Sanford, 15 Ga. 1, 1854 Ga. LEXIS 1 (1854); Edwards v. Ross, 58 Ga. 147, 1877 Ga. LEXIS 35 (1877); Cain v. Seaboard Air-Line Ry., 138 Ga. 96, 74 S.E. 764, 1912 Ga. LEXIS 209 (1912).

Removal must be intended as change of residence. — In order for removal of debtor from this state to suspend operation of statute of limitations, it must be accompanied by intention to change the debtor's legal residence or domicile. Stanfield v. Hursey, 36 Ga. App. 394, 136 S.E. 826, 1927 Ga. App. LEXIS 88 (1927).

Long-arm statute. — Two-year statute of limitations on actions for personal injury was not tolled throughout the period of defendants' alleged absence from the state since there was no showing that the defendants could not have been served with process pursuant to the long-arm statute. Towns v. Brown, 177 Ga. App. 504, 339 S.E.2d 926, 1986 Ga. App. LEXIS 1464 (1986); Gould v. Latorre, 227 Ga. App. 32, 488 S.E.2d 116.

This section does not apply when the defendant is temporarily absent. Sedwick v. Gerding, 55 Ga. 264, 1875 Ga. LEXIS 399 (1875).

Rule that statutory period is tolled during time defendant resides in another state, until the defendant returns to this state, does not apply when absence is only temporary. Bryant v. Sanders, 139 Ga. App. 379, 228 S.E.2d 329, 1976 Ga. App. LEXIS 1816 (1976).

Speculation as to defendant's whereabouts. — Claimant's mere speculation as to the driver's possible whereabouts was insufficient to invoke the tolling provision of O.C.G.A. § 9-3-94. Costello v. Bothers, 278 Ga. App. 750, 629 S.E.2d 599, 2006 Ga. App. LEXIS 409 (2006), cert. denied, No. S06C1480, 2006 Ga. LEXIS 1023 (Ga. Nov. 20, 2006), overruled in part, Ragan v. Mallow, 319 Ga. App. 443, 744 S.E.2d 337, 2012 Ga. App. LEXIS 1061 (2012), overruled in part as stated in Durland v. Colotl, 359 Ga. App. 170, 855 S.E.2d 83, 2021 Ga. App. LEXIS 114 (2021).

Section applies only when service made impossible. — Tolling by reason of removal from this state applies only if removal makes it impossible to perfect service on defendant. Railey v. State Farm Mut. Auto. Ins. Co., 129 Ga. App. 875, 201 S.E.2d 628, 1973 Ga. App. LEXIS 1181 (1973).

If process can be lawfully served on the defendant, thus enabling the plaintiff to proceed with the action, the period of the defendant's absence from state is not to be excluded from period of limitation, and the statute will continue to run during the defendant's absence. Railey v. State Farm Mut. Auto. Ins. Co., 129 Ga. App. 875, 201 S.E.2d 628, 1973 Ga. App. LEXIS 1181 (1973).

Tolling statute could not be applied to extend the statute of limitations in consolidated personal injury renewal actions because the fact that the driver against whom the actions were filed had moved to Maryland did not make it impossible to perfect service. Dickson v. Amick, 291 Ga. App. 557, 662 S.E.2d 333, 2008 Ga. App. LEXIS 571 (2008), overruled in part, Giles v. State Farm Mut. Ins. Co., 330 Ga. App. 314, 765 S.E.2d 413, 2014 Ga. App. LEXIS 717 (2014).

No application to dormant judgments. — This section does not have reference to period of time in which judgment becomes dormant when not kept in life in any manner specified by law. Tift v. Bank of Tifton, 60 Ga. App. 563, 4 S.E.2d 495, 1939 Ga. App. LEXIS 86 (1939); Stanley v. Stanley, 141 Ga. App. 411, 233 S.E.2d 454, 1977 Ga. App. LEXIS 1928 (1977).

Former Code 1933, § 3-805 (see now O.C.G.A. § 9-3-94) related to causes of action when personal service or its legal substitute was required, and had no reference to, nor did it repeal, the plain provisions of former Code 1933, § 110-1001 (see now O.C.G.A. § 9-12-60) in respect to dormant judgments. Crawford v. Boyd, 62 Ga. App. 885, 10 S.E.2d 144, 1940 Ga. App. LEXIS 462 (1940).

Absence of defendant in fi. fa. from state does not prevent the plaintiff in fi. fa., or transferee, from keeping judgment in life as provided by law, nor does it prevent the plaintiff from reviving execution. Stanley v. Stanley, 141 Ga. App. 411, 233 S.E.2d 454, 1977 Ga. App. LEXIS 1928 (1977).

Temporary return does not revive statute. — If debtor has removed from this state, the debtor cannot revive statute by temporary return for a season. Whitman v. McClure, 51 Ga. 590, 1874 Ga. LEXIS 204 (1874).

Property ownership irrelevant. — Fact that the defendant owned property within state during period of nonresidence does not operate to prevent tolling of statute. Kimball v. Kimball, 35 Ga. App. 462, 133 S.E. 295, 1926 Ga. App. LEXIS 911 (1926).

Removal to another state of principal on note, after its execution, will suspend statute of limitation as to the principal, but not as to sureties thereon. Langston v. Aderhold, 60 Ga. 376, 1878 Ga. LEXIS 475 (1878).

When note was made by nonresident outside limits of this state, and such maker subsequently removed here, period of nonresidence will not be excluded in computing time necessary to bar action upon such instrument. Howell v. Burnett, 11 Ga. 303, 1852 Ga. LEXIS 44 (1852); Moore v. Carroll, 54 Ga. 126, 1875 Ga. LEXIS 96 (1875).

Denial of service by publication was error. — In a personal injury suit arising from a motor vehicle accident, the

trial court erred in denying the plaintiff's motion for service by publication and dismissing the action because the appellate court could not determine which standard the trial court applied in determining due diligence as to service. Humphries v. Weekly, 360 Ga. App. 59, 860 S.E.2d 619, 2021 Ga. App. LEXIS 311 (2021).

Appointment of receiver for foreign corporation does not affect running of statute of limitations. Cain v. Seaboard Air-Line Ry., 138 Ga. 96, 74 S.E. 764, 1912 Ga. LEXIS 209 (1912).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Limitation of Actions, § 171 et seq.

C.J.S.

54 C.J.S., Limitations of Actions, § 147 et seq.

ALR.

Provision in statute of limitations as to absence from state as applied to a nonresident individual who has an office or place of business in the state, 61 A.L.R. 391.

Provision suspending limitations while defendant is a nonresident or without the state as affected by nonresidence of party asserting cause of action, 83 A.L.R. 271.

Nonresidence or absence of defendant from state as suspending or tolling statute of limitations, where relief is sought, or could have been sought, by an action or proceeding in rem or quasi in rem, 119 A.L.R. 331.

Withdrawal of foreign corporation from state as tolling statute of limitations as to action against corporation, 133 A.L.R. 774.

Provision of statute of limitation excluding period of absence of debtor or defendant from state as applicable to action on liability or cause of action accruing out of state, 148 A.L.R. 732.

Right to enter judgment by confession as affecting suspension of statute of limitations during absence of debtor from state, 172 A.L.R. 997.

Provision of statute of limitations excluding period of defendant's absence from the state as applicable to a local cause of action against individual who was a nonresident when the same arose, 17 A.L.R.2d 502.

Absence of judgment debtor from state as suspending or tolling running of period of limitations as to judgment, 27 A.L.R.2d 839.

Tolling of statute of limitations during absence from state as affected by fact that party claiming benefit of limitations remained subject to service during absence or nonresidence, 55 A.L.R.3d 1158.

What constitutes "fleeing from justice" within meaning of 18 USCA § 3290 which provides that no statute of limitations shall extend to persons fleeing from justice, 148 A.L.R. Fed. 573.

9-3-95. Disability of one or more with joint right of action; effect of severability.

Where there is a joint right of action and one or more of the persons having the right is under any of the disabilities specified in Code Section 9-3-90, the terms of limitation shall not be computed against the joint action until all the disabilities are removed. However, if the action is severable so that each person may bring an action for his own share, those free from disability shall be barred after the running of the applicable statute of limitations, and only the rights of those under disability shall be protected.

History.

Ga. L. 1855-56, p. 233, § 24; Code 1863, § 2871; Code 1868, § 2879; Code 1873, § 2930; Code 1882, § 2930; Civil Code

1895, § 3784; Civil Code 1910, § 4379; Code 1933, § 3-806.

JUDICIAL DECISIONS

Five year period of Ga. L. 1953, Nov.-Dec. Sess., p. 342, §§ 1 and 2 (see now O.C.G.A. § 9-2-60), relating to dismissals for want of prosecution, was not a limitation within meaning of former Code 1933, § 3-806 (see now O.C.G.A. § 9-3-95). Swint v. Smith, 219 Ga. 532, 134 S.E.2d 595, 1964 Ga. LEXIS 311 (1964).

This section may preserve right of one of several coheirs, even when other coheirs, under no disability, will be bound. Doe v. Gullatt, 10 Ga. 218, 1851 Ga. LEXIS 93 (1851).

Revival of dormant judgment. — When judgment obtained by several parties, some of whom are minors, is not divided into separate parts but is for one entire sum in favor of all, if it becomes dormant the time prescribed by law within which suit may be brought on dormant judgments does not begin to run against any of them until disability of each minor ceases to exist. Williams v. Merritt, 109 Ga. 213, 34 S.E. 312, 1899 Ga. LEXIS 614 (1899).

Wrongful death of wife and mother. — Former Civil Code 1910, § 4379 (see now O.C.G.A. § 9-3-95) did not apply to an action by a husband and children for homicide of married woman. Williams v. Seaboard Air-Line Ry., 33 Ga. App. 164, 125 S.E. 769, 1924 Ga. App. LEXIS 790 (1924).

Wife held not entitled to benefit from husband's disability. — Wife, who had a separate right to bring her action for loss of consortium, was not entitled to the benefit of the tolling provision in O.C.G.A. § 9-3-95 based on her husband's disability. Johnson v. Yeager, 188 Ga. App. 588, 373 S.E.2d 763, 1988 Ga. App. LEXIS 1120 (1988).

Since deed grantor's action to set aside and cancel warranty deed that the deed grantor conveyed to the deed grantees was severable as to the deed grantor's interest in the property that the deed grantor held as a joint tenant with the deed grantor's husband, the deed grantor could not toll the applicable statute of limitations for bringing the deed grantor's action as the deed grantor could not use the husband's disability to toll the action that the deed grantor could have brought as to the deed grantor's own interest in the property. Pivic v. Pittard, 258 Ga. App. 675, 575 S.E.2d 4, 2002 Ga. App. LEXIS 1347 (2002), cert. denied, No. S03C0550, 2003 Ga. LEXIS 218 (Ga. Feb. 24, 2003).

RESEARCH REFERENCES

C.J.S.
54 C.J.S., Limitation of Actions, § 154 et seq.

9-3-96. Tolling of limitations for fraud of defendant.

If the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud.

History.
Ga. L. 1855-56, p. 233, § 30; Code 1863, § 2872; Code 1868, § 2880; Code 1873, § 2931; Code 1882, § 2931; Civil Code 1895, § 3785; Civil Code 1910, § 4380; Code 1933, § 3-807.

Cross references.

Barring of actions in equity due to laches, § 23-1-25.

Law reviews.

For comment on Saffold v. Scarborough, 91 Ga. App. 628, 86 S.E.2d 649 (1955), see 18 Ga. B.J. 79 (1955).

For comment on Clinton v. State Farm Mut. Auto. Ins. Co., 110 Ga. App. 417, 138 S.E.2d 687 (1964), see 1 Ga. St. B.J. 553 (1965).

For case note, "Lynch v. Waters: Tolling Georgia's Statute of Limitations for Medical Malpractice," see 38 Mercer L. Rev. 1493 (1987).

For article, "A Comprehensive Analysis of Georgia RICO," see 9 Ga. St. U.L. Rev. 537 (1993).

For annual survey article discussing trial practice and procedure, see 51 Mercer L. Rev. 487 (1999).

For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009).

For annual survey on zoning and land use law, see 61 Mercer L. Rev. 427 (2009).

For annual survey on wills, trusts, guardianships, and fiduciary administration, see 66 Mercer L. Rev. 231 (2014).

For annual survey of tort laws, see 67 Mercer L. Rev. 237 (2015).

For annual survey on trial practice and procedure, see 67 Mercer L. Rev. 257 (2015).

For note, "Forty-Eight States are Probably Not Wrong: An Argument for Modernizing Georgia's Legal Malpractice Statute of Limitations," see 33 Ga. St. U.L. Rev. 805 (2017).

For annual survey on product liability, see 69 Mercer L. Rev. 231 (2017).

For annual survey on torts, see 74 Mercer L. Rev. 243 (2022).

JUDICIAL DECISIONS

Analysis

General Consideration
Fraud Defined
Relationship of Parties
Application

General Consideration

History of this section, see Trust Co. Bank v. Union Circulation Co., 241 Ga. 343, 245 S.E.2d 297, 1978 Ga. LEXIS 940 (1978).

Rule in this section was applied in equity before it was enacted by legislature. Pendergrast v. Foley, 8 Ga. 1, 1850 Ga. LEXIS 1 (1850).

Strict construction of section. — As an exception to statute of limitations, this section should be strictly construed. Bates v. Metropolitan Transit Sys., 128 Ga. App. 720, 197 S.E.2d 781, 1973 Ga. App. LEXIS 1594 (1973).

Because this section provides for a departure from the general rule, requiring actual fraud involving moral turpitude or breach of duty to disclose because of relationship of trust and confidence, and does not toll the statute unless the fraud is distinguishable from that giving rise to cause of action, it must be strictly construed. Trust Co. Bank v. Union Circulation Co., 241 Ga. 343, 245 S.E.2d 297, 1978 Ga. LEXIS 940 (1978).

Because a catheter was purposefully placed in a patient's body, it was not a "foreign object" as contemplated by O.C.G.A. § 9-3-72, and the fact that it might have been negligently placed did not alter this finding; hence, absent evidence of a doctor's fraud or concealment of the catheter, summary judgment in a patient's medical malpractice suit was properly granted to a doctor and a clinic as the applicable two-year statute of limitation had expired by the time the action was filed. Pogue v. Goodman, 282 Ga. App. 385, 638 S.E.2d 824, 2006 Ga. App. LEXIS 1396 (2006), overruled, Norred v. Teaver, 320 Ga. App. 508, 740 S.E.2d 251, 2013 Ga. App. LEXIS 225 (2013).

Phrase "those under whom he claims" should be given a limited application. Trust Co. Bank v. Union Circulation Co., 241 Ga. 343, 245 S.E.2d 297, 1978 Ga. LEXIS 940 (1978).

"Time of discovery of fraud" means time at which fraud is or should have been discovered. Jones v. Spindel, 239 Ga. 68, 235 S.E.2d 486, 1977 Ga. LEXIS 819 (1977).

Section tolls statute on original wrong. — Language of this section means that statute of limitations which might run on original wrong is tolled, and cause of action on that wrong is preserved. Saffold v. Scarborough, 91 Ga. App. 628, 86 S.E.2d 649, 1955 Ga. App. LEXIS 825 (1955) (for comment, see 18 Ga. B.J. 79 (1955)).

When there is an allegation of fraud, a statute of limitations is tolled until the fraudulent conduct is discovered or by exercise of due diligence ought to have been discovered. Dunn v. Towle, 170 Ga. App. 487, 317 S.E.2d 266, 1984 Ga. App. LEXIS 1934 (1984).

Statute tolled when no reason to investigate. — Statute of limitations was tolled under Georgia law with respect to commissions received by the debtor but not deposited when another shareholder had no reason to believe that the payments from a talent agency were continuing and no reason to believe that there was another account into which the money was being deposited. Hot Shot Kids Inc. v. Pervis (In re Pervis), 512 B.R. 348, 2014 Bankr. LEXIS 2496 (Bankr. N.D. Ga. 2014).

Fraud defense adequately pled. — Client adequately pled the client's fraud defense to a former employee benefits plan administrator's claim that the client's breach of contract claim was time-barred under the statute of limitation provided in the parties' agreement because in the consolidated pretrial order, which was signed by the trial judge and explicitly stated that it superseded the pleadings, the client asserted that the administrator falsely stated that there were no fund fees to be credited to the client, and the client provided details of the dates and contents of the administrator's alleged misrepresentations. Hewitt Assocs., LLC v. Rollins, Inc., 308 Ga. App. 848, 708 S.E.2d 697, 2011 Ga. App. LEXIS 292 (2011).

Tolling of statute when gravamen of action is fraud. — When actual fraud is gravamen of action, statute is tolled until the fraud is discovered or by reasonable diligence should have been discovered, and no other independent fraudulent act is required to toll the statute. Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244, 1980 Ga. LEXIS 943 (1980).

When actual fraud is the gravamen of the underlying action, no independent fraud is required for tolling of the statute of limitation, and the limitation period is tolled until the plaintiff discovers or in the exercise of reasonable diligence should have discovered the fraud. Hahne v. Wylly, 199 Ga. App. 811, 406 S.E.2d 94, 1991 Ga. App. LEXIS 666 (1991).

When a trust beneficiary alleged a bank violated the terms of a trust established for the beneficiary's benefit by failing to hold the trust property until it achieved maximum value, selling the property for less than market value, failing to report to the beneficiaries regarding the trust, and failing to distribute trust assets as directed, fraud was sufficiently alleged to toll the applicable statute of limitations, given the bank's fiduciary relationship with the beneficiary. Goldston v. Bank of Am. Corp., 259 Ga. App. 690, 577 S.E.2d 864, 2003 Ga. App. LEXIS 238 (2003).

When items stolen from an electric company were sold to a supply company, the trial court erroneously granted partial summary judgment dismissing some of the electric company's claims against the supply company on statute of limitations grounds as, under O.C.G.A. § 9-3-96, there were material fact issues as to whether the supply company's fraud precluded the electric company from filing within the limitations period. Fed. Ins. Co. v. Westside Supply Co., 264 Ga. App. 240, 590 S.E.2d 224, 2003 Ga. App. LEXIS 1450 (2003).

Trial court did not err by failing to rule that a client's breach of contract action against a former employee benefits plan administrator was time-barred because the evidence authorized the jury to find that the administrator committed fraud and that under O.C.G.A. § 9-3-96, the limitation period provided in the parties' agreement was tolled by the administrator's fraudulent conduct since the client presented evidence that it had a confiden-

General Consideration (Cont'd)

tial relationship with the administrator that entitled it to "conclusively rely" on writings and other communications from the administrator. The evidence also authorized the jury to find that the administrator's fraud hindered the client from discovering its cause of action because there was evidence that a close scrutiny of the administrator's invoices would not have disclosed the cause of action. Hewitt Assocs., LLC v. Rollins, Inc., 308 Ga. App. 848, 708 S.E.2d 697, 2011 Ga. App. LEXIS 292 (2011).

Tolling of statute when gravamen of action is other than actual fraud. — When gravamen of action is other than actual fraud, there must be a separate independent actual fraud involving moral turpitude which debars and deters the plaintiff from bringing the plaintiff's action, and the statute will be tolled only until fraud is discovered or should have been discovered. Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244, 1980 Ga. LEXIS 943 (1980); Bray v. Dixon, 176 Ga. App. 895, 338 S.E.2d 872, 1985 Ga. App. LEXIS 2589 (1985).

Attempt to set aside divorce time barred. — Even if the plaintiff had the standing to ask for the 2012 divorce decree to be set aside, both Georgia's general fraud statute of limitation and the statute of limitation to set aside a judgment based on fraud had run before the plaintiff filed the complaint on September 22, 2017; therefore, the trial court properly granted the defendant's motion to dismiss the complaint. Copeland v. Miller, 347 Ga. App. 123, 817 S.E.2d 692, 2018 Ga. App. LEXIS 468 (2018).

This section consists of three elements: (1) actual fraud on part of the defendant involving moral turpitude; (2) which conceals existence of cause of action from the plaintiff; and (3) the plaintiff's reasonable diligence in discovering the cause of action despite failure to do so within time of applicable statute of limitations. Jim Walter Corp. v. Ward, 245 Ga. 355, 265 S.E.2d 7, 1980 Ga. LEXIS 795 (1980).

Fraud must debar or defer action. — Fraud which will toll statute of limitations must be of that character which debars or deters the plaintiff from action. Perkins v. Aetna Cas. & Sur. Co., 147 Ga. App. 662, 249 S.E.2d 661, 1978 Ga. App. LEXIS 2888 (1978), dismissed, Aetna Casualty & Surety Co. v. Perkins, 243 Ga. 701, 256 S.E.2d 792, 1979 Ga. LEXIS 1037 (1979).

Key element of this section is whether the plaintiff was debarred or deterred from action by alleged fraud. General Tire & Rubber Co. v. Alex, 149 Ga. App. 393, 254 S.E.2d 509, 1979 Ga. App. LEXIS 1866 (1979).

Cause of action for fraudulent inducement to enter an employment contract and lease accrued when the employee became aware of alleged fraud, assuming, arguendo, that the employer's fraud debarred or deterred the employee from bringing the action. Smith v. Alimenta Processing Corp., 197 Ga. App. 57, 397 S.E.2d 444, 1990 Ga. App. LEXIS 1148 (1990), cert. denied, No. S91C0023, 1990 Ga. LEXIS 500 (Ga. Oct. 24, 1990).

In order for fraud to toll the statute, it must have effect of deterring the plaintiff from bringing an action. Wolfe v. Virusky, 306 F. Supp. 519, 1969 U.S. Dist. LEXIS 8805 (S.D. Ga. 1969).

Parol promise is not such debarring as to prevent bar. — If fraud cuts plaintiff off from suing, precludes the plaintiff, hinders the plaintiff, shuts the plaintiff out, or excludes the plaintiff, then it debars, and the statute is suspended, but a mere promise by parol, without consideration, is not such a debarring as is intended and does not save bar from attaching. Haynesworth v. Hall Constr. Co., 44 Ga. App. 807, 163 S.E. 273, 1932 Ga. App. LEXIS 530 (1932).

Mere request to defer action. — Mere request by the defendant to the plaintiff, before expiration of statutory period for bringing of action, to defer action until after expiration of period will not, absent fraud, operate to estop the defendant from pleading statute of limitations to action brought after expiration of statutory period. Taylor v. State, 44 Ga. App. 64, 160 S.E. 667, 1931 Ga. App. LEXIS 599 (1931).

Mere uncertain and indefinite understanding, based on no consideration, that debt might be admitted as set-off on

certain judgment if the debt should be recovered, on account of which the plaintiff refrained from bringing an action, was not such fraud as would relieve bar of statute. Haynesworth v. Hall Constr. Co., 44 Ga. App. 807, 163 S.E. 273, 1932 Ga. App. LEXIS 530 (1932).

Running of statute when the plaintiff debarred or deterred. — When the plaintiff has been debarred or deterred by fraud of the defendant from bringing action, the statute of limitation does not begin to run until the discovery of the fraud. Buttersworth v. Swint, 181 Ga. 430, 182 S.E. 520, 1935 Ga. LEXIS 113 (1935), transferred, 53 Ga. App. 602, 186 S.E. 770, 1936 Ga. App. LEXIS 334 (1936); Georgia Power Co. v. Womble, 150 Ga. App. 28, 256 S.E.2d 640, 1979 Ga. App. LEXIS 2077 (1979).

Rules of limitation do not apply if the defendant or those under whom the defendant claims have been guilty of fraud by which the plaintiff is debarred or deterred from the plaintiff's action; in such case, the period of limitation runs only from the time of the discovery of the fraud. Stephens v. Walker, 193 Ga. 330, 18 S.E.2d 537, 1942 Ga. LEXIS 385 (1942).

Fraud must involve moral turpitude. — Fraud which will relieve the bar of the statute of limitations must be of that character which involves moral turpitude. Austin v. Raiford, 68 Ga. 201, 1881 Ga. LEXIS 352 (1881); Anderson v. Foster, 112 Ga. 270, 37 S.E. 426, 1900 Ga. LEXIS 125 (1900); Frost v. Arnaud, 144 Ga. 26, 85 S.E. 1028, 1915 Ga. LEXIS 25 (1915); Morris v. Johnstone, 172 Ga. 598, 158 S.E. 308, 1931 Ga. LEXIS 155 (1931); Middleton v. Pruden, 57 Ga. App. 555, 196 S.E. 259, 1938 Ga. App. LEXIS 335 (1938); Stephens v. Walker, 193 Ga. 330, 18 S.E.2d 537, 1942 Ga. LEXIS 385 (1942); Troutman v. Southern Ry., 296 F. Supp. 963, 1968 U.S. Dist. LEXIS 9685 (N.D. Ga. 1968), aff'd, Troutman v. Southern R. Co., 441 F.2d 586, 1971 U.S. App. LEXIS 10678 (5th Cir. 1971); Riddle v. Driebe, 153 Ga. App. 276, 265 S.E.2d 92, 1980 Ga. App. LEXIS 1770 (1980); Bowen & Bowen, Inc. v. McCoy-Gibbons, Inc., 185 Ga. App. 298, 363 S.E.2d 827, 1987 Ga. App. LEXIS 2484 (1987).

Effect of debarring and deterring. — Fraud which will relieve the bar of the statute of limitations must be of that character which involves moral turpitude, and must have the effect of debarring or deterring the plaintiff from action. Ponder v. Barrett, 46 Ga. App. 757, 169 S.E. 257, 1933 Ga. App. LEXIS 231 (1933); Silvertooth v. Shallenberger, 49 Ga. App. 133, 174 S.E. 365, 1934 Ga. App. LEXIS 296 (1934), overruled, Parker v. Vaughan, 124 Ga. App. 300, 183 S.E.2d 605, 1971 Ga. App. LEXIS 902 (1971); Bates v. Metropolitan Transit Sys., 128 Ga. App. 720, 197 S.E.2d 781, 1973 Ga. App. LEXIS 1594 (1973).

Fraud referred to in this section which is necessary to toll the statute of limitations until discovery of fraud which gives rise to cause of action, must be actual fraud, involving moral turpitude, which "debars and deters" plaintiff from action. Union Circulation Co. v. Trust Co. Bank, 146 Ga. App. 612, 247 S.E.2d 197, 1978 Ga. App. LEXIS 2478 (1978).

Actual fraud involves moral turpitude and has effect of debarring and deterring the plaintiff from action. Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244, 1980 Ga. LEXIS 943 (1980).

To establish tolling, homeowners had to prove that the builder engaged in fraud sufficient to have debarred or deterred the homeowners from discovering the homeowners' cause of action; homeowners had to show that the builders concealed the defects through some trick to prevent inquiry or elude investigation. Gropper v. STO Corp., 250 Ga. App. 820, 552 S.E.2d 118, 2001 Ga. App. LEXIS 795 (2001), cert. denied, No. S01C1747, 2002 Ga. LEXIS 541 (Ga. June 21, 2002), cert. denied, No. S01C1790, 2002 Ga. LEXIS 542 (Ga. June 21, 2002).

Only actual fraud tolls statute of limitations. Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244, 1980 Ga. LEXIS 943 (1980).

Statute of limitations for a written contract-based action was not tolled for fraudulent concealment because the named plaintiffs in a purported class action, the next of kin whose loved ones' bodies were mishandled by a crematorium, did not allege actual fraud involving moral turpitude on the part of the funeral homes. In re Tri-State Crematory Litig., 215 F.R.D. 660, 2003 U.S. Dist. LEXIS 4538 (N.D. Ga. 2003).

General Consideration (Cont'd)

Trial court did not err in concluding that there was no legal or factual basis to toll the statutes of limitation on the plaintiff's fraud claims asserted against the defendant, an investment advisory company, because the record was devoid of any evidence of any concealment or actual fraud on the part of the defendant which deterred or debarred the plaintiff from discovering the acts which were the basis of the action and which would have tolled the statute of limitation. Hamburger v. PFM Capital Mgmt., 286 Ga. App. 382, 649 S.E.2d 779, 2007 Ga. App. LEXIS 786 (2007).

Constructive fraud does not toll the statute. Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244, 1980 Ga. LEXIS 943 (1980); Macon-Bibb County Hosp. Auth. v. Georgia Kaolin Co., 646 F. Supp. 90, 1986 U.S. Dist. LEXIS 20439 (M.D. Ga. 1986), aff'd, 817 F.2d 98, 1987 U.S. App. LEXIS 6168 (11th Cir. 1987).

Constructive fraud as well as actual fraud may give rise to cause of action, but the only kind of fraud which will toll the statute of limitations is actual fraud. Middleton v. Pruden, 57 Ga. App. 555, 196 S.E. 259, 1938 Ga. App. LEXIS 335 (1938).

Fraud required by this section must be actual moral fraud, and not a mere constructive one, whether cause of action is original fraud or fraudulent concealment of existence of cause of action. Anderson v. Gailey, 33 F.2d 589, 1929 U.S. Dist. LEXIS 1331 (D. Ga. 1929).

No tolling of limitations unless plaintiff had knowledge of alleged fraud. — Motion for directed verdict as to a fraud in the inducement claim was properly denied when nothing in the record indicated that the plaintiff had any knowledge of the alleged fraud, which knowledge would have allowed the statute of limitations to have tolled prior to bringing this action. Growth Properties of Fla., Ltd. v. Wallace, 168 Ga. App. 893, 310 S.E.2d 715, 1983 Ga. App. LEXIS 2948 (1983).

Actual fraud which tolls statute arises in two entirely different circumstances: when actual fraud is the gravamen of the action, and when the gravamen of the action is something other than actual fraud, such as constructive fraud, negligence, breach of contract, etc. Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244, 1980 Ga. LEXIS 943 (1980).

This section applies when cause of action was not an original fraud, but when existence was fraudulently concealed; fraud in the latter instance must be an actual moral fraud, and not a mere constructive one. Anderson v. Foster, 112 Ga. 270, 37 S.E. 426, 1900 Ga. LEXIS 125 (1900); Maxwell v. Walsh, 117 Ga. 467, 43 S.E. 704, 1903 Ga. LEXIS 269 (1903); Mobley v. Faircloth, 174 Ga. 808, 164 S.E. 195, 1932 Ga. LEXIS 149 (1932).

Fraud giving right of action not necessarily sufficient to conceal cause. — While fraud in a particular case may be sufficient to give to complaining party a right of action, it may not in same case also be sufficient to serve to conceal cause of action within contemplation of the law. Middleton v. Pruden, 57 Ga. App. 555, 196 S.E. 259, 1938 Ga. App. LEXIS 335 (1938).

To constitute concealment of cause of action so as to prevent running of limitations, some trick or artifice must be employed to prevent inquiry or elude investigation, or to mislead and hinder party who has cause of action from obtaining information, and acts relied on must be of affirmative character and fraudulent. Middleton v. Pruden, 57 Ga. App. 555, 196 S.E. 259, 1938 Ga. App. LEXIS 335 (1938); Clinton v. State Farm Mut. Auto. Ins. Co., 110 Ga. App. 417, 138 S.E.2d 687, 1964 Ga. App. LEXIS 654 (1964) (for comment, see 1 Ga. St. B.J. 553 (1965)), Union Circulation Co. v. Trust Co. Bank, 146 Ga. App. 612, 247 S.E.2d 197, 1978 Ga. App. LEXIS 2478 (1978); Wilson v. Tara Ford, Inc., 200 Ga. App. 98, 406 S.E.2d 807, 1991 Ga. App. LEXIS 756 (1991); Costrini v. Hansen Architects, P.C., 247 Ga. App. 136, 543 S.E.2d 760, 2000 Ga. App. LEXIS 1432 (2000).

Actual fraud which conceals rather than creates cause of action by some affirmative trick or artifice to prevent inquiry or elude investigation and which hinders party who has cause of action from obtain-

ing information operates to toll running of statute until cause of action is discovered. Kicklighter v. New York Life Ins. Co., 145 F.2d 548, 1944 U.S. App. LEXIS 2574 (5th Cir. 1944).

Trial court properly dismissed the farmers' breach of contract claim against a county, as the successor to a city, as the agreement between the city and the farmers that permitted the city to spread sewer sludge on the farmers' land obligated the farmers to conduct annual testing for the same constituents for which the city was to test; thus, the farmers could not show that the farmers exercised reasonable diligence in relying on any misrepresentations by the city as to the presence of the substances and the farmers could not prove fraudulent concealment to toll the statute of limitations. McElmurray v. Augusta-Richmond County, 274 Ga. App. 605, 618 S.E.2d 59, 2005 Ga. App. LEXIS 752 (2005), cert. denied, No. S05C1995, 2006 Ga. LEXIS 289 (Ga. Apr. 25, 2006).

Concealment must be by affirmative act. — To toll statute of limitation, concealment of cause of action must be by positive affirmative act and not by mere silence. Comerford v. Hurley, 154 Ga. App. 387, 268 S.E.2d 358, 1980 Ga. App. LEXIS 2184, aff'd, 246 Ga. 501, 271 S.E.2d 782, 1980 Ga. LEXIS 1175 (1980).

If knowledge of existence of cause of action is fraudulently concealed by defendant, delay in bringing action is owing to defendant's fraud; and for purposes of limitation, cause of action should not be considered as accrued until discovery of fraud, for reason that fraud continues during whole period of its concealment, inseparable from original wrong. Kicklighter v. New York Life Ins. Co., 145 F.2d 548, 1944 U.S. App. LEXIS 2574 (5th Cir. 1944).

Effect of silence when basis of action is fraud. — When basis of action is actual fraud, silence of party committing the fraud is treated as continuation of original fraud. Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244, 1980 Ga. LEXIS 943 (1980).

When gravamen of action is other than actual fraud, mere silence is not sufficient to toll the statute unless there is a duty to make disclosure because of a relationship of trust and confidence between the parties. Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244, 1980 Ga. LEXIS 943 (1980).

Complaining party must use reasonable diligence to discover fraud, and statute will be tolled only when such diligence is used. Warnock v. Warnock, 206 Ga. 548, 57 S.E.2d 571, 1950 Ga. LEXIS 369 (1950).

Failure to exercise ordinary diligence which would have resulted in a discovery of the fraud is a good defense to this section. Little v. Reynolds, 101 Ga. 594, 28 S.E. 919, 1897 Ga. LEXIS 280 (1897); Bennett v. Bird, 139 Ga. 25, 76 S.E. 568, 1912 Ga. LEXIS 512 (1912).

Fraud which will remove bar of statute must be moral fraud, and there must be reasonable diligence on part of the plaintiff to discover the fraud. Brinsfield v. Robbins, 183 Ga. 258, 188 S.E. 7, 1936 Ga. LEXIS 212 (1936).

Fraud which must have been discovered if usual and reasonable diligence had been exercised is not good reply to statute of limitations. Middleton v. Pruden, 57 Ga. App. 555, 196 S.E. 259, 1938 Ga. App. LEXIS 335 (1938).

Mere ignorance not sufficient. — Mere ignorance of fraud which, by use of ordinary diligence, might have been discovered in due time, will not suspend operation of statute of limitations. Morris v. Johnstone, 172 Ga. 598, 158 S.E. 308, 1931 Ga. LEXIS 155 (1931); Brinsfield v. Robbins, 183 Ga. 258, 188 S.E. 7, 1936 Ga. LEXIS 212 (1936); Middleton v. Pruden, 57 Ga. App. 555, 196 S.E. 259, 1938 Ga. App. LEXIS 335 (1938).

Mere ignorance of existence of facts constituting cause of action does not prevent running of statute of limitations. Arnold v. Rogers, 43 Ga. App. 390, 159 S.E. 136, 1931 Ga. App. LEXIS 385 (1931); Peacock v. Retail Credit Co., 302 F. Supp. 418, 1969 U.S. Dist. LEXIS 9860 (N.D. Ga. 1969), aff'd, 429 F.2d 31, 1970 U.S. App. LEXIS 8345 (5th Cir. 1970); Comerford v. Hurley, 154 Ga. App. 387, 268 S.E.2d 358, 1980 Ga. App. LEXIS 2184, aff'd, 246 Ga. 501, 271 S.E.2d 782, 1980 Ga. LEXIS 1175 (1980).

When alleged tort feasor or those under whom the tort feasor claims have been

General Consideration (Cont'd)

guilty of no fraud by which injured person has been debarred or deterred from instituting action within period of limitation, mere ignorance of injured person of existence of facts constituting cause of action does not prevent running of statute of limitations. Dalrymple v. Brunswick Coca-Cola Bottling Co., 51 Ga. App. 754, 181 S.E. 597, 1935 Ga. App. LEXIS 464 (1935).

Bar of statute is not tolled merely because of ignorance of facts. Rigdon v. Barfield, 194 Ga. 77, 20 S.E.2d 587, 1942 Ga. LEXIS 513 (1942).

Mere ignorance of existence of right of action, absent element of fraud, does not toll statute of limitation. Everhart v. Rich's, Inc., 229 Ga. 798, 194 S.E.2d 425, 1972 Ga. LEXIS 777 (1972).

Absent fraudulent concealment or duty to disclose. — Mere ignorance of facts constituting cause of action does not prevent running of statute of limitations; but when such facts are fraudulently concealed by other party, as when some trick or artifice has been employed to prevent inquiry or elude investigation, or to mislead and hinder a party who has cause of action from obtaining information, and when there is more than mere failure to disclose, or when there is a duty to make disclosure, the bar of the statute will be relieved. Priest v. Exposition Cotton Mills, 86 Ga. App. 301, 71 S.E.2d 743, 1952 Ga. App. LEXIS 942 (1952).

Reasonable diligence required by plaintiff. — Since the plaintiffs took no steps to scrutinize the information provided to the plaintiffs by the defendant and did not consult independent advisers, the plaintiffs failed to act with reasonable diligence so as to toll the statute of limitations pursuant to O.C.G.A. § 9-3-96. Garland v. Advance Med. Funding L.P., 86 F. Supp. 2d 1195, 2000 U.S. Dist. LEXIS 2547 (N.D. Ga. 2000).

Mere failure to sue, by reason of fraud, will not relieve bar of statute, since the plaintiff must be debarred or deterred from suing by reason of fraud involving moral turpitude, independent of facts which give rise to cause of action itself. Barrett v. Jackson, 44 Ga. App. 611, 162 S.E. 308, 1932 Ga. App. LEXIS 422 (1932).

Plaintiff has burden of establishing fraud involving moral turpitude. Bates v. Metropolitan Transit Sys., 128 Ga. App. 720, 197 S.E.2d 781, 1973 Ga. App. LEXIS 1594 (1973).

If facts do exist which would toll the statute of limitations, the plaintiff has the burden of setting forth and supporting these facts. Edmonds v. Bates, 178 Ga. App. 69, 342 S.E.2d 476, 1986 Ga. App. LEXIS 1588 (1986).

Teacher's fraudulent inducement claim against a school district arising from an agreement entered into between the parties with respect to the teacher's resignation was barred by the four-year statute of limitations pursuant to O.C.G.A. § 9-3-31; although the limitation period could be tolled pursuant to O.C.G.A. § 9-3-96 if the teacher was "debarred or deterred" from filing suit because of the district's fraud, the teacher failed to show the existence of facts that would toll the limitations period. Kaylor v. Rome City Sch. Dist., 267 Ga. App. 647, 600 S.E.2d 723, 2004 Ga. App. LEXIS 742 (2004).

Applicability of section to legal and equitable relief. — This section is applicable when legal relief because of fraud is sought and also equitable relief. Anderson v. Gailey, 33 F.2d 589, 1929 U.S. Dist. LEXIS 1331 (D. Ga. 1929); Mobley v. Faircloth, 174 Ga. 808, 164 S.E. 195, 1932 Ga. LEXIS 149 (1932).

Equitable estoppel. — When defendant has by fraudulent conduct induced the plaintiff to defer action until after the period of limitation, or has promised not to rely upon the statute, the defendant is estopped from pleading the statute on equitable grounds. Taylor v. State, 44 Ga. App. 64, 160 S.E. 667, 1931 Ga. App. LEXIS 599 (1931).

County, the county health department, and builders were not equitably estopped from raising a defense based upon the expiration of the statutory repose period of O.C.G.A. § 9-3-51 in a purchaser's action alleging that they committed fraud because the purchaser failed to allege or to present evidence of any fraudulent act or statement to the purchaser by the county, department, or builders regarding

the property's history of drainage problems, or the possible causes thereof, that occurred after the purchaser bought the property or of any fraud that prevented the purchaser from filing the cause of action. Wilhelm v. Houston County, 310 Ga. App. 506, 713 S.E.2d 660, 2011 Ga. App. LEXIS 533 (2011), cert. denied, No. S11C1745, 2012 Ga. LEXIS 219 (Ga. Feb. 27, 2012).

Notice of information needed to determine truth. — Claims by limited partners in a real estate investment limited partnership that the general partners had breached the partners' fiduciary duty by making material misrepresentations and omissions about net sales proceeds for 13 years were time-barred under O.C.G.A. § 9-3-31; the first communication was in 1987, and the action had been brought more than four years after that date, and the limitation period was not tolled under O.C.G.A. § 9-3-96 because the limited partners had been on notice of the true contents of the partnership agreement the entire time and thus had always had proper notice of the information necessary to determine the truth. Hendry v. Wells, 286 Ga. App. 774, 650 S.E.2d 338, 2007 Ga. App. LEXIS 812 (2007), cert. denied, No. S07C1835, 2008 Ga. LEXIS 102 (Ga. Jan. 7, 2008).

Trustees failed to exercise minimal degree of due diligence. — Dismissal of the trustees' claims as time barred was upheld because the trustees conceded that, despite signing numerous documents as trustees of the marital trust, the trustees made no attempt at all to obtain information the trustees were legally entitled to in that capacity; thus, the trustees failed to exercise even a minimal degree of due diligence to discover their claims as a matter of law. Rollins v. LOR, Inc., 345 Ga. App. 832, 815 S.E.2d 169, 2018 Ga. App. LEXIS 291 (2018), cert. denied, No. S18C1362, 2019 Ga. LEXIS 49 (Ga. Jan. 7, 2019).

Trust beneficiary's action against trustee barred. — Because a decedent died in May 2013, the two-year period in O.C.G.A. § 53-12-45(a) barred the niece's challenge to the revocable trust asserted in January 2017; even assuming that § 53-12-45(a) was a statute of limitations that could be tolled by fraud, the trustee talked with the niece in early July 2013 and then notified the niece by letter that the niece was to receive a $25,000 distribution under the trust a week or two later, and did not act to conceal the trust's existence or contents. Howell v. Bates, 350 Ga. App. 708, 830 S.E.2d 250, 2019 Ga. App. LEXIS 358 (2019).

Questions of law and of fact. — When sole question regards length of time which has elapsed between accrual of right and institution of action, question as to whether action is barred is one of law; but when there are facts involving fraud and excuses for delay in discovering the fraud, question becomes one of mixed law and fact, and is a proper question for determination by the jury under proper instructions from the court. Brown v. Brown, 209 Ga. 620, 75 S.E.2d 13, 1953 Ga. LEXIS 359 (1953).

When there are facts involving fraud and excuses for delay in discovering the fraud, question is one of mixed law and fact, and is a proper question for determination by the jury under proper instructions from the court. Cleveland Lumber Co. v. Proctor & Schwartz, Inc., 397 F. Supp. 1088, 1975 U.S. Dist. LEXIS 14052 (N.D. Ga. 1975).

It is the province of the jury to pass upon facts in questions of fraud, under proper instructions from the court, unless facts from which fraud is inferred are undisputed. Hickson v. Bryan, 75 Ga. 392, 1885 Ga. LEXIS 142 (1885).

Fraud Defined

Fraud cannot consist of mere broken promises, unfilled predictions, or erroneous conjecture as to future events. Riddle v. Driebe, 153 Ga. App. 276, 265 S.E.2d 92, 1980 Ga. App. LEXIS 1770 (1980).

Evasion of a direct inquiry is fraud within this section. Broughton v. Winn, 60 Ga. 486, 1878 Ga. LEXIS 513 (1878).

Fraud which tolls statute may be distinct from fraud giving cause of action. — Fraud referred to in this section, which tolls operation of the statute of limitations, is not necessarily the same fraud which gives rise to a cause of action. Middleton v. Pruden, 57 Ga. App. 555, 196 S.E. 259, 1938 Ga. App. LEXIS 335 (1938).

Fraud Defined (Cont'd)

Establishment of fraud that gives rise to cause of action does not necessarily establish fraud that debars or deters plaintiff from action. Union Circulation Co. v. Trust Co. Bank, 143 Ga. App. 715, 240 S.E.2d 100, 1977 Ga. App. LEXIS 2475 (1977), rev'd on other grounds, 241 Ga. 343, 245 S.E.2d 297, 1978 Ga. LEXIS 940 (1978).

Fraud defense adequately pled. — Client adequately pled the client's fraud defense to a former employee benefits plan administrator's claim that the client's breach of contract claim was time-barred under the statute of limitation provided in the parties' agreement because in the consolidated pretrial order, which was signed by the trial judge and explicitly stated that it superseded the pleadings, the client asserted that the administrator falsely stated that there were no fund fees to be credited to the client, and the client provided details of the dates and contents of the administrator's alleged misrepresentations. Hewitt Assocs., LLC v. Rollins, Inc., 308 Ga. App. 848, 708 S.E.2d 697, 2011 Ga. App. LEXIS 292 (2011).

Relationship of Parties

More than mere failure to disclose, absent duty to do so or confidential relation. — Mere failure to give notice of cause of action will not constitute necessary fraud, unless fiduciary relation exists which renders it the duty of one possessing facts as to cause of action to reveal them; mere kinship by blood does not create such a relation. Stephens v. Walker, 193 Ga. 330, 18 S.E.2d 537, 1942 Ga. LEXIS 385 (1942).

When right of action exists because of wrongful conduct which does not involve actual fraud, in order to prevent statute of limitations from running by reason of fraud consisting of concealment of such conduct there must be something more than mere failure, with fraudulent intent, to disclose the right unless the party committing such wrong has a duty to make disclosure thereof by reason of facts and circumstances or by reason of existence between parties of confidential relation. Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244, 1980 Ga. LEXIS 943 (1980).

Confidential relationship between the parties imposes a greater duty on a defendant to reveal what should be revealed, and a lessened duty on the part of a plaintiff to discover what should be discoverable through the exercise of ordinary care, but the fraud itself — the defendant's intention to conceal or deceive — still must be established, as must the plaintiff's deterrence from bringing suit. Hunter, Maclean, Exley & Dunn v. Frame, 269 Ga. 844, 507 S.E.2d 411, 1998 Ga. LEXIS 821 (1998).

When a confidential relationship existed, and that relationship lessened the plaintiff's obligation to discover the fraud and heightened the duty of the defendant to disclose what should be revealed, an action for fraud was still time-barred, since the plaintiff failed to exercise reasonable diligence in suing on an alleged fraudulent promissory note, the plaintiff should have known about the note, and the attendant indebtedness when plaintiff acknowledged the existence of a security deed. Boaz v. Latson, 260 Ga. App. 752, 580 S.E.2d 572, 2003 Ga. App. LEXIS 319 (2003), aff'd in part and rev'd in part, 278 Ga. 113, 598 S.E.2d 485, 2004 Ga. LEXIS 526 (2004), vacated in part, 269 Ga. App. 589, 605 S.E.2d 46, 2004 Ga. App. LEXIS 1230 (2004).

Concealment involving a confidential relationship.— When a party to a confidential relationship has a duty to disclose and breaches that duty in a manner sufficient to toll the statute of limitation under O.C.G.A. § 9-3-96, such a breach could violate a fiduciary's duty of utmost good faith. King v. King, No. S23Q0105, 2023 Ga. LEXIS 100 (Ga. May 16, 2023).

Ordinary diligence necessary absent confidential relationship. — In absence of any confidential relation, fraud which tolls statute of limitations must be such fraud as could not have been discovered by the exercise of ordinary care. Middleton v. Pruden, 57 Ga. App. 555, 196 S.E. 259, 1938 Ga. App. LEXIS 335 (1938).

In absence of fiduciary relation, even fraud will not prevent action from being

barred when the plaintiff has failed to exercise reasonable diligence to detect such fraud. Stephens v. Walker, 193 Ga. 330, 18 S.E.2d 537, 1942 Ga. LEXIS 385 (1942); Bates v. Metropolitan Transit Sys., 128 Ga. App. 720, 197 S.E.2d 781, 1973 Ga. App. LEXIS 1594 (1973).

As a general rule, equity will grant no relief to one against whom an unfavorable judgment has been rendered, even in consequence of fraud, when the aggrieved party could have prevented return of such judgment by exercise of proper diligence; but this rule is not applicable when there is a confidential or fiduciary relation between the parties, in which case the law requires utmost good faith. Union Circulation Co. v. Trust Co. Bank, 143 Ga. App. 715, 240 S.E.2d 100, 1977 Ga. App. LEXIS 2475 (1977), rev'd on other grounds, 241 Ga. 343, 245 S.E.2d 297, 1978 Ga. LEXIS 940 (1978).

Fraud which tolls the statute of limitations must be such fraud as could not have been discovered by exercise of reasonable diligence, when there is no confidential or fiduciary relation existing between the parties, or other facts which will excuse a failure to act. Georgia Power Co. v. Womble, 150 Ga. App. 28, 256 S.E.2d 640, 1979 Ga. App. LEXIS 2077 (1979).

In absence of confidential relationship, type of fraud necessary to toll statute of limitation is actual fraud, involving moral turpitude, which could not have been discovered by the exercise of ordinary diligence. Comerford v. Hurley, 154 Ga. App. 387, 268 S.E.2d 358, 1980 Ga. App. LEXIS 2184, aff'd, 246 Ga. 501, 271 S.E.2d 782, 1980 Ga. LEXIS 1175 (1980).

Plaintiffs could not rely on the tolling provisions of O.C.G.A. § 9-3-96 when the plaintiffs could have discovered the fraud if the plaintiffs had exercised reasonable diligence and when no relationship of trust which would excuse the failure to exercise due diligence existed at the time the actual fraud occurred. Stricker v. Epstein, 213 Ga. App. 226, 444 S.E.2d 91, 1994 Ga. App. LEXIS 524 (1994), cert. denied, No. S94C1353, 1994 Ga. LEXIS 927 (Ga. Sept. 8, 1994).

Relation of trust and confidence may justify failure to exercise ordinary diligence. Bennett v. Bird, 139 Ga. 25, 76 S.E. 568, 1912 Ga. LEXIS 512 (1912).

Rule that, in cases of fraud, statute of limitations begins to run only from time of discovery of fraud will not apply when party affected by fraud might, with ordinary diligence, have discovered the fraud; but failure to use such diligence may be excused when there exists some relation of trust and confidence, as principal and agent, client and attorney, or cestui que trust and trustee, between the party committing the fraud and the party who is affected by it, rendering it the duty of the former to disclose to the latter the true state of the transaction, and when it appears that it was through confidence in acts of the party who committed the fraud that the other was prevented from discovering the fraud. Brown v. Brown, 209 Ga. 620, 75 S.E.2d 13, 1953 Ga. LEXIS 359 (1953).

When gravamen of action is actual fraud, failure to exercise reasonable diligence to discover the fraud may be excused if a relationship of trust and confidence exists between the parties. Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244, 1980 Ga. LEXIS 943 (1980).

Summary judgment against sellers based on the statute of limitations was denied since failure to exercise reasonable diligence to discover an alleged fraud may be excused if a relationship of trust and confidence existed between the parties and the sellers presented evidence such that a jury could determine that the purchaser was in a confidential relationship with the heirs to the land. McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548, 1992 U.S. Dist. LEXIS 631 (M.D. Ga. 1992).

Duration of confidential relationship. — Confidential relationship had to continue in order to excuse a continued failure to use diligence, as one is not necessarily expected to question the actions of a person with whom one has a confidential relationship. McLendon v. Georgia Kaolin Co., 837 F. Supp. 1231, 1993 U.S. Dist. LEXIS 16347 (M.D. Ga. 1993).

Duty to make full disclosure. — When fraudulent concealment of cause of action is in breach of confidential relation

Relationship of Parties (Cont'd)

involving duty to make full disclosure, statute does not begin to run until discovery of fraud. Lowe v. Presley, 86 Ga. App. 328, 71 S.E.2d 730, 1952 Ga. App. LEXIS 947 (1952).

Jury issue as to whether trustees fraudulently concealed breach of duty. — Because there were genuine issues as to whether the trustees fraudulently concealed their breach of fiduciary duty in selling the principal trust asset to a co-trustee at a discount through a straw man in 1979, tolling the statute of limitations, and whether the beneficiaries exercised diligence in discovering the fraud, summary judgment was improper. Smith v. SunTrust Bank, 325 Ga. App. 531, 754 S.E.2d 117, 2014 Ga. App. LEXIS 13 (2014), cert. denied, No. S14C0747, 2014 Ga. LEXIS 682 (Ga. Sept. 8, 2014).

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Trust company not "claiming under" depositor. — Trust company with whom a corporation's executive vice-president and his wife fraudulently deposited checks payable to such corporation, subsequently converting such funds, was not "claiming under" vice-president and his wife within meaning of this section, and their fraud would not be imputed to the trust company so as to toll the statute of limitations. Trust Co. Bank v. Union Circulation Co., 241 Ga. 343, 245 S.E.2d 297, 1978 Ga. LEXIS 940 (1978).

Claims brought under the Uniform Deceptive Trade Practices Act, the Georgia Uniform Limited Partnership Act, and common-law fraud were not barred by the four-year limitations period of O.C.G.A. § 9-3-31, which was tolled by the Georgia fraud discovery rule, O.C.G.A. § 9-3-96. Currie v. Cayman Resources Corp., 595 F. Supp. 1364, 1984 U.S. Dist. LEXIS 23274 (N.D. Ga. 1984), aff'd in part and rev'd in part, 835 F.2d 780, 1988 U.S. App. LEXIS 217 (11th Cir. 1988).

Statute not tolled in unjust enrichment claim when employee failed to show reliance or fraud. — Employee's claims for unjust enrichment and unpaid compensation were partially barred by the statutes of limitations; the statutes of limitations were not tolled since the employee failed to show fraud by claiming that the employee justifiably relied on the corporation's representations that the employee would be paid all the monies owed. Heretyk v. P.M.A. Cemeteries, Inc., 272 Ga. App. 79, 611 S.E.2d 744, 2005 Ga. App. LEXIS 223 (2005).

Unjust enrichment claim. — Unjust enrichment claim survived summary judgment because timeliness could not be determined as a matter of law; fact issues existed as to when an alleged fraud was discovered. Am. Pegasus SPC v. Clear Skies Holding Co., LLC, No. 1:13-CV-03035-ELR, 2015 U.S. Dist. LEXIS 189547 (N.D. Ga. Sept. 22, 2015).

Due diligence required. — Townhome buyers' fraud and Interstate Land Sales Full Disclosure Act (ILSA) claims against a seller were barred by the four-year statute of limitations for fraud, O.C.G.A. § 9-3-31, and the three-year statute of limitations for ILSA violations, 15 U.S.C. § 1711; the buyers were on notice when the closing did not take place in 2003, and certainly when the closing did not occur by 2006, that something was wrong and should have discovered any alleged violations of ILSA. Allmond v. Young, 314 Ga. App. 230, 723 S.E.2d 691, 2012 Ga. App. LEXIS 89 (2012), cert. denied, No. S12C1083, 2012 Ga. LEXIS 827 (Ga. Oct. 15, 2012).

Certain of plaintiff's claims for fraud, conversion, and breach of oral contract arose outside of the four-year statute of limitation, and the undisputed facts showed that the plaintiff did not exercise reasonable diligence in discovering the defendant's alleged fraud as to a certain account as the defendant was put on notice of the account when the defendant received two personal checks issued from that account, endorsed and cashed the checks, but never inquired as to the checks' source. Hot Shot Kids Inc. v. Pervis (In re Pervis), 497 B.R. 612, 2013 Bankr. LEXIS 3374 (Bankr. N.D. Ga. 2013).

Court did not err in dismissing the tax advisor's claims as time-barred because the advisor filed the complaint long after the limitations periods governing the fraud, breach of fiduciary duty, and Geor-

gia RICO claims expired, and the advisor had not plausibly alleged that the advisor exercised reasonable diligence in discovering the causes of action and thus could not have invoked tolling because the advisor received direct information that conflicted with the bank entities' representation that the tax shelter transactions at issue had economic substance, the advisor did not explain how the advisor exercised reasonable diligence in light of that notice, and the advisor did not explain why the advisor could not have sued earlier. Klopfenstein v. Deutsche Bank Sec., Inc., 592 Fed. Appx. 812, 2014 U.S. App. LEXIS 22077 (11th Cir. 2014).

In a business dispute, the trial court properly granted summary judgment to the defendant because the evidence plainly showed that the plaintiff was aware of the alleged breach as early as 2008 and no later than November 2009, and thus the plaintiff had a duty to exercise reasonable diligence to discover the plaintiff's cause of action within the contractual one-year period of limitation set forth in the software development agreements. N4D, LLC v. Passmore, 329 Ga. App. 565, 765 S.E.2d 717, 2014 Ga. App. LEXIS 736 (2014).

Legal malpractice. — In a legal malpractice action filed subsequent to the running of the four-year statute of limitations, since there was no evidence giving rise to factual merit in plaintiff's claim that the limitations statute was tolled due to fraud, and since there existed no justiciable issue of law as to such claim, the trial court erred in denying the defendant attorney's motion for attorney fees. Brown v. Kinser, 218 Ga. App. 385, 461 S.E.2d 564, 1995 Ga. App. LEXIS 737 (1995).

In a claim for legal malpractice sounding in tort, the plaintiff was not debarred or deterred from finding out the true facts and taking action, so as to toll the statute of limitations, when the plaintiff sought the advice of another attorney. Morris v. Atlanta Legal Aid Soc'y, Inc., 222 Ga. App. 62, 473 S.E.2d 501.

In an action for legal malpractice, it was error to grant summary judgment where there was a question of fact as to whether the attorney's conduct during the attorney's representation of the plaintiff in bankruptcy proceedings tolled the statute of limitation. Green v. White, 229 Ga. App. 776, 494 S.E.2d 681.

Statute of limitations was not tolled by O.C.G.A. § 9-3-96 after corporate shareholders sued the law firm that represented them in the sale of their corporation for malpractice in making material errors that led to a judgment against them by the purchasers, but there was no evidence that the law firm intentionally concealed the material errors, and the shareholders learned of the errors well within the applicable limitations period. Hunter, Maclean, Exley & Dunn v. Frame, 269 Ga. 844, 507 S.E.2d 411, 1998 Ga. LEXIS 821 (1998).

When the client did not file the client's legal malpractice claim within four years of the time that the attorney stopped representing the client, and the client made no argument and presented no evidence of an independent act of fraud that prevented the client from discovering the malpractice that the client alleged the attorney committed in connection with the attorney's representation of the client in a bankruptcy proceeding, the four-year legal malpractice statute of limitations was not tolled because the client did not show that the client was deterred from timely filing a legal malpractice claim. Shores v. Troglin, 260 Ga. App. 696, 580 S.E.2d 659, 2003 Ga. App. LEXIS 459 (2003).

Client's legal malpractice claim was barred by the four-year statute of limitations and was not tolled by fraud pursuant to O.C.G.A. § 9-3-96 because the client learned of the client's action against the attorney within the limitations period but still did not file suit timely. There was no evidence that the attorney deterred the client from bringing the client's action, although the attorney erred in telling the client that the statute ran from the date the client's appeal was denied rather than from the date that the attorney filed the appeal improperly. Sowerby v. Doyal, 307 Ga. App. 6, 703 S.E.2d 326, 2010 Ga. App. LEXIS 994 (2010), cert. denied, No. S11C0554, 2011 Ga. LEXIS 318 (Ga. Apr. 18, 2011).

Disputes concerning material facts precluded summary judgment for defendants

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on the statute of limitations defense when in support of their tolling argument, the plaintiffs claimed that the defendants concealed the fact that defendants did not read the transaction documents, which would have alerted them to inaccuracies in the underlying assumptions of the tax opinion. Christenbury v. Locke Lord Bissell & Liddell, LLP, No. 1:11-cv-3459-JEC, 2013 U.S. Dist. LEXIS 143648 (N.D. Ga. Aug. 22, 2013).

Georgia Court of Appeals erred in determining the taxpayers failed, as a matter of law, to exercise reasonable diligence to discover the law firm's allegedly fraudulent acts because once the IRS initiated an audit in 2005, the taxpayers did not ignore the problem and hired a law firm, which was an independent counsel with an established reputation in tax matters to assist them. Coe v. Proskauer Rose, LLP, 314 Ga. 519, 878 S.E.2d 235, 2022 Ga. LEXIS 239 (2022).

Underlying action based on malpractice. — Statute of limitations is tolled in malpractice actions when a defendant intentionally conceals an act of professional negligence from a plaintiff, causing the plaintiff to be deterred from bringing a claim. Hunter, Maclean, Exley & Dunn v. Frame, 269 Ga. 844, 507 S.E.2d 411, 1998 Ga. LEXIS 821 (1998).

In malpractice cases, the statute of limitations is tolled only upon a showing of a separate independent actual fraud involving moral turpitude that deters a plaintiff from filing suit. Before the running of the statute will toll, it must be shown that the defendant concealed information by an intentional act, which is something more than a mere failure, with fraudulent intent to disclose such conduct, unless there is on the party committing such wrong a duty to make a disclosure thereof by reason of facts and circumstances, or the existence between the parties of a confidential relationship. Hunter, Maclean, Exley & Dunn v. Frame, 269 Ga. 844, 507 S.E.2d 411, 1998 Ga. LEXIS 821 (1998).

In a legal malpractice action, the plaintiff failed to satisfy the elements of fraud necessary to toll the statute since the plaintiff could point to no specific misrepresentations that misled or deterred the suit and only contended that failure to disclose was sufficient during the existence of the confidential relationship. Douglas Kohoutek, Ltd. v. Hartley Rowe & Fowler, P.C., 247 Ga. App. 422, 543 S.E.2d 406, 2000 Ga. App. LEXIS 1429 (2000), cert. denied, No. S01C0610, 2001 Ga. LEXIS 498 (Ga. June 12, 2001).

Concealment in doctor-patient relationship. — When there is a confidential relationship between the physician and a patient, concealment of facts constitutes actual fraud and tolls the statute of limitations. Breedlove v. Aiken, 85 Ga. App. 719, 70 S.E.2d 85, 1952 Ga. App. LEXIS 819 (1952).

When the parties in a case are in a confidential relationship as between a physician and a patient, there is no requirement that actual fraud be shown in order to come within the purview of O.C.G.A. § 9-3-96 to toll the applicable statute of limitation. Lorentzson v. Rowell, 171 Ga. App. 821, 321 S.E.2d 341, 1984 Ga. App. LEXIS 2344 (1984), modified, aff'd, 254 Ga. 111, 327 S.E.2d 221, 1985 Ga. LEXIS 647 (1985).

Question of the actual existence of fraud for failure on the part of a physician to disclose problems following an operation, as well as the question of plaintiffs' diligence in discovering the injury and the fraudulent concealment, are for the jury. Quattlebaum v. Cowart, 182 Ga. App. 473, 356 S.E.2d 91, 1987 Ga. App. LEXIS 1708 (1987).

Facts raised an issue of fraud for jury determination which, if found, would estop a dentist from raising the defense of the statute of repose, when it was alleged that the dentist failed to inform a patient of an impacted tooth and that the dentist stated that the patient's pain was caused by bone slivers. Hill v. Fordham, 186 Ga. App. 354, 367 S.E.2d 128, 1988 Ga. App. LEXIS 366 (1988).

Statute of limitation was not tolled by defendant physician's alleged fraud, since the record contained nothing to suggest plaintiff was prevented from learning of the defendant's alleged negligence in treating the plaintiff's leg fracture. Padgett v. Klaus, 201 Ga. App. 399, 411 S.E.2d 126, 1991 Ga. App. LEXIS 1343 (1991).

Summary judgment pursuant to O.C.G.A. § 9-11-56 was properly granted to physicians in a patient and the spouse's medical malpractice action against them, wherein the patient claimed that the patient had sustained radiation damage to the patient's arm which the doctors did not reveal until the expiration of the limitations period of O.C.G.A. § 9-3-71(a); however, the record revealed that the physicians had repeatedly informed the patient that such damage was one of the possible causes of the patient's arm pain and there was no fraud found on their part which would have extended the time period pursuant to O.C.G.A. § 9-3-96. Price v. Currie, 260 Ga. App. 526, 580 S.E.2d 299, 2003 Ga. App. LEXIS 421 (2003).

Plaintiffs' malpractice claims were not tolled by O.C.G.A. § 9-3-96 and thus were time-barred by O.C.G.A. § 9-3-71; plaintiffs, whose vision had deteriorated after laser surgery, had not shown that the defendants' alleged fraud prevented them from knowing of their claims at the time when each consulted other specialists about their vision problems. Gibson v. Thompson, 283 Ga. App. 705, 642 S.E.2d 366, 2007 Ga. App. LEXIS 162 (2007).

Evidence that a nurse-midwife, hospital, and medical practice deliberately misrepresented and withheld information concerning a baby's condition before and just after the baby's birth was sufficient to create a jury question as to whether they committed fraud sufficient to toll the statute of limitations and estop the application of the statute of repose, O.C.G.A. § 9-3-71(a), pursuant to O.C.G.A. § 9-3-96. Wilson v. Obstetrics & Gynecology of Atlanta, P.C., 304 Ga. App. 300, 696 S.E.2d 339, 2010 Ga. App. LEXIS 475 (2010), cert. denied, No. S10C1642, 2010 Ga. LEXIS 802 (Ga. Oct. 18, 2010), cert. denied, No. S10C1641, 2010 Ga. LEXIS 791 (Ga. Oct. 18, 2010).

Trial court did not err in granting a doctor's motion for judgment on the pleadings on the ground that a patient failed to file a medical malpractice complaint within the two-year period of limitation for medical malpractice claims pursuant to O.C.G.A. § 9-3-71(a) because the limitation period did not remain tolled due to the doctor's alleged fraudulent statements; the doctor's assertion that the doctor had not done anything wrong did not prevent the patient from asking any of the doctors that treated the patient over the next several months about what could have caused a needle to break in the patient's cheek. Pryce v. Rhodes, 316 Ga. App. 523, 729 S.E.2d 641, 2012 Ga. App. LEXIS 603 (2012), cert. denied, No. S12C1785, 2013 Ga. LEXIS 223 (Ga. Mar. 4, 2013).

Concealment by employer's physician. — Because it was undisputed that, in 1994, plaintiff former flight attendant knew defendant doctor was the medical review officer for the employer and that the doctor had received a lab report that the sample was unsuitable, and it was also undisputed that, in 1993, the doctor told the attendant there was a problem with the test and the attendant was fired 6 weeks later due to the test, the attendant knew, 7 years before filing suit, that the attendant had suffered an injury and that the doctor was involved; thus, there was insufficient evidence of fraudulent concealment for equitable tolling under O.C.G.A. § 9-3-96. Drake v. Whaley, 355 Fed. Appx. 315, 2009 U.S. App. LEXIS 26415 (11th Cir. 2009).

Fraud in medical misdiagnosis. — In a suit for medical malpractice, a fraud count must be based on more than evidence of a misdiagnosis to withstand a motion for judgment on the pleadings. Rather, the patient must present evidence of a known failure to reveal negligence in order to show fraud. Rowell v. McCue, 188 Ga. App. 528, 373 S.E.2d 243, 1988 Ga. App. LEXIS 1076 (1988).

Since plaintiff knew the plaintiff's spouse died of a heart attack, a doctor's attribution of the cause to a heart murmur rather than cardiomyopathy did not constitute sufficient evidence of fraud to create a jury question on whether the defendant was equitably estopped from raising the defense of the statute of repose. Hutcherson v. Obstetric & Gynecologic Assocs., 247 Ga. App. 685, 543 S.E.2d 805, 2000 Ga. App. LEXIS 1473 (2000).

Specificity of physician's admission that surgery unsuccessful. — Statute of limitations is not tolled on grounds of fraudulent concealment against a physi-

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cian when the physician informs the patient that surgery had been unsuccessful, even though the physician did not inform the patient of the specific complication. Cannon v. Smith, 187 Ga. App. 434, 370 S.E.2d 529, 1988 Ga. App. LEXIS 719 (1988).

Dental malpractice. — Appellate court properly reversed the grant of summary judgment to a dentist because the statutory period of limitation was tolled where the second dentist the patient consulted provided professional services to the patient jointly with the first. Gallant v. MacDowell, 295 Ga. 329, 759 S.E.2d 818, 2014 Ga. LEXIS 490 (2014).

Although an oral surgeon told a dental patient that the reconstruction process was taking too long and that the patient's reconstruction was too narrow, material issues of fact remained as to whether the surgeon's communications gave the patient actual notice of the dentist's malpractice and fraudulent concealment for purposes of the statute of limitations. MacDowell v. Gallant, 344 Ga. App. 856, 811 S.E.2d 513, 2018 Ga. App. LEXIS 144 (2018), cert. denied, No. S18C0963, 2018 Ga. LEXIS 626 (Ga. Aug. 27, 2018).

Two-year period of incontestibility in a health insurance policy was not tolled by the insured's fraudulent misrepresentations on the application and subsequent failure to file claims for more than two years. Blue Cross & Blue Shield of Ga., Inc. v. Sheehan, 215 Ga. App. 228, 450 S.E.2d 228, 1994 Ga. App. LEXIS 1175 (1994), cert. denied, No. S95C0418, 1995 Ga. LEXIS 447 (Ga. Feb. 23, 1995).

Disability insurance limitation period not tolled. — Trial court did not err in failing to find that the six-year statute of limitation contained in O.C.G.A. § 9-3-24 tolled under O.C.G.A. § 9-3-96 in a retirement plan participant's breach of contract action, which was related to the denial of the participant's claim for disability benefits, because the participant was aware of the facts that the participant contended gave rise to the participant's claim for disability benefits: the fact of the participant's disability, and the fact that the participant received a Social Security award; even if a hospital authority employees retirement plan had a duty to notify the participant when the participant became entitled to pursue a disability claim under the retirement plan. There was no evidence that the plan was aware that the participant had begun receiving Social Security benefits, thereby triggering the participant's eligibility for the disability benefits. Paschal v. Fulton-DeKalb Hosp. Auth. Emples. Ret. Plan, 305 Ga. App. 6, 699 S.E.2d 357, 2010 Ga. App. LEXIS 661 (2010), cert. denied, No. S10C1888, 2011 Ga. LEXIS 72 (Ga. Jan. 24, 2011).

When prospective purchaser not prevented from discovering discrepancy in lot numbers. — When a prospective property purchaser sees a specific lot number and decides to purchase the lot, only to discover later that both the closing agreement and the warranty deed identify the purchased property as a different lot number, but the purchaser was not prevented or deterred by any act of the seller from discovering the difference in lot numbers, O.C.G.A. § 9-3-96 is not applicable. Kerce v. Bent Tree Corp., 166 Ga. App. 728, 305 S.E.2d 462, 1983 Ga. App. LEXIS 2311 (1983).

Burglars' concealment of their identities as perpetrators did not toll statute of limitation. — Action that was filed in 1999 by two property owners against three alleged burglars to recover money which was stolen in 1993 was barred by the four-year statute of limitation of O.C.G.A. § 9-3-32 because the burglars' concealment of their identities as the perpetrators by making threats against those to whom they had admitted their guilt or by denying their involvement to others did not constitute concealment of the existence of the cause of action for purposes of tolling the statute of limitation under O.C.G.A. § 9-3-96. Stewart v. Warner, 257 Ga. App. 322, 571 S.E.2d 189, 2002 Ga. App. LEXIS 1144 (2002).

Statement made after running of statute did not support tolling. — Since the homeowner did not become the owner of the house until after the tort and contract statutes of limitation had run, the homeowner was not allowed to revive those causes of action against the builder

of the house based on alleged faulty construction of the house; all representations allegedly by the builder made after the cause of action arose took place after the statutes of limitation had expired and thus did not support equitable tolling. Bauer v. Weeks, 267 Ga. App. 617, 600 S.E.2d 700, 2004 Ga. App. LEXIS 733 (2004).

Ordinary care. — Relative to fraud which gives cause of action, during period fixed by statute of limitations plaintiff can rely upon representations of defendant and take the representations at full face value; but as fraud which conceals cause of action, that is, fraud that "debars or deters," referred to in this section, is not limited to any time save time of discovery, plaintiff cannot rely unqualifiedly upon such representations, but must exercise ordinary care to discover the fraud. Middleton v. Pruden, 57 Ga. App. 555, 196 S.E. 259, 1938 Ga. App. LEXIS 335 (1938).

Fraud that "debars or deters," referred to in this section, not being limited to any time save time of discovery, the plaintiff cannot rely unqualifiedly upon representations, but must exercise ordinary care to discover the fraud. Clinton v. State Farm Mut. Auto. Ins. Co., 110 Ga. App. 417, 138 S.E.2d 687, 1964 Ga. App. LEXIS 654 (1964) (For comment, see 1 Ga. St. B.J. 553 (1965)).

Equitable estoppel. — Fraud under O.C.G.A. § 9-3-96 does not toll the statute of repose; however, if the evidence of defendant's fraud or other conduct on which the plaintiff reasonably relied in forbearing the bringing of a lawsuit is found by the jury to exist, then the defendant is estopped from raising the defense of the statute of ultimate repose. Esener v. Kinsey, 240 Ga. App. 21, 522 S.E.2d 522.

Secretion of property may constitute fraud which will relieve bar of statute of limitations. Burts v. Duncan, 36 Ga. 575, 1867 Ga. LEXIS 96 (1867).

Concealment as actual fraud. — Concealment of a right by one whose duty it is to disclose it prevents running of statute of limitations. Hoyle v. Jones, 35 Ga. 39, 35 Ga. 40, 1866 Ga. LEXIS 155 (1866); Southern Feed Stores v. Sanders, 193 Ga. 884, 20 S.E.2d 413, 1942 Ga. LEXIS 497 (1942).

Concealment per se amounts to actual fraud when for any reason one party has right to expect full communication of facts from another. Morris v. Johnstone, 172 Ga. 598, 158 S.E. 308, 1931 Ga. LEXIS 155 (1931); Breedlove v. Aiken, 85 Ga. App. 719, 70 S.E.2d 85, 1952 Ga. App. LEXIS 819 (1952); Comerford v. Hurley, 154 Ga. App. 387, 268 S.E.2d 358, 1980 Ga. App. LEXIS 2184, aff'd, 246 Ga. 501, 271 S.E.2d 782, 1980 Ga. LEXIS 1175 (1980).

Knowledge of cause of action. — Even if the county school district fraudulently concealed matters pertaining to the child's condition so as to toll the two-year limitations period, the parents had actual knowledge of the child's condition and the tolling stopped. Accordingly, the child's claim for fraudulent concealment had to be asserted within two years of the time the parents had knowledge in order to not be barred by the two-year statute of limitations. DeKalb County Sch. Dist. v. J.W.M., 445 F. Supp. 2d 1371, 2006 U.S. Dist. LEXIS 58912 (N.D. Ga. 2006).

Shareholder cannot turn a blind eye on available information, and when a general ledger contained information concerning the subject of plaintiff shareholder's complaint, the statute of limitations was not tolled because the plaintiff failed to acquire that knowledge. Averill v. Akin, 219 Ga. App. 32, 463 S.E.2d 730, 1995 Ga. App. LEXIS 947 (1995).

Concealment by law firm. — Actions of a law firm in assuring the firm's client that an enforceable option existed, and continuing to represent the client in a breach of contract action, since the law firm had failed to include a negotiated option to purchase in the final contract, constituted such concealment as would toll the statute of limitations in a legal malpractice action. Arnall, Golden & Gregory v. Health Serv. Ctrs., Inc., 197 Ga. App. 791, 399 S.E.2d 565, 1990 Ga. App. LEXIS 1490 (1990).

Insured's complaint rejected. — Summary judgment was properly granted for the insurer because the insured's complaint fell outside the four-year statute of limitation for fraud and negligent misrepresentation claims. Nash v. Ohio Nat'l Life

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Ins. Co., 266 Ga. App. 416, 597 S.E.2d 512, 2004 Ga. App. LEXIS 396 (2004).

Abuse of power of attorney in handling farm quotas. — In a dispute involving a family farm partnership, the trial court erred by granting summary judgment to the children/grandchildren as to the claim regarding the peanut and tobacco quotas and assignments because certain claims were not untimely since genuine issues of fact existed as to whether a son inappropriately used a power of attorney as to the quotas and assignments and the father/grandfather sought to recover damage to personalty. Godwin v. Mizpah Farms, LLLP, 330 Ga. App. 31, 766 S.E.2d 497, 2014 Ga. App. LEXIS 808 (2014).

Putative heir's action seeking an order opening the father's intestate estate was subject to the three-year statute of limitations contained in O.C.G.A. § 9-11-60(f); the action was untimely because the action was filed more than three years after the probate court issued an order discharging the decedent's widow as administrator and the heir did not provide evidence sufficient to show that the statute of limitations should be tolled pursuant to O.C.G.A. § 9-3-96 because the widow fraudulently kept the heir from learning that she filed a petition seeking letters allowing her to administer her husband's estate. Moore v. Mack, 266 Ga. App. 847, 598 S.E.2d 525, 2004 Ga. App. LEXIS 419 (2004), cert. dismissed, No. S04C1434, 2004 Ga. LEXIS 786 (Ga. Sept. 8, 2004).

Recording of deeds is merely one circumstance bearing on whether and when fraud was or should have been discovered. Jones v. Spindel, 239 Ga. 68, 235 S.E.2d 486, 1977 Ga. LEXIS 819 (1977).

Fraud action in real property transaction time barred. — Seller's fraud claim against buyers was time-barred because the evidence was undisputed that more than four years passed between when the seller became aware that two parcels had been conveyed to the buyers, not just one, as the seller believed. Serchion v. Capstone Partners, Inc., 298 Ga. App. 73, 679 S.E.2d 40, 2009 Ga. App. LEXIS 509 (2009), cert. denied, No. S09C1642, 2009 Ga. LEXIS 781 (Ga. Nov. 9, 2009).

Fraud on part of debtor, by which creditor is debarred or deterred from instituting action, and which deprives debtor of right to insist upon statute of limitations, as provided in this section, must be actual fraud involving moral turpitude, and must have effect of depriving or deterring creditor from action. Carnes v. Bank of Jonesboro, 58 Ga. App. 193, 198 S.E. 338, 1938 Ga. App. LEXIS 225 (1938), aff'd, 187 Ga. 795, 2 S.E.2d 495, 1939 Ga. LEXIS 768 (1939).

Promises of bank officer to pay note owed bank. — Mere fact that debtor as surety on promissory note was one of directors and officer of payee bank, and that the debtor had assured other directors and officers, both before and after note was barred, that the debtor would pay the debt, is not sufficient to estop executors from pleading statute of limitations as bar to action on such note, since it does not appear that the debtor had practiced any fraud or deception on the bank, or that the debtor had made any misrepresentations to the bank save oral promises to pay. Bank of Jonesboro v. Carnes, 187 Ga. 795, 2 S.E.2d 495, 1939 Ga. LEXIS 768 (1939).

Negligence of bank directors. — This section was not applicable to action by receiver for misconduct and negligence of directors of national bank in making and handling loans. Anderson v. Gailey, 33 F.2d 589, 1929 U.S. Dist. LEXIS 1331 (D. Ga. 1929).

Borrower's fraud claim against lenders. — Plaintiff borrower's fraud claims against defendant lenders, in connection with an alleged long-term tax-favorable loan failed under O.C.G.A. § 9-3-31's four year statute of limitations because the limitations period began when the assumption agreement was signed but suit was not filed until almost six years later, and, at the very latest, if O.C.G.A. § 9-3-96 applied to toll the limitations period, the statute of limitations began to run nearly five years earlier when repayment was demanded only one year after the loan was made. Curtis Inv. Co., LLC v. Bayerische Hypo-Und Verein-

sbank, AG, 341 Fed. Appx. 487, 2009 U.S. App. LEXIS 17469 (11th Cir. 2009).

Directors of corporation who fraudulently induce persons to subscribe for stock are not trustees of such persons. Frost v. Arnaud, 144 Ga. 26, 85 S.E. 1028, 1915 Ga. LEXIS 25 (1915).

Relationship to bankruptcy law. — Creditor's nondischargeability claim was barred as the creditor's claim had expired under Georgia's statute of limitations for fraud claims and the creditor's first attempt to assert the creditor's rights came two months after the 30-day extension provided in the Bankruptcy Code had closed. Wilcox v. Dopson (In re Dopson), No. 17-51476-JRS, No. 18-05020-JRS, 2018 Bankr. LEXIS 2620 (Bankr. N.D. Ga. Aug. 29, 2018).

Fraud and concealment of public official. — When public official is not only guilty of intentional breach of public duty, but is also guilty of fraud and concealment in connection with public moneys, statute of limitations begins at expiration of the official's term of office. Gwinnett County v. Archer, 102 Ga. App. 821, 118 S.E.2d 102, 1960 Ga. App. LEXIS 758 (1960).

Statute of limitation does not begin to run against public official for fraud coupled with concealment thereof until fraud is discovered. Archer v. Gwinnett County, 110 Ga. App. 469, 138 S.E.2d 892, 1964 Ga. App. LEXIS 671 (1964).

Collusion of trustee to defraud beneficiary. — When trustee colludes with third person to defraud cestui que trust, statute of limitations does not begin to run until after fraud is discovered. Walker v. Walker, 25 Ga. 76, 1858 Ga. LEXIS 18 (1858).

Fraud of administrators. — When receipt in full is given by heir at law to administrators of estate in consequence of fraudulent conduct and misrepresentations of administrators, statute of limitations will run only from discovery of fraud. Morris v. Johnstone, 172 Ga. 598, 158 S.E. 308, 1931 Ga. LEXIS 155 (1931).

Fraud by former land manager. — Partnership's claims against its former managing partner with regard to a land deal and with regard to alleged mismanagement were not tolled by O.C.G.A. § 9-3-96; there was no evidence that the former partner concealed or failed to disclose information that deterred any partner from deciding if the partnership had claims arising from the purchase, and the partners were sophisticated business people who were put on notice of the former partner's alleged mismanagement as early as 1990. Cochran Mill Assocs. v. Stephens, 286 Ga. App. 241, 648 S.E.2d 764, 2007 Ga. App. LEXIS 764 (2007).

Failure of gas company to inform owner who had paid for extension that certain consumers had been taken on the extension, was fraud which deterred owner from action on contract, and period of limitation within which owner could bring action on amount due under contract by reason of taking on of consumers ran from time when the consumer discovered the gas company's fraud. Macon Gas Co. v. Crockett, 58 Ga. App. 361, 198 S.E. 267, 1938 Ga. App. LEXIS 254 (1938).

Failure to review legal bills. — Appellants' claims for alleged fraudulent billing for legal work billed before the date a fee award was approved by a federal district court were not tolled under O.C.G.A. § 9-3-96; it was error to hold that fees associated with appellate work were time-barred, however, as the evidence did not establish that the alleged fraud as to this work, which was not included in the bills submitted to the district court, occurred outside the limitation period as a matter of law. Falanga v. Kirschner & Venker, P.C., 286 Ga. App. 92, 648 S.E.2d 690, 2007 Ga. App. LEXIS 703 (2007).

Mere statements by attorney to effect that documents which the attorney had prepared were legally sufficient are not sufficient to establish fraud required to toll statute of limitation pursuant to this section. Riddle v. Driebe, 153 Ga. App. 276, 265 S.E.2d 92, 1980 Ga. App. LEXIS 1770 (1980).

Opinions held insufficient to support fraudulent concealment. — Statements made to investors to the effect that counsel were working to recover misappropriated assets, which would be used to repay the investors, were essentially opinions that did not support fraudulent concealment so as to toll the statute of limitations governing actions under the Georgia securities law. Barton v. Peterson,

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733 F. Supp. 1482, 1990 U.S. Dist. LEXIS 3727 (N.D. Ga. 1990).

Evidence did not show that a limited liability company (LLC) which bought land from a city in 1994 and agreed to pay $125,000 for the land and an additional one percent of its profits up to $1 million did anything to conceal its profitability or business plans from the city at the time it bought the land, and the trial court ruled correctly that a claim alleging fraudulent concealment which the city filed after the LLC paid $125,000 but no more because it did not make a profit was governed by the four-year statute of limitation and that the statute of limitations was not tolled by O.C.G.A. § 9-3-96 because there was no evidence of fraudulent concealment, and that the city's claim was time-barred. City of McCaysville v. Cardinal Robotics, LLC, 263 Ga. App. 847, 589 S.E.2d 614, 2003 Ga. App. LEXIS 1348 (2003), cert. denied, No. S04C0498, 2004 Ga. LEXIS 226 (Ga. Mar. 1, 2004).

When unskillfulness and neglect in agent is cause of action, unskillful act itself sets statute in motion, not occurrence of special damage, and ignorance of it by plaintiff is not important. Anderson v. Gailey, 33 F.2d 589, 1929 U.S. Dist. LEXIS 1331 (D. Ga. 1929).

Surveyor's alleged statements to home buyers that the survey was correct constituted mere statements of opinion, which were not sufficient to establish the fraud required to toll the statute of limitation. Forsyth v. Jim Walter Homes, Inc., 177 Ga. App. 353, 339 S.E.2d 350, 1985 Ga. App. LEXIS 2608 (1985).

To establish passive concealment by the seller of defective realty, the purchaser must prove that the concealment was an act of fraud and deceit, that the defect could not have been discovered by the purchaser by the exercise of due diligence, and that the seller was aware of the defect and did not disclose the defect. Wilson v. Phillips, 230 Ga. App. 290, 495 S.E.2d 904.

In action based on breach of an oral agreement which provided that plaintiff and defendant would be joint owners of any patent issued for the apparatus in question, the breach occurred when the defendant executed the patent application naming the defendant as the sole inventor, but the statute of limitations was not tolled by fraud since the defendant had no duty to disclose the defendant's actions to the plaintiff, the plaintiff having previously terminated the plaintiff's association with defendant. Palmer v. Neal, 602 F. Supp. 882, 1984 U.S. Dist. LEXIS 18441 (N.D. Ga. 1984).

Defendant's repeated promises to repair windows. — When plaintiffs asserted that the property damage claim was not time-barred because the statute of limitation was tolled by the defendant's alleged repeated promises to repair or replace the windows, there was no allegation of the type of fraud necessary to stop the clock from running as to plaintiff's claim for property damage and thus to save the property damage count from the dismissal. Kemp v. Bell-View, Inc., 179 Ga. App. 577, 346 S.E.2d 923, 1986 Ga. App. LEXIS 1949 (1986).

In action for conversion of plaintiff's property interest in a patent, when the plaintiff ended the plaintiff's association with the defendant prior to the defendant's filing the patent application without the plaintiff's name, the defendant had no duty to disclose the defendant's actions to the plaintiff, and therefore there was no basis for tolling the statute of limitations for fraud. Palmer v. Neal, 602 F. Supp. 882, 1984 U.S. Dist. LEXIS 18441 (N.D. Ga. 1984).

Concealment of sewer line damage. — Placement of a tin covering over a damaged sewer line in the course of phone company equipment installation was a positive and affirmative act of intentional concealment of damage and amounted to fraud which tolled the running of the statute until the fraud's discovery. Fleming v. Lee Eng'g & Constr. Co., 184 Ga. App. 275, 361 S.E.2d 258, 1987 Ga. App. LEXIS 2230 (1987).

Concealment by accounting firm. — In a negligent misrepresentation case wherein a trustee obtained a $10 million verdict against an accounting firm, the evidence authorized the jury to find that the firm's fraud prevented the trustees from discovering the trusts' cause of ac-

tion until January 2002, despite reasonable diligence and, therefore, the claim was properly filed within four years after the beginning of the limitation period. PricewaterhouseCoopers, LLP v. Bassett, 293 Ga. App. 274, 666 S.E.2d 721, 2008 Ga. App. LEXIS 876 (2008).

Statute not applicable to notice of appeal in condemnation action. — O.C.G.A. § 32-3-14 sets forth a mandatory time period for filing an appeal in a condemnation action, not a statute of limitation for commencing a particular type of action; thus, O.C.G.A. § 9-3-96 did not apply to extend a property owner's time for filing an appeal. Moreover, the owner did not show that the Department of Transportation committed actual fraud involving moral turpitude or that the owner itself exercised reasonable diligence. Cedartown North P'ship, LLC v. Ga. DOT, 296 Ga. App. 54, 673 S.E.2d 562, 2009 Ga. App. LEXIS 118 (2009).

Equitable tolling disallowed in action concerning excessive notary fee. — In an action by borrowers claiming that the lender defrauded the borrowers by charging an excessive notary fee, the district court did not err in dismissing, on statute of limitations grounds, the fraud claim, which was brought more than five years after the borrowers signed the loan agreement because, even assuming the lender's conduct constituted actual fraud, Georgia's Supreme Court, in response to a certified question, declined to allow equitable tolling because the borrowers could have discovered the discrepancy between the notary fee statute and the actual fee charged at any time by simple reference to the notary fee statute. Anthony v. Am. Gen. Fin. Servs., 626 F.3d 1318, 2010 U.S. App. LEXIS 24446 (11th Cir. 2010).

Statute of limitations not tolled in application of proceeds case. — Even assuming that a confidential relationship existed between the parties, it would not have tolled the statute of limitations on plaintiffs' claims under Georgia law because the plaintiffs were already aware as of at least November 2005 that the defendants did not plan to distribute the proceeds of a sale equally to the plaintiffs and the defendants, but instead planned to apply the proceeds to the preexisting debts of one of the plaintiffs' entities. HealthPrime, Inc. v. Smith/Packett/Med/Com, LLC, 428 Fed. Appx. 937, 2011 U.S. App. LEXIS 11324 (11th Cir. 2011).

Statute of limitations not tolled against county. — In a landfill's suit against a county and the county's commission asserting an open meetings violation, neither the landfill's complaint nor the landfill's brief on appeal alleged with any particularity that the county commission made any fraudulent statements or representations or that the commission committed any fraudulent actions; thus, the trial court did not err in finding that the landfill could not avail itself of the tolling provisions of O.C.G.A. § 9-3-96. Sweet City Landfill, LLC v. Lyon, 352 Ga. App. 824, 835 S.E.2d 764, 2019 Ga. App. LEXIS 648 (2019), cert. denied, No. S20C0514, 2020 Ga. LEXIS 502 (Ga. June 29, 2020).

Statute of limitations not tolled in scouting abuse case. — In the six plaintiffs' lawsuit alleging sexual abuse by two scoutmasters, whose troop meetings were hosted on the churches' property from the 1950s to the 1980s, the statutes of limitation were not tolled by fraudulent concealment based on the fact that the churches knew about the sexual abuse by the scoutmaster but concealed that knowledge from the plaintiffs because the plaintiffs were aware at that time that the church had breached its duties to the plaintiffs; and the churches' alleged conduct in tolerating that abuse and keeping the abuse secret from the public and parishioners did not, as a legal matter, debar the plaintiffs from pursuing their tort claims. McArthur v. Beech Haven Baptist Church of Athens, 361 Ga. App. 877, 864 S.E.2d 189, 2021 Ga. App. LEXIS 517 (2021).

Fraud not shown. — Four-year statute of limitations applicable to accountant malpractice actions, O.C.G.A. § 9-3-25, was not tolled by fraud pursuant to O.C.G.A. § 9-3-96 because there was no evidence that the accountant concealed or failed to disclose information that deterred the client from filing suit within the limitation period; the accountant consistently and truthfully informed the client that the tax return was not complete. Bryant v. Golden, 302 Ga. App. 760, 691 S.E.2d 672, 2010 Ga. App. LEXIS 234 (2010).

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Property owners' argument that a utility defrauded the owners by claiming that the utility had no easement and no plan to enter the owners' property again did not toll the owners' claims relating to the entry of the owners' property because the trespass was completed and would not recur, and no matter what, the utility could not put back the trees and vegetation the utility had clear-cut, so the conversion was complete. There was no allegation, much less evidence, that the utility misled the owners as to a damages action. Daniel v. Amicalola Elec. Mbrshp. Corp., 289 Ga. 437, 711 S.E.2d 709, 2011 Ga. LEXIS 507 (2011).

Claim for pain and suffering was time barred under O.C.G.A. § 9-3-33 because O.C.G.A. § 9-3-96 failed to provide any tolling based on fraud since the very act of hiring a hit man to commit murder was not a separate and distinct fraud to support a finding of fraudulent concealment or actual fraud in and of itself in favor of the administrator of the victim's estate. Rai v. Reid, 294 Ga. 270, 751 S.E.2d 821, 2013 Ga. LEXIS 1002 (2013).

Trial court properly granted summary judgment to an ex-husband as to the ex-wife's and mother's action to set aside or modify a divorce decree because they did not present evidence that the ex-husband committed any act of fraud concealing any act as there was no genuine issue of material fact that the former spouses did not own any real estate at the time of their divorce and that they knowingly remained together even after the divorce. Robertson v. Robertson, 333 Ga. App. 864, 778 S.E.2d 6, 2015 Ga. App. LEXIS 549 (2015).

RESEARCH REFERENCES

Am. Jur. 2d.

37 Am. Jur. 2d, Fraud and Deceit, § 463 et seq. 51 Am. Jur. 2d, Limitation of Actions, § 164 et seq.

Am. Jur. Proof of Facts.

Proving Fraudulent Concealment to Toll Statutory Limitations Periods, 32 POF3d 129.

C.J.S.

54 C.J.S., Limitation of Actions, §§ 76, 268 et seq., 398 et seq.

ALR.

Applicability of nonclaim statute in case of misappropriation or fraudulent breach of trust by decedent, 41 A.L.R. 169.

When statute of limitations or laches commences to run against action to set aside conveyance or transfer in fraud of creditors, 76 A.L.R. 864; 100 A.L.R.2d 1094.

Fraud of judgment debtor in concealing assets or misrepresenting his financial condition as affecting failure to issue execution or revive judgment within the statutory period or as ground of action for fraud and deceit causing loss of legal remedy on the judgment, 104 A.L.R. 214.

Time when limitation commences to run against action at law or in equity based on fraud inducing execution of contract or conveyance as affected by time when actual damages resulted, 110 A.L.R. 1178.

When action considered to be one on contract rather than one for fraud as regards statute of limitations, 114 A.L.R. 525.

Concealment of fact that party to contract was acting for undisclosed principal as fraud which will toll statute of limitations, 114 A.L.R. 864.

Time when statute of limitation commences to run in favor of indorser of paper upon which prior indorsement was forged, 117 A.L.R. 1164.

Presumption and burden of proof as to discovery of mistake or fraud for purposes of statutory provision or rule that limitation does not begin to run against action based on mistake or fraud, until discovery of the mistake or fraud, 118 A.L.R. 1002.

Expiration of time within which action could have been brought on original cause of action, if not released, as bar to action which seeks to avoid release because of fraud or mistake and recover on original cause or for loss of value of original cause, 120 A.L.R. 1500.

Nonexhaustion of other legal remedies that might obviate, or make certain amount of, actual damage from fraud as suspending running of limitation against action based on fraud, 128 A.L.R. 762.

Public records as notice of facts starting

running of statute of limitations against action based on fraud, 137 A.L.R. 268.

When statute of limitations commences to run against action based on fraud in construction, repair, or equipment of building, 150 A.L.R. 778.

Insurer's denial of liability as suspending running of statute of limitation or limitation provision of policy, 171 A.L.R. 577.

Pleading avoidance of delay in discovery of fraud in order to toll statute of limitations, 172 A.L.R. 265.

What constitutes concealment which will prevent running of statute of limitations, 173 A.L.R. 576.

Right of creditor to set aside transfer of property as fraudulent as affected by the fact that his claim is barred by statute of limitation, 14 A.L.R.2d 598.

When statute of limitations commences to run against malpractice action against physician, surgeon, dentist, or similar practitioner, 80 A.L.R.2d 368; 70 A.L.R.3d 7.

When statute of limitations or laches commences to run against action to set aside fraudulent conveyance or transfer in fraud of creditors, 100 A.L.R.2d 1094.

Application of statute of limitations to damage actions against public accountants for negligence in performance of professional services, 26 A.L.R.3d 1438.

Fraud and deceit: liability in damages for preventing bringing of action before its being barred by statute of limitations, 33 A.L.R.3d 1077.

Fraud, misrepresentation, or deception as estopping reliance on statute of limitations, 43 A.L.R.3d 429.

Agreement of parties as estopping reliance on statute of limitations, 43 A.L.R.3d 756.

Promises to settle or perform as estopping reliance on statute of limitations, 44 A.L.R.3d 482.

Plaintiff's diligence as affecting his right to have defendant estopped from pleading the statute of limitations, 44 A.L.R.3d 760.

When statute of limitations commences to run against malpractice action based on leaving foreign substance in patient's body, 70 A.L.R.3d 7.

Statute of limitations: running of statute of limitations on products liability claim against manufacturer as affected by plaintiff's lack of knowledge of defect allegedly causing personal injury or disease, 91 A.L.R.3d 991.

When statute of limitations begins to run upon action against attorney for malpractice, 32 A.L.R.4th 260.

Application of statute of limitations to actions for breach of duty in performing services of public accountant, 7 A.L.R.5th 852.

When statute of limitations begins to run upon action against attorney for legal malpractice — deliberate wrongful acts or omissions, 67 A.L.R.5th 587.

Attorney malpractice — tolling or other exceptions to running of statute of limitations, 87 A.L.R.5th 473.

9-3-97. Limitations extended for counterclaims and cross-claims.

The limitations of time within which various actions may be commenced and pursued within this state to enforce the rights of the parties are extended, only insofar as the enforcement of rights which may be instituted by way of counterclaim and cross-claim, so as to allow parties, up to and including the last day upon which the answer or other defensive pleadings should have been filed, to commence the prosecution and enforcement of rights by way of counterclaim and cross-claim, provided that the final date allowed by such limitations for the commencement of such actions shall not have expired prior to filing of the main action.

History.
Ga. L. 1964, p. 165, § 1; Ga. L. 1967, p. 226, § 37.
Cross references.
Counterclaims and cross-claims generally, § 9-11-13.

Law reviews.
For article, "The 1967 Amendments to the Georgia Civil Practice Act and the Appellate Procedure Act," see 3 Ga. St. B.J. 383 (1967).

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Counterclaim timely filed. — Counterclaim was timely if filed within the time that a party was obligated to answer the main action as long as the limitations period for the counterclaim had not expired before the main action was filed. When both the main action against a truck driver and the truck driver's third party complaint against an injured person were filed within the two year statute of limitations period, the injured person's personal injury counterclaim against the truck driver was not barred even though it was filed beyond the two year period, and the trial court erred in dismissing the counterclaim. Harpe v. Hall, 266 Ga. App. 340, 596 S.E.2d 666, 2004 Ga. App. LEXIS 314 (2004).

Meaning of "main action." — Word "main" means most important in size or extent and, by definition, only one "main action" in a case can exist. American Credit Corp. v. United States Cas. Co., 49 F.R.D. 314, 1969 U.S. Dist. LEXIS 13515 (D. Ga. 1969).

Counterclaim asserting a violation of the Federal Truth in Lending Act, 15 U.S.C. § 1601 et seq., is subject to the limitations period of O.C.G.A. § 9-3-97. Vikowsky v. Savannah Appliance Serv. Corp., 179 Ga. App. 135, 345 S.E.2d 621, 1986 Ga. App. LEXIS 1834 (1986).

When plaintiff recommences an action under former Code 1933, § 3-808 (see now O.C.G.A. § 9-2-61), the defendant, who previously merely interposed defenses to an original action, may not for the first time seek to affirmatively recover damages by counterclaim, third-party complaint, or cross-claim, when the period provided by the statute of limitation for recovery of such damages has expired. Champion v. Wells, 139 Ga. App. 759, 229 S.E.2d 479, 1976 Ga. App. LEXIS 1977 (1976).

Stipulated extension of time to file an answer did not extend the defendant's time for filing a counterclaim. Gibson v. Casto, 233 Ga. App. 403, 504 S.E.2d 705.

Stipulated extension of time within which to file an answer and defensive pleadings also extends the time to file a compulsory counterclaim which would otherwise be time-barred. Gibson v. Casto, 271 Ga. 667, 523 S.E.2d 564.

RESEARCH REFERENCES

Am. Jur. 2d.
51 Am. Jur. 2d, Limitation of Actions, §§ 98 et seq., 225.
C.J.S.
54 C.J.S., Limitations of Actions, §§ 80, 314, 354.
ALR.
Right to dismissal of action for delay in prosecution as affected by filing of, or as affecting, cross complaint, counterclaim, intervention, and the like, 90 A.L.R. 387.

Commencement of action as suspending running of limitation against claim which is subject of setoff, counterclaim, or recoupment, 127 A.L.R. 909.

Pleading or attempting to prove by way of setoff, counterclaim, or recoupment, related claim barred by statute of limitations, as waiver of defendant's plea of limitation against plaintiff's claim, 137 A.L.R. 324.

Claim barred by limitation as subject of setoff, counterclaim, recoupment, cross bill, or cross action, 1 A.L.R.2d 630.

Tort claim against which period of statute of limitations has run as subject of setoff, counterclaim, cross bill, or cross action in tort action arising out of same accident or incident, 72 A.L.R.3d 1065.

9-3-97.1. Tolling of limitations for medical malpractice.

(a) The periods of limitation for bringing an action for medical malpractice as provided in Code Sections 9-3-71 and 9-3-72 shall be tolled if:

(1) The injured person or his duly appointed attorney makes a request by certified or registered mail or statutory overnight delivery, return receipt requested, upon any physician, hospital, or other health care provider for medical records in their custody or control relating to such injured person's health or medical treatment which medical records the injured person is entitled by law to receive;

(2) The request, if made by an injured person's duly appointed attorney, has enclosed therewith a properly executed medical authorization authorizing release of the requested information to said attorney;

(3) Such request expressly requests that the medical records be mailed to the injured person or his attorney by certified or registered mail or statutory overnight delivery, return receipt requested and states therein that the requested records are needed by the injured person for possible use in a medical malpractice action;

(4) The injured person or his attorney has promptly paid all fees and costs charged by such physician, hospital, or other health care provider for compiling, copying, and mailing such medical records; and

(5) Such medical records or a letter of response stating that the provider does not have custody or control of the medical records has not been received by the injured person or his attorney within 21 days of the date of receiving such request.

Such periods of limitation shall cease to run on the twenty-second day following the day such request was received and shall resume on the day following the date such medical records, or response stating that the provider does not have custody or control of the medical records, are actually received by such injured person or his attorney; provided, however, that such periods of limitation shall be tolled only once for any cause of action.

(b) Any action filed in reliance upon a tolling of the statute of limitations as authorized by this Code section shall contain in the complaint as first filed allegations showing that the plaintiff is entitled to rely upon the provisions of this Code section, and said complaint as first filed shall have attached thereto as exhibits copies of the request, medical release, and evidence of mailing and receipt by certified or registered mail or statutory overnight delivery.

(c) Notwithstanding any other provision of this Code section, no period of limitation shall be tolled for a period exceeding 90 days except as provided in this subsection. In the event the procedure set forth in subsection (a) of this Code section has been followed by an injured person but the requested records or a letter of response stating that the provider does not have custody or control of the medical records have not been received within 85 days, the injured person shall have the right to petition the court for an order tolling the period of limitation beyond the 90 days and requiring the delivery of the medical records originally requested or a letter of response stating that the provider does not have custody or control of the medical records.

(d) It is intended that the provisions of this Code section tolling the statute of limitations for medical malpractice under certain circumstances be strictly complied with and strictly construed.

History.

Code 1981, § 9-3-97.1, enacted by Ga. L. 1989, p. 419, § 2; Ga. L. 2000, p. 1589, § 4.

Editor's notes.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

JUDICIAL DECISIONS

O.C.G.A. § 9-3-97.1 does not prescribe exact language for identifying the records sought, and using slightly different language in the request and the authorization to release records does not change the request itself. Ajayi v. Williams, 248 Ga. App. 325, 546 S.E.2d 537, 2001 Ga. App. LEXIS 266 (2001), overruled in part, VATACS Group, Inc. v. HomeSide Lending, Inc., 281 Ga. 50, 635 S.E.2d 758, 2006 Ga. LEXIS 648 (2006).

Requirement that records be sent "return receipt requested." — There was no violation of O.C.G.A. § 9-3-97.1 because the plaintiff failed to request that the plaintiff's medical records be mailed by certified or registered mail or statutory overnight delivery, "return receipt requested," since such requirement is for the protection of the patient making the request rather than the provider, and it was undisputed that the records were never sent. Ajayi v. Williams, 248 Ga. App. 325, 546 S.E.2d 537, 2001 Ga. App. LEXIS 266 (2001), overruled in part, VATACS Group, Inc. v. HomeSide Lending, Inc., 281 Ga. 50, 635 S.E.2d 758, 2006 Ga. LEXIS 648 (2006).

Request for certified copies of records. — There was no violation of O.C.G.A. § 9-3-97.1 because the plaintiff requested certified copies of the plaintiff's medical records, notwithstanding that such request is not authorized by the statute; however, because compliance with this request was not mandated by the statute, but was merely an additional request of terms with which the defendant was not required to comply. Ajayi v. Williams, 248 Ga. App. 325, 546 S.E.2d 537, 2001 Ga. App. LEXIS 266 (2001), overruled in part, VATACS Group, Inc. v. HomeSide Lending, Inc., 281 Ga. 50, 635 S.E.2d 758, 2006 Ga. LEXIS 648 (2006).

9-3-98. Applicability of article.

This article shall apply to tort actions as well as actions on contracts.

History.
Orig. Code 1863, § 2993; Code 1868, § 3006; Code 1873, § 3061; Code 1882, § 3061; Civil Code 1895, § 3901; Civil Code 1910, § 4498; Code 1933, § 3-1005.

Law reviews.
For article, "A Comprehensive Analysis of Georgia RICO," see 9 Ga. St. U.L. Rev. 537 (1993).

JUDICIAL DECISIONS

Former Code 1933, § 3-801 (see now O.C.G.A. § 9-3-98) was made applicable to tort actions by former Code 1933, § 3-1005 (see now O.C.G.A. § 9-3-98). City of Atlanta v. Barrett, 102 Ga. App. 469, 116 S.E.2d 654, 1960 Ga. App. LEXIS 654 (1960); Lowe v. Pue, 150 Ga. App. 234, 257 S.E.2d 209, 1979 Ga. App. LEXIS 2129 (1979).

New promise will not constitute a new period from which limitations of a tort action will run. Goodwyn v. Goodwyn, 16 Ga. 114, 1854 Ga. LEXIS 177 (1854).

RESEARCH REFERENCES

C.J.S.
54 C.J.S., Limitation of Actions, §§ 114 et seq., 253 et seq.

ALR.
Appointment of guardian for incompetent or for infant as affecting running of statute of limitations against ward, 86 A.L.R.2d 965.

Attorney's mistake or neglect as excuse for failing to file timely notice of tort claim against state or local governmental unit, 55 A.L.R.3d 930.

9-3-99. Tolling of limitations for tort actions while criminal prosecution is pending.

The running of the period of limitations with respect to any cause of action in tort that may be brought by the victim of an alleged crime which arises out of the facts and circumstances relating to the commission of such alleged crime committed in this state shall be tolled from the date of the commission of the alleged crime or the act giving rise to such action in tort until the prosecution of such crime or act has become final or otherwise terminated, provided that such time does not exceed six years, except as otherwise provided in Code Section 9-3-33.1.

History.
Code 1981, § 9-3-99, enacted by Ga. L. 2005, p. 88, § 2/HB 172; Ga. L. 2015, p. 675, § 2-4/SB 8; Ga. L. 2015, p. 689, § 4/HB 17.

Editor's notes.
Ga. L. 2005, p. 88, § 1/HB 172, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Crime Victims Restitution Act of 2005.'"

Ga. L. 2015, p. 675, § 1-1/SB 8, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Safe Harbor/Rachel's Law Act.'"

Ga. L. 2015, p. 675, § 1-2/SB 8, not codified by the General Assembly, provides that: "(a) The General Assembly finds that arresting, prosecuting, and incarcerating victimized children serves to retraumatize children and increases their feelings of low self-esteem, making the process of recovery more difficult. The General Assembly acknowledges that both federal and state laws recognize that sexually exploited children are the victims of crime and should be treated as victims. The General Assembly finds that sexually exploited children deserve the protection of child welfare services, including family support, crisis intervention, counseling,

and emergency housing services. The General Assembly finds that it is necessary and appropriate to adopt uniform and reasonable assessments and regulations to help address the deleterious secondary effects, including but not limited to, prostitution and sexual exploitation of children, associated with adult entertainment establishments that allow the sale, possession, or consumption of alcohol on premises and that provide to their patrons performances and interaction involving various forms of nudity. The General Assembly finds that a correlation exists between adult live entertainment establishments and the sexual exploitation of children. The General Assembly finds that adult live entertainment establishments present a point of access for children to come into contact with individuals seeking to sexually exploit children. The General Assembly further finds that individuals seeking to exploit children utilize adult live entertainment establishments as a means of locating children for the purpose of sexual exploitation. The General Assembly acknowledges that many local governments in this state and in other states found deleterious secondary effects of adult entertainment establishments are exacerbated by the sale, possession, or consumption of alcohol in such establishments.

"(b) The purpose of this Act is to protect a child from further victimization after he or she is discovered to be a sexually exploited child by ensuring that a child protective response is in place in this state. The purpose and intended effect of this Act in imposing assessments and regulations on adult entertainment establishments is not to impose a restriction on the content or reasonable access to any materials or performances protected by the First Amendment of the United States Constitution or Article I, Section I, Paragraph V of the Constitution of this state."

Ga. L. 2015, p. 689, § 1/HB 17, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Hidden Predator Act.'"

Law reviews.

For article on the 2015 amendment of this Code section, see 32 Ga. St. U. L. Rev. 43 (2015).

For annual survey on torts law, see 69 Mercer L. Rev. 299 (2017).

For annual survey on trial practice and procedure, see 69 Mercer L. Rev. 321 (2017).

For note, "I Tolled You I Had More Time!: The Future of Tolling Looks Bright for Crime Victims, as the Georgia Court of Appeals Establishes New Meaning of O.C.G.A. § 9-3-99," see 68 Mercer L. Rev. 557 (2017).

For annual survey on wills, trusts, guardianships, and fiduciary administration, see 74 Mercer L. Rev. 277 (2022).

JUDICIAL DECISIONS

Tolling applied to tort action arising out of crime, not just against alleged perpetrator. — Valades v. Uslu, 301 Ga. App. 885, 888-89(1), 689 S.E.2d 338 (2009), Columbia Cty. v. Branton, 304 Ga. App. 149, 152-53(1), 695 S.E.2d 674 (2010), Mays v. Target Corp., 322 Ga. App. 44, 743 S.E.2d 603 (2013), and Orr v. River Edge Cmty. Serv. Bd., 331 Ga. App. 228, 230(1), 770 S.E.2d 308 (2015) were overruled to the extent those cases required that the tort action be brought against a criminal defendant for tolling under O.C.G.A. § 9-3-99 to apply. Harrison v. McAfee, 338 Ga. App. 393, 788 S.E.2d 872, 2016 Ga. App. LEXIS 417 (2016), cert. denied, No. S17C0093, 2017 Ga. LEXIS 269 (Ga. Apr. 17, 2017).

Contrary to holdings in prior cases that O.C.G.A. § 9-3-99 applied only to a crime victim's claims against someone accused of committing the crime that formed the basis for the suit, the plain language tolled the statute for any tort action arising out of the crime; stare decisis did not warrant holding firm to this prior erroneous construction. Harrison v. McAfee, 338 Ga. App. 393, 788 S.E.2d 872, 2016 Ga.

App. LEXIS 417 (2016), cert. denied, No. S17C0093, 2017 Ga. LEXIS 269 (Ga. Apr. 17, 2017).

Ante litem provision in Georgia Tort Claims Act not tolled. — In a driver's tort action against the Department of Public Safety, the trial court erred in finding that the time for filing the ante litem notice under the Georgia Tort Claims Act pursuant to O.C.G.A. § 50-21-26(a)(1) was subject to tolling under O.C.G.A. § 9-3-99, although the tort at issue arose from a crime because the ante litem notice requirement was not a statute of limitations and it contained no provision for tolling. Dep't of Pub. Safety v. Ragsdale, 308 Ga. 210, 839 S.E.2d 541, 2020 Ga. LEXIS 137 (2020).

Not applicable because parents were not victims. — Trial court did not err in concluding that the parents' survivor claims fell outside the scope of those claims covered by the tolling statute because the parents were not victims covered by O.C.G.A. § 9-3-99. Hicks v. Universal Health Services, Inc., 364 Ga. App. 769, 874 S.E.2d 877, 2022 Ga. App. LEXIS 311 (2022).

Fine paid for traffic citation. — Couple had not shown that the statute of limitation on their personal injury claim against a second driver was tolled under O.C.G.A. § 9-3-99; the second driver, who had been cited for making an improper lane change, had paid the fine, and the couple had not provided any citation to the record to support their claim that the second driver remained subject to prosecution. McGhee v. Jones, 287 Ga. App. 345, 652 S.E.2d 163, 2007 Ga. App. LEXIS 967 (2007).

Alleged traffic violation did not toll statute when there was no prosecution. — Personal injury claim against a driver that was filed as a renewal action under O.C.G.A. § 9-2-61(a) was subject to summary judgment based on the statute of limitations, O.C.G.A. § 9-3-33; because the plaintiffs did not perfect service on the driver in the prior suit, and the statute had run, the plaintiffs could not renew the suit. The statute was not tolled under O.C.G.A. § 9-3-99 because the time for prosecuting the driver for following too closely had expired, and there had been no prosecution. Jenkins v. Keown, 351 Ga. App. 428, 830 S.E.2d 498, 2019 Ga. App. LEXIS 407 (2019).

Traffic violation pending which tolled limitations period. — Summary judgment in favor of the defendant was reversed because the plaintiff met the plaintiff's burden of producing evidence that the two year limitation period applicable to the plaintiff's tort suit had not run because the statute of limitations was tolled as the plaintiff established that the prosecution of the defendant for the traffic violation remained pending in municipal court until November 18, 2014, which was less than two years before the lawsuit was filed. Williams v. Durden, 347 Ga. App. 363, 819 S.E.2d 524, 2018 Ga. App. LEXIS 569 (2018).

ARTICLE 6

REVIVAL

RESEARCH REFERENCES

ALR.

General acknowledgment or promise in statement addressed to public as removing bar of limitation, 8 A.L.R. 1258.

Limitation of actions: acknowledgment, new promise, or payment by grantee of mortgaged premises, 18 A.L.R. 1027; 142 A.L.R. 615.

Check in payment of interest or installment of principal as tolling statute of limitations, 28 A.L.R. 84; 125 A.L.R. 271.

Power of legislature to revive a right of action barred by limitation, 36 A.L.R. 1316; 133 A.L.R. 384; 133 A.L.R. 384.

Effect as regards interest of acknowledgment, new promise, or payment which takes case out of statute of limitations as regards principal, 78 A.L.R. 959.

Power of legislature to revive a right of action barred by limitation or to revive an action which has abated by lapse of time, 133 A.L.R. 384.

Amendment of pleading after limitation period changing from allegation of negligence to allegation of fraud, or vice versa, as stating a new cause of action, 141 A.L.R. 1363.

Limitation of actions: acknowledgment, new promise, or payment by grantee of mortgaged premises, 142 A.L.R. 615.

Acknowledgment or payment effective to toll statute against corporation on obligation upon which it is bound as a co-obligor with a corporate officer as supporting an inference of acknowledgment which will toll statute as against latter, or vice versa, 144 A.L.R. 1019.

Giving of collateral as acknowledgment and new promise to pay tolling statute of limitations, 171 A.L.R. 315.

Entry or endorsement by creditor on note, bond, or other obligation as evidence of part payment which will toll the statute of limitations, 23 A.L.R.2d 1331.

Part payment or promise to pay judgment as affecting the running of statute of limitations, 45 A.L.R.2d 967.

Reviving, renewing, or extending judgment by order entered after expiration of statutory limitation period on motion made or proceeding commenced within such period, 52 A.L.R.2d 672.

General appearance as avoiding otherwise effective bar of statute of limitations, 82 A.L.R.2d 1200.

9-3-110. New promise to be in writing.

A new promise, in order to renew a right of action already barred or to constitute a point from which the limitation shall commence running on a right of action not yet barred, shall be in writing, either in the party's own handwriting or subscribed by him or someone authorized by him.

History.

Ga. L. 1855-56, p. 233, § 25; Code 1863, § 2875; Code 1868, § 2883; Code 1873, § 2934; Code 1882, § 2934; Civil Code 1895, § 3788; Civil Code 1910, § 4383; Code 1933, § 3-901.

Cross references.

For provision of statute of frauds relating to promise to revive debt barred by statute of limitations, § 13-5-30(6).

JUDICIAL DECISIONS

Purpose of the writing requirement in O.C.G.A. § 9-3-110 is simply to avoid the uncertainties to which parol evidence is exposed. Siefferman v. Peppers, 159 Ga. App. 688, 285 S.E.2d 61, 1981 Ga. App. LEXIS 2771 (1981).

Term "renewal," as applied to promissory notes, means reestablishment of the particular contract for another period of time. Sammons v. Nabers, 186 Ga. 161, 197 S.E. 284, 1938 Ga. LEXIS 583 (1938).

Considering extrinsic evidence to establish writing's identity. — When the defendant did not dispute the existence or genuineness of the note or claim that the note did not constitute a settlement of the liability claimed and, indeed, raised the acknowledgement in the defendant's own pleadings, the jury was authorized to consider evidence extrinsic to the writing itself to establish the writing's identity with the underlying right of action. Loftin v. Brown, 179 Ga. App. 337, 346 S.E.2d 114, 1986 Ga. App. LEXIS 1899 (1986).

New promise to pay or written acknowledgment of liability may revive or extend original debt. Bingham v. Advance Indus. Sec., Inc., 138 Ga. App. 875, 228 S.E.2d 1, 1976 Ga. App. LEXIS 2352 (1976).

Limitation laws do not extinguish rights. — Although action to recover a debt may be barred by statute of limitations, the debt is not extinguished thereby,

as limitation laws act only upon remedies and do not extinguish rights; hence, a writing signed by the defendant, which constitutes a new promise to pay, acts to revive or extend the defendant's liability on the debt. Sinclair Ref. Co. v. Scott, 60 Ga. App. 76, 2 S.E.2d 755, 1939 Ga. App. LEXIS 507 (1939).

Written acknowledgment equivalent to new promise. — Written acknowledgment of an existing liability is the equivalent of a new promise to pay. National City Bank v. First Nat'l Bank, 193 Ga. 477, 19 S.E.2d 19, 1942 Ga. LEXIS 424 (1942).

Written acknowledgment of existing liability is equivalent of a new promise to pay, and constitutes new point from which statute of limitations begins to run. Martin v. Mayer, 63 Ga. App. 387, 11 S.E.2d 218, 1940 Ga. App. LEXIS 106 (1940); Langford v. First Nat'l Bank, 122 Ga. App. 210, 176 S.E.2d 484, 1970 Ga. App. LEXIS 836 (1970).

Distinct admission of a present subsisting debt is such an acknowledgment as will take a case out of statute of limitations. National City Bank v. First Nat'l Bank, 193 Ga. 477, 19 S.E.2d 19, 1942 Ga. LEXIS 424 (1942).

Distinct admission of a present subsisting debt is such an acknowledgment as will take a case out of the statute of limitations, and it is not necessary that the party should express oneself willing and able to pay, since a promise is implied from an acknowledgment that a particular debt is still due. Heath v. Wheeler, 234 Ga. App. 606, 507 S.E.2d 508.

Requirements of written acknowledgment. — While written acknowledgment of an existing liability is equivalent to a new promise to pay, and like such a promise will renew right of action already barred by statute of limitations or create a new point of departure for the running of the statute, such an acknowledgment must meet two requirements: that it shall in legal effect have been made by the debtor to the creditor, and that it shall sufficiently identify the debt or afford a means of identification with reasonable certainty. Middlebrooks v. Cabaniss, 193 Ga. 764, 20 S.E.2d 10, 1942 Ga. LEXIS 469 (1942).

Promise or acknowledgment must be made to creditor. — Written promise by debtor to pay a debt must be made to creditor or to some one representing the creditor. Carnes v. Bank of Jonesboro, 58 Ga. App. 193, 198 S.E. 338, 1938 Ga. App. LEXIS 225 (1938), aff'd, 187 Ga. 795, 2 S.E.2d 495, 1939 Ga. LEXIS 768 (1939).

New promise must identify the debt. — In order to revive debt barred by statute of limitations by new promise, new promise must so plainly and clearly refer to or describe very debt in question as to identify it with reasonable certainty. Oglesby v. Trust Co., 47 Ga. App. 749, 171 S.E. 393, 1933 Ga. App. LEXIS 703 (1933).

Writing designed to toll statute of limitations must in itself connect debt with promise and sufficiently identify the debt. Duke v. Lynch, 56 Ga. App. 331, 192 S.E. 535, 1937 Ga. App. LEXIS 343 (1937).

When the letters written by the defendant are relied on to create a new promise to pay an existing open account, a promissory note not under seal, which on its face is barred by statute of limitations, such letters must, with reasonable certainty, of themselves connect the debt with the promise, and sufficiently identify the debt; by their words they must acknowledge the particular debt as an existing liability in order to remove bar of the statute. Duke v. Lynch, 56 Ga. App. 331, 192 S.E. 535, 1937 Ga. App. LEXIS 343 (1937); Martin v. Mayer, 63 Ga. App. 387, 11 S.E.2d 218, 1940 Ga. App. LEXIS 106 (1940).

Acknowledgment of indebtedness, to constitute point from which limitation shall commence running, must be in writing and must sufficiently identify the debt or afford the means by which the debt might be identified with reasonable certainty. Hudson v. Sadtler, 100 Ga. App. 232, 110 S.E.2d 706, 1959 Ga. App. LEXIS 582 (1959).

Monthly wire transfer payments from a debtor to a creditor containing notations regarding the debtor's account constituted new promises by the debtor to pay under O.C.G.A. §§ 9-3-110 and 9-3-112 and sufficed to renew the running of the four-year statute of limitations, O.C.G.A. § 9-3-25. Because the last payment was made in July 2008, the creditor's suit in March 2012 was not time-barred. SKC, Inc. v. eMag Solutions, LLC, 326 Ga. App. 798,

755 S.E.2d 298, 2014 Ga. App. LEXIS 160 (2014), cert. denied, No. S14C1134, 2014 Ga. LEXIS 642 (Ga. Sept. 8, 2014).

Parol acknowledgment or partial payment not sufficient. — Parol acknowledgment of indebtedness was not sufficient to save account from running of statute of limitations under this section, requiring a writing, nor was mere partial payment sufficient. Murray v. Lightsey, 58 Ga. App. 100, 197 S.E. 870, 1928 Ga. App. LEXIS 652 (1928).

Mere partial payment, in absence of a writing, is not sufficient to revive or extend original debt. Bingham v. Advance Indus. Sec., Inc., 138 Ga. App. 875, 228 S.E.2d 1, 1976 Ga. App. LEXIS 2352 (1976).

Written acknowledgment of an existing liability constitutes a new promise to pay which revives debt so as to recommence running of statute of limitations, but mere partial payment, in the absence of such a writing, is not sufficient. Garrett v. Lincoln Cem., 148 Ga. App. 744, 252 S.E.2d 650, 1979 Ga. App. LEXIS 1640 (1979).

This section does not apply to a parol promise to devise land. Redford v. Lloyd, 147 Ga. 145, 93 S.E. 296, 1917 Ga. LEXIS 90 (1917).

Private memorandum not sufficient. — Acknowledgment, to relieve bar of statute of limitations, must be made known to some person; a mere private memorandum, unsigned and found after death of the maker, is not sufficient. McLin v. Harvey, 8 Ga. App. 360, 69 S.E. 123, 1910 Ga. App. LEXIS 162 (1910); Mitchell v. Graham, 27 Ga. App. 60, 107 S.E. 373, 1921 Ga. App. LEXIS 685 (1921).

Mere indulgence by creditor not a renewal. — Mere indulgence for a period, without consideration, made by creditor of estate to executor, is not a contract of extension of payment or renewal; and a mere request by executor for such indulgence, which creditor grants, constitutes no acknowledgment of debt by executor or promise to pay the debt, and therefore does not extend bar created by statute of limitations. Thompson v. Bank of Buckhead, 45 Ga. App. 94, 163 S.E. 255, 1932 Ga. App. LEXIS 178 (1932).

Oral promise made by debtor to creditor to pay an existing debt does not constitute such new promise as constitutes a point from which limitation to sue shall commence running on right of action not barred or as renews a right of action already barred. Carnes v. Bank of Jonesboro, 58 Ga. App. 193, 198 S.E. 338, 1938 Ga. App. LEXIS 225 (1938), aff'd, 187 Ga. 795, 2 S.E.2d 495, 1939 Ga. LEXIS 768 (1939).

Verbal agreement plus written check insufficient. — Allegation that defendants entered into a verbal agreement with plaintiff to revive and extend indebtedness, which verbal agreement was evidenced by a written check was insufficient under this section. Hudson v. Sadtler, 100 Ga. App. 232, 110 S.E.2d 706, 1959 Ga. App. LEXIS 582 (1959).

Notation made on check delivered to creditor constitutes sufficient written acknowledgment when it affords means of identifying debt with reasonable certainty. Garrett v. Lincoln Cem., 148 Ga. App. 744, 252 S.E.2d 650, 1979 Ga. App. LEXIS 1640 (1979).

Letters written by defendant to plaintiff within four years prior to bringing action, taken in connection with prior correspondence in which defendant identified account, could be found by jury to show an acknowledgment of the indebtedness together with a promise to pay the same, and consequently petition was not subject to objection that action was barred by statute of limitations. Martin v. Mayer, 63 Ga. App. 387, 11 S.E.2d 218, 1940 Ga. App. LEXIS 106 (1940).

Writing made by debtor and addressed to executors of the debtor's will, acknowledging debt and desiring that the debt be paid from the debtor's estate irrespective of whether it is barred, is insufficient to constitute a new promise which extends or removes bar of statute of limitations. Carnes v. Bank of Jonesboro, 58 Ga. App. 193, 198 S.E. 338, 1938 Ga. App. LEXIS 225 (1938), aff'd, 187 Ga. 795, 2 S.E.2d 495, 1939 Ga. LEXIS 768 (1939).

Statute which applies to original demand governs when new promise is proven, with result that an unsealed written acknowledgment or recognition of original obligation under seal revives or extends such obligation for period of time during which a sealed paper would run.

Sammons v. Nabers, 186 Ga. 161, 197 S.E. 284, 1938 Ga. LEXIS 583 (1938).

Statute commences to run from acknowledgment. Sammons v. Nabers, 186 Ga. 161, 197 S.E. 284, 1938 Ga. LEXIS 583 (1938).

Agreement extending time of payment of note, signed and acted on by defendant, surety on the note, is binding on the defendant in an action to enforce the note, and the statute of limitations runs from the date of extension by the defendant and not from the original due date. Woolfolk v. Mathews, 54 Ga. App. 694, 188 S.E. 729, 1936 Ga. App. LEXIS 732 (1936).

Law of the forum governs sufficiency of promise. Obear v. First Nat'l Bank, 97 Ga. 587, 25 S.E. 335, 1895 Ga. LEXIS 533 (1895).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Limitation of Actions, § 284 et seq.

Am. Jur. Pleading and Practice Forms.

1 Am. Jur. Pleading and Practice Forms, Abatement, Revival, and Stay, § 130. 8A Am. Jur. Pleading and Practice Forms, Death, § 4.

C.J.S.

54 C.J.S., Limitations of Actions, § 362 et seq.

ALR.

Revival of debt barred by statute of limitations by realization on security deposited as collateral, 10 A.L.R. 838.

Payment, acknowledgment, or new promise by mortgagor as tolling statute of limitations as against grantee of mortgaged premises, 101 A.L.R. 337.

Promise by holder of obligation to extend time for payment or not to press for payment as tolling statute of limitations, 120 A.L.R. 765.

Statutory requirement that new promise or acknowledgment must be in writing in order to toll statute of limitation, as applicable where new promise or acknowledgment is supported by a contemporaneous consideration, 135 A.L.R. 433.

Constitutionality, construction, and application of statute modifying or limiting effect of acknowledgment, payment, or other conditions to toll or extend the period of limitation with respect to mortgage foreclosure, 150 A.L.R. 134.

Payment, acknowledgment, or new promise by mortgagor or vendee as tolling, or removing bar of, statute of limitations as against junior encumbrancers or lienors, 150 A.L.R. 331.

Insurer's admission of liability, offers of settlement, negotiations, and the like, as waiver of, or estoppel to assert, contractual limitation provision, 29 A.L.R.2d 636.

Limitation of actions as applied to account stated, 51 A.L.R.2d 331.

Agreement of parties as estopping reliance on statute of limitations, 43 A.L.R.3d 756.

9-3-111. Written promise following discharge in bankruptcy.

No promise made after discharge in bankruptcy to pay a debt provable in bankruptcy from the liability of which the debtor has been discharged shall be valid or binding upon the debtor or promisor unless the same is made in writing and signed by the party making the same or to be charged therewith, or by someone duly authorized by him.

History.

Ga. L. 1905, p. 101, § 1; Civil Code 1910, § 4384; Code 1933, § 3-902.

JUDICIAL DECISIONS

Bankruptcy of debtor does not extinguish debt, but merely operates as a bar to an action thereon. Oglesby v. Trust Co., 47 Ga. App. 749, 171 S.E. 393, 1933 Ga. App. LEXIS 703 (1933).

Debt discharged in bankruptcy is not extinguished but only barred. Such a debt can be reassumed. Siefferman v. Peppers, 159 Ga. App. 688, 285 S.E.2d 61, 1981 Ga. App. LEXIS 2771 (1981).

Requirements of agreement. — If creditor is to successfully invoke reassumption agreement in order to enforce obligations of a bankrupt on a debt discharged in bankruptcy, agreement to reassume must be clear, express, distinct, unequivocal, and without qualification or condition. Peppers v. Siefferman, 153 Ga. App. 206, 265 S.E.2d 26, 1980 Ga. App. LEXIS 1751 (1980).

Promise made after adjudication but before discharge. — Promise by debtor made after adjudication as a bankrupt but before discharge will not be impaired by subsequently acquired discharge, as discharge relates back to adjudication in bankruptcy. Moore v. Trounstine, 126 Ga. 116, 54 S.E. 810, 1906 Ga. LEXIS 344 (1906); Dicks v. Andrews, 132 Ga. 601, 64 S.E. 788, 1909 Ga. LEXIS 369 (1909); Bank of Elberton v. Vickery, 20 Ga. App. 96, 92 S.E. 547, 1917 Ga. App. LEXIS 734 (1917).

While promise by debtor, made after adjudication as a bankrupt but before discharge, will not be impaired by subsequently acquired discharge, as the discharge relates to the adjudication, such promise must be clear, express, distinct, unequivocal, and without qualification or condition before it will be enforceable against the bankrupt. Oglesby v. Trust Co., 47 Ga. App. 749, 171 S.E. 393, 1933 Ga. App. LEXIS 703 (1933).

Acquiescence that discharged debt is "owing" is insufficient to overcome effect of discharge in bankruptcy when discharge has been set forth in an affirmative defense to an action on the debt. Peppers v. Siefferman, 153 Ga. App. 206, 265 S.E.2d 26, 1980 Ga. App. LEXIS 1751 (1980).

Promissory note held sufficiently specific. — When written promise to revive debt otherwise barred by bankruptcy is in the form of a promissory note, made out to creditor, for balance due on the debt, and there are no circumstances authorizing any other conclusion, the promise is sufficiently specific to be enforceable. Waters v. Lanier, 116 Ga. App. 471, 157 S.E.2d 796, 1967 Ga. App. LEXIS 855 (1967).

Although executory contract does not remain in force after one party has received a discharge in bankruptcy, parties may, by subsequent acquiescence in its terms and performance of its conditions, elect to treat such contract as still subsisting. Fairmont Creamery Co. v. Collier, 21 Ga. App. 87, 94 S.E. 56, 1917 Ga. App. LEXIS 440 (1917).

Credit entered and signed by maker upon promissory note is acknowledgment of the debt as existing at the time of entry and operates as a new promise. Siefferman v. Peppers, 159 Ga. App. 688, 285 S.E.2d 61, 1981 Ga. App. LEXIS 2771 (1981).

Endorsement of checks with debt payments deducted. — When a debtor discharged in bankruptcy had without complaint endorsed and cashed checks from which were expressly deducted payments to the debtor's old debt, such written acquiescence might amount to a new contract to pay the debt. Siefferman v. Peppers, 159 Ga. App. 688, 285 S.E.2d 61, 1981 Ga. App. LEXIS 2771 (1981).

Amendment of pleadings. — When action is brought upon a debt and defendant pleads discharge in bankruptcy, plaintiff may amend the plaintiff's petition by alleging a new promise to pay, made in compliance with this section. Shumate v. Ryan, 127 Ga. 118, 56 S.E. 103, 1906 Ga. LEXIS 766 (1906); Beasley v. Padgett, 28 Ga. App. 268, 110 S.E. 739, 1922 Ga. App. LEXIS 441 (1922).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Limitation of Actions, §§ 284 et seq., 318 et seq.

ALR.

What amounts to promise to pay which will avoid effect of discharge in bankruptcy, 75 A.L.R. 580.

Effect of subsequent acceptance of note or other contractual obligation in payment, or as evidence, of claim not otherwise barred by discharge in bankruptcy, 145 A.L.R. 1238.

Constitutionality, construction, and application of statute modifying or limiting effect of acknowledgment, payment, or other conditions to toll or extend the period of limitation with respect to mortgage foreclosure, 150 A.L.R. 134.

9-3-112. Payment or written acknowledgment equivalent to new promise.

A payment entered upon a written evidence of debt by the debtor or upon any other written acknowledgment of the existing liability shall be equivalent to a new promise to pay.

History.

Orig. Code 1863, § 2876; Code 1868, § 2884; Code 1873, § 2935; Code 1882, § 2935; Civil Code 1895, § 3789; Civil Code 1910, § 4385; Code 1933, § 3-903.

Cross references.

For provision of statute of frauds relating to promise to revive debt barred by statute of limitations, § 13-5-30(6).

JUDICIAL DECISIONS

Term "renewal," as applied to promissory notes, means reestablishment of the particular contract for another period of time. Sammons v. Nabers, 186 Ga. 161, 197 S.E. 284, 1938 Ga. LEXIS 583 (1938).

Requirements of statute of frauds. — Under the statute of frauds, former Code 1933, § 20-401 (see now O.C.G.A. § 13-5-30), any promise to revive a debt barred by the statute of limitation must be in writing and must be signed by the promisor or some person lawfully authorized by the promisor. National City Bank v. First Nat'l Bank, 193 Ga. 477, 19 S.E.2d 19, 1942 Ga. LEXIS 424 (1942).

New promise to pay or written acknowledgment of liability may revive or extend original debt. Bingham v. Advance Indus. Sec., Inc., 138 Ga. App. 875, 228 S.E.2d 1, 1976 Ga. App. LEXIS 2352 (1976).

Acknowledgment in writing of existing liability is equivalent to new promise to pay. National City Bank v. First Nat'l Bank, 193 Ga. 477, 19 S.E.2d 19, 1942 Ga. LEXIS 424 (1942); Middlebrooks v. Cabaniss, 193 Ga. 764, 20 S.E.2d 10, 1942 Ga. LEXIS 469 (1942).

Debtor's annual payment of interest on promissory notes to the debtor's siblings acted as a renewal of the promise to pay, even if the statute of limitations on the notes would have run but for such payments. Heath v. Wheeler, 234 Ga. App. 606, 507 S.E.2d 508.

Distinct admission of a present subsisting debt is such an acknowledgment as will take a case out of the statute of limitations. National City Bank v. First Nat'l Bank, 193 Ga. 477, 19 S.E.2d 19, 1942 Ga. LEXIS 424 (1942).

Written acknowledgment must admit debt to be a present subsisting liability which party is liable to pay. Kelley v. Strouse & Bros., 116 Ga. 872, 43 S.E. 280, 1903 Ga. LEXIS 111 (1903).

Identification of acknowledged debt. — While new promise or acknowledgment must itself identify debt to be revived or afford sufficient means of identification, still if it supplies a key by which the debt may be identified with the aid of extrinsic evidence, it is in this respect a

sufficient compliance with the statute of frauds. National City Bank v. First Nat'l Bank, 193 Ga. 477, 19 S.E.2d 19, 1942 Ga. LEXIS 424 (1942).

Acknowledgment of indebtedness, to constitute point from which limitation shall commence running, must be in writing and must sufficiently identify the debt or afford means by which it might be identified with reasonable certainty. Hudson v. Sadtler, 100 Ga. App. 232, 110 S.E.2d 706, 1959 Ga. App. LEXIS 582 (1959).

Express or implied promise to pay. — In order to constitute a "new promise," acknowledgment must refer to a particular debt as an existing liability, and there must be an express promise to pay the claim or such absolute and unqualified admission of it as an existing indebtedness that the law would imply a promise to pay the debt. Cleveland Lumber Co. v. Proctor & Schwartz, Inc., 397 F. Supp. 1088, 1975 U.S. Dist. LEXIS 14052 (N.D. Ga. 1975).

It is not necessary that party should express oneself willing and liable to pay, which would be an express promise; a promise is implied from acknowledgment that the particular debt is still due. National City Bank v. First Nat'l Bank, 193 Ga. 477, 19 S.E.2d 19, 1942 Ga. LEXIS 424 (1942).

Delivery necessary. — Delivery of memorandum to some person is required, and a mere private memorandum found after the maker's death is insufficient. Abercombie v. Butts, 72 Ga. 74, 1883 Ga. LEXIS 17 (1883).

Mere partial payment, in absence of a writing, is not sufficient to revive or extend original debt. Bingham v. Advance Indus. Sec., Inc., 138 Ga. App. 875, 228 S.E.2d 1, 1976 Ga. App. LEXIS 2352 (1976).

Written acknowledgment of an existing liability constitutes a new promise to pay, which revives the debt so as to recommence the running of the statute of limitations; mere partial payment in the absence of such a writing is not sufficient. Garrett v. Lincoln Cem., 148 Ga. App. 744, 252 S.E.2d 650, 1979 Ga. App. LEXIS 1640 (1979).

This section accepts an entry by debtor or the debtor's agent. Green v. Hall, 36 Ga. 538, 1867 Ga. LEXIS 86 (1867).

Entry by the creditor is insufficient. Ryal v. Morris, 68 Ga. 834, 1882 Ga. LEXIS 157 (1882).

Maker of a note may make the entry. Vines v. Tift & Co., 79 Ga. 301, 7 S.E. 227, 1888 Ga. LEXIS 424 (1888).

Agent of maker of note may make the entry. Foster v. Cochran, 89 Ga. 466, 15 S.E. 551, 1892 Ga. LEXIS 386 (1892).

Proof of agent's authority. — Agent's authority to renew or extend promissory note by a new promise may be proved by parol. Foster v. Cochran, 89 Ga. 466, 15 S.E. 551, 1892 Ga. LEXIS 386 (1892).

Verbal agreement plus check insufficient. — Allegation that defendants entered into a verbal agreement with plaintiff to revive and extend indebtedness, which verbal agreement was evidenced by a written check was insufficient under this section. Hudson v. Sadtler, 100 Ga. App. 232, 110 S.E.2d 706, 1959 Ga. App. LEXIS 582 (1959).

Notation made on check delivered to creditor constitutes a sufficient written acknowledgment, when it affords a means of identifying the debt with reasonable certainty. Garrett v. Lincoln Cem., 148 Ga. App. 744, 252 S.E.2d 650, 1979 Ga. App. LEXIS 1640 (1979).

Monthly wire transfer with notation regarding account. — Monthly wire transfer payments from a debtor to a creditor containing notations regarding the debtor's account constituted new promises by the debtor to pay under O.C.G.A. §§ 9-3-110 and 9-3-112 and sufficed to renew the running of the four-year statute of limitations, O.C.G.A. § 9-3-25. Because the last payment was made in July 2008, the creditor's suit in March 2012 was not time-barred. SKC, Inc. v. eMag Solutions, LLC, 326 Ga. App. 798, 755 S.E.2d 298, 2014 Ga. App. LEXIS 160 (2014), cert. denied, No. S14C1134, 2014 Ga. LEXIS 642 (Ga. Sept. 8, 2014).

Written notations on back of sealed note. — In an action upon a sealed note, brought by creditor against administrator of maker's estate, written entries on back of note in handwriting of deceased were equivalent to written acknowledgment of existing liability, thus extending original

liability for 20 years from the date of last of such acknowledgments. Murray v. Baldwin, 69 Ga. App. 473, 26 S.E.2d 133, 1943 Ga. App. LEXIS 119 (1943).

Letter signed by endorser of unsealed note and mailed to creditor bank before debt was barred, directing it to withdraw a stated sum from the endorser's account "to be credited on interest of the note of the Dixon estate," further described in the letter as a note bearing the writer's endorsement, was a sufficient acknowledgment and identification of the debt, fixing a new point from which the limitation period should be calculated. National City Bank v. First Nat'l Bank, 193 Ga. 477, 19 S.E.2d 19, 1942 Ga. LEXIS 424 (1942).

Agreement extending time of payment of note, signed and acted on by defendant surety, was binding on the defendant in an action to enforce the note, and the statute of limitations ran from date of the extension, not the original due date. Woolfolk v. Mathews, 54 Ga. App. 694, 188 S.E. 729, 1936 Ga. App. LEXIS 732 (1936).

Unsealed renewal of sealed security deed. — When, after execution under seal in 1914 of original deed to secure debt, in 1927 debtor executed an unsealed promissory note in renewal of the original security or debt, even though this signed renewal note itself was barred, it operated as a written acknowledgment of the original liability under seal, and suspended running of the statute against the original security deed, so that foreclosure in equity in 1936 was properly within 20-year period. Sammons v. Nabers, 186 Ga. 161, 197 S.E. 284, 1938 Ga. LEXIS 583 (1938).

Entry on a fi. fa. of a void judgment will not constitute an acknowledgment under this section. Reed v. Thomas & McNeal, 66 Ga. 595, 1881 Ga. LEXIS 68 (1881).

Statute which applies to original demand governs when new promise is proven so that unsealed written acknowledgment or recognition of original obligation under seal revives or extends such obligation for period of time during which sealed paper would run, that is, 20 years. Sammons v. Nabers, 186 Ga. 161, 197 S.E. 284, 1938 Ga. LEXIS 583 (1938).

Statute commences to run from acknowledgment. Sammons v. Nabers, 186 Ga. 161, 197 S.E. 284, 1938 Ga. LEXIS 583 (1938).

Renewal of interest bearing note does not extinguish claim for subsequent accruing interest. Crockett v. Mitchell, 88 Ga. 166, 14 S.E. 118, 1891 Ga. LEXIS 313 (1891).

Evidence of handwriting of debtor may be required when the debtor died after entry of payment on a note. Watkins v. Harris, 83 Ga. 680, 10 S.E. 447, 1889 Ga. LEXIS 135 (1889).

Listing of time-barred claim in bankruptcy schedules. — Under Georgia law, a time-barred debt was not revived under O.C.G.A. § 9-3-112 by: (1) a debtor's listing of the time-barred claim in the debtor's schedules as undisputed and providing in the debtor's plan for the payment in full of allowed unsecured claims; and (2) the commencement of payments by the trustee to the holder of such claim under a confirmed plan. Hope v. Quantum3 Group LLC (In re Seltzer), 529 B.R. 385, 2015 Bankr. LEXIS 949 (Bankr. M.D. Ga. 2015).

Scheduling of debts in compliance with Bankruptcy Code. — Debtor's scheduling of debts in compliance with the Bankruptcy Code is not the "unqualified admission" of liability required under Georgia law. Hope v. Quantum3 Group LLC (In re Seltzer), 529 B.R. 385, 2015 Bankr. LEXIS 949 (Bankr. M.D. Ga. 2015).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Limitation of Actions, §§ 284 et seq., 318 et seq.

C.J.S.

54 C.J.S., Limitation of Actions, §§ 204 et seq., 380 et seq.

ALR.

Application by vendor of proceeds of sale of property seized under conditional sales contract as interrupting statute of limitations, 55 A.L.R. 274.

Effect as regards interest of acknowl-

edgment, new promise, or payment which takes case out of statute of limitations as regards principal, 78 A.L.R. 959.

Acknowledgment, new promise, or payment by principal as tolling statute of limitations as against guarantor, 84 A.L.R. 729.

Part payment, acknowledgment, or promise by devisee, who has accepted devise charged with legacy, as tolling statute of limitations as against purchaser or mortgagee, 97 A.L.R. 992.

Payment, acknowledgment, or new promise by mortgagor as tolling statute of limitations as against grantee of mortgaged premises, 101 A.L.R. 337.

Bank's application of deposit or right to apply deposit against indebtedness as tolling statute of limitations as regards balance of indebtedness, 107 A.L.R. 1527.

Duration of lien of special assessment and period of limitation of actions for its enforcement as affected by adoption of installment plan of payment, 114 A.L.R. 399.

Promise by holder of obligation to extend time for payment or not to press for payment as tolling statute of limitations, 120 A.L.R. 765.

Promise to pay part of obligation if another, or others, would pay part, as tolling statute of limitations, 133 A.L.R. 974.

Necessity and sufficiency of identification of part payment with the particular debt in question, for purposes of tolling, or removing bar of, statute of limitations, 142 A.L.R. 389.

Constitutionality, construction, and application of statute modifying or limiting effect of acknowledgment, payment, or other conditions to toll or extend the period of limitation with respect to mortgage foreclosure, 150 A.L.R. 134.

Payment on account, or claimed to be on account, as removing or tolling statute of limitations, 156 A.L.R. 1082.

Authority of officer or employee of corporation to acknowledge corporate debt, make partial payment or new promise, or do other act which will have effect of tolling or suspending statute of limitations, 161 A.L.R. 1443.

Authority of agent to make payment on behalf of principal, as regards statute of limitations, 31 A.L.R.2d 139.

Payment of obligor on note or other instrument containing warrant of attorney to confess judgment as extending time within which power to confess may be exercised, 35 A.L.R.2d 1452.

9-3-113. Effect of new promise.

A new promise shall revive or extend the original liability; it shall not create a new one.

History.

Orig. Code 1863, § 2877; Code 1868, § 2885; Code 1873, § 2936; Code 1882, § 2936; Civil Code 1895, § 3790; Civil Code 1910, § 4386; Code 1933, § 3-904.

JUDICIAL DECISIONS

Debt not extinguished by statute of limitations. — Although an action to recover a debt may be barred by the statute of limitations, the debt is not extinguished thereby as the limitation laws act only upon remedies and do not extinguish rights. Sinclair Ref. Co. v. Scott, 60 Ga. App. 76, 2 S.E.2d 755, 1939 Ga. App. LEXIS 507 (1939); Martin v. Mayer, 63 Ga. App. 387, 11 S.E.2d 218, 1940 Ga. App. LEXIS 106 (1940).

Old debt, by virtue of new promise, is revived and remedy thereon restored. Comer & Co. v. Allen, 72 Ga. 1, 1883 Ga. LEXIS 1 (1883); Shumate v. Ryan, 127 Ga. 118, 56 S.E. 103, 1906 Ga. LEXIS 766 (1906).

New promise to pay or written acknowledgment of liability may revive or extend original debt. Bingham v. Advance Indus. Sec., Inc., 138 Ga. App. 875, 228 S.E.2d 1, 1976 Ga. App. LEXIS 2352 (1976).

Writing signed by defendant, which

constitutes new promise to pay, acts to revive or extend defendant's liability on the debt. Sinclair Ref. Co. v. Scott, 60 Ga. App. 76, 2 S.E.2d 755, 1939 Ga. App. LEXIS 507 (1939).

Written acknowledgment of an existing liability constitutes a new promise to pay which revives the debt so as to recommence the running of the statute of limitations. Garrett v. Lincoln Cem., 148 Ga. App. 744, 252 S.E.2d 650, 1979 Ga. App. LEXIS 1640 (1979).

Obligation is renewed when the same obligation is carried forward by new paper or undertaking; there may be a change of parties or an increase of security, but there is no renewal unless the obligation is the same, as what makes the renewal is an extension of time in which to discharge the obligation. King v. Edel, 69 Ga. App. 607, 26 S.E.2d 365, 1943 Ga. App. LEXIS 149 (1943).

Statute which applies to original demand is the statute which governs when a new promise is proven, so that an unsealed written acknowledgment or recognition of an original obligation under seal revives or extends such obligation for the period of time during which a sealed paper would run, which is 20 years. King v. Edel, 69 Ga. App. 607, 26 S.E.2d 365, 1943 Ga. App. LEXIS 149 (1943).

When a new promise is given, duration of statute of limitation is not determined by the nature of the new promise, but by the nature of the original obligation. Jackson v. Brown, 118 Ga. App. 558, 164 S.E.2d 450, 1968 Ga. App. LEXIS 1456 (1968).

New promise revives debt. — Under this section, new promise which revives a debt revives or extends the debt for a period of time during which the original debt would run. Webb v. Carter, 62 Ga. 415, 1879 Ga. LEXIS 547 (1879).

Statute runs from date of the extension. — Agreement extending time of payment of a note, signed and acted on by defendant surety, was binding on the defendant in an action to enforce the note, and the statute of limitations ran from the date of the extension, not the original due date. Woolfolk v. Mathews, 54 Ga. App. 694, 188 S.E. 729, 1936 Ga. App. LEXIS 732 (1936).

Written entries on back of sealed note were equivalent to written acknowledgment of existing liability, thus extending original liability for 20 years from the date of the last of such acknowledgments. Murray v. Baldwin, 69 Ga. App. 473, 26 S.E.2d 133, 1943 Ga. App. LEXIS 119 (1943).

Note containing covenant not to sue was not such a new promise, within the contemplation of this section, as to revive or extend original liability for a debt which was barred by the statute of limitations. Arnold v. Johnston, 84 Ga. App. 138, 65 S.E.2d 707, 1951 Ga. App. LEXIS 649 (1951).

Extension of interest-bearing note carries an extension of provision to pay interest. Vines v. Tift & Co., 79 Ga. 301, 7 S.E. 227, 1888 Ga. LEXIS 424 (1888).

Renewal not a novation. — When a new note is given in lieu of an existing note, and there is no new consideration, it does not constitute a novation, but merely revives or extends the debt. Georgia Nat'l Bank v. Fry, 32 Ga. App. 695, 124 S.E. 542, 1924 Ga. App. LEXIS 592 (1924); Motor Contract Div. v. Southern Cotton Oil Co., 76 Ga. App. 199, 45 S.E.2d 291, 1947 Ga. App. LEXIS 404 (1947).

Section inapplicable when payee contracts not to sue. — This section does not apply to subsequent promise of maker of note to executor of estate of payee who had contracted never to sue maker on the note. Monroe v. Martin, 137 Ga. 262, 73 S.E. 341, 1911 Ga. LEXIS 374 (1911).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Limitation of Actions, § 284 et seq.

C.J.S.

54 C.J.S., Limitation of Actions, § 362 et seq.

ALR.

Revival of debt barred by statute of limitations by realization on security deposited as collateral, 10 A.L.R. 838.

Acknowledgment, new promise, or payment by principal as tolling statute of

limitations as against guarantor, 84 A.L.R. 729.

Payment, acknowledgment, or new promise by mortgagor as tolling statute of limitations as against grantee of mortgaged premises, 101 A.L.R. 337.

Restatement of fraudulent statements or reassurance of truth of original statements after other party had actual or constructive knowledge of their falsity as excusing latter's delay in bringing action or asserting counterclaim based thereon, 107 A.L.R. 589.

Bank's application of deposit or right to apply deposit against indebtedness as tolling statute of limitations as regards balance of indebtedness, 107 A.L.R. 1527.

Promise by holder of obligation to extend time for payment or not to press for payment as tolling statute of limitations, 120 A.L.R. 765.

Constitutionality, construction, and application of statute modifying or limiting effect of acknowledgment, payment, or other conditions to toll or extend the period of limitation with respect to mortgage foreclosure, 150 A.L.R. 134.

Insurer's admission of liability, offers of settlement, negotiations, and the like, as waiver of, or estoppel to assert, contractual limitation provision, 29 A.L.R.2d 636.

Payment by obligor on note or other instrument containing warrant of attorney to confess judgment as extending time within which power to confess may be exercised, 35 A.L.R.2d 1452.

9-3-114. Whom new promise by joint contractor binds.

In cases of joint or joint and several contracts, a new promise by one of the contractors shall operate only against the promisor.

History.

Ga. L. 1855-56, p. 233, § 27; Code 1863, § 2879; Code 1868, § 2887; Code 1873, § 2938; Code 1882, § 2938; Civil Code 1895, § 3792; Civil Code 1910, § 4388; Code 1933, § 3-906.

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Limitation of Actions, § 284 et seq.

C.J.S.

54 C.J.S., Limitation of Actions, § 362 et seq.

ALR.

Acknowledgment or payment effective to toll statute against corporation on obligation upon which it is bound as a co-obligor with a corporate officer as supporting an inference of acknowledgment which will toll statute as against latter, or vice versa, 144 A.L.R. 1019.

9-3-115. Effect of new promise by partner.

After the dissolution of a partnership, a new promise by one partner shall revive or extend a partnership debt only as to the promisor and not as to his copartner or copartners.

History.

Ga. L. 1855-56, p. 233, § 26; Code 1863, § 2878; Code 1868, § 2886; Code 1873, § 2937; Code 1882, § 2937; Civil Code 1895, § 3791; Civil Code 1910, § 4387; Code 1933, § 3-905.

Cross references.

Effect of dissolution of partnership on existing liability of partners, § 14-8-36.

JUDICIAL DECISIONS

Petition in action against members of partnership dissolved by discharge in bankruptcy was demurrable (subject to motion to dismiss) when new promise was made by one partner only. Meinhard, Schaul & Co. v. Folsom Bros., 3 Ga. App. 251, 59 S.E. 830, 1907 Ga. App. LEXIS 612 (1907).

Amendment setting forth a new promise by an individual partner, in an action against a partnership, is not germane to original action. Ford v. Clark, 72 Ga. 760, 1884 Ga. LEXIS 316 (1884).

RESEARCH REFERENCES

Am. Jur. 2d.

51 Am. Jur. 2d, Limitation of Actions, § 284 et seq.

Am. Jur. Pleading and Practice Forms.

19 Am. Jur. Pleading and Practice Forms, Partnership, § 133.

C.J.S.

54 C.J.S., Limitations of Actions, § 362 et seq.

ALR.

Constitutionality, construction, and application of statute modifying or limiting effect of acknowledgment, payment, or other conditions to toll or extend the period of limitation with respect to mortgage foreclosure, 150 A.L.R. 134.

CHAPTER 4

DECLARATORY JUDGMENTS

Sec.		Sec.	
9-4-1.	Purpose and construction of chapter.	9-4-7.	Only parties affected; when municipality made party; when Attorney General served and heard.
9-4-2.	Declaratory judgments authorized; force and effect.	9-4-8.	When court may refuse declaratory judgment.
9-4-3.	Further relief; interlocutory extraordinary relief to preserve status quo.	9-4-9.	Costs.
9-4-4.	Declaratory judgments involving fiduciaries.	9-4-10.	Equity jurisdiction not impaired.
9-4-5.	Filing and service; time of trial; drawing of jury.	9-4-11.	Combining proceedings in probate court.
9-4-6.	Submission of fact issues to jury.		

RESEARCH REFERENCES

Am. Jur. 2d.
22A Am. Jur. 2d, Declaratory Judgments, § 4 et seq.
C.J.S.
26 C.J.S., Declaratory Judgments, § 1 et seq.
U.L.A.
Uniform Declaratory Judgments Act (U.L.A.) § 1 et seq.

ALR.
Declaration of rights or declaratory judgments, 12 A.L.R. 52; 19 A.L.R. 1124; 50 A.L.R. 42; 68 A.L.R. 110; 87 A.L.R. 1205; 114 A.L.R. 1361; 142 A.L.R. 8.

9-4-1. Purpose and construction of chapter.

The purpose of this chapter is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and this chapter is to be liberally construed and administered.

History.
Ga. L. 1945, p. 137, § 13.
Law reviews.
For survey article on administrative law, see 60 Mercer L. Rev. 1 (2008).
For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration
Application

General Consideration

Legislative intent. — Purpose of the provisions on declaratory judgment is to settle and afford relief with respect to rights, status and other legal relations, and the courts of this state will refuse to render or enter a declaratory judgment or decree when such judgment or decree, if rendered, will not terminate the controversy or remove the uncertainty giving rise to the proceeding. Felton v. Chandler, 75 Ga. App. 354, 43 S.E.2d 742, 1947 Ga. App. LEXIS 543 (1947); Pennsylvania Thresherman & Farmers Mut. Cas. Ins. Co. v. Gardner, 107 Ga. App. 472, 130 S.E.2d 507, 1963 Ga. App. LEXIS 881 (1963).

It is the intent and purpose of the provisions on declaratory judgment to settle and afford relief from uncertainty and insecurity with respect to rights and other legal relations between the parties, but it is not the function of the Act (Ga. L. 1945, p. 137) to settle controversies, and make binding declarations, concerning a mere privilege; there must be in the controversy a legally protectible interest existing in virtue of some public law or ordinance. City of Brunswick v. Anderson, 204 Ga. 515, 50 S.E.2d 337, 1948 Ga. LEXIS 480 (1948).

Legislative intent and purpose of the provisions on declaratory judgment is to relieve against uncertainty and insecurity, to declare rights, status and legal relations, but not to execute remedies or grant coercive relief. Consequently, a judgment for damages may not be recovered in a declaratory action. Calvary Independent Baptist Church v. City of Rome, 208 Ga. 312, 66 S.E.2d 726, 1951 Ga. LEXIS 348 (1951); Burgess v. Burgess, 210 Ga. 380, 80 S.E.2d 280, 1954 Ga. LEXIS 314 (1954).

Purpose of the provisions on declaratory judgment is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and the Act (Ga. L. 1945, p. 137) is to be liberally construed. Parks v. Jones, 88 Ga. App. 188, 76 S.E.2d 449, 1953 Ga. App. LEXIS 1038 (1953).

Declaratory judgment law permits one who is walking in the dark to turn on a light to ascertain where one is and where one is going. Venable v. Dallas, 212 Ga. 595, 94 S.E.2d 416, 1956 Ga. LEXIS 455 (1956).

Purpose of the provisions on declaratory judgment is to permit one who is walking in the dark to ascertain where one is and where one is going, to turn on the light before one steps rather than after one has stepped in a hole. Rowan v. Herring, 214 Ga. 370, 105 S.E.2d 29, 1958 Ga. LEXIS 429 (1958); Georgia Power Co. v. City of Cedartown, 116 Ga. App. 596, 158 S.E.2d 475, 1967 Ga. App. LEXIS 902 (1967); Sapp v. ABC Credit & Inv. Co., 243 Ga. 151, 253 S.E.2d 82, 1979 Ga. LEXIS 840 (1979); Slaughter v. Faust, 155 Ga. App. 68, 270 S.E.2d 218, 1980 Ga. App. LEXIS 2461 (1980).

Object of the declaratory judgment is to permit determination of a controversy before obligations are repudiated or rights are violated. Rowan v. Herring, 214 Ga. 370, 105 S.E.2d 29, 1958 Ga. LEXIS 429 (1958); Lumbermens Mut. Cas. Co. v. Moody, 116 Ga. App. 2, 156 S.E.2d 117, 1967 Ga. App. LEXIS 667 (1967); Brogdon v. McMillan, 116 Ga. App. 34, 156 S.E.2d 828, 1967 Ga. App. LEXIS 680 (1967); Georgia Power Co. v. City of Cedartown, 116 Ga. App. 596, 158 S.E.2d 475, 1967 Ga. App. LEXIS 902 (1967); Poole v. City of Atlanta, 117 Ga. App. 432, 160 S.E.2d 874, 1968 Ga. App. LEXIS 1113 (1968); Sapp v. ABC Credit & Inv. Co., 243 Ga. 151, 253 S.E.2d 82, 1979 Ga. LEXIS 840 (1979); Sacks v. Bell Tel. Labs., Inc., 149 Ga. App. 799, 256 S.E.2d 87, 1979 Ga. App. LEXIS 2039 (1979); Slaughter v. Faust, 155 Ga. App. 68, 270 S.E.2d 218, 1980 Ga. App. LEXIS 2461 (1980).

Provisions on declaratory judgment permit a person to seek direction from the courts without having to make a decision which without such direction might reasonably jeopardize a person's interest. Jahncke Serv., Inc. v. Department of Transp., 134 Ga. App. 106, 213 S.E.2d 150, 1975 Ga. App. LEXIS 1923 (1975).

Purpose of the declaratory judgment provisions are not to delay the trial of cases of actual controversy but to guide and protect the parties from uncertainty and insecurity with respect to the propriety of some future act or conduct in order not to jeopardize their interest. Pendleton

General Consideration (Cont'd)

v. City of Atlanta, 236 Ga. 479, 224 S.E.2d 357, 1976 Ga. LEXIS 908 (1976).

It is not purpose of the declaratory judgment law to declare what would be defense to possible action for damages, when the declaration would not also serve as a guide for future conduct. Consolidated Quarries Corp. v. Davidson, 79 Ga. App. 248, 53 S.E.2d 231, 1949 Ga. App. LEXIS 630 (1949).

Declaratory judgment law is not intended to be used to set aside, modify, or interpret judicial decrees or judgments of courts having jurisdiction of the subject matter and parties, but is to be used to obtain a declaration of rights not already adjudicated. Lawrence v. Lawrence, 87 Ga. App. 150, 73 S.E.2d 231, 1952 Ga. App. LEXIS 633 (1952); Burgess v. Burgess, 210 Ga. 380, 80 S.E.2d 280, 1954 Ga. LEXIS 314 (1954); Peeples Indus., Inc. v. Parker Hannifin Corp., 189 Ga. App. 857, 377 S.E.2d 691, 1989 Ga. App. LEXIS 46 (1989).

Declaratory judgment law is not intended to blot out innumerable rights and privileges bestowed by the Code and by the fundamental principles of law, but was intended by the very meaning and concept of the word to give additional protection to persons who may become involved in an actual justiciable controversy, in that they differ between themselves as to what their rights are, and to wish to find them out before taking some dangerous step which might or might not be authorized. Rowan v. Herring, 214 Ga. 370, 105 S.E.2d 29, 1958 Ga. LEXIS 429 (1958).

It is not function of the declaratory judgment law to settle controversies and make binding declarations concerning a mere privilege. Hudon v. North Atlanta, 108 Ga. App. 370, 133 S.E.2d 58, 1963 Ga. App. LEXIS 647 (1963).

Limitations on declaratory judgments. — Although this chapter is to be liberally construed and administered, it manifestly was never intended to be applicable to every occasion or question arising from any justiciable controversy since the statute does not take the place of existing remedies. Mayor of Athens v. Gerdine, 202 Ga. 197, 42 S.E.2d 567, 1947 Ga. LEXIS 395 (1947); Felton v. Chandler, 75 Ga. App. 354, 43 S.E.2d 742, 1947 Ga. App. LEXIS 543 (1947); Findley v. City of Vidalia, 78 Ga. App. 581, 51 S.E.2d 542, 1949 Ga. App. LEXIS 933 (1949); Peoples v. Bass, 93 Ga. App. 71, 90 S.E.2d 926, 1955 Ga. App. LEXIS 479 (1955); Jones v. Moore, 94 Ga. App. 348, 94 S.E.2d 523, 1956 Ga. App. LEXIS 540 (1956); Central Ry. v. Southern Clays, Inc., 94 Ga. App. 377, 94 S.E.2d 625, 1956 Ga. App. LEXIS 549 (1956); United States Cas. Co. v. Georgia, S. & Fla. Ry., 95 Ga. App. 100, 97 S.E.2d 185, 1957 Ga. App. LEXIS 726 (1957), overruled, Atlantic Wood Industries, Inc. v. Argonaut Ins. Co., 190 Ga. App. 814, 380 S.E.2d 504, 1989 Ga. App. LEXIS 438 (1989); Rowan v. Herring, 214 Ga. 370, 105 S.E.2d 29, 1958 Ga. LEXIS 429 (1958); Powers v. Kleven, 97 Ga. App. 705, 104 S.E.2d 533, 1958 Ga. App. LEXIS 861 (1958).

Declaratory judgment was not available to the insurer in a case when the insurer denied that the insured was responsible for providing coverage because there was no future act to which a declaratory judgment could be used to guide and protect the insurer. Builders Ins. Group, Inc. v. Ker-Wil Enters., 274 Ga. App. 522, 618 S.E.2d 160, 2005 Ga. App. LEXIS 788 (2005).

Under the right-for-any-reason rule, the trial court did not err by dismissing a law firm's case against an insurer under the Declaratory Judgment Act, O.C.G.A. § 9-4-1, and O.C.G.A. § 15-19-14(b) to enforce its attorney's lien in a case the firm filed on behalf of an owner against the insurer because declaratory judgment was not available; the issues the firm raised were the same as those raised in an owner's case against the insurer for failure to provide a defense, and the rights of the parties in the owner's case had already accrued. McRae, Stegall, Peek, Harman, Smith & Manning, LLP v. Ga. Farm Bureau Mut. Ins. Co., 316 Ga. App. 526, 729 S.E.2d 649, 2012 Ga. App. LEXIS 599 (2012).

Because in its counterclaim for declaratory relief, the defendant sought a ruling from the trial court regarding the viability

of any future lawsuit brought by the administrator of the two estates on behalf of the estates seeking redemption of the disputed property, and entry of a declaratory judgment that ruled in a party's favor as to future litigation over the subject matter would constitute an erroneous advisory opinion, the defendant's counterclaim for declaratory relief was premature and not ripe for adjudication. Strong v. JWM Holdings, LLC, 341 Ga. App. 309, 800 S.E.2d 380, 2017 Ga. App. LEXIS 187 (2017).

Liberal construction. — Liberality of construction as to whether resort to a declaratory judgment is available is determined by reference to whether any existing provision of law or equity will provide as complete protection as would a declaratory judgment with respect to some future action or conduct as to the propriety of which a doubt exists. Cohen v. Reisman, 203 Ga. 684, 48 S.E.2d 113, 1948 Ga. LEXIS 498 (1948).

"Actual controversy." — Term "actual controversy" and the terms "rights, status and other legal relations," all relate to a justiciable controversy, and a controversy is justiciable when there are interested parties asserting adverse claims upon an accrued state of facts. Adler v. Adler, 87 Ga. App. 842, 75 S.E.2d 578, 1953 Ga. App. LEXIS 869 (1953).

Court cannot issue advisory opinions. — Trial court erred by failing to dismiss a city's suits seeking a declaratory judgment as to the annexation of school property because there was no actual annexation of any of the properties in question; thus, the controversy was founded upon proposed legislation and the trial court could not render an advisory opinion. City of Atlanta v. Atlanta Indep. Sch. Sys., 300 Ga. 213, 794 S.E.2d 162, 2016 Ga. LEXIS 762 (2016).

Words "rights, status and other legal relations," have application solely with reference to legal relations. Issues which are based on fictitious, colorable, hypothetical, or academic questions, or questions that have become moot, do not involve legal rights, legal status, and other legal relations within the meaning of an "actual" justiciable controversy. Brown v. Lawrence, 204 Ga. 788, 51 S.E.2d 651, 1949 Ga. LEXIS 475 (1949).

Words "rights, status and other legal relations," are dependent upon "actual controversy," in a proceeding for declaratory judgment. The "actual controversy" means a justiciable controversy. Brown v. Lawrence, 204 Ga. 788, 51 S.E.2d 651, 1949 Ga. LEXIS 475 (1949).

Petition for declaratory judgment will lie only when there is some fact or circumstances which necessitate determination of disputes, not merely for the purpose of enforcing accrued rights, but in order to guide and protect the petitioner from uncertainty and insecurity with respect to the propriety of some future act or conduct which is properly incident to the petitioner's alleged rights, and which future action, without such direction, might reasonably jeopardize the petitioner's interest. Cohen v. Reisman, 203 Ga. 684, 48 S.E.2d 113, 1948 Ga. LEXIS 498 (1948).

Declaratory judgment inappropriate if adjudication of rights was not needed to avoid future undirected action. — When plaintiff landowners filed a declaratory judgment action seeking a finding that the installation of fiber optic cable in a pipeline that ran through defendant pipeline owner's easement effected a legal abandonment of the easement over the landowners' property, there was no basis for the trial court's issuance of a declaratory judgment on the issue under the Declaratory Judgment Act, O.C.G.A. § 9-4-1 et seq., because the rights of the parties had already accrued and no facts were alleged which showed that an adjudication of the landowners' rights was needed to relieve them from the risk of taking future undirected action incident to their rights that, without direction, would jeopardize their interests. Plantation Pipe Line Co. v. Milford, 257 Ga. App. 709, 572 S.E.2d 67, 2002 Ga. App. LEXIS 1268 (2002).

Petition for declaratory judgment is available remedy when there exists justiciable issue, involving uncertainty and danger of loss or detriment to the applicant in the event the applicant chooses the wrong one of two or more legally uncharted courses that appear to be open to the applicant. The remedy is not to be employed to test the validity of

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determinations having the force of solemn judgments to which no exceptions have been taken. City of Atlanta v. Lopert Pictures Corp., 217 Ga. 432, 122 S.E.2d 916, 1961 Ga. LEXIS 481 (1961).

Trial court correctly found that declaratory relief was appropriate to relieve an electrical transmission corporation of uncertainty and insecurity with regard to its rights after a county board of commission enacted an ordinance that imposed a moratorium on the construction of new power lines since the ordinance expressly targeted the very power line proposed by the corporation and plainly prohibited the construction of that line or similar ones. If the corporation could not have obtained declaratory relief, it would have been in danger of losing a valuable property right as a result of the enforcement of the ordinance, which was declared to be unconstitutional. Cobb County v. Ga. Transmission Corp., 276 Ga. 367, 578 S.E.2d 852, 2003 Ga. LEXIS 285 (2003).

Declaratory judgment cannot be advisory to review will's validity. — Guardian's declaratory judgment action seeking to have elderly woman's 2013 last will and testament deemed invalid and void was properly dismissed by the trial court because the elderly woman was still alive and may still revoke the 2013 will; therefore, any ruling determining the will's validity constituted an improper advisory opinion. Kellar v. Davis, 350 Ga. App. 385, 829 S.E.2d 466, 2019 Ga. App. LEXIS 309 (2019), cert. denied, No. S19C1423, 2020 Ga. LEXIS 26 (Ga. Jan. 13, 2020).

Mere dispute of facts insufficient to create "uncertainty and insecurity." — Mere fact that there is a dispute as to issues of fact could not give the necessary element of "uncertainty and insecurity" to entitle a petitioner to maintain a declaratory judgment action. State v. Hospital Auth., 213 Ga. 894, 102 S.E.2d 543, 1958 Ga. LEXIS 315 (1958).

Negative declarations. — Suitability of application for relief by prayer for a negative declaration is clear from this section, even though to call such a prayer negative had been called a colloquialism, and has been said to describe a positive declaration that no right exists on the part of the defendant. Bond v. Ray, 83 Ga. App. 817, 65 S.E.2d 30, 1951 Ga. App. LEXIS 972 (1951).

Testing validity of statute. — Action for declaratory judgment is an available remedy to test the validity and enforceability of a statute when an actual controversy exists with respect thereto. Total Vending Serv., Inc. v. Gwinnett County, 153 Ga. App. 109, 264 S.E.2d 574, 1980 Ga. App. LEXIS 1698 (1980).

Party seeking declaratory relief is not required to violate a law about which there is an actual controversy concerning its enforceability and suffer a criminal prosecution, in order to test its validity. Total Vending Serv., Inc. v. Gwinnett County, 153 Ga. App. 109, 264 S.E.2d 574, 1980 Ga. App. LEXIS 1698 (1980).

No uncertainty as to alleged right. — In a case arising from a taxpayer grievance concerning whether the Fulton County Board of Tax Assessors had been diligent in determining that the stadium company had a usufruct interest in the new football stadium that was not subject to ad valorem taxation, even if the Exemption Decision (or failure to reconsider that decision) of the Board members was arbitrary, capricious, or simply wrong in light of the Stadium License and Management Agreement, the appellants did not face any uncertainty as to an alleged right, and the trial court properly dismissed their claim for a declaratory judgment. Love v. Fulton County Bd. of Tax Assessors, 311 Ga. 682, 859 S.E.2d 33, 2021 Ga. LEXIS 294 (2021).

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Challenge to tax statute. — O.C.G.A. §§ 9-4-1, 9-5-1, 40-2-8, 40-3-6, 40-3-21, and 48-2-59 provided plaintiff challenging automobile "title transfer fee" with "plain, speedy, and efficient" pre-tax and post-tax remedies by which a taxpayer might challenge the constitutional validity of a state tax, and so satisfied the criteria of the Tax Injunction Act, 18 U.S.C. § 1341, so as to bar jurisdiction of the federal court. Johnsen v. Collins, 875 F. Supp. 1571, 1994 U.S. Dist. LEXIS 20214 (S.D. Ga. 1994).

Declaratory judgment law does not nullify statutes of limitations and established principles of law, so as to authorize a petitioner to brush aside previous judgments of the same court, and seek a determination of the petitioner's rights as if the rights had never been adjudicated. Bingham v. Citizens & S. Nat'l Bank, 205 Ga. 285, 53 S.E.2d 228, 1949 Ga. LEXIS 344 (1949); Burgess v. Burgess, 210 Ga. 380, 80 S.E.2d 280, 1954 Ga. LEXIS 314 (1954); Royal v. Royal, 246 Ga. 229, 271 S.E.2d 144, 1980 Ga. LEXIS 1064 (1980).

Petition seeking to compel husband to provide additional funds. — Wife did not file a declaratory judgment action since the wife sought guidance with respect to provisions in a settlement agreement in order to compel a husband to provide the wife with additional funds; as the trial court's decision was interlocutory and the wife did not secure a certificate of immediate review, the discretionary appeal to resolve whether the trial court's declaratory ruling was appealable as a final judgment was dismissed. Gelfand v. Gelfand, 281 Ga. 40, 635 S.E.2d 770, 2006 Ga. LEXIS 642 (2006).

Declaratory judgment action not applicable to criminal case. — Petition was not saved by its prayer for declaratory relief under the Declaratory Judgment Act, O.C.G.A. § 9-4-1 et seq., as the dispute between the solicitor general and the recorder's court judges was not a controversy between two adverse parties because a judge acting in an official capacity in a criminal case was not an adverse party with interests antagonistic to those of the state or the defendant, but instead served in the role of a neutral decision maker; and the underlying decisions that the solicitor general challenged arose in criminal cases, and not justiciable controversies of a civil nature. Armstrong v. Solicitor General of Gwinnett County, 366 Ga. App. 865, 884 S.E.2d 556, 2023 Ga. App. LEXIS 90 (2023).

Declaratory judgment action not applicable to moot issue. — Plaintiff's appeal of the dismissal of a declaratory judgment complaint failed when there was no longer a justiciable controversy as a declaratory judgment action could not lie for a probable future contingency. Barksdale v. DeKalb County, 254 Ga. App. 7, 561 S.E.2d 163, 2002 Ga. App. LEXIS 244 (2002).

Superior court's judgment declaring that an agreement between a condominium association and a telecommunications company was subject to termination by the association pursuant to O.C.G.A. § 44-3-101 was vacated because the 12-month period of O.C.G.A. § 44-3-101(c) expired without the association having terminated any telecommunications contract, rendering the issue in its declaratory judgment action moot, and the declaratory judgment upon a moot issue was not authorized under the Declaratory Judgment Act, O.C.G.A. § 9-4-1 et seq.; by the time the superior court issued the declaratory judgment, the statutory period of O.C.G.A. § 44-3-101(c) had expired, and any right the association had to cancel and terminate contracts under that statute expired. Capitol Infrastructure, LLC v. Plaza Midtown Residential Condo. Ass'n, 306 Ga. App. 794, 702 S.E.2d 910, 2010 Ga. App. LEXIS 1058 (2010), cert. denied, No. S11C0500, 2011 Ga. LEXIS 331 (Ga. Apr. 18, 2011).

Declaratory judgment was not appropriate in a derivative action by two property management entities against a managing member of a limited liability company because the entities did not seek guidance as to future actions, but instead sought a determination as to whether the managing member had already breached a contract. Pinnacle Benning, LLC v. Clark Realty Capital, LLC, 314 Ga. App. 609, 724 S.E.2d 894, 2012 Ga. App. LEXIS 247 (2012).

Declaratory action as to regulatory investigation. — Trial court properly dismissed a declaratory judgment action brought by a bank and a cash advance lender, which was operating as an agent for the bank, to stop the Georgia Industrial Loan Commissioner from conducting an investigation of their lending activities because the Commissioner was authorized to conduct an investigation of the two entities' loan activities, notwithstanding the lender's claim that the bank and the lender were operating under the authority of federal banking law. BankWest, Inc. v. Oxendine, 266 Ga. App. 771, 598

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S.E.2d 343, 2004 Ga. App. LEXIS 397 (2004), cert. denied, No. S04C1408, 2004 Ga. LEXIS 731 (Ga. Sept. 7, 2004).

Trust beneficiary entitled to declaration of rights despite settlement agreement. — Both a settlement agreement between a trustee and several beneficiaries and the trial court's temporary restraining order maintained the status quo with regard to the personal contents of the beneficiaries' father's home and preserved the issue of one beneficiary's entitlement to the contents for a declaration of the parties' respective rights. Garner v. Redwine, 309 Ga. App. 158, 709 S.E.2d 569, 2011 Ga. App. LEXIS 178 (2011), cert. denied, No. S11C1234, 2011 Ga. LEXIS 593 (Ga. Sept. 6, 2011), cert. denied, No. S11C1236, 2011 Ga. LEXIS 600 (Ga. Sept. 6, 2011).

Uncertain future act for determination essential. — Automobile liability insurer's declaratory judgment action was dismissed for mootness and lack of jurisdiction since the insurer sought to determine if the insurer was required to provide coverage in the underlying personal injury action, but although the insurer had filed the declaratory judgment action before judgment was entered in the underlying suit, the insurer already had refused coverage and refused to provide a defense for its insured in that action, thus removing any uncertain future act as the basis for determination by the court. Empire Fire & Marine Ins. Co. v. Metro Courier Corp., 234 Ga. App. 670, 507 S.E.2d 525, 1998 Ga. App. LEXIS 1332 (1998), cert. denied, No. S99C0295, 1999 Ga. LEXIS 184 (Ga. Feb. 19, 1999).

In a dispute over marble and mineral rights, plaintiff had begun subsurface mining operations, but it had not conducted any activity on the surface of the property and had been ordered by the defendant not to enter; thus, a declaratory judgment would have the effect of "guiding and protecting plaintiff with regard to some future act." J.M. Huber Corp. v. Georgia Marble Co., 239 Ga. App. 271, 520 S.E.2d 296.

In an action against an airport authority for violations of the Open Meetings Act, O.C.G.A. § 50-14-1 et seq., taxpayers did not seek to contest any decisions made at any of the challenged meetings or assert that the taxpayers were in a position of uncertainty as to an alleged right, but sought to prohibit future violations and punish the authority for the authority's violations; dismissal of the taxpayers' claim for declaratory relief was proper. Avery v. Paulding County Airport Auth., 343 Ga. App. 832, 808 S.E.2d 15, 2017 Ga. App. LEXIS 566 (2017).

Controversy not created by filing lawsuit. — Insurer improperly sought a declaratory judgment that the insurer had mistakenly made payments under a policy since the declaration would be merely advisory; the only actual controversy was created by the action itself, and one cannot create a controversy for declaratory judgment purposes by filing a lawsuit. Miller v. Southern Heritage Ins. Co., 215 Ga. App. 173, 450 S.E.2d 432, 1994 Ga. App. LEXIS 1165 (1994), cert. denied, No. S95C0393, 1995 Ga. LEXIS 305 (Ga. Feb. 20, 1995), overruled, Hurst v. Grange Mut. Cas. Co., 266 Ga. 712, 470 S.E.2d 659, 1996 Ga. LEXIS 245 (1996).

Judicial review of administrative decision. — Action for declaratory judgment challenging the validity of an agency rule has no place once judicial review of an administrative decision is sought. State Health Planning Agency v. Coastal Empire Rehabilitation Hosp., 261 Ga. 832, 412 S.E.2d 532, 1992 Ga. LEXIS 76 (1992).

Trial court properly dismissed a mortgagor's declaratory judgment counterclaim, which related to the purported conduct of the lender before the lender's failure, because the claim was not filed until after the Federal Deposit Insurance Corporation (FDIC) assumed control of the failed lender and, thus, constituted a post-receivership claim for which the mortgagor was required to exhaust administrative remedies before the FDIC prior to asserting the counterclaim against the lender. Bobick v. Cmty. & S. Bank, 321 Ga. App. 855, 743 S.E.2d 518, 2013 Ga. App. LEXIS 425 (2013), cert. denied, No. S13C1454, 2013 Ga. LEXIS 825 (Ga. Oct. 7, 2013).

Declaratory relief is available to an insured seeking a determination as to

whether insurers were obligated to defend a pending action. Atlantic Wood Indus., Inc. v. Argonaut Ins. Co., 190 Ga. App. 814, 380 S.E.2d 504, 1989 Ga. App. LEXIS 438 (1989).

Declaratory relief available to insurer. — In a declaratory action brought by an insurer, the trial court properly granted the insurer summary judgment because there was no evidence that the insurer ever denied coverage. Barclay v. Stephenson, 337 Ga. App. 365, 787 S.E.2d 322, 2016 Ga. App. LEXIS 336 (2016).

Insurer's motion for directed verdict should have been granted in declaratory judgment action. — Trial court's denial of a directed verdict in favor of the insurer was reversed on the issue of whether the policy was void based upon misrepresentations in the application because the undisputed evidence showed that the use of a certified public accountant audit and a requirement that checks be countersigned were material to the insurer's decision to issue crime coverage to the insured and that the insurer would not have issued the policy if the insurer had known the true facts. Ga. Cas. & Sur. Co. v. Valley Wood, Inc., 336 Ga. App. 795, 783 S.E.2d 441, 2016 Ga. App. LEXIS 229 (2016), cert. denied, No. S16C1468, 2016 Ga. LEXIS 714 (Ga. Oct. 31, 2016).

Dentist's action for declaratory and injunctive relief, seeking to prevent the board of dentistry from taking action against the dentist based on an opinion of the attorney general to the effect that certain procedures being performed by the dentist were not within the lawful scope of the practice of dentistry, was not barred by a failure to exhaust administrative remedies since the only way for the dentist to challenge the board's position was to continue performing the procedures, thereby risking criminal prosecution for the felony offense of practicing medicine without a license and/or the initiation of administrative proceedings to revoke the dentist's license to practice dentistry. Thomas v. Georgia Bd. of Dentistry, 197 Ga. App. 589, 398 S.E.2d 730, 1990 Ga. App. LEXIS 1395 (1990).

Viability of comparative negligence defense. — When the insurer conceded that the insurer owed a duty to defend under a liability policy, a declaratory judgment action was not available to determine the identity of the driver of a vehicle involved in an accident as the insurer sought merely to test the viability of its comparative negligence defense in the main tort action or any future bad faith action. Cotton States Mut. Ins. Co. v. Stallings, 235 Ga. App. 212, 508 S.E.2d 688.

Insurance company which informed an insured that the insured's policy did not provide coverage for an accident caused by the insured's nephew was not permitted to seek a judgment declaring that it did not have an obligation to defend or indemnify the insured. Drawdy v. Direct Gen. Ins. Co., 277 Ga. 107, 586 S.E.2d 228, 2003 Ga. LEXIS 714 (2003).

Ascertaining property rights. — Declaratory relief was appropriate to relieve a niece of uncertainty and insecurity with regard to her property rights under a prior consent order; the unclear provisions in the decree concerning the amount of tax liability and the amount to be paid by the niece if she were the high bidder on the property at issue in the prior consent decree authorized the use of declaratory relief to ascertain the parties' rights and duties. McClure v. Raper, 277 Ga. 642, 594 S.E.2d 330, 2004 Ga. LEXIS 196 (2004).

That disputed factual issues remained as to the actualization of a judgment creditor's claimed interest in properties that allegedly were fraudulently transferred by the judgment debtor did not foreclose on the judgment creditor's standing to seek a declaratory judgment as to the priority of that interest. RES-GA YPL, LLC v. Rowland, 340 Ga. App. 713, 798 S.E.2d 315, 2017 Ga. App. LEXIS 130 (2017).

Proper remedy in dispute over zoning ordinance. — In a declaratory judgment action brought by a county against a property owner, the trial court properly granted the county a declaratory judgment because there was a bona fide dispute over the applicability of the county's zoning ordinance and over whether the property owner had vested rights to use a petroleum gas tank on the property. Since the county was in a position of uncertainty

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as to the county's legal rights, a declaratory judgment was authorized. U. S. A. Gas, Inc. v. Whitfield County, 298 Ga. App. 851, 681 S.E.2d 658, 2009 Ga. App. LEXIS 797 (2009).

County's action against an airport authority stated grounds for relief. — County's action against an airport authority seeking a declaration that the authority lacked the authority to submit an application to the Federal Aviation Administration for an Airport Operating Certificate without the county's consent stated an actual controversy under the Declaratory Judgment Act, O.C.G.A. § 9-4-1 et seq., and should not have been dismissed. Avery v. Paulding County Airport Auth., 343 Ga. App. 832, 808 S.E.2d 15, 2017 Ga. App. LEXIS 566 (2017).

Standing to file for declaratory judgment established. — Participants, the pension board members, and the advocates were authorized under O.C.G.A. § 9-4-1 to file for a declaratory judgment on behalf of the municipal pension funds against the City of Atlanta, in which they sought a declaration allowing the funds to hire a third party administrator and an outside counsel; the participants, the members, and the advocates had an interest in having the matters at issue resolved as the members owed duties to the beneficiaries of the pension funds, the participants had an interest in how the funds were administered, and the advocates engaged in advocacy for the participants. City of Atlanta v. S. States Police Benevolent Ass'n, 276 Ga. App. 446, 623 S.E.2d 557, 2005 Ga. App. LEXIS 1282 (2005), cert. denied, No. S06C0609, 2006 Ga. LEXIS 314 (Ga. May 8, 2006).

Involuntary dismissal must be without prejudice. — Involuntary dismissal of a declaratory-judgment action for want of justiciability does not operate as an adjudication on the merits and is instead an issue of subject-matter jurisdiction. Accordingly, dismissal must be without prejudice. Pinnacle Benning, LLC v. Clark Realty Capital, LLC, 314 Ga. App. 609, 724 S.E.2d 894, 2012 Ga. App. LEXIS 247 (2012).

Because the defendant's counterclaim for declaratory judgment was premature and sought an opinion that was advisory in nature, the trial court lacked subject matter jurisdiction over the counterclaim; thus, the trial court's final order and judgment denying the defendant's counterclaim for a declaratory judgment had to be vacated, and the case was remanded for the trial court to dismiss the counterclaim without prejudice. Strong v. JWM Holdings, LLC, 341 Ga. App. 309, 800 S.E.2d 380, 2017 Ga. App. LEXIS 187 (2017).

Insurer not required to rescind policy and return premium before seeking judgment. — Based on evidence from an insurance underwriter that the underwriter would have rejected an application for crime coverage if the application had accurately stated that the insured was not audited by a CPA and did not require countersignatures on checks, these misrepresentations were material under O.C.G.A. § 33-24-7(b) and entitled the insurer to a declaratory judgment; the insurer was not required to rescind the policy and return the premium prior to seeking judgment. Ga. Cas. & Sur. Co. v. Valley Wood, Inc., 336 Ga. App. 795, 783 S.E.2d 441, 2016 Ga. App. LEXIS 229 (2016), cert. denied, No. S16C1468, 2016 Ga. LEXIS 714 (Ga. Oct. 31, 2016).

Declaratory judgment action not justified to challenge will. — Probate court properly dismissed the brothers' petition because the proposed declaratory judgment action would have triggered the in terrorem clause since although the brothers claimed that their proposed declaratory judgment action sought to interpret the father's will, the proposed declaratory judgment action made clear that what the brothers truly sought was to remove the father's girlfriend as a beneficiary, executor, and trustee. In re Estate of Johnson, 352 Ga. App. 164, 834 S.E.2d 283, 2019 Ga. App. LEXIS 543 (2019).

RESEARCH REFERENCES

Am. Jur. 2d.
22A Am. Jur. 2d, Declaratory Judgments, §§ 1 et seq., 5, 6, 11.
C.J.S.
26 C.J.S., Declaratory Judgments, § 1 et seq.
U.L.A.
Uniform Declaratory Judgments Act (U.L.A.) § 12.
ALR.
Declaration of rights or declaratory judgments, 12 A.L.R. 52; 19 A.L.R. 1124; 50 A.L.R. 42; 68 A.L.R. 110; 87 A.L.R. 1205; 114 A.L.R. 1361; 142 A.L.R. 8.
What constitutes plain, speedy, and efficient state remedy under Tax Injunction Act (28 USCS § 1341), prohibiting federal district courts from interfering with assessment, levy, or collection of state business taxes, 31 A.L.R. Fed. 2d 237.

9-4-2. Declaratory judgments authorized; force and effect.

(a) In cases of actual controversy, the respective superior courts of this state and the Georgia State-wide Business Court shall have power, upon petition or other appropriate pleading, 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; and the declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(b) In addition to the cases specified in subsection (a) of this Code section, the respective superior courts of this state and the Georgia State-wide Business Court shall have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for the 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 the declaration should be made; and the declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(c) Relief by declaratory judgment shall be available, notwithstanding the fact that the complaining party has any other adequate legal or equitable remedy or remedies.

History.
Ga. L. 1945, p. 137, § 1; Ga. L. 1959, p. 236, § 1; Ga. L. 1982, p. 3, § 9; Ga. L. 2019, p. 845, § 3-1/HB 239.
Cross references.
Actions for declaratory judgment regarding validity of agency rules, § 50-13-10.
Law reviews.
For article, "The Civil Jurisdiction of State and Magistrate Courts," see 24 Ga. St. B. J. 29 (1987).
For article, "Tracing Georgia's English Common Law Equity Jurisprudential Roots: Quia Timet," see 14 The Journal of Southern Legal History 135 (2006).
For survey article on real property law, see 67 Mercer L. Rev. 193 (2015).
For article on the 2019 amendment of this Code section, see 36 Ga. St. U.L. Rev. 1 (2019).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Specific Cases
1. Insurance Policies
2. Miscellaneous
State Patrol Officer Entitled to Sovereign Immunity.

General Consideration

Scope of section. — Because of subsection (b) of this section, the Declaratory Judgment Act (Ga. L. 1945, p. 137) is much broader in scope and more comprehensive in its jurisdiction of justiciable controversies than is the Uniform Declaratory Judgment Act, which was approved in 1922 by the National Conference of Commissioners on Uniform State Laws, and which has since been enacted into law, as thus approved, in more than 20 of the states. Therefore, by giving full effect to the provisions of the Act, it follows, as a matter of course, that the respective superior courts of this state, under subsection (b) of this section, have power to determine and settle by declaration any justiciable controversy of a civil nature when it appears to the court that the ends of justice require that such should be made for the guidance and protection of the petitioner, and when such a declaration will relieve the petitioner from uncertainty and insecurity with respect to the petitioner's rights, status, and legal relations. Calvary Independent Baptist Church v. City of Rome, 208 Ga. 312, 66 S.E.2d 726, 1951 Ga. LEXIS 348 (1951) (see now O.C.G.A. § 9-4-2).

Court of Appeals of Georgia construe the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., liberally and merely requires the presence in a declaratory action of a party with an interest in the controversy adverse to that of the petitioner. A declaratory judgment is authorized when there are circumstances showing a necessity for a determination of the dispute to guide and protect the plaintiff from uncertainty and insecurity with regard to the propriety of some future act or conduct, which is properly incident to the plaintiff's alleged rights and which if taken without direction might reasonably jeopardize the plaintiff's interest. RTS Landfill, Inc. v. Appalachian Waste Sys., LLC, 267 Ga. App. 56, 598 S.E.2d 798, 2004 Ga. App. LEXIS 441 (2004), cert. denied, No. S04C1456, 2004 Ga. LEXIS 715 (Ga. Sept. 7, 2004), cert. denied, No. S04C1461, 2004 Ga. LEXIS 712 (Ga. Sept. 7, 2004), dismissed in part sub nom. Waste Mgmt. of Metro Atlanta, Inc. v. Appalachian Waste Sys., LLC, 286 Ga. App. 476, 649 S.E.2d 578, 2007 Ga. App. LEXIS 807 (2007).

Because an actual and ongoing controversy existed regarding the rights of competing parties to a condominium unit, specifically the unit's owners and its buyer and disputes concerning ownership of or right of access to land were classic candidates for resolution via declaratory judgment, the trial court correctly denied the owners' motion for summary judgment on the buyer's counterclaim for declaratory judgment. Quality Foods, Inc. v. Smithberg, 288 Ga. App. 47, 653 S.E.2d 486, 2007 Ga. App. LEXIS 1103 (2007), cert. denied, No. S08C0437, 2008 Ga. LEXIS 316 (Ga. Mar. 31, 2008).

In a declaratory judgment action between a water utility and residents of a subdivision, given that the residents had standing to sue on a contract for the provision of water services as incidental beneficiaries, the trial court erred in finding that the utility was charging the appropriate rates thereunder; but, the utility was allowed to increase the utility's minimum annual fee and, given the clear and unambiguous language of the contract, enforce a restrictive covenant. Alday v. Decatur Consol. Water Servs., 289 Ga. App. 902, 658 S.E.2d 476, 2008 Ga. App. LEXIS 225 (2008).

Standing to challenge statute. — In a declaratory judgment action facially challenging Georgia's good behavior bond statute, O.C.G.A. § 17-6-90, the trial

court judgment granting summary judgment to appellees was vacated because § 17-6-90(a) did not regulate the appellants' conduct and, in the absence of current peace bonding proceedings or even an allegation that a judicial officer in the county would exercise such discretion, the appellants failed to show nothing more than a hypothetical concern regarding § 17-6-90(a) and, therefore, lacked standing to challenge it. Parker v. Leeuwenburg, 300 Ga. 789, 797 S.E.2d 908, 2017 Ga. LEXIS 166 (2017).

Effect of subsection (c). — Subsection (c) of this section does not change the requirement that in order to be entitled to a declaratory judgment the plaintiff must show facts or circumstances whereby it is in a position of uncertainty or insecurity because of a dispute and of having to take some future action which is properly incident to its alleged right, and which future action without direction from the court might reasonably jeopardize its interest. Phoenix Assurance Co. v. Glens Falls Ins. Co., 101 Ga. App. 530, 114 S.E.2d 389, 1960 Ga. App. LEXIS 923 (1960).

Subsection (c) of this section does not mean that a declaratory judgment will lie to have just any justiciable controversy decided. Petitioners must show a necessity for a declaration of their rights or liabilities on account of uncertainty or insecurity regarding prior actions. Reliance Ins. Co. v. Brooks Lumber Co., 101 Ga. App. 620, 115 S.E.2d 271, 1960 Ga. App. LEXIS 961 (1960); Hartford Accident & Indem. Co. v. Boyle, 124 Ga. App. 739, 186 S.E.2d 140, 1971 Ga. App. LEXIS 1087 (1971).

Under subsection (c) of this section, one is not precluded from obtaining relief by declaratory judgment merely because the complaining party has other adequate legal or equitable remedy or remedies. Lumbermens Mut. Cas. Co. v. Moody, 116 Ga. App. 2, 156 S.E.2d 117, 1967 Ga. App. LEXIS 667 (1967).

Although subsection (c) of this section provides that relief by declaratory judgment is available notwithstanding other adequate legal or equitable remedies, the necessity therefor must appear, and a petition will not lie when all rights of the parties have already accrued and when no facts or circumstances are alleged showing a necessity for adjudication in order to relieve the plaintiff from the risk of taking future undirected action, which, without such action, would jeopardize the plaintiff's interest. United States Fid. & Guar. Co. v. Bishop, 121 Ga. App. 75, 172 S.E.2d 855, 1970 Ga. App. LEXIS 1111 (1970).

To obtain relief by declaratory judgment, the plaintiff must show facts or circumstances whereby it is in a position of uncertainty because of a dispute and of having to take some future action which is properly incident to its alleged right, and which future action without direction from the court might reasonably jeopardize its interest. Farm & Home Life Ins. Co. v. Skelton, 235 Ga. App. 507, 510 S.E.2d 76.

Other adequate remedies at law. — While under subsection (c) of this section, one is not precluded from obtaining relief by declaratory judgment merely because the complaining party has other adequate legal or equitable remedy or remedies, yet, when the petition shows that the rights of the parties have already accrued and no facts or circumstances are alleged which show the necessity for a determination of any dispute to guide and protect the petitioners from uncertainty and insecurity with respect to the propriety of some future act or conduct which is properly incident to their alleged right, which future action without direction would jeopardize their interest, the petition fails to state a cause of action for a declaratory judgment. Holcomb v. Bivens, 103 Ga. App. 86, 118 S.E.2d 840, 1961 Ga. App. LEXIS 867 (1961).

Declaratory judgment proceeding is action at law and, in the absence of specific statutory authority, new parties defendant cannot be made by a defendant in an action at law. Lumbermens Mut. Cas. Co. v. Moody, 116 Ga. App. 2, 156 S.E.2d 117, 1967 Ga. App. LEXIS 667 (1967).

Declaratory judgment action, absent appropriate prayers for specific equitable relief, is itself but an action at law. Lumbermens Mut. Cas. Co. v. Moody, 116 Ga. App. 2, 156 S.E.2d 117, 1967 Ga. App. LEXIS 667 (1967).

Petition for declaratory judgment is an action at law, and it is not converted into

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an equitable action simply because a temporary restraining order is granted in order to maintain the status quo pending adjudication. Hobgood v. Black, 144 Ga. App. 448, 241 S.E.2d 60, 1978 Ga. App. LEXIS 1628 (1978).

Action brought under this section is not equitable proceeding per se. Felton v. Chandler, 201 Ga. 347, 39 S.E.2d 654, 1946 Ga. LEXIS 457 (1946); Milwaukee Mechanics Ins. Co. v. Davis, 204 Ga. 67, 48 S.E.2d 876, 1948 Ga. LEXIS 555 (1948); City of Summerville v. Georgia Power Co., 204 Ga. 276, 49 S.E.2d 661, 1948 Ga. LEXIS 416 (1948), transferred, 78 Ga. App. 666, 51 S.E.2d 702, 1949 Ga. App. LEXIS 956 (1949); Adler v. Adler, 209 Ga. 363, 72 S.E.2d 714, 1952 Ga. LEXIS 498 (1952), transferred, 87 Ga. App. 842, 75 S.E.2d 578, 1953 Ga. App. LEXIS 869 (1953); Boggs v. Broome, 209 Ga. 836, 76 S.E.2d 497, 1953 Ga. LEXIS 422 (1953), transferred, 89 Ga. App. 574, 80 S.E.2d 208, 1954 Ga. App. LEXIS 517 (1954); United States Cas. Co. v. Georgia S. & Fla. Ry., 212 Ga. 569, 94 S.E.2d 422, 1956 Ga. LEXIS 447 (1956), transferred, 95 Ga. App. 100, 97 S.E.2d 185, 1957 Ga. App. LEXIS 726 (1957).

Relief provided for under the provisions of the Declaratory Judgment Act (Ga. L. 1945, p. 137) is not equitable per se. In suits instituted under the Act, when there is an absence of appropriate pleadings and prayers for specific equitable relief, in addition to those for the statutory relief provided for thereby, the case does not fall within the jurisdiction of the Supreme Court as being one in equity. Bond v. Ray, 207 Ga. 559, 63 S.E.2d 399, 1951 Ga. LEXIS 475 (1951).

Action brought under this section is not a proceeding involving extraordinary remedy within meaning of the Constitution. Felton v. Chandler, 201 Ga. 347, 39 S.E.2d 654, 1946 Ga. LEXIS 457 (1946); Milwaukee Mechanics Ins. Co. v. Davis, 204 Ga. 67, 48 S.E.2d 876, 1948 Ga. LEXIS 555 (1948); City of Summerville v. Georgia Power Co., 204 Ga. 276, 49 S.E.2d 661, 1948 Ga. LEXIS 416 (1948), transferred, 78 Ga. App. 666, 51 S.E.2d 702, 1949 Ga. App. LEXIS 956 (1949); Adler v. Adler, 209 Ga. 363, 72 S.E.2d 714, 1952 Ga. LEXIS 498 (1952), transferred, 87 Ga. App. 842, 75 S.E.2d 578, 1953 Ga. App. LEXIS 869 (1953).

Declaratory judgment defined. — Declaratory judgment or decree is one which simply declares the rights of the parties or expresses the opinion of the court on a question of law, without ordering anything to be done; its distinctive characteristic being that the declaration stands by itself, and no executory process follows as of course; and the action is therefore distinguished from other actions in that it does not seek execution or performance from the defendant or opposing party. Burgess v. Burgess, 210 Ga. 380, 80 S.E.2d 280, 1954 Ga. LEXIS 314 (1954); Lee v. Beneficial Fin. Co., 159 Ga. App. 205, 282 S.E.2d 770, 1981 Ga. App. LEXIS 2549 (1981).

Superior courts retain exclusive jurisdiction as to declaratory judgment actions. EVI Equip., Inc. v. Northern Ins. Co., 178 Ga. App. 197, 342 S.E.2d 380, 1986 Ga. App. LEXIS 1605 (1986), overruled, Mitchell v. Southern General Ins. Co., 185 Ga. App. 870, 366 S.E.2d 179, 1988 Ga. App. LEXIS 29 (1988).

Administrative proceeding pending. — Subsection (c) of O.C.G.A. § 9-4-2 did not give the plaintiff a right to sue for declaratory judgment notwithstanding pendency of the administrative proceeding. George v. Department of Natural Resources, 250 Ga. 491, 299 S.E.2d 556, 1983 Ga. LEXIS 555 (1983).

Availability of administrative remedy will not preclude declaratory judgment if the seeking of the remedy would expose the seeker, if unsuccessful, to loss of livelihood or otherwise seriously jeopardize the seeker's interests. Moss v. Central State Hosp., 255 Ga. 403, 339 S.E.2d 226, 1986 Ga. LEXIS 549 (1986).

Failure to exhaust administrative remedies. — When an applicant's request for a solid waste handling permit was denied and the applicant then failed to exhaust administrative remedies, there was no longer an actual controversy, and the applicant's petition for declaratory judgment was not appropriate. Chambers of Ga., Inc. v. Department of Natural Resources, 232 Ga. App. 632, 502 S.E.2d 553.

Because the superior court should not have exercised the court's equitable jurisdiction when the property owners failed to exhaust their administrative remedies under O.C.G.A. § 48-5-311 through the county board of equalization, the superior court's judgment for declaratory relief in favor of the property owners at summary judgment was reversed; instead, the superior court should have dismissed the property owners' suit for failing to state a claim. Chatham County Bd. of Assessors v. Jepson, 261 Ga. App. 771, 584 S.E.2d 22, 2003 Ga. App. LEXIS 774 (2003).

Trial court did not err by failing to dismiss a medical center's declaratory action based on the center's failure to exhaust administrative remedies because the center had standing to pursue, and was in fact pursuing, a direct facial constitutional challenge to a statute and was not required to exhaust the center's administrative remedies before filing its declaratory action. Women's Surgical Ctr., LLC v. Berry, 302 Ga. 349, 806 S.E.2d 606, 2017 Ga. LEXIS 894 (2017).

Words "actual controversy" in this section mean justiciable controversy, when interested parties are asserting adverse claims upon a state of facts wherein a legal judgment is sought that would control or direct future action. The danger, dilemma, or injury about which the plaintiff complains must not be speculative or contingent upon the happening of future events, but rather there must be a present, concrete issue between the parties wherein there is a definite assertion on the part of the plaintiff of legal rights and a positive legal duty on the part of the adverse party which is denied by such party. Darnell v. Tate, 206 Ga. 576, 58 S.E.2d 160, 1950 Ga. LEXIS 536 (1950).

Term "actual controversy" as used in this section and the terms "rights, status and other legal relations," all relate to a justiciable controversy, and a controversy is justiciable when there are interested parties asserting adverse claims upon an accrued state of facts. Adler v. Adler, 87 Ga. App. 842, 75 S.E.2d 578, 1953 Ga. App. LEXIS 869 (1953).

When there was an actual controversy between the parties which was ripe for adjudication, but the petition for declaratory judgment showed on its face that all possible rights between the parties had accrued and all possible obligations had attached, there was no actual or justiciable controversy present, and the trial court was without jurisdiction to enter a judgment. Farm & Home Life Ins. Co. v. Skelton, 235 Ga. App. 507, 510 S.E.2d 76.

Trial court erred by failing to dismiss a city's suits seeking a declaratory judgment as to the annexation of school property because there was no actual annexation of any of the properties in question; thus, the controversy was founded upon proposed legislation and the trial court could not render an advisory opinion. City of Atlanta v. Atlanta Indep. Sch. Sys., 300 Ga. 213, 794 S.E.2d 162, 2016 Ga. LEXIS 762 (2016).

If an action for a declaration raises issues which are fictitious, colorable, hypothetical, abstract, academic, or dead, and hence moot, the Georgia declaratory judgments statute is not applicable, and the action must be dismissed as decisively as would be any other action presenting the same nonjusticiable issues. Felton v. Chandler, 75 Ga. App. 354, 43 S.E.2d 742, 1947 Ga. App. LEXIS 543 (1947).

Issues which are based on fictitious, colorable, hypothetical, or academic questions, or questions that have become moot, do not involve legal rights, legal status, and other legal relations within the meaning of "actual" justiciable controversy as used in this section. Brown v. Lawrence, 204 Ga. 788, 51 S.E.2d 651, 1949 Ga. LEXIS 475 (1949); Bankers Life & Cas. Co. v. Cravey, 90 Ga. App. 113, 82 S.E.2d 150, 1954 Ga. App. LEXIS 649 (1954).

Word "actual," preceding word "controversy" in this section is word of emphasis, and not of definition. The word "controversy" within itself contemplates a justiciable controversy. A controversy is justiciable when there are "interested parties" asserting "adverse" claims upon a state of facts which must have accrued, wherein a legal decision is sought or demanded. Brown v. Lawrence, 204 Ga. 788, 51 S.E.2d 651, 1949 Ga. LEXIS 475 (1949).

Actual controversy must exist to justify declaratory relief. — Trial court was without jurisdiction to entertain a

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request for a declaratory judgment in a dispute over the annexation of certain property because the 2017 Ordinance at issue was explicitly limited to the annexation of a singular parcel of land that the city already owned and the school failed to establish the existence of an actual controversy, for purposes of declaratory relief, because the school failed to demonstrate that a ruling in the school's favor would have any immediate legal consequence. City of Atlanta v. Atlanta Indep. Sch. Sys., 307 Ga. 877, 838 S.E.2d 834, 2020 Ga. LEXIS 88 (2020).

No "actual controversy" shown. — There was no "actual controversy" when the plaintiff acknowledged that the plaintiff had not been charged with a violation of the statute nor had there been any showing of intent by authorities to take any action pursuant to the statute. Patterson v. State, 242 Ga. App. 131, 528 S.E.2d 884, 2000 Ga. App. LEXIS 110 (2000).

Trial court did not err by affirming the dismissal of the property owner's two latest lawsuits in a case in which the owners were challenging zoning decisions related to a proposed private school near or contiguous to their property; none of the claims in the fourth lawsuit challenged the zoning status of the county government representatives and private developers' property and the fifth lawsuit did not present a justiciable issue of fact, or, in other words, an "actual controversy." Harrell v. Fulton County, 272 Ga. App. 760, 612 S.E.2d 838, 2005 Ga. App. LEXIS 322 (2005).

Given the absence of a justiciable controversy, the trial court erred in granting a county industrial development authority's petition for declaratory judgment finding that the authority was immune from a county's zoning regulations as it amounted to an advisory opinion and had to be vacated and remanded for an order dismissing the petition without prejudice. Effingham County Bd. of Comm'rs v. Effingham County Indus. Dev. Auth., 286 Ga. App. 748, 650 S.E.2d 274, 2007 Ga. App. LEXIS 727 (2007).

As a city had the right under a lease and an airport authority's enabling legislation to relocate the airport against the authority's wishes, the authority did not face "uncertainty and insecurity" as to such an action. As the authority did not establish the existence of a justiciable controversy under O.C.G.A. § 9-4-2(a), the authority's declaratory judgment suit was properly dismissed. Airport Auth. v. City of St. Marys, 297 Ga. App. 645, 678 S.E.2d 103, 2009 Ga. App. LEXIS 494 (2009).

Trial court's holding that a bank was not required to confirm a second nonjudicial foreclosure sale under O.C.G.A. § 44-14-161 before pursuing an action for a deficiency judgment against a guarantor was an erroneous advisory opinion because the bank did file a confirmation petition and, thus, the parties failed to show under O.C.G.A. § 9-4-2(a) that there was any justiciable controversy on the issue of whether the bank was required to do so. Building Block Enterprises, LLC v. State Bank & Trust Company, 314 Ga. App. 147, 723 S.E.2d 467, 2012 Ga. App. LEXIS 146 (2012), cert. denied, No. S12C1053, 2012 Ga. LEXIS 553 (Ga. May 29, 2012).

Although there might be some actual or justiciable controversy between the offender and the sheriff, there was no present controversy whatsoever between the offender and the Sexual Offender Registration Review Board as the relief requested by the offender, if granted, would have no practical effect on the controversy between the offender and the Board and, thus, the trial court erred in denying the Board's motion to dismiss the offender's declaratory judgment action. Sexual Offender Registration Review Bd. v. Berzett, 301 Ga. 391, 801 S.E.2d 821, 2017 Ga. LEXIS 532 (2017).

Trial court erred in granting a declaratory judgment in favor of the appellee under the Declaratory Judgment Act, O.C.G.A. § 9-4-1 et seq., because, while the appellee established that the parties disagreed whether a warranty deed was delivered, the appellee failed to show that resolution of that dispute would have had a legal effect on anything; thus, the case did not present an actual, justiciable controversy appropriate for declaratory relief. Willis v. Cheeley, 363 Ga. App. 341, 870 S.E.2d 907, 2022 Ga. App. LEXIS 156 (2022).

"Interested" parties as used in this section must, of course, mean parties having legal, protectible interest. If the petitioner can show that the petitioner's rights are in direct issue or jeopardy, and at the same time show that the facts are complete, and that the petitioner's interest is not merely academic, hypothetical, or colorable, but actual, a "legal interest" as related to a justiciable controversy may be shown. Brown v. Lawrence, 204 Ga. 788, 51 S.E.2d 651, 1949 Ga. LEXIS 475 (1949).

Under the Declaratory Judgment Act (Ga. L. 1945, p. 137), the respective superior courts of the state have power on petition therefor to declare the rights and other legal relations of an interested party, (a) in cases of actual controversy, and (b) in any civil case in which it appears to the court that the ends of justice require that such a declaration should be made for the guidance and protection of the petitioner. Cook v. Sikes, 210 Ga. 722, 82 S.E.2d 641, 1954 Ga. LEXIS 418 (1954).

Party is "interested" within the meaning of this section whenever a party has a protectible interest and asserts an adverse claim on an accrued statement of facts. Hobgood v. Black, 144 Ga. App. 448, 241 S.E.2d 60, 1978 Ga. App. LEXIS 1628 (1978).

Adverse claim asserted under real estate contract. — Since the president of the corporate buyer on a real estate contract asserted an adverse claim based upon the transaction in a separate suit in federal court, the president was an interested party within the meaning of the declaratory judgment statute, O.C.G.A. § 9-4-2(a), and was subject to the declaratory relief relating to the contract sought by the sellers. Smyrna Dev. Co. v. Whitener Ltd. P'ship, 280 Ga. App. 788, 635 S.E.2d 173, 2006 Ga. App. LEXIS 871 (2006), cert. dismissed in part, cert. denied, No. S06C2117, 2006 Ga. LEXIS 875 (Ga. Oct. 16, 2006).

Under this section, court may declare rights, and other legal relations of any interested party petitioning. Central Ry. v. Southern Clays, Inc., 94 Ga. App. 377, 94 S.E.2d 625, 1956 Ga. App. LEXIS 549 (1956).

Default judgment was properly entered, after the defendant did not file an answer within the time permitted by law. Town of Thunderbolt v. River Crossing Apts., Ltd., 189 Ga. App. 607, 377 S.E.2d 12, 1988 Ga. App. LEXIS 1484 (1988).

When a seller failed to pay the closing costs under a buy-back provision in its contract with the buyers, the buyers were properly granted a declaratory judgment which held that the seller was responsible to pay the closing costs, and an offer to do so was insufficient to satisfy this duty, and did not satisfy O.C.G.A. § 13-4-24. Tullis Devs., Inc. v. 3M Constr., Inc., 282 Ga. App. 335, 638 S.E.2d 787, 2006 Ga. App. LEXIS 1385 (2006).

Trial court did not err in granting declaratory relief to an attorney via a default judgment because a petition for declaratory judgment was an action at law pursuant to O.C.G.A. § 9-4-2 and a petition for declaratory judgment was governed by the practice rules contained in the Civil Practice Act, specifically O.C.G.A. § 9-11-81, including the rules pertaining to default judgment; the attorney was entitled to a judgment that a doctor was not entitled to attorney fees from the doctor's former spouse under O.C.G.A. § 9-15-14(b) based on the admissions that the former spouse had successfully obtained a family violence protective order against the doctor and that this order was only vacated after the former spouse agreed to voluntarily dismiss the case. Vaughters v. Outlaw, 293 Ga. App. 620, 668 S.E.2d 13, 2008 Ga. App. LEXIS 1029 (2008).

Principle of declaratory judgment is that it declares existing law on existing state of facts. The danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events and the prejudice to the plaintiff's position must be actual and genuine and not merely possible or remote. City of Nashville v. Snow, 204 Ga. 371, 49 S.E.2d 808, 1948 Ga. LEXIS 423 (1948); Brown v. Lawrence, 204 Ga. 788, 51 S.E.2d 651, 1949 Ga. LEXIS 475 (1949); Hudgens v. Retail, Whsle. & Dep't Store Local 315, 133 Ga. App. 329, 210 S.E.2d 821, 1974 Ga. App. LEXIS 1065 (1974), cert. denied, 424 U.S. 957, 96 S.

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Ct. 1435, 47 L. Ed. 2d 364, 1976 U.S. LEXIS 245 (1976).

Declaratory judgment is available in case of "actual controversy" to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. Mayor of Savannah v. Bay Realty Co., 90 Ga. App. 261, 82 S.E.2d 710, 1954 Ga. App. LEXIS 679 (1954).

Under the Declaratory Judgment Act (Ga. L. 1945, p. 137), the courts of this state are authorized to grant declaratory relief only when there exists between the parties an actual controversy which is ripe for judicial determination; the courts are unauthorized to grant such relief respecting future rights. Sanders v. Harlem Baptist Church, 207 Ga. 7, 59 S.E.2d 720, 1950 Ga. LEXIS 373 (1950).

Justiciable controversy is essential to the right to obtain an action for declaratory judgment. Hatcher v. Georgia Farm Bureau Mut. Ins. Co., 112 Ga. App. 711, 146 S.E.2d 535, 1965 Ga. App. LEXIS 819 (1965).

Case is appropriate for declaratory judgment where a justiciable controversy between adverse parties is evident from the pleadings and record in the case. Hassell v. Citizens & S. Nat'l Bank, 240 Ga. 285, 240 S.E.2d 35, 1977 Ga. LEXIS 1477 (1977).

O.C.G.A. § 9-4-2 does not mean that a declaratory judgment action will lie to have just any justiciable controversy decided. Chattahoochee Bancorp, Inc. v. Roberts, 203 Ga. App. 405, 416 S.E.2d 875, 1992 Ga. App. LEXIS 437 (1992).

Determining when controversy justiciable. — When a concrete issue is present, and there is a definite assertion of legal rights, and a positive legal duty with respect thereto, which are denied by the adverse party, there is a justiciable controversy calling for the invocation of a declaratory judgment action. However, the controversy must have proceeded sufficiently, or have ripened to the extent, that it has progressed beyond the stage of a mere apprehension, or fear that the defendant may make some assertion adverse to the plaintiff's rights. City of Nashville v. Snow, 204 Ga. 371, 49 S.E.2d 808, 1948 Ga. LEXIS 423 (1948).

Controversy is justiciable when there are interested parties asserting "adverse" claims upon a state of facts which must have accrued, wherein a legal decision is sought or demanded. Sanders v. Harlem Baptist Church, 207 Ga. 7, 59 S.E.2d 720, 1950 Ga. LEXIS 373 (1950); Bankers Life & Cas. Co. v. Cravey, 90 Ga. App. 113, 82 S.E.2d 150, 1954 Ga. App. LEXIS 649 (1954).

Not just a question of meaning of statute. — In order that a controversy may justify the making of a declaration, it must include a right claimed by one party and denied by the other, and not merely a question as to the abstract meaning or validity of a statute. Brown v. Lawrence, 204 Ga. 788, 51 S.E.2d 651, 1949 Ga. LEXIS 475 (1949); Cook v. Sikes, 210 Ga. 722, 82 S.E.2d 641, 1954 Ga. LEXIS 418 (1954); Pilgrim v. First Nat'l Bank, 235 Ga. 172, 219 S.E.2d 135, 1975 Ga. LEXIS 813 (1975).

For a controversy to justify the making of a declaration, it must include a right claimed by one party and denied by the other, and not merely a question as to the abstract meaning or validity of a statute. Pangle v. Gossett, 261 Ga. 307, 404 S.E.2d 561, 1991 Ga. LEXIS 284 (1991).

There can be no justiciable controversy unless there are interested parties asserting adverse claims upon a state of facts which have accrued. Cook v. Sikes, 210 Ga. 722, 82 S.E.2d 641, 1954 Ga. LEXIS 418 (1954); Pilgrim v. First Nat'l Bank, 235 Ga. 172, 219 S.E.2d 135, 1975 Ga. LEXIS 813 (1975).

Justiciable controversy must include a right claimed by one party and denied by the other, and there must be interested parties asserting adverse claims upon a state of facts which have accrued. Slaughter v. Faust, 155 Ga. App. 68, 270 S.E.2d 218, 1980 Ga. App. LEXIS 2461 (1980).

Presence in the declaratory judgment action of a party with an interest in the controversy adverse to that of the petitioner is necessary under either subsection (a) or (b) of O.C.G.A. § 9-4-2. Pangle v. Gossett, 261 Ga. 307, 404 S.E.2d 561, 1991 Ga. LEXIS 284 (1991).

While administrators are entitled to judicial guidance under O.C.G.A. § 9-4-4(a), the requirement for a determination to guide and protect administrators from uncertainty and insecurity with respect to some future act or conduct applies in cases under O.C.G.A. § 9-4-4 as well as to cases arising under O.C.G.A. § 9-4-2; consequently, a declaratory judgment was not authorized when the rights of the parties had accrued and there was no uncertainty alleged requiring direction from the court. Hammond v. Sanders, 210 Ga. App. 307, 436 S.E.2d 45, 1993 Ga. App. LEXIS 1171 (1993).

Whe no justiciable controversy is alleged, action for declaratory judgment will not lie. Liner v. City of Rossville, 212 Ga. 664, 94 S.E.2d 862, 1956 Ga. LEXIS 487 (1956).

When a complaint for declaratory judgment shows upon its face there is no actual or justiciable controversy between adverse parties, a trial court does not have jurisdiction to render a declaratory judgment. Kaylor v. Kaylor, 236 Ga. 777, 225 S.E.2d 320, 1976 Ga. LEXIS 1023 (1976).

Declaratory judgment may not be granted in the absence of a justiciable controversy. Town of Thunderbolt v. River Crossing Apts., Ltd., 189 Ga. App. 607, 377 S.E.2d 12, 1988 Ga. App. LEXIS 1484 (1988).

Action for declaratory judgment will not lie when declaration would be academic or useless. Kiker v. Hefner, 119 Ga. App. 629, 168 S.E.2d 637, 1969 Ga. App. LEXIS 1192 (1969).

Action for declaratory judgment will not lie when rights of parties have already accrued. Kiker v. Hefner, 119 Ga. App. 629, 168 S.E.2d 637, 1969 Ga. App. LEXIS 1192 (1969).

Declaratory judgment cannot be obtained when there is no room for reasonable question as to rights of parties. Hatcher v. Georgia Farm Bureau Mut. Ins. Co., 112 Ga. App. 711, 146 S.E.2d 535, 1965 Ga. App. LEXIS 819 (1965).

Declaratory judgment action will not be rendered based upon possible or probable contingency, but must be based upon accrued facts, or facts already existing. State Farm Mut. Auto. Ins. Co. v. Hillhouse, 131 Ga. App. 524, 206 S.E.2d 627, 1974 Ga. App. LEXIS 1456 (1974).

Courts will not render declaratory judgment as to future rights, but just as in ordinary actions will wait until the event giving rise to the rights has happened, or, in other words, until the rights have become fixed under an existing state of facts. Sanders v. Harlem Baptist Church, 207 Ga. 7, 59 S.E.2d 720, 1950 Ga. LEXIS 373 (1950).

Statutes relative to declaratory judgments do not as a rule contemplate declarations upon remote contingencies or as to matters whenre the interest of the plaintiff is merely contingent upon the happening of some event in the future. Bankers Life & Cas. Co. v. Cravey, 90 Ga. App. 113, 82 S.E.2d 150, 1954 Ga. App. LEXIS 649 (1954).

No declaratory judgment permitted to confirm action already taken. — When the plaintiff is not faced with any dilemma with regard to the course it should pursue but seeks confirmation of what it has already done, declaratory judgment is not an available remedy. Norfolk & Dedham Mut. Fire Ins. Co. v. Jones, 124 Ga. App. 761, 186 S.E.2d 119, 1971 Ga. App. LEXIS 1096 (1971).

Declaratory judgment is not available to a party merely to test the viability of its defenses. Chattahoochee Bancorp, Inc. v. Roberts, 203 Ga. App. 405, 416 S.E.2d 875, 1992 Ga. App. LEXIS 437 (1992).

Declaratory judgment cannot be advisory. — Guardian's declaratory judgment action seeking to have elderly woman's 2013 last will and testament deemed invalid and void was properly dismissed by the trial court because the elderly woman was still alive and may still revoke the 2013 will; therefore, any ruling determining the will's validity constituted an improper advisory opinion. Kellar v. Davis, 350 Ga. App. 385, 829 S.E.2d 466, 2019 Ga. App. LEXIS 309 (2019), cert. denied, No. S19C1423, 2020 Ga. LEXIS 26 (Ga. Jan. 13, 2020).

Georgia Declaratory Judgment Act (Ga. L. 1945, p. 137) makes no provision for declaratory judgment which is merely advisory. Liner v. City of Rossville, 212 Ga. 664, 94 S.E.2d 862, 1956 Ga.

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LEXIS 487 (1956); Henderson v. Alverson, 217 Ga. 541, 123 S.E.2d 721, 1962 Ga. LEXIS 317 (1962); Village of N. Atlanta v. Cook, 219 Ga. 316, 133 S.E.2d 585, 1963 Ga. LEXIS 449 (1963); Bryant v. Clark Glass & Mirror Co., 109 Ga. App. 606, 136 S.E.2d 915, 1964 Ga. App. LEXIS 930 (1964); Garrett v. Columbus Realty Co., 113 Ga. App. 835, 149 S.E.2d 757, 1966 Ga. App. LEXIS 1219 (1966); Hawes v. Cordell Ford Co., 223 Ga. 260, 154 S.E.2d 599, 1967 Ga. LEXIS 489 (1967); Residential Devs., Inc. v. Merchants Indem. Co., 122 Ga. App. 503, 177 S.E.2d 715, 1970 Ga. App. LEXIS 923 (1970), aff'd, 227 Ga. 332, 180 S.E.2d 729, 1971 Ga. LEXIS 692 (1971), overruled, Atlantic Wood Industries, Inc. v. Argonaut Ins. Co., 190 Ga. App. 814, 380 S.E.2d 504, 1989 Ga. App. LEXIS 438 (1989); King v. Peagler, 227 Ga. 29, 178 S.E.2d 897, 1970 Ga. LEXIS 386 (1970); Hudgens v. Retail, Whsle. & Dep't Store Local 315, 133 Ga. App. 329, 210 S.E.2d 821, 1974 Ga. App. LEXIS 1065 (1974), cert. denied, 424 U.S. 957, 96 S. Ct. 1435, 47 L. Ed. 2d 364, 1976 U.S. LEXIS 245 (1976).

In order to authorize declaratory relief, the record must disclose antagonistic claims indicating imminent and inevitable litigation; and courts will not render an opinion which is merely advisory in character upon a state of facts which have not fully accrued. Wright v. Heffernan, 205 Ga. 75, 52 S.E.2d 289, 1949 Ga. LEXIS 510 (1949).

When the party seeking declaratory judgment does not show it is in a position of uncertainty as to an alleged right, dismissal of the declaratory judgment action is proper; otherwise, the trial court will be issuing an advisory opinion, and the Declaratory Judgment Act (Ga. L. 1945, p. 137) makes no provision for a judgment that would be "advisory." Sieg v. Pricewaterhousecoopers, L.L.P., 246 Ga. App. 394, 539 S.E.2d 896, 2000 Ga. App. LEXIS 1189 (2000).

Opinions are denominated "advisory" when there is insufficient interest in plaintiff or defendant to justify judicial determination, when the judgment sought would not constitute specific relief to a litigant or affect legal relations or when, by reason of inadequacy of parties defendant, the judgment could not be sufficiently conclusive. Cook v. Sikes, 210 Ga. 722, 82 S.E.2d 641, 1954 Ga. LEXIS 418 (1954); Pennsylvania Thresherman & Farmers Mut. Cas. Ins. Co. v. Gardner, 107 Ga. App. 472, 130 S.E.2d 507, 1963 Ga. App. LEXIS 881 (1963).

No advisory opinions regarding issues pending in other court proceedings. — Courts will ordinarily refuse to entertain an action for a declaratory judgment as to questions which are determinable in a pending action or proceeding between the same parties. Shippen v. Folsom, 200 Ga. 58, 35 S.E.2d 915, 1945 Ga. LEXIS 396 (1945); Carter v. State, 93 Ga. App. 12, 90 S.E.2d 672, 1955 Ga. App. LEXIS 462 (1955).

Declaratory judgment will not be rendered to give an advisory opinion in regard to questions arising in a proceeding, pending in a court of competent jurisdiction in which the same questions may be raised and determined. Ulmer v. State Hwy. Dep't, 90 Ga. App. 833, 84 S.E.2d 583, 1954 Ga. App. LEXIS 826 (1954); Kiker v. Hefner, 119 Ga. App. 629, 168 S.E.2d 637, 1969 Ga. App. LEXIS 1192 (1969); Frost v. Gazaway, 122 Ga. App. 244, 176 S.E.2d 476, 1970 Ga. App. LEXIS 842 (1970); Norfolk & Dedham Mut. Fire Ins. Co. v. Jones, 124 Ga. App. 761, 186 S.E.2d 119, 1971 Ga. App. LEXIS 1096 (1971).

When a declaration is sought as to matters or claims already pending between the parties in a court of competent jurisdiction, a declaratory judgment will be denied, since such declaration will be in nature and effect an advisory opinion to such other court. State Farm Mut. Auto. Ins. Co. v. Hillhouse, 131 Ga. App. 524, 206 S.E.2d 627, 1974 Ga. App. LEXIS 1456 (1974).

It is not grounds for denial of relief that declaratory judgment action anticipate another proceeding. Jahncke Serv., Inc. v. Department of Transp., 134 Ga. App. 106, 213 S.E.2d 150, 1975 Ga. App. LEXIS 1923 (1975).

Court may not decide abstract questions of law. — Proceeding must not be merely one in which the court is called

upon to decide an abstract or theoretical question of law or to give an advisory opinion. Questions which are merely incidental to a determination of no controversy between the parties are not the proper subject matter of a declaratory judgment proceeding. Darnell v. Tate, 206 Ga. 576, 58 S.E.2d 160, 1950 Ga. LEXIS 536 (1950).

No abstract ability to determine validity of statute or ordinance. — General rule is that a court under a declaratory judgment proceeding does not have the right to determine whether a statute or ordinance is, abstractly, valid or invalid. City of Nashville v. Snow, 204 Ga. 371, 49 S.E.2d 808, 1948 Ga. LEXIS 423 (1948).

Declaratory Judgment Act (Ga. L. 1945, p. 137) does not give the superior court authority to render a declaratory judgment as to the validity or invalidity of a municipal ordinance when there is a pending prosecution of the plaintiff by the defendant municipality for a violation of the ordinance. Staub v. Mayor of Baxley, 211 Ga. 1, 83 S.E.2d 606, 1954 Ga. LEXIS 468 (1954).

No action for declaratory judgment when no need to determine petitioner's rights in order to protect its interests. — When the petition shows that the rights of the parties have already accrued and no facts or circumstances are alleged which show that an adjudication of the plaintiffs' rights is necessary in order to relieve the plaintiffs from the risk of taking any future undirected action incident to their rights, which action without direction would jeopardize their interests, the petition fails to state a cause of action for declaratory judgment. Pinkard v. Mendel, 216 Ga. 487, 117 S.E.2d 336, 1960 Ga. LEXIS 511 (1960); State Hwy. Dep't v. Georgia S. & Fla. Ry., 216 Ga. 547, 117 S.E.2d 897, 1961 Ga. LEXIS 273 (1961); Dunn v. Campbell, 219 Ga. 412, 134 S.E.2d 20, 1963 Ga. LEXIS 468 (1963); Salomon v. Central of Ga. Ry., 220 Ga. 671, 141 S.E.2d 424, 1965 Ga. LEXIS 602 (1965); Lumbermens Mut. Cas. Co. v. Moody, 116 Ga. App. 2, 156 S.E.2d 117, 1967 Ga. App. LEXIS 667 (1967).

Petition does not state a cause of action for a declaratory judgment when the rights of the parties have already accrued and there is no necessity to protect and guide the petitioner from uncertainty and insecurity with respect to the propriety of some future act or conduct. Gant v. State Farm Mut. Auto. Ins. Co., 109 Ga. App. 41, 134 S.E.2d 886, 1964 Ga. App. LEXIS 791 (1964); State Farm Mut. Auto. Ins. Co. v. Hillhouse, 131 Ga. App. 524, 206 S.E.2d 627, 1974 Ga. App. LEXIS 1456 (1974).

Petition fails to state a cause of action for declaratory judgment when the petition shows that any rights the plaintiff has have already accrued, and does not show that the plaintiff is in danger of taking some future undirected action which if taken without judicial direction might reasonably jeopardize the plaintiff's rights. Bryant v. Clark Glass & Mirror Co., 109 Ga. App. 606, 136 S.E.2d 915, 1964 Ga. App. LEXIS 930 (1964).

Petition for declaratory judgment will not lie when all rights of the parties have already accrued unless it is necessary in order to relieve the parties from the risk of taking any future undirected action incident to their rights, which action without direction would jeopardize their interests. Fletcher v. Russell, 151 Ga. App. 229, 259 S.E.2d 212, 1979 Ga. App. LEXIS 2509, rev'd on other grounds, 244 Ga. 854, 262 S.E.2d 138, 1979 Ga. LEXIS 1440 (1979).

Subject matter jurisdiction. — Subject matter of which the court must have jurisdiction in order to enter a valid declaratory judgment is defined by the courts of this state as: "the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power." Williams v. Kaylor, 218 Ga. 576, 129 S.E.2d 791, 1963 Ga. LEXIS 265 (1963).

Parties seeking to maintain action must have capacity to sue, and must have a right which is justiciable and subject to a declaration of rights, and it must be brought against an adverse party with an antagonistic interest. Cook v. Sikes, 210 Ga. 722, 82 S.E.2d 641, 1954 Ga. LEXIS 418 (1954); Pilgrim v. First Nat'l Bank, 235 Ga. 172, 219 S.E.2d 135, 1975 Ga. LEXIS 813 (1975).

Declaration will be refused when no party to proceeding has interest in

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controversy adverse to that of the petitioner. Cook v. Sikes, 210 Ga. 722, 82 S.E.2d 641, 1954 Ga. LEXIS 418 (1954); Pilgrim v. First Nat'l Bank, 235 Ga. 172, 219 S.E.2d 135, 1975 Ga. LEXIS 813 (1975).

Party is not entitled to declaratory judgment if the party has no present right to protect or right to a directive decree to guide the party with respect to some future act or conduct which is properly incidental to any of the party's alleged rights, and which future action without such direction might jeopardize the party's interest. Bankers Life & Cas. Co. v. Cravey, 90 Ga. App. 113, 82 S.E.2d 150, 1954 Ga. App. LEXIS 649 (1954).

Declaratory Judgment Act (Ga. L. 1945, p. 137) is governed by the practice rules contained in the Civil Practice Act. Town of Thunderbolt v. River Crossing Apts., Ltd., 189 Ga. App. 607, 377 S.E.2d 12, 1988 Ga. App. LEXIS 1484 (1988); Smith v. Ticor Title Ins. Co., 200 Ga. App. 534, 408 S.E.2d 833, 1991 Ga. App. LEXIS 1097 (1991).

General civil practice rules applicable to pleadings for declaratory judgment. — Since the Declaratory Judgment Act (Ga. L. 1945, p. 137) contains no special provisions for pleading, the test of what is needed to withstand a motion to dismiss a petition for declaratory judgment is determined under other provisions of this title. Southeastern Fid. Fire Ins. Co. v. State Farm Mut. Auto. Ins. Co., 118 Ga. App. 861, 165 S.E.2d 887, 1968 Ga. App. LEXIS 1549 (1968).

Petition must plead existence of justiciable controversy. — It is incumbent upon the party seeking declaratory judgment to allege facts sufficient to show the existence of a controversy within the meaning of this section, and a petition which does not set forth an actual controversy between the parties may be subject to demurrer (now motion to dismiss). Pennsylvania Thresherman & Farmers Mut. Cas. Ins. Co. v. Gardner, 107 Ga. App. 472, 130 S.E.2d 507, 1963 Ga. App. LEXIS 881 (1963).

Mere conclusions of pleader insufficient to state cause of action. — When the petition contains only conclusions of the pleader that there does exist a substantial controversy for determination, and no facts are alleged upon which the controversy can be predicated, the petition fails to state a justiciable dispute or controversy which would authorize the court to grant any relief under this section. Pennsylvania Thresherman & Farmers Mut. Cas. Ins. Co. v. Gardner, 107 Ga. App. 472, 130 S.E.2d 507, 1963 Ga. App. LEXIS 881 (1963).

Failure to name adverse party or parties with antagonistic interest is fatal to justiciability in an action for declaratory relief. Cook v. Sikes, 210 Ga. 722, 82 S.E.2d 641, 1954 Ga. LEXIS 418 (1954); Pilgrim v. First Nat'l Bank, 235 Ga. 172, 219 S.E.2d 135, 1975 Ga. LEXIS 813 (1975).

Adequacy of pleadings. — When the allegations of the petition show an actual controversy between the petitioner and the defendants, the petition presents a case for a declaratory judgment as to the rights of the parties, and, accordingly, the court does not err in overruling the general demurrer (now motion to dismiss). Mensinger v. Standard Accident Ins. Co., 202 Ga. 258, 42 S.E.2d 628, 1947 Ga. LEXIS 396 (1947).

To withstand a general demurrer (now motion to dismiss), it is only necessary that the plaintiff show an existing justiciable controversy as provided by the Declaratory Judgment Act (Ga. L. 1945, p. 137). It is not necessary that the petition go farther and show that the plaintiff's contention is correct. Georgia Cas. & Sur. Co. v. Turner, 86 Ga. App. 418, 71 S.E.2d 773, 1952 Ga. App. LEXIS 966 (1952); Parks v. Jones, 88 Ga. App. 188, 76 S.E.2d 449, 1953 Ga. App. LEXIS 1038 (1953).

When a petition fails to allege a situation of uncertainty and insecurity with respect to the propriety of some future act or conduct, which action without such direction might reasonably jeopardize the petitioner's interest, it fails to allege a cause of action for a declaration of rights. Brown v. Cobb County, 212 Ga. 172, 91 S.E.2d 516, 1956 Ga. LEXIS 294 (1956).

Petition seeking a declaratory judgment, which shows that the petitioner was not uncertain or insecure as to the petitioner's asserted rights as executor as

against the claim of a legatee, was properly dismissed on demurrer (now motion to dismiss). Venable v. Dallas, 212 Ga. 595, 94 S.E.2d 416, 1956 Ga. LEXIS 455 (1956).

When no facts or circumstances are alleged to show any necessity for a determination of any dispute to guide and protect the plaintiff from uncertainty and insecurity with regard to the propriety of some future act or conduct which is properly incident to the plaintiff's alleged rights and which future action, without such directions, might reasonably jeopardize the plaintiff's interest, there are no grounds for a declaration of rights. Henderson v. Alverson, 217 Ga. 541, 123 S.E.2d 721, 1962 Ga. LEXIS 317 (1962).

Petition that had no parties against whom any declaration of rights could be made under the Declaratory Judgment Act (Ga. L. 1945, p. 137) did not state a cause of action for declaratory relief. Village of N. Atlanta v. Cook, 219 Ga. 316, 133 S.E.2d 585, 1963 Ga. LEXIS 449 (1963).

Plaintiffs' allegations are not sufficient for a declaratory judgment if the petition fails to allege any necessity for a determination to guide and protect the plaintiffs from uncertainty and insecurity with respect to the propriety of some future act or conduct which is properly incident to their alleged right, and which future action without such direction might reasonably jeopardize their interest. Gay v. Hunt, 221 Ga. 841, 148 S.E.2d 310, 1966 Ga. LEXIS 719 (1966).

When the petition shows that the rights of the parties have already accrued and no facts or circumstances are alleged which show that an adjudication of the plaintiffs' rights is necessary in order to relieve the plaintiffs from the risk of taking any future undirected action incident to their rights, which action without direction would jeopardize their interests, the petition fails to state a cause of action for declaratory judgment. Poole v. City of Atlanta, 117 Ga. App. 432, 160 S.E.2d 874, 1968 Ga. App. LEXIS 1113 (1968).

Allegations of a petition clearly bring the petition within the ambit of the Declaratory Judgment Act (Ga. L. 1945, p. 137) when the petitioner is faced with an immediacy of choice before rights must become fixed or affected by the rendition of judgments. Southeastern Fid. Fire Ins. Co. v. State Farm Mut. Auto. Ins. Co., 118 Ga. App. 861, 165 S.E.2d 887, 1968 Ga. App. LEXIS 1549 (1968).

Trial court erred by dismissing the appellants' declaratory judgment action on the basis that it improperly called for the interpretation and application of a criminal statute because they were not seeking an advisory opinion but sought a determination of whether licensed individuals may carry a weapon on the grounds of the garden at issue in accordance with O.C.G.A. § 16-11-127(c), which was a proper subject for declaratory relief. Georgiacarry.Org, Inc. v. Atlanta Botanical Garden, Inc., 299 Ga. 26, 785 S.E.2d 874, 2016 Ga. LEXIS 356 (2016).

Party opposing motion under § 9-11-12 or § 9-11-56 entitled to respond. — When a party seeking a declaratory judgment contends that the party is entitled to judgment based on the facts or allegations currently of record, the party may move for judgment on the pleadings pursuant to O.C.G.A. § 9-11-12(c) or for summary judgment pursuant to O.C.G.A. § 9-11-56(a). Under either procedure, the opposing party would be entitled to an opportunity to respond. Smith v. Ticor Title Ins. Co., 200 Ga. App. 534, 408 S.E.2d 833, 1991 Ga. App. LEXIS 1097 (1991).

Notice and opportunity to be heard required. — There is no procedure pursuant to which the trial court may simply grant a complaint for declaratory judgment sua sponte, without affording the opposing party notice or an opportunity to be heard. Smith v. Ticor Title Ins. Co., 200 Ga. App. 534, 408 S.E.2d 833, 1991 Ga. App. LEXIS 1097 (1991).

No executory action follows declaratory judgment. — Distinctive characteristic of a declaratory judgment is that it stands by itself, and no executory process follows as of course; and the action is therefore distinguished from other actions in that it does not seek execution or performance from the defendant or opposing party. Kiker v. Hefner, 119 Ga. App. 629, 168 S.E.2d 637, 1969 Ga. App. LEXIS 1192 (1969).

Appeal from declaratory judgment. — Declaratory judgments have the force

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and effect of final judgments and are reviewable as such. Sunstates Refrigerated Servs., Inc. v. Griffin, 215 Ga. App. 61, 449 S.E.2d 858, 1994 Ga. App. LEXIS 1120 (1994).

In a shareholder dispute between siblings, a trial court's declaratory judgment on one issue was directly appealable because it had the force and effect of a final judgment, notwithstanding that other issues and claims in the case remained pending before the trial court; accordingly, the appellate court had jurisdiction. Ward v. Ward, 322 Ga. App. 888, 747 S.E.2d 95, 2013 Ga. App. LEXIS 629 (2013).

Applicability to Specific Cases

1. Insurance Policies

Section applicable to automobile insurance policies. — When there exists a controversy within the meaning of this section, parties to a policy of automobile liability insurance may invoke this remedy for determination of controversies arising from the construction and operation of the policy. Pennsylvania Thresherman & Farmers Mut. Cas. Ins. Co. v. Gardner, 107 Ga. App. 472, 130 S.E.2d 507, 1963 Ga. App. LEXIS 881 (1963).

Retroactive application of judicial decision regarding optional no-fault coverage. — Declaratory judgment action was appropriate vehicle for determination of whether case requiring insurer to obtain insured's signature indicating acceptance or rejection of optional no-fault coverages should be applied retroactively. Allstate Ins. Co. v. Shuman, 163 Ga. App. 313, 293 S.E.2d 868, 1982 Ga. App. LEXIS 3201 (1982).

Declaratory judgment inappropriate when no dispute as to meaning of policy. — When it was nowhere alleged that there was any dispute between the parties as to the meaning of the contract of insurance in any particular, or that there was any uncertainty in the meaning of any portion of the contract of insurance and there was no allegation that the facts were in dispute on which the operation of the contract depended, and there was no prayer for a determination of disputed facts, the petitioner was not entitled to a declaratory judgment. Hatcher v. Georgia Farm Bureau Mut. Ins. Co., 112 Ga. App. 711, 146 S.E.2d 535, 1965 Ga. App. LEXIS 819 (1965).

Insurer not entitled to declaratory judgment. — Insurer had not shown that the insurer was entitled to a declaratory judgment that a second insurer had to defend an estate against a personal injury lawsuit; the first insurer had conceded that it was obligated to defend the estate itself, and it had not demonstrated sufficient uncertainty concerning its duty to negotiate a settlement demand that exceeded its policy limits to authorize a declaratory judgment. State Farm Auto. Ins. Co. v. Metro. Prop. & Cas. Ins. Co., 284 Ga. App. 430, 643 S.E.2d 895, 2007 Ga. App. LEXIS 341 (2007).

On appeal from an order denying an insurer's motion to enforce a settlement agreement with an estate, and the insurer's petition for a declaratory judgment, the trial court did not clearly err in finding that: (1) absent an executed writing, a settlement agreement between the parties was never finalized; and (2) admissions that the negotiation between the estate's attorney and the insurer was restricted by the probate court's order, and evidence that the estate subsequently offered to assign the bad faith claim after the alleged settlement clearly showed that the estate never reached a final agreement with the insurer. In re Estate of Huff, 287 Ga. App. 614, 652 S.E.2d 203, 2007 Ga. App. LEXIS 1036 (2007), cert. denied, No. S08C0217, 2008 Ga. LEXIS 223 (Ga. Feb. 25, 2008).

Lack of standing to pursue declaratory judgment action. — Trial court erred in denying the rental defendants' motion to dismiss because a declaratory judgment action was improper against the defendants as the widow had not shown standing since the widow sought a declaratory judgment as to liability beyond that minimum amount and had no direct relationship with rental defendants until (and if) the widow obtained a judgment in the underlying tort suit; thus, only a hy-

pothetical and generalized economic interest existed. U-Haul Co. v. Rutland, 348 Ga. App. 738, 824 S.E.2d 644 (2019).

Widow had no standing to bring declaratory judgment action against rental companies as self-insurers. — In a widow's wrongful death action against rental truck companies, the widow's declaratory judgment claim under O.C.G.A. § 9-4-2 seeking a determination that the companies did not qualify as self-insurers under O.C.G.A. §§ 33-34-2(4) and 33-34-5.1 and, thus, could be liable for damages under O.C.G.A. § 33-34-3, should have been dismissed because the widow had no direct relationship with the companies, the widow had only a hypothetical and generalized economic interest, and the widow was not in a position of uncertainty. U-Haul Co. of Arizona v. Rutland, 348 Ga. App. 738, 824 S.E.2d 644, 2019 Ga. App. LEXIS 87 (2019).

Right of intervention. — When there is no allegation in the petition claiming that the plaintiff insurer is uncertain as to its right to intervene, or as to the extent of its rights after intervening, nor any other allegation indicating that it is uncertain as to any further action on its part or that a declaration of its rights will furnish it guidance and protection, it fails to meet the requirements of the Declaratory Judgment Act (Ga. L. 1945, p. 137). American Mut. Ins. Co. v. Aderholt, 114 Ga. App. 508, 151 S.E.2d 833, 1966 Ga. App. LEXIS 821 (1966).

Insurer filing action prior to lawsuit. — When a claim for insurance has been made, and a legitimate question exists as to the propriety of denying coverage, the insurance company may file a declaratory judgment action before denying the claim. It is not necessary for the insurance company to wait for the insured to file a lawsuit against it. Atlanta Cas. Co. v. Fountain, 262 Ga. 16, 413 S.E.2d 450, 1992 Ga. LEXIS 207 (1992).

Question of whether insurance company is required to defend insured in damage suit may be proper subject for declaratory judgment when the facts alleged present an actual or justiciable controversy for determination of the courts, or when the ends of justice demand that such relief be given. Pennsylvania Thresherman & Farmers Mut. Cas. Ins. Co. v. Gardner, 107 Ga. App. 472, 130 S.E.2d 507, 1963 Ga. App. LEXIS 881 (1963).

When an insurer denies coverage under a particular policy and seeks to relieve itself of its obligation to defend a pending suit against an insured because of circumstances pleaded which cast doubt on the coverage of the policy as applied to those circumstances, there is such an immediacy of choice imposed upon it as to justify an adjudication by declaratory judgment. Ditmyer v. American Liberty Ins. Co., 117 Ga. App. 512, 160 S.E.2d 844, 1968 Ga. App. LEXIS 1130 (1968); LaSalle Nat'l Ins. Co. v. Popham, 125 Ga. App. 724, 188 S.E.2d 870, 1972 Ga. App. LEXIS 1456 (1972).

Insurance company may by a declaratory judgment action, and after procuring a reservation of rights agreement from one claiming to be insured under its policy, seek a judicial determination of its obligations under the policy and its duty, if any, to defend certain pending actions. State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co., 132 Ga. App. 332, 208 S.E.2d 170, 1974 Ga. App. LEXIS 1685 (1974), aff'd, 236 Ga. 710, 225 S.E.2d 1, 1976 Ga. LEXIS 999 (1976).

Insurance company's petition for declaratory judgment was properly granted when the declaratory judgment sought provided specific relief to the insurance company and the directly affected legal relations between the insurance company and defendants, indirectly affecting the company's legal relations with the injured party. Famble v. State Farm Ins. Co., 204 Ga. App. 332, 419 S.E.2d 143, 1992 Ga. App. LEXIS 833 (1992).

Declaratory judgment on duty to defend will determine insurer's duty to pay judgment. — When the insurance company presents a justiciable controversy with its insured, wherein it seeks determination of the question of whether, under the facts alleged and the terms of its policy, it is required to defend the insured in damage suit actions, an adjudication in a declaratory judgment action, of that question will determine the company's liability to pay any judgment obtained by the plaintiffs; but, if the acci-

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dent victims are not parties to the declaratory judgment action these victims will not be bound thereby. Saint Paul Fire & Marine Ins. Co. v. Johnson, 216 Ga. 437, 117 S.E.2d 459, 1960 Ga. LEXIS 497 (1960).

Interest adverse to insured. — When an insurance company entered a reservation of rights with its insured, the insurer and the insured's interest were adverse regarding whether the insurer did or did not have a right to decline to defend a pending suit brought against the insured. Famble v. State Farm Ins. Co., 204 Ga. App. 332, 419 S.E.2d 143, 1992 Ga. App. LEXIS 833 (1992); Harkins v. Progressive Gulf Ins. Co., 262 Ga. App. 559, 586 S.E.2d 1, 2003 Ga. App. LEXIS 744 (2003), cert. denied, No. S03C1803, 2004 Ga. LEXIS 54 (Ga. Jan. 12, 2004).

Failing and refusing to defend or defending without reservation of rights will bar declaratory judgment action by an insurer to determine its obligation to defend in pending actions. State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co., 132 Ga. App. 332, 208 S.E.2d 170, 1974 Ga. App. LEXIS 1685 (1974), aff'd, 236 Ga. 710, 225 S.E.2d 1, 1976 Ga. LEXIS 999 (1976).

Insurer may not refuse to pay and then use declaratory judgment procedure to avoid bad faith penalties. State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co., 132 Ga. App. 332, 208 S.E.2d 170, 1974 Ga. App. LEXIS 1685 (1974), aff'd, 236 Ga. 710, 225 S.E.2d 1, 1976 Ga. LEXIS 999 (1976).

Accident victims proper parties to action declaring insurer's liability. — Accident victims in a damage suit had such interest in the policy of insurance on the insured's car as made them proper parties to the declaratory judgment action of the insurance company to determine its liability to pay any judgment that might be secured by the victims against the insured. Saint Paul Fire & Marine Ins. Co. v. Johnson, 216 Ga. 437, 117 S.E.2d 459, 1960 Ga. LEXIS 497 (1960).

When there has been no disclaimer by the accident victims of intention to seek payment of their judgments against the insured by the insurance company, the victims are proper parties to a declaratory judgment suit by the insurance company against them. Saint Paul Fire & Marine Ins. Co. v. Johnson, 216 Ga. 437, 117 S.E.2d 459, 1960 Ga. LEXIS 497 (1960).

Petition must allege necessity of judgment to prevent harm to insurer's interests. — When a petition for declaratory judgment brought by the insurer against the insured and a known uninsured motorist seeks to have the court declare its rights under an exclusion clause of the policy, but does not allege that the adjudication of the plaintiff insurer's rights is necessary in order to relieve the plaintiff from the risk of taking any future undirected action incident to its rights, which action without direction would jeopardize its interest, the petition fails to state a cause of action for declaratory judgment. American Mut. Ins. Co. v. Aderholt, 114 Ga. App. 508, 151 S.E.2d 833, 1966 Ga. App. LEXIS 821 (1966).

Required to pay diminution in value despite repair. — Trial court appropriately entered a declaratory judgment finding that an insurance company was required to pay any diminution in value caused by the fact of physical damage to covered vehicles even if repairs returned the vehicles to pre-loss condition in terms of appearance and function. State Farm Mut. Auto. Ins. Co. v. Mabry, 274 Ga. 498, 556 S.E.2d 114, 2001 Ga. LEXIS 910 (2001).

Declaratory judgment to determine defense obligations. — Trial court erred in denying motions for summary judgment pursuant to O.C.G.A. § 9-11-56 by an insurer in a declaratory judgment action pursuant to O.C.G.A. § 9-4-2 to determine whether the insurer had a duty to defend, and by the owners of an automobile on claims of negligent entrustment by the plaintiffs, a driver and passengers; the owners' son, who was driving the vehicle when the accident occurred, did not have permission to drive the vehicle, and therefore the son was not an insured under the owners' insurance policy. Metro. Prop. & Cas. Ins. Co. v. McCall, 261 Ga. App. 92, 581 S.E.2d 651, 2003 Ga. App. LEXIS 495 (2003).

Trial court properly granted summary judgment to an insured in its insurer's

declaratory judgment action, requiring the insurer to defend and indemnify the insured in the underlying suit filed by a resident of the insured's personal care home arising from an attack by a fellow resident, as the incident occurred without the insured's foresight, expectation, or design, and was thus properly characterized as accidental under the terms of the insured's policy. Cincinnati Ins. Co. v. Magnolia Estates, Inc., 286 Ga. App. 183, 648 S.E.2d 498, 2007 Ga. App. LEXIS 725 (2007), cert. denied, No. S07C1660, 2008 Ga. LEXIS 88 (Ga. Jan. 7, 2008).

Resolution of issues raised by Georgia Insurers Insolvency Pool. — Because: (1) resolution of the issues raised in a petition filed by the Georgia Insurers Insolvency Pool was dependent upon a determination by the State Board of Workers' Compensation of the amount, if any, an injured employee was entitled to recover in the pending, unresolved claim for workers' compensation; and (2) after a notice to controvert was filed, the Board never held a hearing or issued any findings with regard to liability for the claim, the trial court lacked subject matter jurisdiction to determine the applicability of earlier provisions of O.C.G.A. § 33-36-14(a) to the Pool's claim against an insurer, after another carrier became insolvent, and hence, grant the Pool summary judgment in its declaratory judgment action. Royal Indem. Co. v. Ga. Insurers Insolvency Pool, 284 Ga. App. 787, 644 S.E.2d 279, 2007 Ga. App. LEXIS 178 (2007), cert. denied, No. S07C1207, 2007 Ga. LEXIS 639 (Ga. Sept. 10, 2007).

Claims seeking declaratory judgment found moot. — Taxpayer's claims seeking declaratory judgment regarding a county commissioner's transaction by which property was sold to the county were properly found moot because the transaction had already concluded. Richardson v. Phillips, 302 Ga. App. 305, 690 S.E.2d 918, 2010 Ga. App. LEXIS 126 (2010).

Trial court properly dismissed residents' declaratory judgment action which asked the trial court to declare an election of the board of directors of a homeowners' association valid on the ground that the residents' claim was moot because the residents failed to demonstrate that the residents were in need of guidance from the trial court to protect the residents from uncertainty regarding some future conduct; the residents sought to have the trial court validate a past event and, thus, the residents were not entitled to declaratory judgment, which would be nothing more than an advisory opinion from the trial court as to which party would succeed on the merits of any claim pertaining to the outcome of that election. Crittenton v. Southland Owners Ass'n, 312 Ga. App. 521, 718 S.E.2d 839, 2011 Ga. App. LEXIS 932 (2011).

Declaratory judgment upon moot issue not authorized. — Superior court's judgment declaring that an agreement between a condominium association and a telecommunications company was subject to termination by the association pursuant to O.C.G.A. § 44-3-101 was vacated because the 12-month period of O.C.G.A. § 44-3-101(c) expired without the association having terminated any telecommunications contract, rendering the issue in its declaratory judgment action moot, and the declaratory judgment upon a moot issue was not authorized under the Declaratory Judgment Act, O.C.G.A. § 9-4-1 et seq.; by the time the superior court issued the declaratory judgment, the statutory period of O.C.G.A. § 44-3-101(c) had expired, and any right the association had to cancel and terminate contracts under that statute expired. Capitol Infrastructure, LLC v. Plaza Midtown Residential Condo. Ass'n, 306 Ga. App. 794, 702 S.E.2d 910, 2010 Ga. App. LEXIS 1058 (2010), cert. denied, No. S11C0500, 2011 Ga. LEXIS 331 (Ga. Apr. 18, 2011).

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Constitutionality of statutes. — In an action for injunctive and declaratory relief, after the trial court resolved a controversy between a county and city on the annexation and re-zoning of property, in the absence of an actual controversy or circumstances showing a necessity for a determination to guide and protect a party from uncertainty and insecurity with regard to the propriety of some future act or conduct, the court erred when

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the court ruled on the portion of the county's petition seeking a declaratory judgment that certain statutes were unconstitutional. Baker v. City of Marietta, 271 Ga. 210, 518 S.E.2d 879.

After proceedings to revoke the license of a mortgage lending company for allegedly having an impermissible relationship with an individual in violation of O.C.G.A. § 7-1-1004(e), it was appropriate for the individual, a convicted felon, to bring a declaratory judgment action questioning the constitutionality of the subsection. Agan v. State, 272 Ga. 540, 533 S.E.2d 60, 2000 Ga. LEXIS 538 (2000).

Regulatory investigation. — Trial court properly dismissed a declaratory judgment action brought by a bank and a cash advance lender, which was operating as an agent for the bank, to stop the Georgia Industrial Loan Commissioner from conducting an investigation of their lending activities because the Commissioner was authorized to conduct an investigation of the two entities' loan activities, notwithstanding the lender's claim that the bank and the lender were operating under the authority of federal banking law. BankWest, Inc. v. Oxendine, 266 Ga. App. 771, 598 S.E.2d 343, 2004 Ga. App. LEXIS 397 (2004), cert. denied, No. S04C1408, 2004 Ga. LEXIS 731 (Ga. Sept. 7, 2004).

Judgment creditor's property rights. — That disputed factual issues remained as to the actualization of a judgment creditor's claimed interest in properties that allegedly were fraudulently transferred by the judgment debtor did not foreclose on the judgment creditor's standing to seek a declaratory judgment as to the priority of that interest. RES-GA YPL, LLC v. Rowland, 340 Ga. App. 713, 798 S.E.2d 315, 2017 Ga. App. LEXIS 130 (2017).

Standing to challenge commissioner's rules and regulations. — Trial court did not err in concluding that the plaintiff had standing to bring the declaratory judgment action as the plaintiff made a sufficient showing that the facts were complete and that its interest was not merely academic, hypothetical, or colorable, but actual because, as a Vidalia onion grower, the plaintiff was an interested party claiming a right to ship onions pursuant to the shipping statute — a right the plaintiff claimed was impeded by a newly enacted regulation; and because, if the plaintiff failed to comply with the new regulation, the Georgia Commissioner of Agriculture had that statutory authority to impose civil and criminal penalties. Black v. Bland Farms, LLC, 332 Ga. App. 653, 774 S.E.2d 722, 2015 Ga. App. LEXIS 380 (2015), cert. denied, No. S15C1669, 2015 Ga. LEXIS 713 (Ga. Oct. 5, 2015).

District attorney request for declaratory judgment on admissibility of hearsay evidence. — Supreme Court of Georgia reversed the judgment of the lower courts granting a district attorney a declaratory judgment because the district attorney did not have the right to bring a declaratory judgment action to obtain review of the probable cause decisions of magistrate judges at preliminary hearings or to challenge the admissibility of hearsay evidence at such hearings. Leitch v. Fleming, 291 Ga. 669, 732 S.E.2d 401, 2012 Ga. LEXIS 771 (2012).

Action in ejectment. — Action in ejectment and a suit for specific performance contained in a one count petition for declaratory relief is not such procedure authorized under the Declaratory Judgment Act (Ga. L. 1945, p. 137). Clein v. Kaplan, 201 Ga. 396, 40 S.E.2d 133, 1946 Ga. LEXIS 256 (1946).

No standing to seek declaration regarding physician participation in execution. — Physicians and a sociologist lacked standing to seek a declaration under O.C.G.A. § 9-4-2 that Georgia law prohibited physician participation in executions; the physicians in question had not participated or planned to participate in executions, only three of them practiced medicine in Georgia, and a medical board decision indicated that no physician who participated in an execution would be subject to disciplinary proceedings. Zitrin v. Ga. Composite State Bd. of Med. Examiners, 288 Ga. App. 295, 653 S.E.2d 758, 2007 Ga. App. LEXIS 1115 (2007), cert. denied, No. S08C0500, 2008 Ga. LEXIS 285 (Ga. Mar. 10, 2008).

Non-party could not challenge validity of agreement, but could seek a declaration of rights. — In a dispute

between a back-up buyer and the buyer and sellers of real property, the back-up buyer had standing under O.C.G.A. § 9-4-2 to seek a declaration of its rights, if any, to the disputed property, although the back-up buyer was not a party to the contracts between the buyer and the sellers; however, the back-up buyer did not have standing to challenge the signatures on those contracts pursuant to O.C.G.A. § 9-2-20. Del Lago Ventures, Inc. v. QuikTrip Corp., 330 Ga. App. 138, 764 S.E.2d 595, 2014 Ga. App. LEXIS 820 (2014).

Disputes concerning ownership of or right of access to land. — Because a club's possession of certain real property did not eliminate the need for direction to resolve an on-going conflict over a buyer's re-entry rights to the property, declaratory judgment was an available remedy for the club. Smith v. Jones, 278 Ga. 661, 604 S.E.2d 187, 2004 Ga. LEXIS 849 (2004).

Lease dispute. — Owner of leased facilities was not prohibited from seeking a declaratory judgment against a corporation regarding the rights of the parties to written leases for the facilities on the basis that the owner had already executed a lease with a new tenant and filed dispossessory actions against the corporation; the dispossessory actions against the corporation were stayed pending the outcome of the declaratory judgment action, and the corporation remained in possession of the facilities. Mariner Healthcare, Inc. v. Foster, 280 Ga. App. 406, 634 S.E.2d 162, 2006 Ga. App. LEXIS 867 (2006), cert. denied, No. S06C2005, 2006 Ga. LEXIS 798 (Ga. Oct. 2, 2006).

Obligations under loans and security deeds. — Summary judgment was improperly denied to the lender on the borrowers' declaratory judgment claim as the obligations under the loans and security deeds were set forth on the face of each document and the borrowers did not show the need of any direction from the trial court with respect to the borrower's future conduct. Oconee Fed. S&L Ass'n v. Brown, 351 Ga. App. 561, 831 S.E.2d 222, 2019 Ga. App. LEXIS 444 (2019), cert. dismissed, No. S20C0074, 2020 Ga. LEXIS 201 (Ga. Mar. 13, 2020).

Challenge to the validity of administrative rule. — Challenge to a rule of the Composite State Board of Medical Examiners (now Georgia Composite Medical Board) arising from the initiation of disciplinary proceedings against the complainant could not be the subject of declaratory relief because the issues raised were purely hypothetical and there was no justiciable controversy. Burton v. Composite State Bd. of Med. Examin'rs, 245 Ga. App. 587, 538 S.E.2d 501, 2000 Ga. App. LEXIS 1025 (2000).

Petition by administrative agency. — Petition of the State Highway Board (now Board of Transportation) for a declaratory judgment which shows a pressing need in an important matter pertaining to the board's right in the construction of a highway, and that there is an actual controversy and justiciable issue in reference to such matter set forth a cause for the relief prayed. Woodside v. State Hwy. Dep't, 216 Ga. 254, 115 S.E.2d 560, 1960 Ga. LEXIS 439 (1960).

Declaratory judgment improper after administrative appeal. — Appellants, once having invoked their right of appeal to the city personnel board, could not thereafter properly seek a declaratory judgment. Wooten v. City of Atlanta, 149 Ga. App. 568, 254 S.E.2d 889, 1979 Ga. App. LEXIS 1936 (1979).

Payment of legal fees incurred by county solicitor. — In county solicitor's declaratory judgment action against a county to declare the solicitor's entitlement to reimbursement from the county for legal fees the solicitor had already expended, there was no actual controversy under O.C.G.A. § 9-4-2(a) and no justiciable controversy existed under § 9-4-2(b) since the fees were already incurred and, when the trial court addressed the issue, the court had already found the solicitor had no right to compel the county to pay the fees. Gwinnett County v. Blaney, 275 Ga. 696, 572 S.E.2d 553, 2002 Ga. LEXIS 1032 (2002).

Condemnation proceedings. — Petition for a declaratory judgment should be denied when the petition is filed after a condemnation case has proceeded to an award by the master, payment into court by the condemnor of the amount awarded by the master, a judgment decreeing title to the lands described in the petition to be

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in the condemnor, and appeals by both parties to a jury therein. Johnson v. Fulton County, 216 Ga. 498, 117 S.E.2d 155, 1960 Ga. LEXIS 514 (1960).

When every relief sought by a petition for declaratory judgment pertained to matters involved in a condemnation case, and the court in the condemnation case had jurisdiction to adjudicate every question raised, the court erred in denying a motion to dismiss the petition, which motion was based on the ground that every question raised should have been presented in the condemnation case. Johnson v. Fulton County, 216 Ga. 498, 117 S.E.2d 155, 1960 Ga. LEXIS 514 (1960).

Power company was properly granted declaratory relief and an injunction against the property owners who would not permit the power company access to their land to conduct surveys for a planned electrical transmission line because the power company, as the condemning body, had the right to survey and the property owners' express refusal to allow access presented an actual risk of a breach of the peace that was alleviated by the entry of the declaratory judgment. Bearden v. Ga. Power Co., 262 Ga. App. 550, 586 S.E.2d 10, 2003 Ga. App. LEXIS 814 (2003), cert. denied, No. S03C1804, 2004 Ga. LEXIS 30 (Ga. Jan. 12, 2004).

Land disturbance permits. — In a declaratory judgment action brought by a developer against a county seeking to invalidate an ordinance which required denial of the developer's land disturbance permit based on two soil-related ordinance violations existing, the judgment in favor of the developer was upheld on appeal with regard to the developer's claim for damages under 42 U.S.C. § 1983, for alleged violations of the developer's equal protection rights in the county's enforcement of the ordinance. The trial court properly determined that the developer was not required to prove a valid property right with regard to the developer's equal protection challenge; the trial court properly awarded attorney fees to the developer under O.C.G.A. § 13-6-11 as the jury was authorized to award the attorney fees as an element of the damages the jury awarded on the developer's federal equal protection claim, regardless of whether the developer could prevail on any state law claim for damages; but the trial court erred by failing to address the merits of the developer's petition for a declaratory judgment since the overall enforceability of the ordinance, which was still the law, was not rendered moot by the withdrawal notice. Fulton County v. Legacy Inv. Group, LLC, 296 Ga. App. 822, 676 S.E.2d 388, 2009 Ga. App. LEXIS 332 (2009).

Validity of proposed annexation. — City's declaratory judgment action seeking to determine the validity of a proposed annexation, to which the county objected based on a local constitutional amendment creating the industrial district sought to be annexed which prohibited annexation, presented no justiciable controversy because the annexation was merely proposed. Fulton County v. City of Atlanta, 299 Ga. 676, 791 S.E.2d 821, 2016 Ga. LEXIS 596 (2016).

Construction of contracts. — When a contract is so plain and unambiguous as not to be susceptible to any logical construction except its unmistakable mandate, there is no need of a declaratory judgment. Vandiver v. Transcontinental Gas Pipe Line Corp., 222 F. Supp. 731, 1963 U.S. Dist. LEXIS 6647 (M.D. Ga. 1963).

In a declaratory judgment action between a settlor's offspring regarding an agreement signed by the settlor to reform a trust, the trial court properly granted summary judgment to one sibling over the other, upholding the agreement as validly reforming the trust in order to fully effectuate the settlor's intent that the offspring divide the remainder of a trust's proceeds equally between them, per stirpes; moreover, the trial court correctly ruled that the prevailing sibling could not rely on the defenses of laches and unclean hands as such were equitable doctrines not applicable in a declaratory judgment action. Briden v. Clement, 283 Ga. App. 626, 642 S.E.2d 318, 2007 Ga. App. LEXIS 141 (2007).

Drainage disputes. — Homeowners established entitlement to declaratory judgment since there was evidence that drainage pipes running through the prop-

erty were not maintained properly and resulted in flooding of the homeowner's property but there was a dispute as to who was responsible for maintaining the pipes. Macko v. City of Lawrenceville, 231 Ga. App. 671, 499 S.E.2d 707.

Employment agreements. — Action seeking a declaratory judgment that restrictive covenants in an employment agreement were unenforceable presented a justiciable case or controversy. Enron Capital & Trade Resources Corp. v. Pokalsky, 227 Ga. App. 727, 490 S.E.2d 136.

Trial court erroneously declared that a non-solicitation covenant between a group of employees and their former employer was unenforceable as overbroad, and the Court of Appeals wrongfully upheld that decision, addressing only the lack of any restriction placed on the period of time during which the employees served the former employer's customers, because the covenant was narrowly limited to those customers served by the employees during their terms of employment; hence, it was not overbroad merely because it provided no time restriction on the provision of services to the former employer's customers. Palmer & Cay of Ga., Inc. v. Lockton Cos., 280 Ga. 479, 629 S.E.2d 800, 2006 Ga. LEXIS 259 (2006).

In a removed action seeking a declaration as to the enforceability of a non-compete provision, a corporation was not fraudulently joined as a plaintiff in order to avoid complete diversity, warranting a remand pursuant to 28 U.S.C. § 1447, because under O.C.G.A. § 9-4-2(b) state courts were authorized to entertain declaratory actions brought by any interested party whether or not further relief was or could have been prayed when the ends of justice required that the declaration should be made, and the court could not say with certainty that the corporation was not a real party in interest. Campbell v. Quixtar, Inc., No. 2:08-CV-0045-RWS, 2008 U.S. Dist. LEXIS 46507 (N.D. Ga. June 13, 2008).

Requirements for application of the declaratory judgment statute, O.C.G.A. § 9-4-2, were met in a case involving a new employer bringing suit against the former employer seeking a declaration as to the legal effect of the non-compete covenants between the former employer and the former employees, thus, the new employer had standing to seek a declaration as to the legal effect of the non-compete covenants in the employment agreements. Lapolla Indus. v. Hess, 325 Ga. App. 256, 750 S.E.2d 467, 2013 Ga. App. LEXIS 926 (2013), cert. denied, No. S14C0459, 2014 Ga. LEXIS 230 (Ga. Mar. 10, 2014).

In a declaratory judgment action seeking a declaration as to the enforceability of non-compete clauses in an employment contract, the trial court properly granted the competitor judgment on the pleadings because the court correctly found that the pleadings showed that the lack of any limit on the scope of the restricted work or the solicitation of former customers were void and unenforceable under the non-severability rule as a matter of law. Lapolla Indus. v. Hess, 325 Ga. App. 256, 750 S.E.2d 467, 2013 Ga. App. LEXIS 926 (2013), cert. denied, No. S14C0459, 2014 Ga. LEXIS 230 (Ga. Mar. 10, 2014).

Suit for declaratory judgment cannot be maintained by person accused of crime when the alleged criminal conduct has already taken place. Ross v. State, 238 Ga. 445, 233 S.E.2d 381, 1977 Ga. LEXIS 1056 (1977).

Actions for declaratory judgment are not maintainable by persons already convicted of crimes who wish to examine or reexamine aspects of the conviction or sentence for the reasons that the controversy has been adjudicated, and the rights and relations have become fixed. Ross v. State, 238 Ga. 445, 233 S.E.2d 381, 1977 Ga. LEXIS 1056 (1977).

Authority of state court judge to appoint county officers. — Justiciable controversy existed between a county and a state court judge concerning the judge's authority to appoint county officers and order funds withheld from the county treasury. Cramer v. Spalding County, 261 Ga. 570, 409 S.E.2d 30, 1991 Ga. LEXIS 423 (1991).

Applicability to divorce decree. — Declaratory judgment is an appropriate means of ascertaining one's rights and duties under a contract and decree of divorce. Royal v. Royal, 246 Ga. 229, 271 S.E.2d 144, 1980 Ga. LEXIS 1064 (1980).

Construing language of divorce decree. — Language in 1960 divorce decree "setting aside" property "to" wife "for the

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purpose of making a home for herself and the children" was ambiguous and unclear as to whether the language was intended to confer fee simple title to the property or some limited estate, and consequently, a construction of the effect of this language would be a proper subject of a declaratory judgment action. Royal v. Royal, 246 Ga. 229, 271 S.E.2d 144, 1980 Ga. LEXIS 1064 (1980).

Wife did not file a declaratory judgment action since the wife sought guidance with respect to provisions in a settlement agreement in order to compel a husband to provide the wife with additional funds as the trial court's decision was interlocutory and the wife did not secure a certificate of immediate review, the discretionary appeal to resolve whether the trial court's declaratory ruling was appealable as a final judgment was dismissed. Gelfand v. Gelfand, 281 Ga. 40, 635 S.E.2d 770, 2006 Ga. LEXIS 642 (2006).

Declaratory judgment improper when relief sought is cancellation of divorce decree. — When the petitioner sought in the superior court to obtain a judgment declaring void a divorce decree rendered against her in an action between her former husband, now deceased, and herself, and declaring that she is the widow and lawful heir of the deceased, and entitled to be the administratrix of his estate; and the petition shows the rendition of judgments by courts having jurisdiction of the subject matter and parties and under which the rights in question were conclusively and finally adjudicated against the plaintiff; and the judgment of the superior court denying, after a hearing, the petitioner's application to intervene in the proceeding and be appointed administratrix of the estate, the petitioner was not entitled to a declaratory judgment in the premises. Lawrence v. Lawrence, 87 Ga. App. 150, 73 S.E.2d 231, 1952 Ga. App. LEXIS 633 (1952).

When the real relief and only substantial relief sought is the cancellation of the divorce decree, the facts alleged in the petition do not present a question that can be properly decided under the provisions of the Declaratory Judgment Act (Ga. L. 1945, p. 137). Burgess v. Burgess, 210 Ga. 380, 80 S.E.2d 280, 1954 Ga. LEXIS 314 (1954).

Marital status. — Petition alleging that the defendant falsely claimed to have entered into a ceremonial marriage with the plaintiff and that he was the father of her child, and that she caused to be issued a warrant accusing him of abandonment of the child, failed to state a cause of action for a declaratory judgment to establish that the plaintiff and the defendant were not husband and wife. Gibbs v. Forrester, 204 Ga. 545, 50 S.E.2d 318, 1948 Ga. LEXIS 472 (1948).

Support obligations. — As a former spouse planned to continue denying the second former spouse's claim of back child support based on the first spouse's understanding of an unclear divorce decree's formula for calculating increases in the first spouse's support obligation, but doing so subjected the first spouse to contempt charges, the first spouse properly filed a declaratory judgment action under Georgia's Uniform Declaratory Judgments Act, O.C.G.A. § 9-4-1 et seq. Acevedo v. Kim, 284 Ga. 629, 669 S.E.2d 127, 2008 Ga. LEXIS 870 (2008).

Construction of parenting plan. — Trial court erred in denying the mother's request for declaratory judgment because the provision in the parenting plan regarding summer vacation provided that each parent may select two consecutive weeks of uninterrupted parenting time during the children's summer vacation and did not allow up to 14 additional days of non-consecutive time. Brown v. Brown, 359 Ga. App. 511, 857 S.E.2d 505, 2021 Ga. App. LEXIS 195 (2021).

Railroad corporation. — Superior court had jurisdiction to provide declaratory relief to a railroad corporation in an appeal from a decision of the Public Service Commission denying the corporation's application to modify its staff at a service facility. Georgia Pub. Serv. Comm'n v. CSX Transp., Inc., 225 Ga. App. 787, 484 S.E.2d 799.

Effect on prior existing landlord remedies. — Law does not nullify the rights, remedies and penalties in favor of landlords already accruing under dispossessory warrants law when the tenant is

already in default. Shippen v. Folsom, 200 Ga. 58, 35 S.E.2d 915, 1945 Ga. LEXIS 396 (1945).

Possession of building. — When there is a controversy as to who is entitled to possession of a building on a specified date, there is a case for a declaratory judgment. Greene v. Golucke, 202 Ga. 494, 43 S.E.2d 497, 1947 Ga. LEXIS 450 (1947).

Determination of the rights of the parties to a lease agreement is a proper subject for relief under O.C.G.A. § 9-4-1 et seq. Cook Farms, Inc. v. Bostwick, 165 Ga. App. 692, 302 S.E.2d 574, 1983 Ga. App. LEXIS 1989 (1983).

Taxation. — State could not hold out what plainly appeared to be a "clear and certain" postdeprivation remedy and then declare, only after the disputed taxes had been paid, that no such remedy existed. Reich v. Collins, 513 U.S. 106, 115 S. Ct. 547, 130 L. Ed. 2d 454, 1994 U.S. LEXIS 8789 (1994).

Trial court erred by dismissing a city's declaratory judgment action against several online travel companies for lack of subject matter jurisdiction, and the appellate court erred by affirming the dismissal,as the issue of whether the city's ordinance allowing the city to collect a hotel occupancy tax from the online travel companies was a contested issue in the matter that neither lower court had determined. The legal question of whether the ordinance even applied to the online travel companies had to be determined before the city was required to submit to the administrative process set forth within the ordinance and the Enabling Statutes, O.C.G.A. § 48-13-50 et seq. City of Atlanta v. Hotels.com, L.P., 285 Ga. 231, 674 S.E.2d 898, 2009 Ga. LEXIS 96 (2009).

Trial court granted an impermissible advisory opinion when the court granted a second city's request for a declaratory judgment that the second city was authorized to impose and collect taxes on the sale, storage, and distribution of alcoholic beverages at an airport within that city's limits because the second city failed to show that there was any justiciable controversy; the first city conceded that, under Georgia's Alcoholic Beverages Code, O.C.G.A. § 3-8-1(e), only the second city was authorized to impose and collect taxes on the sale, storage, and distribution of alcoholic beverages at the airport within the city's limits and that the first city had to refund any alcoholic beverage taxes that the city received in error for the sale, storage, and distribution of alcohol in portions of the airport located within the corporate boundaries of the second city. City of Atlanta v. City of College Park, 311 Ga. App. 62, 715 S.E.2d 158, 2011 Ga. App. LEXIS 548 (2011), aff'd, 292 Ga. 741, 741 S.E.2d 147, 2013 Ga. LEXIS 316 (2013).

Existence of agreement to sell property. — When the vendor of property denied the existence of any agreement to sell the property and asserted control over the property which was inconsistent with the buyer's claimed contractual rights, this case presented a proper matter for a declaration as to the existence and effect of such an agreement. Stephens v. Trotter, 213 Ga. App. 596, 445 S.E.2d 359, 1994 Ga. App. LEXIS 686 (1994).

Violation of Open Meetings Act. — In an action against an airport authority for violations of the Open Meetings Act, O.C.G.A. § 50-14-1 et seq., the taxpayers did not seek to contest any decisions made at any of the challenged meetings or assert that the taxpayers were in a position of uncertainty as to an alleged right, but sought to prohibit future violations and punish the authority for the authority's violations; dismissal of the taxpayers' claim for declaratory relief was proper. Avery v. Paulding County Airport Auth., 343 Ga. App. 832, 808 S.E.2d 15, 2017 Ga. App. LEXIS 566 (2017).

Constitutionality of county ordinance. — Trial court correctly found that declaratory relief was appropriate to relieve an electrical transmission corporation of uncertainty and insecurity with regard to its rights after a county board of commission enacted an ordinance that imposed a moratorium on the construction of new power lines, since the ordinance expressly targeted the very power line proposed by the corporation and plainly prohibited the construction of that line or similar ones. If the corporation could not have obtained declaratory relief, it would have been in danger of losing a valuable

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property right as a result of the enforcement of the ordinance which was declared to be unconstitutional. Cobb County v. Ga. Transmission Corp., 276 Ga. 367, 578 S.E.2d 852, 2003 Ga. LEXIS 285 (2003).

Lack of actual controversy when city sued over sidewalks. — Plaintiffs sought a declaratory judgment stating that a city was prohibited from installing sidewalks. As the city never began construction of the sidewalks and asserted that the city had no plans to do so, there was no actual controversy within the meaning of O.C.G.A. § 9-4-2(a); therefore, the plaintiffs did not have standing to raise a claim under the Georgia Declaratory Judgment Act, O.C.G.A. § 9-4-1 et seq. Bailey v. City of Atlanta, 296 Ga. App. 679, 675 S.E.2d 564, 2009 Ga. App. LEXIS 306 (2009).

County's action against an airport authority. — County's action against an airport authority seeking a declaration that the authority lacked the authority to submit an application to the Federal Aviation Administration for an Airport Operating Certificate without the county's consent stated an actual controversy under the Declaratory Judgment Act, O.C.G.A. § 9-4-1 et seq., and should not have been dismissed. Avery v. Paulding County Airport Auth., 343 Ga. App. 832, 808 S.E.2d 15, 2017 Ga. App. LEXIS 566 (2017).

Probationer's claim for declaratory judgment on bond issue. — Trial court correctly dismissed a former probationer's claim for declaratory judgment, in which the probationer sought a declaration that an insurance policy satisfied the statutory bond requirements for officers under O.C.G.A. § 42-8-26(d), because a resolution as to whether the officer was properly bonded for damages caused by the officer's misfeasance was of no consequence until a judgment was obtained against the officer for such conduct and the probationer was entitled to collect damages. Walker v. Owens, 298 Ga. 516, 783 S.E.2d 114, 2016 Ga. LEXIS 164 (2016).

Actions by pension fund administrators. — In a case in which the pension fund participants, the board members, and the advocates sought a declaration allowing the pension funds to hire a third party administrator and an outside counsel, an actual controversy existed pursuant to O.C.G.A. § 9-4-2(a), (b) with regard to the two funds that had already hired third party administrators and outside counsel; the City of Atlanta had refused to recognize, honor, cooperate with, or implement the decisions of the pension funds to hire third party administrators and outside counsel. City of Atlanta v. S. States Police Benevolent Ass'n, 276 Ga. App. 446, 623 S.E.2d 557, 2005 Ga. App. LEXIS 1282 (2005), cert. denied, No. S06C0609, 2006 Ga. LEXIS 314 (Ga. May 8, 2006).

Counterclaim. — In an interpleader action by a bank against a depositor and the depositor's assignee with respect to funds in bank accounts, the assignee's counterclaim seeking a declaratory judgment that the bank's setoff against one of the accounts was improper presented a justiciable controversy and the trial court could consider the counterclaim. Bank of Spalding County v. Pound, 213 Ga. App. 324, 444 S.E.2d 375, 1994 Ga. App. LEXIS 555 (1994), cert. denied, No. S94C1385, 1994 Ga. LEXIS 998 (Ga. Sept. 22, 1994).

Challenging failure to designate a location as a voter registration site. — Complaint seeking a declaratory judgment that the acts and policies of the local board of registrars in not designating the plaintiff-church as a voter registration site were illegal was properly dismissed as (1) mandamus, used to compel official action when a public official has discretion to act, but arbitrarily and capriciously refuses to do so, was the appropriate remedy; and (2) nothing in O.C.G.A. § 21-2-218(f) (voter registration places) required that churches be designated as voter registration sites. Fourth St. Baptist Church v. Board of Registrars, 253 Ga. 368, 320 S.E.2d 543, 1984 Ga. LEXIS 951 (1984).

County lacked standing to challenge the state's rules restricting emissions of volatile compounds; while the county presented evidence that the rules might deter some investment in the county, there was no evidence that the rules had actually done so, and whether any economic harm to its own emission sources would be caused by the rules was speculative. Bd. of Natural Res. of Ga. v.

Monroe County, 252 Ga. App. 555, 556 S.E.2d 834, 2001 Ga. App. LEXIS 1340 (2001), cert. denied, No. S02C0503, 2002 Ga. LEXIS 300 (Ga. Mar. 29, 2002).

Authority of chairperson of county board of commissioners. — Based on the authority granted under Ga. L. 1984, p. 3815, § VIII, the chairperson of a county board of commissioners was authorized to hire and fire county employees without the approval of the board as the power to do so was reasonably necessary for the chairperson to carry out the expressed authority to administer, supervise, operate, and control the county departments, agencies, and offices; thus, the trial court erred in denying the chairperson declaratory relief regarding the personnel. Duggan v. Leslie, 281 Ga. App. 894, 637 S.E.2d 428, 2006 Ga. App. LEXIS 1158 (2006).

General contractor's obligations under bond. — In the general contractor's declaratory judgment action against the materials provider in which the general contractor sought a declaration as to its rights with regard to a payment bond claim filed by the provider, the action was justiciable under O.C.G.A. § 9-4-2(a); the general contractor faced uncertainty as to the legal effect of the payment bond and as to the specific amount the provider had sent forth in its notice to the contractor, and the general contractor needed direction on these issues to determine whether it had to take additional steps to secure a different type of payment bond in order to properly discharge the provider's lien and so that it could clarify its potential indemnification obligations and/or liability to the retailer for whom the construction was being performed. Sierra Craft, Inc. v. T. D. Farrell Constr., Inc., 282 Ga. App. 377, 638 S.E.2d 815, 2006 Ga. App. LEXIS 1398 (2006), cert. denied, No. S07C0460, 2007 Ga. LEXIS 145 (Ga. Feb. 5, 2007).

Beneficiary's challenge to will provision. — Pursuant to O.C.G.A. § 9-4-2(c), a beneficiary of a will who wished to remove the executor, and who contended that a will provision restricting the beneficiary's right to alienate a fee simple estate was invalid, could seek a declaratory judgment even if the beneficiary had other adequate legal or equitable remedies. Bandy v. Henderson, 284 Ga. 692, 670 S.E.2d 792, 2008 Ga. LEXIS 1023 (2008).

Suit to compel release of medical records. — Surviving spouse sued a nursing home for wrongful death and sought a temporary restraining order and a permanent injunction requiring the home to release the decedent's medical records, as well as a judgment under O.C.G.A. § 9-4-2 declaring her legal entitlement to such records. As the spouse sought injunctive relief in a case involving an actual controversy, the suit was an appropriate case for a declaratory judgment. Alvista Healthcare Ctr., Inc. v. Miller, 296 Ga. App. 133, 673 S.E.2d 637, 2009 Ga. App. LEXIS 147, aff'd on other grounds, 286 Ga. 122, 686 S.E.2d 96, 2009 Ga. LEXIS 679 (2009).

Suit for access to court records. — Law firm that sought copies of a court reporter's recordings of hearings in two criminal cases was not entitled to a declaratory judgment regarding a trial court's order denying the request for copies because the Declaratory Judgment Act, O.C.G.A. § 9-4-1 et seq., was not intended to be used to set aside or modify judicial decrees. Merch. Law Firm, P.C. v. Emerson, 301 Ga. 609, 800 S.E.2d 557, 2017 Ga. LEXIS 438 (2017).

Declaratory judgment not available in action to enforce attorney's lien. — Under the right-for-any-reason rule, the trial court did not err by dismissing a law firm's case against an insurer under the Declaratory Judgment Act, O.C.G.A. § 9-4-1, and O.C.G.A. § 15-19-14(b) to enforce the firm's attorney's lien in a case the firm filed on behalf of an owner against the insurer because declaratory judgment was not available; the issues the firm raised were the same as those raised in an owner's case against the insurer for failure to provide a defense, and the rights of the parties in the owner's case had already accrued. McRae, Stegall, Peek, Harman, Smith & Manning, LLP v. Ga. Farm Bureau Mut. Ins. Co., 316 Ga. App. 526, 729 S.E.2d 649, 2012 Ga. App. LEXIS 599 (2012).

Declaratory relief in interpretation of property tax statute. — Trial court had jurisdiction over a petition by a

Miscellaneous (Cont'd)

County Board of Tax Assessors for declaratory relief as to whether and how the Board could, under the 2017 amendment to O.C.G.A. § 48-5-2(3)(B)(vii), consider low income housing tax credits awarded to taxpayers under 26 U.S.C. § 42 when assessing taxes on low-income housing. Heron Lake II Apartments, LP v. Lowndes County Bd. of Tax Assessors, 306 Ga. 816, 833 S.E.2d 528, 2019 Ga. LEXIS 627 (2019).

Gun permit ruling advisory. — In a suit against a probate court judge, the trial court's grant of the motion to dismiss the plaintiffs' request for declaratory judgment on the ground that a ruling would be advisory was affirmed because the plaintiffs faced no imminent or actual threat of an injury and, in a few years, the plaintiffs would again apply for the carry permits and whether the probate court judge would issue the permits again were hypothetical questions based on a possible future event. Georgiacarry.org v. Bordeaux, 360 Ga. App. 807, 861 S.E.2d 649, 2021 Ga. App. LEXIS 394 (2021).

State Patrol Officer Entitled to Sovereign Immunity.

Declaratory judgment improperly denied when agreement not properly terminated. — Trial court erred in granting summary judgment to the appellee on the appellee's counterclaim for breach of the subordination agreement (SA) as the SA did not bar the appellant from bringing the current lawsuit seeking declaratory and injunctive relief under the management services agreement (MSA) as the MSA remained in effect with respect to the appellant, and management fees continued to accrue to the appellant, as the MSA was not properly terminated as to the appellant because it was not terminated by mutual consent of the parties; thus, the trial court erred in denying the appellant's claim for declaratory judgment. GAPIII, Inc. v. Seal Indus., 338 Ga. App. 101, 789 S.E.2d 321, 2016 Ga. App. LEXIS 434 (2016).

RESEARCH REFERENCES

Am. Jur. 2d.

22A Am. Jur. 2d, Declaratory Judgments, §§ 10 et seq., , 14, 15, 17, 21 et seq., 50.

Am. Jur. Pleading and Practice Forms.

8A Am. Jur. Pleading and Practice Forms, Declaratory Judgments, § 2.

C.J.S.

26 C.J.S., Declaratory Judgments, § 1 et seq.

U.L.A.

Uniform Declaratory Judgments Act (U.L.A.) § 1.

ALR.

Declaration of rights or declaratory judgments, 12 A.L.R. 52; 19 A.L.R. 1124; 50 A.L.R. 42; 68 A.L.R. 110; 87 A.L.R. 1205; 114 A.L.R. 1361; 142 A.L.R. 8.

Decree or order which merely declares rights of parties without an express command or prohibition as basis of contempt proceeding, 29 A.L.R. 134.

Remedy or procedure to make effective rights established by declaratory judgment, 101 A.L.R. 689.

Questions or controversy between public officers as within contemplation of Declaratory Judgment Act, 103 A.L.R. 1094.

Right to quiet title or remove cloud on title to personal property by suit in equity or under Declaratory Judgment Act, 105 A.L.R. 291.

Determination of constitutionality of statute or ordinance, or proposed statute or ordinance, as proper subject of judicial decision under Declaratory Judgment Act, 114 A.L.R. 1361.

Jurisdictional amount in its relation to suit for declaratory judgment, 115 A.L.R. 1489.

Action under Declaratory Judgment Act to test validity or effect of a decree of divorce, 124 A.L.R. 1336.

Original availability to wrongdoer of remedy under Declaratory Judgment Act as affecting defense of laches, mitigation of damages, or other equitable defenses in subsequent suit against him, 131 A.L.R. 791.

Tax questions as proper subject of ac-

tion for declaratory judgment, 132 A.L.R. 1108; 11 A.L.R.2d 359.

Jurisdiction of declaratory action as affected by pendency of another action or proceeding, 135 A.L.R. 934.

Doctrine of in pari delicto as applicable to suits for declaratory relief, 141 A.L.R. 1427.

Application of Declaratory Judgment Act to questions in respect of insurance policies, 142 A.L.R. 8.

Statute of limitations or doctrine of laches in relation to declaratory actions, 151 A.L.R. 1076.

Validity and effect of former judgment or decree as proper subject for consideration in declaratory action, 154 A.L.R. 740.

May declaratory and coercive or executory relief be combined in action under Declaratory Judgment Act, 155 A.L.R. 501.

Application of Declaratory Judgment Act to questions in respect of contracts or alleged contracts, 162 A.L.R. 756.

Release as proper subject of action for declaratory judgment, 167 A.L.R. 433.

Labor dispute as proper subject of declaratory action, 170 A.L.R. 421.

Custody of child as proper subject of declaratory action, 170 A.L.R. 521.

Right to declaratory relief as affected by existence of other remedy, 172 A.L.R. 847.

Determination of seniority rights of employee as proper subject of declaratory suit, 172 A.L.R. 1247.

"Actual controversy" under declaratory judgment statute in zoning and building restriction cases, 174 A.L.R. 853.

Declaratory or advisory relief respecting future interest, 174 A.L.R. 880.

Relief against covenant restricting right to engage in business or profession, as subject of declaratory judgment, 10 A.L.R.2d 743.

Declaratory relief with respect to unemployment compensation, 14 A.L.R.2d 826.

Burden of proof in actions under general declaratory judgment acts, 23 A.L.R.2d 1243.

Issue as to negligence as a proper subject of declaratory judgment action, 28 A.L.R.2d 957.

Partnership or joint-venture matters as subject of declaratory judgment, 32 A.L.R.2d 970.

Availability of declaratory judgment to determine validity of lease of real property, 60 A.L.R.2d 400.

Declaratory judgment, during lifetime of spouses, as to construction of antenuptial agreement dealing with property rights of survivor, 80 A.L.R.2d 941.

Validity, construction and application of criminal statutes or ordinances as proper subject for declaratory judgment, 10 A.L.R.3d 727.

Availability and scope of declaratory judgment actions in determining rights of parties, or powers and exercise thereof by arbitrators, under arbitration agreements, 12 A.L.R.3d 854.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence, 12 A.L.R.5th 577.

9-4-3. Further relief; interlocutory extraordinary relief to preserve status quo.

(a) Further plenary relief, legal or equitable, including but not limited to damages, injunction, mandamus, or quo warranto, may be sought in a petition seeking declaratory judgment, and in such case, the action shall be governed as to process, service, and procedure by Code Section 9-4-5. In all such cases, the court shall award to the petitioning party such relief as the pleadings and evidence may show him to be entitled; and the failure of the petition to state a cause of action for declaratory relief shall not affect the right of the party to any other relief, legal or equitable, to which he may be entitled.

(b) The court, in order to maintain the status quo pending the

adjudication of the questions or to preserve equitable rights, may grant injunction and other interlocutory extraordinary relief in substantially the manner and under the same rules applicable in equity cases.

History.

Ga. L. 1945, p. 137, § 2; Ga. L. 1959, p. 236, § 2; Ga. L. 1982, p. 3, § 9.

Law reviews.

For article, "Variations on a Theme: Georgia's Evolving Test for Interlocutory Injunctive Relief," see 28 Ga. St. B.J. 17 (August 2022).

JUDICIAL DECISIONS

Legislative intent. — From this provision of the Declaratory Judgment Act (Ga. L. 1945, p. 137) there can be no doubt but that it was the legislative intent to confer upon courts of law the right to maintain the status pending a declaration of the rights of the parties. Findley v. City of Vidalia, 204 Ga. 279, 49 S.E.2d 658, 1948 Ga. LEXIS 415 (1948).

This section authorizes granting any relief to which petition showed parties were presently entitled. National Audubon Soc'y, Inc. v. Marshall, 424 F.2d 717, 1970 U.S. App. LEXIS 9873 (5th Cir. 1970).

Injunctive relief cannot be given against party who is not necessary party to the declaratory proceeding. Johnson v. St. Paul Fire & Marine Ins. Co., 101 Ga. App. 734, 115 S.E.2d 221, 1960 Ga. App. LEXIS 994, rev'd on other grounds, 216 Ga. 437, 117 S.E.2d 459, 1960 Ga. LEXIS 497 (1960).

Maintaining status quo pending declaratory judgment. — If a petition otherwise states a cause of action for declaratory relief, the Declaratory Judgment Act (Ga. L. 1945, p. 137) provides for maintaining the status pending the declaration of rights. United States Cas. Co. v. Georgia S. & Fla. Ry., 212 Ga. 569, 94 S.E.2d 422, 1956 Ga. LEXIS 447 (1956), transferred, 95 Ga. App. 100, 97 S.E.2d 185, 1957 Ga. App. LEXIS 726 (1957).

Trial court did not abuse the court's discretion in entering an interlocutory injunction to preserve the status quo pending an adjudication on the merits because the appellees were likely to succeed on the merits, even if the appellees did not defeat the DeKalb County Tax Commissioner's claims as the appellees sought a declaration that ad valorem taxes on the same cars were not owed twice and it was most unlikely that relief of that nature would be denied. Scott v. Prime Sales & Leasing, Inc., 276 Ga. App. 283, 623 S.E.2d 167, 2005 Ga. App. LEXIS 1229 (2005), cert. denied, No. S06C0525, 2006 Ga. LEXIS 279 (Ga. Apr. 25, 2006).

Injunctive relief under subsection (b) interlocutory in nature. — That only interlocutory, or temporary injunctions are intended to be included in actions at law under subsection (b) of this section is indicated by the provision therein for the granting of injunction and other interlocutory extraordinary relief. Norbo Trading Corp. v. Wohlmuth, 115 Ga. App. 69, 153 S.E.2d 727, 1967 Ga. App. LEXIS 1002 (1967).

Court of Appeals has jurisdiction of appeal from declaratory judgment adjudicating the constitutionality of the municipal ordinance and injunctive relief is merely ancillary to that question and does not vest jurisdiction in the Supreme Court. Savannah TV Cable Co. v. Mayor of Savannah, 225 Ga. 821, 171 S.E.2d 498, 1969 Ga. LEXIS 659 (1969), superseded by statute as stated in Willis v. City of Atlanta, 285 Ga. 775, 684 S.E.2d 271, 2009 Ga. LEXIS 466 (2009).

Ancillary relief not equitable relief invoking jurisdiction of Supreme Court. — Purely incidental and ancillary relief provided for by the Declaratory Judgment Act (Ga. L. 1945, p. 137) for the purpose only of retaining the status quo of an existing controversy until there can be a determination and declaration of the rights and liabilities of the parties in controversy is not a provision for equitable relief as contemplated by the Con-

stitution in defining the jurisdiction of the Supreme Court. Milwaukee Mechanics Ins. Co. v. Davis, 204 Ga. 67, 48 S.E.2d 876, 1948 Ga. LEXIS 555 (1948).

Prayer for a restraining order as provided for under the Declaratory Judgment Act (Ga. L. 1945, p. 137), which is in effect only an application for a stay of proceedings until the rights in actual controversy can be declared and decreed, is not one for equitable relief within the meaning of the Georgia Constitution fixing the jurisdiction of the Supreme Court. United States Cas. Co. v. Georgia S. & Fla. Ry., 212 Ga. 569, 94 S.E.2d 422, 1956 Ga. LEXIS 447 (1956), transferred, 95 Ga. App. 100, 97 S.E.2d 185, 1957 Ga. App. LEXIS 726 (1957).

Conclusion of the pleader that equitable relief is necessary is insufficient to convert an action brought under the Declaratory Judgment Act (Ga. L. 1945, p. 137) into an equity case so as to confer jurisdiction of the appeal on the Supreme Court and the fact that the trial judge may have erroneously adjudicated that the present case was one in equity would not make it an equity case within the jurisdiction of the Supreme Court on review. United States Cas. Co. v. Georgia S. & Fla. Ry., 212 Ga. 569, 94 S.E.2d 422, 1956 Ga. LEXIS 447 (1956), transferred, 95 Ga. App. 100, 97 S.E.2d 185, 1957 Ga. App. LEXIS 726 (1957).

Grant of an interlocutory injunction for the purpose of maintaining the status quo of an existing controversy pending the adjudication of the question as provided for by this section is neither such equitable relief nor such extraordinary remedy as contemplated by the Constitution in defining the jurisdiction of the Supreme Court. City of Atlanta v. Georgia Soc'y of Professional Eng'rs., 134 S.E.2d 592 (Ga. 1964).

Petition seeking declaratory judgment is not per se equitable action, nor is it converted into an equitable action merely because the court may grant a temporary restraining order to "maintain the status" pending an adjudication with respect to rights, status and other legal relations. Georgia Cas. & Sur. Co. v. Turner, 208 Ga. 782, 69 S.E.2d 771, 1952 Ga. LEXIS 368, transferred, 86 Ga. App. 418, 71 S.E.2d 773, 1952 Ga. App. LEXIS 966 (1952); Ulmer v. State Hwy. Dep't, 210 Ga. 513, 81 S.E.2d 514, 1954 Ga. LEXIS 368, transferred, 90 Ga. App. 833, 84 S.E.2d 583, 1954 Ga. App. LEXIS 826 (1954); Todd v. Conner, 220 Ga. 173, 137 S.E.2d 614, 1964 Ga. LEXIS 480 (1964).

Injunction to maintain status quo not equitable relief. — Injunction to maintain the status of the parties pending an adjudication of the legal issues involved is not equitable relief. Phoenix Assurance Co. v. Glens Falls Ins. Co., 215 Ga. 650, 112 S.E.2d 588, 1960 Ga. LEXIS 292, transferred, 101 Ga. App. 530, 114 S.E.2d 389, 1960 Ga. App. LEXIS 923 (1960); Reid v. Standard Oil Co., 218 Ga. 289, 127 S.E.2d 678, 1962 Ga. LEXIS 484 (1962), transferred, 107 Ga. App. 497, 130 S.E.2d 777, 1963 Ga. App. LEXIS 890 (1963); Norbo Trading Corp. v. Wohlmuth, 115 Ga. App. 69, 153 S.E.2d 727, 1967 Ga. App. LEXIS 1002 (1967).

Prayer for injunctive relief to maintain the status quo does not convert an action for declaratory relief into an equitable action. City of Columbus v. Atlanta Cigar Co., 220 Ga. 533, 140 S.E.2d 267, 1965 Ga. LEXIS 555 (1965).

Interlocutory injunction not appropriate. — Issuance of an interlocutory injunction would not have been appropriate to maintain the status quo pending a ruling on the merits that would never have occurred. Marietta Props. LLC v. City of Marietta, 319 Ga. App. 184, 732 S.E.2d 102, 2012 Ga. App. LEXIS 1080 (2012), cert. denied, No. S13C0589, 2013 Ga. LEXIS 430 (Ga. May 6, 2013).

Restraining orders. — Temporary restraining order granted to maintain the status pending an adjudication of the questions presented does not make an action an equitable one. Peoples v. Bass, 211 Ga. 802, 89 S.E.2d 171, 1955 Ga. LEXIS 470, transferred, 93 Ga. App. 71, 90 S.E.2d 926, 1955 Ga. App. LEXIS 479 (1955).

Restraining order pursuant to this section does not convert the cause into an equitable action. United States Cas. Co. v. Georgia S. & Fla. Ry., 212 Ga. 569, 94 S.E.2d 422, 1956 Ga. LEXIS 447 (1956),

transferred, 95 Ga. App. 100, 97 S.E.2d 185, 1957 Ga. App. LEXIS 726 (1957).

Court's jurisdiction to grant relief not divested by judge's choice to reserve judgment. — Trial judge's choice to grant declaratory relief and reserve judgment on other prayed-for relief until an appeal from the former order could be taken does not divest the court of the jurisdiction to grant "further plenary relief" upon proper motion to renew such a prayer. Fourth Nat'l Bank v. Grant, 140 Ga. App. 78, 230 S.E.2d 60, 1976 Ga. App. LEXIS 1353 (1976).

Petition does not allege cause of action for other relief if relief sought is dependent upon unsuccessful prayer for declaratory judgment. Gay v. Hunt, 221 Ga. 841, 148 S.E.2d 310, 1966 Ga. LEXIS 719 (1966).

Failure to state cause of action for injunctive relief. — When the only other relief sought in a declaratory judgment petition was to enjoin the defendants from prosecuting a threatened dispossessory warrant proceeding against the petitioners because of an alleged breach of the lease contract on their part, which had already occurred and denial of the breach of the contract was available as a defense by counteraffidavit to the dispossessory warrant, and the ouster of the petitioners and their tenants could be prevented by the filing of such affidavit and the giving of the bond and security required by statute, the petition therefore failed to state a cause of action for the injunctive relief sought. Pinkard v. Mendel, 216 Ga. 487, 117 S.E.2d 336, 1960 Ga. LEXIS 511 (1960).

Laches. — When a neighbor misled officials into issuing a drilling permit and an owner petitioned for relief within a few days after the well was drilled and believed the matter had been resolved, laches did not apply to the owner's petition for injunctive relief. Netherland v. Nelson, 261 Ga. App. 765, 583 S.E.2d 478, 2003 Ga. App. LEXIS 653 (2003).

Supreme Court has jurisdiction in declaratory judgment actions seeking quo warranto relief. — Declaratory judgment action seeking relief quo warranto regarding rights to positions on board of directors of nonprofit corporation brought in Court of Appeals must be transferred to Supreme Court as only it has jurisdiction of all cases involving extraordinary remedies. Morales v. Sevananda, Inc., 160 Ga. App. 92, 286 S.E.2d 327, 1981 Ga. App. LEXIS 2896, transferred, 248 Ga. 557, 289 S.E.2d 246, 1981 Ga. LEXIS 1104 (1981).

Trial court erred in declaring policy void and ordering insurer to elect to affirm or rescind policy. — In an insurer's declaratory judgment seeking a determination that a policy was void due to the insured's misrepresentations in the application, O.C.G.A. § 33-24-7(b), the trial court erred by, rather than simply declaring the policy void, requiring the insurer to elect whether to affirm or rescind the policy and repay the premiums if rescinding. Georgia Casualty & Surety Company v. Valley Wood, Inc., 345 Ga. App. 30, 812 S.E.2d 94, 2018 Ga. App. LEXIS 166 (2018).

RESEARCH REFERENCES

Am. Jur. 2d.

22A Am. Jur. 2d, Declaratory Judgments, §§ 45 et seq., 252 et seq., 255, 261.

C.J.S.

26 C.J.S., Declaratory Judgments, § 1 et seq.

U.L.A.

Uniform Declaratory Judgments Act (U.L.A.) § 8.

ALR.

Declaration of rights or declaratory judgments, 12 A.L.R. 52; 19 A.L.R. 1124; 50 A.L.R. 42; 68 A.L.R. 110; 87 A.L.R. 1205; 114 A.L.R. 1361; 142 A.L.R. 8.

Decree or order which merely declares rights of parties without an express command or prohibition as basis of contempt proceeding, 29 A.L.R. 134.

Remedy or procedure to make effective rights established by declaratory judgment, 101 A.L.R. 689.

Joinder of causes of action and parties in suit under Declaratory Judgment Act, 110 A.L.R. 817.

May declaratory and coercive or executory relief be combined in action under Declaratory Judgment Act, 155 A.L.R. 501.

9-4-4. Declaratory judgments involving fiduciaries.

(a) Without limiting the generality of Code Sections 9-4-2, 9-4-3, 9-4-5 through 9-4-7, and 9-4-9, any person interested as or through an executor, administrator, personal representative, trustee, guardian, conservator, or other fiduciary, creditor, devisee, distributee, legatee, heir, next of kin, or beneficiary in the administration of a trust or of the estate of a decedent, a minor, a ward, an incapacitated person, a protected person, a person who is otherwise legally incompetent because of mental illness or intellectual disability, or an insolvent may have a declaration of rights or legal relations in respect thereto and a declaratory judgment:

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, beneficiaries, or others;

(2) To direct the executor, administrator, trustee, or other fiduciary to do or abstain from doing any particular act in his or her fiduciary capacity;

(3) To determine title to property in which the trust or estate has or is purported to have an ownership or other interest; or

(4) To determine any question arising in the administration of the estate or trust, including questions of construction of wills, trust instruments, and other writings.

(b) The enumeration in subsection (a) of this Code section does not limit or restrict the exercise of general powers conferred in Code Section 9-4-2 in any proceeding covered thereby where declaratory relief is sought in which a judgment or decree will terminate the controversy or remove the uncertainty.

History.

Ga. L. 1945, p. 137, §§ 7, 8; Ga. L. 2015, p. 385, § 4-15/HB 252; Ga. L. 2020, p. 377, § 2-4/HB 865.

The 2020 amendment, effective January 1, 2021, rewrote subsection (a), which read: "(a) Without limiting the generality of Code Sections 9-4-2, 9-4-3, 9-4-5 through 9-4-7, and 9-4-9, any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, ward, next of kin, or beneficiary in the administration of a trust or of the estate of a decedent, a minor, a person who is legally incompetent because of mental illness or intellectual disability, or an insolvent may have a declaration of rights or legal relations in respect thereto and a declaratory judgment:

"(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;

"(2) To direct the executor, administrator, or trustee to do or abstain from doing any particular act in his fiduciary capacity; or

"(3) To determine any question arising

in the administration of the estate or trust, including questions of construction of wills and other writings."

Editor's notes.

Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

JUDICIAL DECISIONS

This section authorizes actions for declaratory judgment to determine any questions in administration of wills or trusts, and to direct a trustee to take particular action. National Audubon Soc'y, Inc. v. Marshall, 424 F.2d 717, 1970 U.S. App. LEXIS 9873 (5th Cir. 1970).

Section inapplicable to issues of venue and issuance of letters of administration. — O.C.G.A. § 9-4-4 is inapplicable when the only issues raised go to venue and the issuance and revocation of letters of administration. Taylor v. Mosley, 252 Ga. 325, 314 S.E.2d 184, 1984 Ga. LEXIS 679 (1984).

Legislative intent. — Manifest purpose of this section is to enable a guardian, administrator, or other fiduciary to go into court and seek guidance during the administration of an estate or trust; the statute does not apply when the trust has already been terminated by the death of the guardian. Tucker v. American Sur. Co., 206 Ga. 533, 57 S.E.2d 662, 1950 Ga. LEXIS 515 (1950).

Executor is entitled to the direction of courts of Georgia and to the aid of equity in the settlement of the executor's accounts in the performance of the executor's duties and the fulfillment of the executor's oath if a proper case for equity is alleged. Georgia Money Corp. v. Rissman, 220 Ga. 476, 139 S.E.2d 486, 1964 Ga. LEXIS 587 (1964).

Every executor is entitled to judicial guidance as to what property the executor is called upon to administer as that of the executor's testator when the question is subject to doubt and plausible contrary contentions of the parties at interest. Stephens v. First Nat'l Bank, 222 Ga. 423, 150 S.E.2d 865, 1966 Ga. LEXIS 500 (1966).

There is a particularly imperative need of the executor for judicial guidance when the estate the executor is to administer is subject to inheritance tax and reasonable accurate knowledge of the estate's value is essential in arriving at the amount of the taxes that the executor has the duty to compute and pay. Stephens v. First Nat'l Bank, 222 Ga. 423, 150 S.E.2d 865, 1966 Ga. LEXIS 500 (1966).

Ga. L. 1945, p. 137, §§ 7 and 8, (see now O.C.G.A. § 9-4-4) must be construed in light of Ga. L. 1945, p. 137, § 1 (see now O.C.G.A. § 9-4-2), which provides that in cases of "actual controversy" the superior courts shall have the power to declare rights and other legal relations of any interested party petitioning for such declaration. Wright v. Heffernan, 205 Ga. 75, 52 S.E.2d 289, 1949 Ga. LEXIS 510 (1949).

Rights given under Ga. L. 1945, p. 137, §§ 7 and 8 (see now O.C.G.A. § 9-4-4) must be construed in connection with Ga. L. 1945, p. 137, § 1 (see now O.C.G.A. § 9-4-2) so that there must exist an actual justiciable controversy between the legatees or as to questions arising out of the administration of the estate or disputed questions necessitating a construction of the will or other writing. Darnell v. Tate, 206 Ga. 576, 58 S.E.2d 160, 1950 Ga. LEXIS 536 (1950); Rowan v. Herring, 214 Ga. 370, 105 S.E.2d 29, 1958 Ga. LEXIS 429 (1958).

Provisions of the Declaratory Judgment Act (Ga. L. 1945, p. 137) empowering a construction of wills must be construed with Ga. L. 1959, p. 236, § 1 (see now O.C.G.A. § 9-4-2). Brewton v. McLeod, 216 Ga. 686, 119 S.E.2d 105, 1961 Ga. LEXIS 313 (1961).

In order to authorize declaratory relief, the record must disclose antagonistic claims indicating "imminent and inevitable litigation"; and the courts will not render an opinion which is merely advisory in character upon a state of facts which have not fully accrued. Wright v. Heffernan, 205 Ga. 75, 52 S.E.2d 289, 1949 Ga. LEXIS 510 (1949).

Rule as to necessity for direction applied in cases arising under Ga. L. 1945, p. 137, §§ 7 and 8 (see now O.C.G.A. § 9-4-4) equally as well as to cases arising under Ga. L. 1945, p. 137, § 1 (see now O.C.G.A. § 9-4-2). Rowan v. Herring, 214 Ga. 370, 105 S.E.2d 29, 1958 Ga. LEXIS 429 (1958); Brewton v. McLeod, 216 Ga. 686, 119 S.E.2d 105, 1961 Ga. LEXIS 313 (1961).

Plaintiffs' allegations are not sufficient for declaratory judgment if petition fails to allege any necessity for a determination to guide and protect the plaintiffs from uncertainty and insecurity with respect to the propriety of some future act or conduct which is properly incident to their alleged right, and which future action without such direction might reasonably jeopardize their interest. The right given by this section to trustees and other named persons to declaratory judgment does not dispense with the requirement just stated. Gay v. Hunt, 221 Ga. 841, 148 S.E.2d 310, 1966 Ga. LEXIS 719 (1966).

Petition for declaratory judgment did not state a cause of action under Ga. L. 1945, p. 137, §§ 7 and 8 (see now O.C.G.A. § 9-4-4) read in conjunction with Ga. L. 1945, p. 137, § 1 (see now O.C.G.A. § 9-4-2), when the devisees did not allege the devisees were uncertain, insecure, and needed direction before taking some future action. National Audubon Soc'y, Inc. v. Marshall, 424 F.2d 717, 1970 U.S. App. LEXIS 9873 (5th Cir. 1970).

Supreme Court should not undertake to decide future rights, dependent upon termination of life estates; but it should await the happening of an event which will bring about an accrued state of facts. Wright v. Heffernan, 205 Ga. 75, 52 S.E.2d 289, 1949 Ga. LEXIS 510 (1949).

Holders of purported note issued by decedent but repudiated by executors were entitled to declaratory judgment under the terms of this section. Darling v. Jones, 88 Ga. App. 812, 78 S.E.2d 94, 1953 Ga. App. LEXIS 1215 (1953).

Validity of in terrorem clause in will. — Legatee who wanted to challenge the will was entitled to a declaration concerning the validity of an in terrorem clause therein. Kesler v. Watts, 218 Ga. App. 104, 460 S.E.2d 822, 1995 Ga. App. LEXIS 659 (1995), cert. denied, No. S95C1855, 1995 Ga. LEXIS 1208 (Ga. Nov. 3, 1995), cert. denied, No. S95C1864, 1995 Ga. LEXIS 1207 (Ga. Nov. 3, 1995).

In a declaratory judgment action, the probate court failed to analyze the issue of the will contestants' proposed claim against the executors as the petition did not specify the proposed claims sufficient for the court to have determined that those claims would not violate the in terrorem clause, and absent such allegations, the record did not support the probate court's conclusion that the will contestants' proposed petition to remove the executors would not violate the in terrorem clause. In re Estate of Burkhalter, 343 Ga. App. 417, 806 S.E.2d 875, 2017 Ga. App. LEXIS 510 (2017).

Probate court erred by granting a declaratory petition to file another petition for declaratory judgment regarding the validity of an in terrorem clause in the decedent's will without violating the in terrorem clause itself because there was no law allowing a second declaratory judgment action on that question; rather, a question regarding the validity of an in terrorem clause should be resolved in the first declaratory judgment action raising that issue. In re Estate of Burkhalter, 343 Ga. App. 417, 806 S.E.2d 875, 2017 Ga. App. LEXIS 510 (2017).

Effect of in terrorem clause in will. — Appellant beneficiary was entitled to pursue a declaratory judgment action under O.C.G.A. § 9-4-4(a)(3) (now (a)(4)) regarding an in terrorem clause in a will as uncertainty existed as to appellant's rights under the will to bring an action for removal of the executor; thus, the complaint did not seek an advisory opinion. Sinclair v. Sinclair, 284 Ga. 500, 670 S.E.2d 59, 2008 Ga. LEXIS 838 (2008).

Testator's children's proposed petition for an accounting or, in the alternative, for the removal of the executor, was not a will contest and, therefore, the trial court correctly found that the petition would not violate the testator's will's in terrorem clause. In re Estate of Burkhalter, 354 Ga.

App. 231, 840 S.E.2d 614, 2020 Ga. App. LEXIS 152 (2020).

No cause of action for declaratory judgment when petitioner's position not insecure and uncertain. — Petition seeking a declaratory judgment for the construction of a will, which showed that all rights have accrued under the will, that the petitioners did not face any uncertainty and insecurity with respect to the propriety of some future act or conduct incident to their rights, which conduct, without direction, could jeopardize their interest, and that the petitioners had an adequate remedy at law or in equity to secure their rights under the will, failed to allege a cause of action for declaratory judgment. Rowan v. Herring, 214 Ga. 370, 105 S.E.2d 29, 1958 Ga. LEXIS 429 (1958).

While administrators are entitled to judicial guidance under subsection (a) of O.C.G.A. § 9-4-4, the requirement for determination to guide and protect administrators from uncertainty and insecurity with respect to some future act or conduct applies in cases under § 9-4-4 as well as to cases arising under O.C.G.A. § 9-4-2; consequently, a declaratory judgment was not authorized when the rights of the parties had accrued and there was no uncertainty alleged requiring direction from the court. Hammond v. Sanders, 210 Ga. App. 307, 436 S.E.2d 45, 1993 Ga. App. LEXIS 1171 (1993).

Declaratory judgment action not justified when rouse for another objective. — Probate court properly dismissed the brothers' petition because the proposed declaratory judgment action would have triggered the in terrorem clause since although the brothers claimed that their proposed declaratory judgment action sought to interpret the father's will, the proposed declaratory judgment action made clear that what the brothers truly sought was to remove the father's girlfriend as a beneficiary, executor, and trustee. In re Estate of Johnson, 352 Ga. App. 164, 834 S.E.2d 283, 2019 Ga. App. LEXIS 543 (2019).

Justiciable issue shown. — Executor's petition that sought judicial clarification as to ownership of a company was based on a legitimate question as to the interpretation of a 1951 year's support award made to the decedent and to the decedent's children; the ultimate resolution of that issue bore directly on what assets were in the estate administered by the executor, and thus the petition identified a justiciable issue under O.C.G.A. § 9-4-4. In re Estate of Wallace, 284 Ga. App. 772, 645 S.E.2d 19, 2007 Ga. App. LEXIS 312 (2007), cert. denied, No. S07C1193, 2007 Ga. LEXIS 534 (Ga. July 12, 2007).

Trial court erred in granting a declaratory judgment in favor of the appellee under the Declaratory Judgment Act, O.C.G.A. § 9-4-1 et seq., because, while the appellee established that the parties disagreed whether a warranty deed was delivered, the appellee failed to show that resolution of that dispute would have had a legal effect on anything; thus, the case did not present an actual, justiciable controversy appropriate for declaratory relief. Willis v. Cheeley, 363 Ga. App. 341, 870 S.E.2d 907, 2022 Ga. App. LEXIS 156 (2022).

Guardianships. — Fulton County Probate Court had jurisdiction to issue a declaratory judgment in a case involving whether a guardian appointed at the request of the Department of Veteran Affairs could receive a bequest under the ward's will because it had concurrent jurisdiction with the superior courts with regard to proceedings for declaratory judgments involving fiduciaries, pursuant to O.C.G.A. § 9-4-4. Cross v. Stokes, 275 Ga. 872, 572 S.E.2d 538, 2002 Ga. LEXIS 1030 (2002).

Trust beneficiary entitled to declaration of rights despite settlement agreement. — Both a settlement agreement between a trustee and several beneficiaries and the trial court's temporary restraining order maintained the status quo with regard to the personal contents of the beneficiaries' father's home and preserved the issue of one beneficiary's entitlement to the contents for a declaration of the parties' respective rights. Garner v. Redwine, 309 Ga. App. 158, 709 S.E.2d 569, 2011 Ga. App. LEXIS 178 (2011), cert. denied, No. S11C1234, 2011

Ga. LEXIS 593 (Ga. Sept. 6, 2011), cert. denied, No. S11C1236, 2011 Ga. LEXIS 600 (Ga. Sept. 6, 2011).

Executor's uncertainty justified declaratory judgment action. — Executor of the estate and partnership head faced uncertainty with respect to conflicting duties to the partnership and to the estate and beneficiaries; thus, a declaratory judgment was an appropriate vehicle to clarify the executor's obligations, and the Georgia superior court had concurrent jurisdiction with the probate court to address those issues as well as was authorized to exercise the court's concurrent and equitable jurisdiction to decide the requests for the temporary restraining orders. Rentz v. Rentz, 339 Ga. App. 66, 793 S.E.2d 112, 2016 Ga. App. LEXIS 582 (2016).

RESEARCH REFERENCES

Am. Jur. 2d.

22A Am. Jur. 2d, Declaratory Judgments, §§ 144 et seq., 150, 206.

Am. Jur. Pleading and Practice Forms.

24 Am. Jur. Pleading and Practice Forms, Trusts, § 190.

C.J.S.

26 C.J.S., Declaratory Judgments, § 133 et seq.

U.L.A.

Uniform Declaratory Judgments Act (U.L.A.) §§ 4, 5.

ALR.

Declaration of rights or declaratory judgments, 12 A.L.R. 52; 19 A.L.R. 1124; 50 A.L.R. 42; 68 A.L.R. 110; 87 A.L.R. 1205; 114 A.L.R. 1361; 142 A.L.R. 8.

Applicability of nonclaim statutes to claims arising under contract executory at the time of death, 47 A.L.R. 896.

9-4-5. Filing and service; time of trial; drawing of jury.

A proceeding instituted under this chapter shall be filed and served as are other cases in the superior courts of this state or in the Georgia State-wide Business Court; provided, however, that a proceeding instituted in the probate court pursuant to paragraph (1) of subsection (a) of Code Section 15-9-127 shall be filed and served in the manner provided for proceedings in the probate courts of this state in Chapter 11 of Title 53. A proceeding instituted under this chapter may be tried at any time designated by the court not earlier than 20 days after the service thereof, unless the parties consent in writing to an earlier trial. If there is an issue of fact that requires a submission to a jury, the jury may be drawn, summoned, and sworn either in regular term or specially for the pending case.

History.

Ga. L. 1945, p. 137, § 4; Ga. L. 2019, p. 845, § 3-2/HB 239; Ga. L. 2020, p. 377, § 2-5/HB 865.

The 2020 amendment, effective January 1, 2021, substituted "; provided, however, that a proceeding instituted in the probate court pursuant to paragraph (1) of subsection (a) of Code Section 15-9-127 shall be filed and served in the manner provided for proceedings in the probate courts of this state in Chapter 11 of Title 53. A proceeding instituted under this chapter" for "and" and substituted "that requires" for "which requires" in the last sentence.

Law reviews.

For article on the 2019 amendment of this Code section, see 36 Ga. St. U.L. Rev. 1 (2019).

JUDICIAL DECISIONS

Jurisdiction same as in other cases. — There is no special statute with respect to the jurisdiction of cases seeking to obtain declaratory judgments, but such proceedings shall be filed and served as in other cases in the superior courts. Maryland Cas. Co. v. City of Adel, 87 Ga. App. 138, 73 S.E.2d 237, 1952 Ga. App. LEXIS 631 (1952).

Effect of certification of premature orders. — When the hearing on a declaratory judgment issue was conducted less than 20 days after service of the plaintiff's petitions, the trial court was without authority to make a ruling on the issue and the court's certification of its orders pursuant to O.C.G.A. § 9-11-54(b) did not make valid the premature orders. Robert W. Woodruff Arts Ctr., Inc. v. Insardi, 266 Ga. 248, 466 S.E.2d 214.

Written agreement not necessary where trial more than 20 days after service. — Provision of this section which refers to a written agreement, which is required if the proceeding is to be tried earlier than 20 days after service, is not applicable when the proceeding was tried more than 20 days after service. Ison v. Travis, 212 Ga. 335, 92 S.E.2d 518, 1956 Ga. LEXIS 361 (1956).

Premature trial. — When the owners of an alleged servient estate filed an action in superior court for a declaratory judgment, it was error, under O.C.G.A. § 9-4-5, for the superior court to try the matter less than 20 days after service of process in that matter on the defendants' holders allegation of an alleged easement over the subject property, despite the fact that the holders had previously filed an action regarding the same subject matter in probate court. Morris v. Mullis, 264 Ga. App. 428, 590 S.E.2d 823, 2003 Ga. App. LEXIS 1500 (2003), cert. denied, No. S04C0677, 2004 Ga. LEXIS 306 (Ga. Mar. 29, 2004).

Right to a jury trial in a declaratory judgment action arises only if there is an issue of fact which requires submission to a jury and a jury trial has not been waived. Aponte v. City of Columbus, 246 Ga. App. 646, 540 S.E.2d 617, 2000 Ga. App. LEXIS 1215 (2000), cert. denied, No. S01C0380, 2001 Ga. LEXIS 376 (Ga. Apr. 30, 2001).

When the owners of an alleged servient estate filed an action in superior court for a declaratory judgment, no jury trial was required, under O.C.G.A. § 9-4-5, despite the demand of the defendants, holders of an alleged easement, because no factual issues requiring submission to a jury were identified. Morris v. Mullis, 264 Ga. App. 428, 590 S.E.2d 823, 2003 Ga. App. LEXIS 1500 (2003), cert. denied, No. S04C0677, 2004 Ga. LEXIS 306 (Ga. Mar. 29, 2004).

RESEARCH REFERENCES

Am. Jur. 2d.

22 Am. Jur. 2d, Declaratory Judgments, §§ 180 et seq., 232 et seq.

C.J.S.

26 C.J.S., Declaratory Judgments, §§ 129 et seq., 148 et seq.

ALR.

Declaration of rights or declaratory judgments, 12 A.L.R. 52; 19 A.L.R. 1124; 50 A.L.R. 42; 68 A.L.R. 110; 87 A.L.R. 1205; 114 A.L.R. 1361; 142 A.L.R. 8.

Right to jury trial in action for declaratory relief in state court, 33 A.L.R.4th 146.

9-4-6. Submission of fact issues to jury.

When a declaration of right or the granting of further relief based thereon involves the determination of issues of fact triable by a jury and jury trial is not waived, the issues shall be submitted to a jury of 12 in the form of interrogatories, with proper instructions by the court, whether a general verdict is required or not. The instructions by the

court shall in all respects be governed by the laws of this state relating to instructions or charges by a court to a jury.

History.
Ga. L. 1945, p. 137, § 3.
Cross references.
Requirement that jury return only special verdict in case involving declaratory judgment, § 9-11-49.

JUDICIAL DECISIONS

Provision is made by this section for determination of factual issues, and the extent of timber cutting which accords with good husbandry in a given locality under ascertained circumstances is a question of fact. Brogdon v. McMillan, 116 Ga. App. 34, 156 S.E.2d 828, 1967 Ga. App. LEXIS 680 (1967).

Oral instructions improper when timely request made for special verdict. — If a timely written request for special verdict was made, the requirements of Ga. L. 1945, p. 137, § 3 and Ga. L. 1972, p. 689, § 8 (see now O.C.G.A. §§ 9-4-6 and 9-11-49) were not satisfied in the declaratory judgment proceedings by instructing the jury orally as to the questions which must be resolved by the job in arriving at a verdict. Frostgate Whses., Inc. v. Cole, 244 Ga. 782, 262 S.E.2d 98, 1979 Ga. LEXIS 1413 (1979).

Party waives error in manner of instruction unless timely objection made. — In the absence of a specific and timely objection, a party waives error relating to the manner in which questions are submitted to the jury. Frostgate Whses., Inc. v. Cole, 244 Ga. 782, 262 S.E.2d 98, 1979 Ga. LEXIS 1413 (1979).

Amount of tax credit is jury question. — Plaintiff housing corporation is entitled to a declaratory judgment fixing the amount of tax credits to be allowed it by defendant municipality under provisions of local Act when defendant has taken over certain graded and paved streets and sewer and water mains constructed by the plaintiff's predecessor in title; but a jury question is made by the evidence as to the value of such credits to be allowed, and under this section, since a jury trial was not waived, the court erred in making a finding as to the amount of such tax credits without submitting such issue to a jury. Mayor of Savannah v. Moses Rogers Hous. Corp., 91 Ga. App. 32, 84 S.E.2d 488, 1954 Ga. App. LEXIS 851 (1954).

Amount of rent due as fixed by jury in declaratory judgment controls in further proceedings. — If, in a declaratory judgment by a tenant proceeding, the amount of rent due should be adjudicated prior to any such determination for past-due rent under a subsequent dispossessory warrant, such finding by a jury in the declaratory judgment case would govern and control the amount due in the dispossessory warrant proceeding, and vice versa. Shippen v. Folsom, 200 Ga. 58, 35 S.E.2d 915, 1945 Ga. LEXIS 396 (1945).

Abandonment of a cemetery was a jury question. — Descendants of the grantor of a burial ground were not entitled to summary judgment on a buyer's claim that the cemetery was abandoned, O.C.G.A. § 36-72-2(1), because there was evidence that no one had been buried there since 1971, that the descendants had not paid taxes on the lot, and that the descendants had not maintained the cemetery. City of Sandy Springs v. Mills, 331 Ga. App. 709, 771 S.E.2d 405, 2015 Ga. App. LEXIS 220 (2015).

RESEARCH REFERENCES

Am. Jur. 2d.
22A Am. Jur. 2d, Declaratory Judgments, § 232 et seq.

C.J.S.
26 C.J.S., Declaratory Judgments, § 164 et seq.

U.L.A.

Uniform Declaratory Judgments Act (U.L.A.) § 9.

ALR.

Declaration of rights or declaratory judgments, 12 A.L.R. 52; 19 A.L.R. 1124; 50 A.L.R. 42; 68 A.L.R. 110; 87 A.L.R. 1205; 114 A.L.R. 1361; 142 A.L.R. 8.

Jury trial in action for declaratory relief, 13 A.L.R.2d 777; 33 A.L.R.4th 146.

Right to jury trial in action for declaratory relief in state court, 33 A.L.R.4th 146.

9-4-7. Only parties affected; when municipality made party; when Attorney General served and heard.

(a) No declaration shall prejudice the rights of persons not parties to the proceeding.

(b) In any proceeding involving the validity of a municipal ordinance or franchise, the municipality shall be made a party and shall be entitled to be heard as a party.

(c) If an Act of the General Assembly, a statute of the state, any order or regulation of any administrative body of the state, or any franchise granted by the state is alleged in an action for declaratory judgment or as a part of any other action to be unconstitutional or otherwise invalid, the Attorney General of the state shall be served with a copy of the proceeding and shall be entitled to be heard in defense of said Act, statute, order, regulation, or franchise, which may include appearing as a party as of right as he or she determines is appropriate.

History.

Ga. L. 1945, p. 137, § 6; Ga. L. 2022, p. 13, § 1/HB 1361.

The 2022 amendment, effective March 4, 2022, substituted the present provisions of subsection (c) for the former provisions, which read: "If a statute of the state, any order or regulation of any administrative body of the state, or any franchise granted by the state is alleged to be unconstitutional, the Attorney General of the state shall be served with a copy of the proceeding and shall be entitled to be heard.".

Editor's notes.

Ga. L. 2022, p. 13, § 2/HB 1361, not codified by the General Assembly, provides, in part, that the amendment to subsection (c) shall apply to all proceedings filed on and after the effective date. This Act became effective March 4, 2022.

JUDICIAL DECISIONS

There is no requirement that notice of service be filed in the record. Pharris v. Mayor of Jefferson, 226 Ga. 489, 175 S.E.2d 845, 1970 Ga. LEXIS 570 (1970).

This section relates only to declaratory judgment proceedings. Daniel v. Federal Nat'l Mtg. Ass'n, 231 Ga. 385, 202 S.E.2d 388, 1973 Ga. LEXIS 715 (1973).

O.C.G.A. § 9-4-7 is applicable to declaratory judgment proceedings and not to appeals to the superior courts. Woodes v. Morris, 247 Ga. 771, 279 S.E.2d 704, 1981 Ga. LEXIS 888 (1981).

Plaintiff's challenge to the offer of settlement statute's, O.C.G.A. § 9-11-68 (d), constitutionality arose from plaintiff's personal injury action and not from a declaratory judgment action; thus, the trial court erred in denying that challenge based on the plaintiff's failure to serve the

Attorney General with notice. Buchan v. Hobby, 288 Ga. App. 478, 654 S.E.2d 444, 2007 Ga. App. LEXIS 1227 (2007).

O.C.G.A. § 9-4-7(c) did not apply to a case because the property owners did not file a declaratory judgment action to have O.C.G.A. § 46-3-204 declared unconstitutional. The declaratory judgments sought by the owners and by the utility in the utility's counterclaim pertained to whether the utility had an easement on the owners' land, and § 46-3-204 was raised by the utility as a defense, to which the owners then asserted the unconstitutionality of § 46-3-204 as an argument against that defense. Daniel v. Amicalola Elec. Mbrshp. Corp., 289 Ga. 437, 711 S.E.2d 709, 2011 Ga. LEXIS 507 (2011).

Necessary or indispensable party is essential to give court jurisdiction of the cause. For without the inclusion of such party, no decree of declaratory relief can be entered in favor of the complainant. Frost v. Gazaway, 122 Ga. App. 244, 176 S.E.2d 476, 1970 Ga. App. LEXIS 842 (1970).

Legal representative of necessary party must be included. — In order to sustain an action for declaratory judgment, the legal representative of a necessary party must be included. Frost v. Gazaway, 122 Ga. App. 244, 176 S.E.2d 476, 1970 Ga. App. LEXIS 842 (1970).

Purpose of subsection (b) is to allow municipality to be heard when private parties question the validity of a municipal ordinance, and it does not apply to a situation where the members of the governing body of a municipality are in dispute as to the proper method of passing a valid ordinance under the city charter, and all of the members of the governing body of the municipality are parties. Aliotta v. Gilreath, 226 Ga. 263, 174 S.E.2d 403, 1970 Ga. LEXIS 500 (1970).

Purpose of subsection (c) of this section is to give notice to Attorney General of constitutional attack being made on the statute and the opportunity, if the Attorney General desires, to be heard. Pharris v. Mayor of Jefferson, 226 Ga. 489, 175 S.E.2d 845, 1970 Ga. LEXIS 570 (1970); State v. Golia, 235 Ga. 791, 222 S.E.2d 27, 1976 Ga. LEXIS 1447 (1976).

"Statute" construed. — Statute of the state is any law directly passed by the legislature of a state, and any enactment to which a state gives the force of law. Williams v. Kaylor, 218 Ga. 576, 129 S.E.2d 791, 1963 Ga. LEXIS 265 (1963).

Word "statute" of necessity includes a provision of the state Constitution. Board of Educ. v. Shirley, 226 Ga. 770, 177 S.E.2d 711, 1970 Ga. LEXIS 679 (1970).

Construction with O.C.G.A. § 50-13-10(a). — Georgia Court of Appeals disagreed that the "may be determined" language in O.C.G.A. § 50-13-10(a) was evidence that the statute was but one of several methods by which to challenge the validity of an agency rule and that O.C.G.A. § 9-4-7(c), as well as case authority, impliedly contemplated the legitimacy of challenges to agency rules outside the purview of the Administrative Procedure Act, O.C.G.A. § 50-13-1 et seq. Live Oak Consulting, Inc. v. Dep't of Cmty. Health, 281 Ga. App. 791, 637 S.E.2d 455, 2006 Ga. App. LEXIS 1254 (2006).

Subsection (c) of this section does not make the Attorney General party to the proceeding. Pharris v. Mayor of Jefferson, 226 Ga. 489, 175 S.E.2d 845, 1970 Ga. LEXIS 570 (1970); State v. Golia, 235 Ga. 791, 222 S.E.2d 27, 1976 Ga. LEXIS 1447 (1976); Pangle v. Gossett, 261 Ga. 307, 404 S.E.2d 561, 1991 Ga. LEXIS 284 (1991).

Subsection (c) of this section does not provide how Attorney General is to be served. Pharris v. Mayor of Jefferson, 226 Ga. 489, 175 S.E.2d 845, 1970 Ga. LEXIS 570 (1970).

Provision for service on Attorney General does not amount to consent by state to be sued. Musgrove v. Georgia R.R. & Banking Co., 204 Ga. 139, 49 S.E.2d 26, 1948 Ga. LEXIS 563 (1948).

Service on Attorney General is mandatory and jurisdictional when declaratory judgment is sought on constitutionality of statutes. Williams v. Kaylor, 218 Ga. 576, 129 S.E.2d 791, 1963 Ga. LEXIS 265 (1963); Board of Educ. v. Shirley, 226 Ga. 770, 177 S.E.2d 711, 1970 Ga. LEXIS 679 (1970).

When service is not made on the Attorney General as required by the declaratory judgments statutes in a case when

there is an attack made upon the constitutionality of a statute enacted by the General Assembly of the state, the court to which the petition is addressed does not have jurisdiction of the subject matter of the case, the subject matter being whether the statute in question is constitutional. Williams v. Kaylor, 218 Ga. 576, 129 S.E.2d 791, 1963 Ga. LEXIS 265 (1963).

Trial court is without jurisdiction to render any judgment except one of dismissal when the Attorney General was not served with a copy of the proceeding seeking a declaratory judgment declaring statutes of the state unconstitutional. Plantation Pipe Line Co. v. City of Bremen, 225 Ga. 607, 170 S.E.2d 398, 1969 Ga. LEXIS 583 (1969).

Jurisdiction existed because the Attorney General of Georgia had notice of the property owners' challenge to the constitutionality of O.C.G.A. § 46-3-204 five months before the trial court ruled, but the Attorney General made no attempt to be heard on the matter or in the case on appeal. Under these circumstances, it could not be said that the owners failed to sufficiently comply with O.C.G.A. § 9-7-4 (c), even assuming that the owners were required to do so. Daniel v. Amicalola Elec. Mbrshp. Corp., 289 Ga. 437, 711 S.E.2d 709, 2011 Ga. LEXIS 507 (2011).

If there is no constitutional attack on any statute, notice to Attorney General is not required under this section. Total Vending Serv., Inc. v. Gwinnett County, 153 Ga. App. 109, 264 S.E.2d 574, 1980 Ga. App. LEXIS 1698 (1980).

When the issue was within the Supreme Court's inherent power to regulate the practice of law, and did not relate to the constitutionality of a statute, notice to the Attorney General was not required. Eckles v. Atlanta Tech. Group, Inc., 267 Ga. 801, 485 S.E.2d 22.

Waiver of sovereign immunity. — In the airport parking company's action against the city and city officials challenging the city's threatened use of a city tax ordinance against the company, the trial court did not err by denying the city's motion to dismiss the company's declaratory judgment claim against the city and city officials in their individual capacities because O.C.G.A. § 9-4-7 constituted a waiver of sovereign immunity. City of Hapeville v. Sylvan Airport McF-020 Parking, 359 Ga. App. 448, 858 S.E.2d 538, 2021 Ga. App. LEXIS 216 (2021).

Claim barred due to no waiver of sovereign immunity. — State of Georgia did not violate O.C.G.A. §§ 9-4-7 and 15-1-8 by arresting and incarcerating the plaintiff for contempt after willfully violating a consent order enjoining the unauthorized practice of law because such claims were barred by the Eleventh Amendment in that the state had not waived sovereign immunity. Alyshah v. Georgia, No. 1:06-CV-0928-TWT, 2006 U.S. Dist. LEXIS 66546 (N.D. Ga. Sept. 1, 2006), aff'd, 230 Fed. Appx. 949, 2007 U.S. App. LEXIS 18581 (11th Cir. 2007).

Shareholder's interests adequately protected by existing parties. — In a suit by an assignee of a judgment seeking to set aside a fraudulent transfer by the judgment debtor to a corporation, the joinder of the debtors' brothers, who claimed an ownership interest in the corporation, was not necessary for a just adjudication of the merits because the brothers' interests were adequately protected by the other defendants. EMM Credit, LLC v. Remington, 343 Ga. App. 710, 808 S.E.2d 96, 2017 Ga. App. LEXIS 557 (2017).

Action on denial of land development permit not barred. — In an action arising from the denial of an application for a land development permit to build town homes, the developer's claim for declaratory judgment was not barred by sovereign immunity. City of Rincon v. Ernest Communities, LLC, 356 Ga. App. 84, 846 S.E.2d 250, 2020 Ga. App. LEXIS 415 (2020).

Appeal by Attorney General. — Whene the Attorney General failed to assert a right to become a party litigant in the case pursuant to this section but rather elected to participate in the litigation only as the attorney on behalf of the revenue commissioner, the Attorney General may appeal only in the name and on behalf of the revenue commissioner and not in the capacity of Attorney General. State v. Golia, 235 Ga. 791, 222 S.E.2d 27, 1976 Ga. LEXIS 1447 (1976).

RESEARCH REFERENCES

Am. Jur. 2d.
7 Am. Jur. 2d, Attorney General, §§ 22, 27 et seq. 22A Am. Jur. 2d, Declaratory Judgments, §§ 88 et seq., 90, 203 et seq.
C.J.S.
26 C.J.S., Declaratory Judgments, §§ 92 et seq., 143 et seq.
U.L.A.
Uniform Declaratory Judgments Act (U.L.A.) § 11.
ALR.
Declaration of rights or declaratory judgments, 12 A.L.R. 52; 19 A.L.R. 1124; 50 A.L.R. 42; 68 A.L.R. 110; 87 A.L.R. 1205; 114 A.L.R. 1361; 142 A.L.R. 8.

Determination of constitutionality of statute or ordinance, or proposed statute or ordinance, as proper subject of judicial decision under declaratory judgment acts, 114 A.L.R. 1361.

Interest necessary to maintenance of declaratory determination of validity of statute or ordinance, 174 A.L.R. 549.

Extent to which principles of res judicata are applicable to judgments in actions for declaratory relief, 10 A.L.R.2d 782.

9-4-8. When court may refuse declaratory judgment.

The court may refuse to render or enter a declaratory judgment or decree where the judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

History.
Ga. L. 1945, p. 137, § 9.

JUDICIAL DECISIONS

Declaratory judgment inappropriate when issues moot. — Since the plaintiff was seeking to have its present rights determined under a contract and the contract expired, by the plaintiff's own terms, three months prior to final adjudication in the trial court, the questions before the Court of Appeals became moot and abstract insofar as relief by declaratory judgment was concerned; if the court should declare the rights of the plaintiff under the contract it would be answering an academic, hypothetical question because the contract sought to be construed was no longer of force and to give the plaintiff answers on appeal could not aid in determination of future conduct under the contract. Consolidated Quarries Corp. v. Davidson, 79 Ga. App. 248, 53 S.E.2d 231, 1949 Ga. App. LEXIS 630 (1949).

Declaratory judgment inappropriate when other action needed to settle controversy. — It is a basic rule of declaratory judgment law that, when it will be necessary to bring another action or proceeding to settle the controversy, a declaratory judgment will not be granted. Consolidated Quarries Corp. v. Davidson, 79 Ga. App. 248, 53 S.E.2d 231, 1949 Ga. App. LEXIS 630 (1949).

Court may refuse declaratory judgment where evidence favorable to defendant. — When, before entry of default judgment, trial or hearing on the merits for final relief is held in a suit for declaratory judgment or injunction or both, and the defendant appears and opposes the relief sought, the trial court may treat the evidence adduced as constituting the answer of the defendant and refuse to enter declaratory or injunctive relief by default if any evidence adduced would authorize judgment in favor of the defendant. Nelson v. Bloodworth, 238 Ga. 264, 232 S.E.2d 547, 1977 Ga. LEXIS 986 (1977).

RESEARCH REFERENCES

Am. Jur. 2d.
22A Am. Jur. 2d, Declaratory Judgments, § 16.
C.J.S.
26 C.J.S., Declaratory Judgments, §§ 92 et seq., 143 et seq.
U.L.A.
Uniform Declaratory Judgments Act (U.L.A.) § 6.
ALR.
Declaration of rights or declaratory judgments, 12 A.L.R. 52; 19 A.L.R. 1124; 50 A.L.R. 42; 68 A.L.R. 110; 87 A.L.R. 1205; 114 A.L.R. 1361; 142 A.L.R. 8.

Doctrine of in pari delicto as applicable to suits for declaratory relief, 141 A.L.R. 1427.

Extent to which principles of res judicata are applicable to judgments in actions for declaratory relief, 10 A.L.R.2d 782.

9-4-9. Costs.

In any proceeding under this chapter the court may make such award or division of costs as may seem equitable and just.

History.
Ga. L. 1945, p. 137, § 5.

JUDICIAL DECISIONS

Attorney fees not cost. — To the extent that the award of "costs" included attorney fees or expenses of litigation those costs were not allowable. Lawhorne v. Soltis, 259 Ga. 502, 384 S.E.2d 662, 1989 Ga. LEXIS 442 (1989).

Although an award of attorney fees to a wife in a declaratory judgment action brought by a husband seeking a determination of the husband's obligations under a divorce decree was not authorized by either O.C.G.A. § 9-4-9 or O.C.G.A. § 13-6-11, the award was allowed by O.C.G.A. § 19-6-2(a)(1) because the wife's separate contempt action based on the husband's failure to comply with the divorce decree was consolidated for disposition with the husband's declaratory judgment action, and the trial court found in favor of the wife in that declaratory judgment action. Waits v. Waits, 280 Ga. App. 734, 634 S.E.2d 799, 2006 Ga. App. LEXIS 823 (2006), cert. denied, No. S06C2100, 2006 Ga. LEXIS 913 (Ga. Oct. 30, 2006).

Error in failing to make express findings supporting award. — In a post-divorce proceeding, the trial court erred to the extent that the court awarded attorney fees to the ex-wife under O.C.G.A. § 9-4-9 and to the extent that the court's award was procedurally improper under O.C.G.A. § 9-15-14(a) in that the court did not make express findings specifying the abusive conduct for which the award was made. Belcher v. Belcher, 298 Ga. 333, 782 S.E.2d 2, 2016 Ga. LEXIS 71 (2016).

RESEARCH REFERENCES

Am. Jur. 2d.
22A Am. Jur. 2d, Declaratory Judgments, § 257 et seq..
C.J.S.
20 C.J.S., Costs, § 31 et seq.
U.L.A.
Uniform Declaratory Judgments Act (U.L.A.), § 10.

9-4-10. Equity jurisdiction not impaired.

Nothing in this chapter is intended to impair the equity jurisdiction of the superior courts of the state or of the Georgia State-wide Business Court.

History.
Ga. L. 1945, p. 137, § 10; Ga. L. 2019, p. 845, § 3-3/HB 239.

Law reviews.
For article on the 2019 amendment of this Code section, see 36 Ga. St. U.L. Rev. 1 (2019).

JUDICIAL DECISIONS

Limits on declaratory judgment not applicable to petition for equitable relief. — Rule that courts generally will not entertain an action for declaratory judgment as to questions which may be determined in a pending action is not applicable when the petitioners are seeking equitable relief. Todd v. Conner, 220 Ga. 173, 137 S.E.2d 614, 1964 Ga. LEXIS 480 (1964).

RESEARCH REFERENCES

Am. Jur. 2d.
22A Am. Jur. 2d, Declaratory Judgments, § 45 et seq.

C.J.S.
26 C.J.S., Declaratory Judgments, § 117.

9-4-11. Combining proceedings in probate court.

A declaratory judgment proceeding brought in the probate court as provided in paragraph (1) of subsection (a) of Code Section 15-9-127 may be combined with or made a part of any proceeding properly before the probate court to the greatest extent that does not infringe the exclusive jurisdiction of the superior courts pursuant to Article VI, Section IV, Paragraph I of the Constitution of this state.

History.
Code 1981, § 9-4-11, enacted by Ga. L. 2020, p. 377, § 2-6/HB 865.

Effective date.
This Code section became effective January 1, 2021.

JUDICIAL DECISIONS

Plaintiff had to act with greatest possible diligence. — Plaintiff's lawsuit was properly dismissed as the plaintiff failed to exercise the greatest possible diligence in perfecting service as the statute of limitation ran on November 7, 2019, the defendant filed a pleading asserting a service defense on that date, and the defendant was not served until April 10, 2020; the plaintiff did not have a good explanation for why the plaintiff did not attempt to serve the defendant at a residence that a private-investigation company found until April 10, 2020, while service was attempted at three other addresses; and, when the statute of limitations expired and the defendant asserted a service defense, the plaintiff waited five months before attempting service at the one address that had not been tried. Fluellen v. Davis, 362 Ga. App. 512, 869 S.E.2d 169, 2022 Ga. App. LEXIS 61 (2022).

CHAPTER 5

INJUNCTIONS

Sec.		Sec.	
9-5-1.	For what purposes injunctions may be issued.	9-5-7.	When breach of contract for personal services enjoined.
9-5-2.	No interference by equity in administration of criminal laws.	9-5-8.	Grant of injunctions in discretion of court; power to be exercised cautiously.
9-5-3.	When court proceedings enjoined; injunctions against sheriffs' sales.	9-5-9.	Second injunction in court's discretion.
9-5-4.	Grounds for restraint of trespass.	9-5-10.	Perpetual injunction after hearing.
9-5-5.	When waste enjoined.	9-5-11.	Injunctions against certain transactions outside state.
9-5-6.	Injunction against debtors not generally available to creditors.		

RESEARCH REFERENCES

ALR.

Recovery of damages resulting from wrongful issuance of injunction as limited to amount of bond, 30 A.L.R.4th 273.

9-5-1. For what purposes injunctions may be issued.

Equity, by a writ of injunction, may restrain proceedings in another or the same court, a threatened or existing tort, or any other act of a private individual or corporation which is illegal or contrary to equity and good conscience and for which no adequate remedy is provided at law.

History.

Orig. Code 1863, § 3137; Code 1868, § 3149; Code 1873, § 3210; Code 1882, § 3210; Civil Code 1895, § 4913; Civil Code 1910, § 5490; Code 1933, § 55-101.

Law reviews.

For article, "Injunction Procedure in Georgia," see 13 Ga. B.J. 300 (1951).

For article advocating consistency in statutory provisions governing review of administrative conduct in Georgia, prior to the enactment of the Georgia Administrative Procedure Act, see 15 Ga. B.J. 153 (1952).

For article, "The 1967 Amendments to the Georgia Civil Practice Act and the Appellate Procedure Act," see 3 Ga. St. B.J. 383 (1967).

For note advocating reassessment of state authority towards injunctions in labor disputes, see 18 Mercer L. Rev. 461 (1967).

For article discussing validity of ex parte injunction affecting constitutionally protected rights, see 7 Ga. L. Rev. 246 (1973).

For article, "State Court Injunctions in Labor Disputes," see 10 Ga. St. B.J. 559 (1974).

For note, "The Ongoing Royalty: What Remedy Should a Patent Holder Receive When a Permanent Injunction Is Denied," see 43 Ga. L. Rev. 543 (2009).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Specific Cases
1. Cases Where Injunction Proper
2. Cases Where Injunction Improper

General Consideration

Equity jurisdiction as it existed at common law has been enlarged by statute in this state and it is not limited to the protection of rights of property. Sutton v. Adams, 180 Ga. 48, 178 S.E. 365, 1934 Ga. LEXIS 449 (1934).

Jurisdiction of federal court. — O.C.G.A. §§ 9-4-1, 9-5-1, 40-2-8, 40-3-6, 40-3-21, and 48-2-59 provided plaintiff challenging automobile "title transfer fee" with "plain, speedy, and efficient" pre-tax and post-tax remedies by which a taxpayer might challenge the constitutional validity of a state tax, and so satisfied the criteria of the Tax Injunction Act, 18 U.S.C. § 1341, so as to bar jurisdiction of the federal court. Johnsen v. Collins, 875 F. Supp. 1571, 1994 U.S. Dist. LEXIS 20214 (S.D. Ga. 1994).

Injunction is an extraordinary process, and the most important one which courts of equity issue; being so, it should never be granted except where there is grave danger of impending injury to person or property rights, and a mere threat or bare fear of such injury is not sufficient. Thomas v. Mayor of Savannah, 209 Ga. 866, 76 S.E.2d 796, 1953 Ga. LEXIS 446 (1953).

Each case must be determined on its particular allegations, and must be decided on the nature, extent, and kind of equitable relief sought and the relationship between the parties to the action. Newport Timber Corp. v. Floyd, 247 Ga. 535, 277 S.E.2d 646, 1981 Ga. LEXIS 786 (1981).

Injunction will restrain any act contrary to equity and good conscience, and for which no adequate remedy at law is provided. Waycross Military Ass'n v. Hiers, 209 Ga. 812, 76 S.E.2d 486, 1953 Ga. LEXIS 419 (1953).

Remedy by injunction in state court is plain, speedy, and efficient remedy. Adams v. Smith, 415 F. Supp. 787, 1976 U.S. Dist. LEXIS 14487 (N.D. Ga. 1976), aff'd, 568 F.2d 1232, 1978 U.S. App. LEXIS 12338 (5th Cir. 1978).

Issuance of a stay of execution is equivalent to grant of interlocutory injunction, at least where a hearing with notice to parties is conducted on application for the stay. Zant v. Dick, 249 Ga. 799, 294 S.E.2d 508, 1982 Ga. LEXIS 1201 (1982).

Remedy of injunction does not lie where one has complete and adequate remedy at law. Lawrence v. Lawrence, 196 Ga. 204, 26 S.E.2d 283, 1943 Ga. LEXIS 320 (1943).

It is error to grant an interlocutory injunction where the plaintiff has an adequate remedy at law. Thomas v. Mayor of Savannah, 209 Ga. 866, 76 S.E.2d 796, 1953 Ga. LEXIS 446 (1953).

Universal test of jurisdiction to issue injunctions is absence of legal remedy by which the complainant might obtain the full relief to which the facts and circumstances entitle the complainant. Chadwick v. Dolinoff, 207 Ga. 702, 64 S.E.2d 76, 1951 Ga. LEXIS 520 (1951).

If court at law has full power to grant relief, there is no ground for equity's jurisdiction. Morton v. Gardner, 242 Ga. 852, 252 S.E.2d 413, 1979 Ga. LEXIS 763 (1979).

Mere pendency of law action not bar to equitable jurisdiction. — Where all parties at interest are parties to the cause, and in which cause the rights of all parties might properly be finally adjudicated, jurisdiction in equity is not ousted because there may be pending an action at law in another court. Todd v. Conner, 220 Ga. 173, 137 S.E.2d 614, 1964 Ga. LEXIS 480 (1964).

Interlocutory injunction is device to keep parties in order, and prevent one from hurting the other while their

General Consideration (Cont'd)

respective rights are under adjudication. Milton Frank Allen Publications, Inc. v. Georgia Ass'n of Petro. Retailers, 223 Ga. 784, 158 S.E.2d 248, 1967 Ga. LEXIS 695 (1967).

Purpose of interlocutory injunction is preliminary and preparatory; it looks to a future final hearing, and while contemplating what the result of that hearing may be, it does not settle what it shall be. Milton Frank Allen Publications, Inc. v. Georgia Ass'n of Petro. Retailers, 223 Ga. 784, 158 S.E.2d 248, 1967 Ga. LEXIS 695 (1967).

Sole purpose for granting interlocutory injunctions is to preserve status quo of the parties pending a final adjudication of the case. Metropolitan Atlanta Rapid Transit Auth. v. Wallace, 243 Ga. 491, 254 S.E.2d 822, 1979 Ga. LEXIS 957 (1979).

Preliminary injunction is, by its very nature, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive. Eastman Kodak Co. v. Fotomat Corp., 317 F. Supp. 304, 1969 U.S. Dist. LEXIS 9732 (N.D. Ga. 1969).

It is not function of preliminary injunction to decide case on merits, and the possibility that the party obtaining a preliminary injunction may not win on the merits at the trial is not determinative of the propriety or validity of the trial court's granting the preliminary injunction. Eastman Kodak Co. v. Fotomat Corp., 317 F. Supp. 304, 1969 U.S. Dist. LEXIS 9732 (N.D. Ga. 1969).

Temporary injunction may be granted where there is substantial controversy between parties and one of them is committing an act or threatening the immediate commission of an act that will cause irreparable injury or destroy the status quo of the controversy before a full hearing can be had on the merits of the case. Eastman Kodak Co. v. Fotomat Corp., 317 F. Supp. 304, 1969 U.S. Dist. LEXIS 9732 (N.D. Ga. 1969).

Factors court considers in passing on preliminary injunction. — When a motion for preliminary injunction is presented to a court in advance of hearing on the merits it is called upon to exercise it discretion upon the basis of a series of estimates including among other things, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally. Eastman Kodak Co. v. Fotomat Corp., 317 F. Supp. 304, 1969 U.S. Dist. LEXIS 9732 (N.D. Ga. 1969).

General Assembly has expressly repealed former Code 1933, § 55-110, which forbade mandatory injunctions. Atlanta Country Club, Inc. v. Sanders, 230 Ga. 146, 195 S.E.2d 893, 1973 Ga. LEXIS 840 (1973); Taylor v. Evans, 232 Ga. 685, 208 S.E.2d 492, 1974 Ga. LEXIS 1056 (1974).

Since repeal of former Code 1933 § 55-110, mandatory injunctions may issue. Faulkner v. Georgia Power Co., 241 Ga. 168, 247 S.E.2d 80 (1978).

In proper case, mandatory injunction may issue after temporary hearing. Wheatley Grading Contractors v. DFT Invs., Inc., 244 Ga. 663, 261 S.E.2d 614, 1979 Ga. LEXIS 1364 (1979).

Injunction will not be granted to restrain acts already completed. Georgia Pac. Ry. v. Mayor of Douglasville, 75 Ga. 828, 1885 Ga. LEXIS 240 (1885); Russell v. Napier, 80 Ga. 77, 4 S.E. 857, 1887 Ga. LEXIS 325 (1887); Simmons v. Lindsay, 144 Ga. 845, 88 S.E. 199, 1916 Ga. LEXIS 144 (1916); Shurley v. Black, 156 Ga. 683, 119 S.E. 618, 1923 Ga. LEXIS 308 (1923); Hapeville-Block, Inc. v. Walker, 204 Ga. 462, 50 S.E.2d 9, 1948 Ga. LEXIS 450 (1948); Blackwell v. Farrar, 209 Ga. 420, 73 S.E.2d 203, 1952 Ga. LEXIS 528 (1952); Scott v. Sherwood Mem. Gardens, Inc., 214 Ga. 25, 102 S.E.2d 556, 1958 Ga. LEXIS 327 (1958); Avis, Inc. v. Graham, 217 Ga. 330, 122 S.E.2d 245, 1961 Ga. LEXIS 440 (1961).

Courts cannot restrain that which has already been done, and where it appears from all of the allegations of the petition that the acts complained of were fully consummated, there are no grounds for injunction. Whipkey v. Turner, 206 Ga. 410, 57 S.E.2d 481, 1950 Ga. LEXIS 356 (1950).

Injunction is never a proper remedy against completed acts. Sandt v. Mason, 208 Ga. 541, 67 S.E.2d 767, 1951 Ga. LEXIS 432 (1951).

Where a single act sought to be enjoined has been accomplished, it is not error for the trial court to refuse to grant the injunction. Smith v. Board of Comm'rs, 229 Ga. 689, 194 S.E.2d 98, 1972 Ga. LEXIS 736 (1972).

Judgment denying injunction not reversed where act completed. — Where it is shown that the very act sought to be enjoined has now been completed, a reversal of the judgment refusing to enjoin that act would be futile, and therefore the questions were moot. Story v. City of Macon, 203 Ga. 105, 45 S.E.2d 196, 1947 Ga. LEXIS 547 (1947).

Merely because defendant has done wrong in certain instances, court will not anticipate similar wrongs which are entirely separate, and will not undertake to control in a general way the acts of the defendant by granting an injunction. Felton Beauty Supply Co. v. Kline, 182 Ga. 20, 184 S.E. 703, 1935 Ga. LEXIS 2 (1935).

Mere threat of injury will not authorize injunction. Moore v. City of Tifton, 204 Ga. 599, 50 S.E.2d 595, 1948 Ga. LEXIS 487 (1948); Thomas v. Mayor of Savannah, 209 Ga. 866, 76 S.E.2d 796, 1953 Ga. LEXIS 446 (1953).

Bare threat of injury to property offers no basis for equitable relief by injunction or otherwise. Allegations based on mere apprehension of injury and general conclusions, without alleging facts to show irreparable injury, are insufficient to authorize the grant of injunctive relief. Insurance Ctr., Inc. v. Hamilton, 218 Ga. 597, 129 S.E.2d 801, 1963 Ga. LEXIS 270 (1963).

A mere apprehension of danger or injury will not require equitable relief. Ellis v. Georgia Kraft Co., 219 Ga. 335, 133 S.E.2d 350, 1963 Ga. LEXIS 452 (1963).

Courts of equity will not exercise power to allay mere apprehensions of injury, but only where the injury is imminent and irreparable and there is no adequate remedy at law. Morton v. Gardner, 242 Ga. 852, 252 S.E.2d 413, 1979 Ga. LEXIS 763 (1979).

One is not required to await infliction of injury before seeking to prevent it by injunction. Ellis v. Georgia Kraft Co., 219 Ga. 335, 133 S.E.2d 350, 1963 Ga. LEXIS 452 (1963).

Equitable relief will not be denied where solid reasons justify apprehension, especially where, had the plaintiff not acted promptly, the plaintiff might be foreclosed from full relief. Ellis v. Georgia Kraft Co., 219 Ga. 335, 133 S.E.2d 350, 1963 Ga. LEXIS 452 (1963).

Allegations as to past trespasses and a reasonable fear of future acts which of necessity would be continuous in nature furnish a basis for equitable relief. Ellis v. Georgia Kraft Co., 219 Ga. 335, 133 S.E.2d 350, 1963 Ga. LEXIS 452 (1963).

Party is not entitled to injunction when, with full knowledge, the party delays in asserting rights, and has negligently suffered large expenditures to be made by another party, on whom great injury would be inflicted by the grant of the injunction. Sandersville R.R. v. Gilmore, 212 Ga. 481, 93 S.E.2d 696, 1956 Ga. LEXIS 420 (1956).

No injunction where statute not yet enforced. — No one has a right to come into a court of equity and obtain the stringent remedy of injunction against the operation of a statute which has not yet in any way been enforced against the complainants. Standard Cigar Co. v. Doyal, 175 Ga. 857, 166 S.E. 434, 1932 Ga. LEXIS 347 (1932).

Injunction not granted where no harm to complainant. — Where it does not appear that the complainant will be hurt by the action the complainant seeks to prevent, an injunction will not be granted. Pattison v. Farkas, 180 Ga. 798, 180 S.E. 831, 1935 Ga. LEXIS 567 (1935).

Injunction is not primary remedy to determine question of title to public office. Martin v. Crawford, 199 Ga. 497, 34 S.E.2d 699, 1945 Ga. LEXIS 338 (1945).

Expressed abandonment by defendant of illegal action not necessarily reason for denying injunction. Denson v. Tarver, 186 Ga. 180, 197 S.E. 242, 1938 Ga. LEXIS 567 (1938).

Residents and taxpayers of municipality may sue in equity to enjoin enforcement of ordinance, on the alleged grounds that it is void, and that the manner of its enforcement would increase the municipal taxes. And this applies to a case where a municipal ordinance exacts

General Consideration (Cont'd)

charges for licenses to engage in sale of "alcoholic beverages," and the action is brought to enjoin the officer whose duty it is to collect the tax, and to issue licenses, from issuing licenses; the alleged ground of relief being that the ordinance is void as being violative of the laws of the state, and that administration of the law will cause an unauthorized burden upon the taxpayers. Bagby v. Bowen, 180 Ga. 214, 178 S.E. 439, 1935 Ga. LEXIS 223 (1935).

Taxpayer may bring suit to enjoin county officials from doing unauthorized or illegal acts. Ferguson v. Randolph County, 211 Ga. 103, 84 S.E.2d 70, 1954 Ga. LEXIS 508 (1954).

Jurisdiction of the person prerequisite to issuance of injunction. — Court must have jurisdiction of the persons of defendants before an injunction other than a mere stay of the proceedings can be granted. Dowdy v. Bird, 146 Ga. 16, 90 S.E. 281, 1916 Ga. LEXIS 555 (1916).

Plaintiff cannot sue to enjoin trespass to land located in another state, although the defendants reside in this state. Laslie v. Gragg Lumber Co., 184 Ga. 794, 193 S.E. 763, 1937 Ga. LEXIS 645 (1937).

Petition must expressly state lack of adequate legal remedy. — In absence of allegations that plaintiff is not possessed of an adequate and complete remedy at law, petition fails to state a proper cause for the extraordinary equitable remedy of injunction. Chadwick v. Dolinoff, 207 Ga. 702, 64 S.E.2d 76, 1951 Ga. LEXIS 520 (1951).

Right to injunction must clearly appear, and a case which does not rest upon doubtful or disputed principles of law must be stated in the pleadings. Everett v. Tabor, 119 Ga. 128, 46 S.E. 72, 1903 Ga. LEXIS 59 (1903).

Terms of injunction should be explicit and definite. Morris Fertilizer Co. v. Boykin, 149 Ga. 673, 101 S.E. 799, 1920 Ga. LEXIS 366 (1920).

Applicability to Specific Cases

1. Cases Where Injunction Proper

Breach of contract. — Even though a contract contains a provision for liquidated damages in the event of its breach, equity will enjoin the breach where the contract plainly shows that faithful performance of its covenants was intended. Insurance Ctr., Inc. v. Hamilton, 218 Ga. 597, 129 S.E.2d 801, 1963 Ga. LEXIS 270 (1963).

Injunctions in insurance dealings. In a breach of contract action between an insurer and an agency, the trial court did not abuse the court's discretion in granting an interlocutory injunction to the agency as, after a balancing of the equities in the agency's favor, the record supported the finding that the insurer conducted itself, to the agency's detriment, as though arbitration of the dispute had been completed and it had been absolved from complying with its post-termination obligations under the underlying agency agreement between the parties. Cotton States Mut. Ins. Co. v. Stephen Brown Ins. Agency, Inc., 290 Ga. App. 660, 660 S.E.2d 445, 2008 Ga. App. LEXIS 390 (2008), cert. denied, No. S08C1321, 2008 Ga. LEXIS 687 (Ga. Sept. 8, 2008).

Cutting of timber. — An injunction may issue to restrain cutting of timber where damages would be irreparable or where the trespass is a continuing one. Anderson v. Thompson, 192 Ga. 570, 15 S.E.2d 890, 1941 Ga. LEXIS 538 (1941); Prescott v. Herring, 212 Ga. 571, 94 S.E.2d 417, 1956 Ga. LEXIS 448 (1956); Ellis v. Georgia Kraft Co., 219 Ga. 335, 133 S.E.2d 350, 1963 Ga. LEXIS 452 (1963).

The cutting of timber may be enjoined where there are frequent acts of trespass, or the circumstances indicate that the trespasses will recur from day to day. Waycross Military Ass'n v. Hiers, 209 Ga. 812, 76 S.E.2d 486, 1953 Ga. LEXIS 419 (1953).

Election improperly conducted or unauthorized by statute. — Where there is no authority to hold the election, or where statutory requirements pertaining to the holding of an election are not complied with, the election is void, and injunction is a proper remedy. Kemp v. Mitchell County Democratic Executive Comm., 216 Ga. 276, 116 S.E.2d 321, 1960 Ga. LEXIS 447 (1960).

Execution of lien encumbrances. — Where upon the agreement of borrower that loan should be a first lien on property

offered as security, and that, in the event lending corporation removed and discharged certain lien encumbrances from the property offered by borrower as security, lender should be subrogated to all the rights of such existing lienholders, it was not error to restrain and temporarily enjoin the holder of an execution against the property, obtained after the dates of the encumbrances which were paid by the lending corporation, from proceeding with a levy of the execution. Flournoy Plumbing Co. v. Home Owners Loan Corp., 181 Ga. 459, 182 S.E. 507, 1935 Ga. LEXIS 125 (1935).

Payday lending case. — Trial court did not manifestly abuse the court's discretion in granting the state a modified injunction in a suit against payday lenders because the state presented sufficient evidence to demonstrate the state was entitled to injunctive relief, namely, that the state would prevail at trial since a substantial judgment was issued against a lender, the lenders failed to produce financial information during discovery, and serious concerns as to the lenders insolvency existed. W. Sky Fin., LLC v. State of Ga. ex rel. Olens, 300 Ga. 340, 793 S.E.2d 357, 2016 Ga. LEXIS 783 (2016).

Exercise of homestead exemption contrary to waiver held by creditor. — Where a creditor holds a note containing a waiver of homestead exemption and assignment of property that might be set apart to a bankrupt under claim of homestead exemption, equity may afford the creditor a remedy by injunction to prevent the bankrupt from receiving property set apart on a claim of homestead exemption, and appointment of a receiver to apply to the court of bankruptcy for possession of the property to be administered by the court of equity, as necessary to collection of the debt. Lyle v. Roswell Store, Inc., 187 Ga. 386, 200 S.E. 702, 1938 Ga. LEXIS 797 (1938).

Exhibition of films on Sunday where contrary to prior law. — On petition brought by the solicitor general, (now district attorney) based on an information filed by citizens of a city, alleging that proposed exhibition of moving picture shows on Sunday constituted a public nuisance and an open violation of former Code 1933, § 26-6905, the court did not err in granting an injunction. Rose Theater, Inc. v. Lilly, 185 Ga. 53, 193 S.E. 866, 1937 Ga. LEXIS 655 (1937).

Illegal payments for city school transferred to county system. — Where the evidence showed an unrevoked and unaltered resolution by the governing authorities of a municipality to continue illegal payments for a city school after it became part of the county system, it was error to refuse an injunction against such illegal expenditures. Miller v. City of Cornelia, 188 Ga. 674, 4 S.E.2d 568, 1939 Ga. LEXIS 591 (1939).

Injunction against violation of ordinances. — Under proper circumstances, a county does have the power to seek an injunction enjoining the violation of the county's ordinances. Thus, the trial court properly granted a county a permanent injunction against a resident who violated property maintenance ordinances and health codes as the court found that criminal prosecutions would not adequately protect the county or be as practical and efficient to the ends of justice. Jacobs v. Chatham County, 295 Ga. App. 74, 670 S.E.2d 885, 2008 Ga. App. LEXIS 1365 (2008).

Injury to property. — Acts which injure property, the use of it, or intrude upon another's physical occupancy can be enjoined. Bush v. City of Gainesville, 206 Ga. 182, 56 S.E.2d 478, 1949 Ga. LEXIS 441 (1949).

Insufficient injury to property to allow injunction. — Because the parties agreed that the owner would retain ownership of a sewer line for a year, the city was properly enjoined from issuing any permits or other form of authorization that would allow a church to connect to the sewer infrastructure installed and paid for by the owner. City of Rincon v. Sean & Ashleigh, Inc., 284 Ga. 465, 667 S.E.2d 354, 2008 Ga. LEXIS 729 (2008).

Former licensee's pirating of customers and funds. — Interlocutory injunction was proper against a for-profit health care insurance company that had allegedly pirated a non-profit health care sharing ministry's customers and funds after termination of the parties' licensing contract; the ministry's loss of status as an

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Affordable Care Act, 42 U.S.C. § 18021 et seq., approved ministry would constitute irreparable harm. Aliera Healthcare, Inc. v. Anabaptist Healthshare, 355 Ga. App. 381, 844 S.E.2d 268, 2020 Ga. App. LEXIS 319 (2020).

Interference by tenant with maintenance of advertising sign. — Under the evidence there was no abuse of discretion in grant of restraining order to enjoin interference by building tenant with maintenance of advertising sign until further order of court. Haralson v. Seminole Bottling Co., 188 Ga. 600, 4 S.E.2d 452, 1939 Ga. LEXIS 580 (1939).

Interference with easement. — Petition alleging that the plaintiff purchased a described tract of land, and at the same time acquired an easement adjacent thereto over a lane as a means of ingress and egress from the public road to the plaintiff's farm, that the plaintiff had used this lane without interruption since the date it was acquired until the defendant obstructed the same by placing a "cattle gap" across it, that such obstruction had interfered with the plaintiff's movement of cattle along said lane to a pasture, thereby causing the plaintiff much inconvenience, trouble, and injury to the plaintiff's cattle, and thereby depriving the plaintiff's family of necessary milk and food, stated a cause of action for injunctive relief. Ozbolt v. Miller, 206 Ga. 558, 57 S.E.2d 601, 1950 Ga. LEXIS 508 (1950).

In a dispute over a driveway easement between a landowner and a couple, the trial court properly granted the landowner an interlocutory injunction. Even if the landowner's deed did not incorporate by reference a plat that showed the easement, it was critical that the landowner's property could be accessed only through the easement, which gave rise to an easement by implication. Haygood v. Tilley, 295 Ga. App. 90, 670 S.E.2d 800, 2008 Ga. App. LEXIS 1185 (2008), cert. denied, No. S09C0581, 2009 Ga. LEXIS 187 (Ga. Feb. 23, 2009), cert. denied, 558 U.S. 1123, 130 S. Ct. 1077, 175 L. Ed. 2d 903, 2010 U.S. LEXIS 403 (2010).

Interference with mill operations. — Insolvency of defendant and inability to respond to such damages as plaintiff might recover for breach of contract to operate mill would be ground for injunctive relief to prevent the continued interference with plaintiff's operation of the mill; if anticipated profits could not be recovered, this would tend to show irreparable injury, and would be an additional reason for injunctive relief. Tanner v. Campbell, 182 Ga. 121, 184 S.E. 705, 1936 Ga. LEXIS 295 (1936).

Interference with possession of office. — A court of equity may restrain one who seeks by force to interfere with an incumbent's possession of an office. Allen v. Wise, 204 Ga. 415, 50 S.E.2d 69, 1948 Ga. LEXIS 459 (1948).

An officer de facto in possession is entitled to equitable intervention to prevent disturbance of such possession otherwise than by judicial process. Allen v. Wise, 204 Ga. 415, 50 S.E.2d 69, 1948 Ga. LEXIS 459 (1948).

Where an officer is in possession of an office, and another person, even though that person be a claimant thereto, seeks to interfere by force with such possession, a court of equity, at the instance of the incumbent, will prevent such interference until right to the office has been determined in a proper proceeding. Allen v. Wise, 204 Ga. 415, 50 S.E.2d 69, 1948 Ga. LEXIS 459 (1948).

Pastor's exercise of church duties. — Where a pastor, after having been legally removed from office by the governing church authority, seeks thereafter to perform the function of pastor and as such to continue in possession of church property devoted to the use and benefit of its pastor, a court, in support of the action of the constituted church authority, may grant an order to restrain. Sanders v. Edwards, 199 Ga. 266, 34 S.E.2d 167, 1945 Ga. LEXIS 308 (1945).

Payment of notes by makers. — In a suit by dealer against manufacturer and several transferees, instituted before maturity of notes, on the basis of the dealer's equitable interest therein, to enjoin further payment of the notes by the makers, and for appointment of a receiver to collect the balance due on the notes and apply the proceeds after discharge of the debt due to the finance company, which the

dealer had guaranteed, the judge did not err on the pleadings and the evidence, in granting an injunction and appointing a receiver. Walter E. Heller & Co. v. Capital City Supply Co., 193 Ga. 695, 19 S.E.2d 729, 1942 Ga. LEXIS 462 (1942).

Pollution of stream and private land by manufacturer. — Where no question of prescriptive rights was involved in suit by a dairy farmer seeking to enjoin a manufacturing company from polluting a stream, and where there was evidence, though conflicting, that the stream was being polluted, and that the petitioner had not acquiesced or consented for the water from the defendants' sewerage disposal plant to be discharged upon the petitioner's land, the trial court did not abuse the court's discretion in granting an interlocutory injunction. Kingsley Mill Corp. v. Edmonds, 208 Ga. 374, 67 S.E.2d 111, 1951 Ga. LEXIS 368 (1951).

Preservation of estate property for creditor's claims. — In suit by creditors of a deceased person, against the executors and others, praying on facts alleged, to have described property decreed to be the property of the estate, and for injunction, receiver, and general relief, it being alleged in the petition that the property in question was claimed adversely to the estate by defendants, that such claim was unfounded in fact, and that without this property the estate would be insolvent, the petition stated a cause of action as against the several defendants. Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580, 1939 Ga. LEXIS 596 (1939).

Resale of land during redemption period following tax sale. — An injunction will lie for the owner of land brought by a county at a tax sale to prevent the county from reselling the land before the time claimed by the owner as the expiration of the owner's redemption period where it is alleged that the county is threatening to sell the land in small tracts to numerous purchasers while the right of redemption still exists, which if done would subject the owner to a multiplicity of suits with such purchasers. Newsom v. Dade County, 177 Ga. 612, 171 S.E. 145, 1933 Ga. LEXIS 370 (1933).

Sale of property based on forged security deed. — Where evidence which the plaintiff introduced at an interlocutory hearing was sufficient to authorize a finding that the security deed which contained the power of sale the defendants were attempting to exercise was in fact a forgery, the trial judge did not abuse the judge's discretion in granting a temporary injunction to enjoin defendants from selling the owner's land at public auction. Budget Charge Accounts, Inc. v. George, 214 Ga. 312, 104 S.E.2d 434, 1958 Ga. LEXIS 409 (1958).

Sale of property to collect tax unauthorized by statute. — Where purported tax fi. fa. is of an origin unauthorized by law, the taxpayer is entitled to an injunction to prevent sale of property. Vincent v. Poole, 181 Ga. 718, 184 S.E. 269, 1936 Ga. LEXIS 415 (1936).

Injunction will lie, at the instance of any taxpayer who has not estopped the taxpayer's rights, to enjoin a sale of the taxpayer's property for the collection of an unauthorized tax, for the reason that, unless authorized by statute, an affidavit of illegality is not a proper remedy to contest the illegality of an execution in the nature of a tax execution; but where one complains of the illegality of a taxing statute or collection procedure thereunder on an attempted collection of an execution issued by the State Revenue Commission, (now State Revenue Commissioner) the taxpayer has an adequate remedy at law by affidavit of illegality. Carreker v. Green & Milam, Inc., 183 Ga. 864, 189 S.E. 836, 1937 Ga. LEXIS 405 (1937).

One against whom an unlawful exaction in the form of a tax is sought to be made is entitled to an injunction to restrain its collection, if adequate remedy at law by affidavit of illegality is not provided. West Lumber Co. v. City of Atlanta, 209 Ga. 739, 76 S.E.2d 10, 1953 Ga. LEXIS 397 (1953).

Illegal audits by Department of Revenue. — Where plaintiffs could show that Department of Revenue employees, acting for the commissioner, were engaged in a series of audits conducted solely to uncover criminal activity unrelated to tax improprieties on the part of the person audited, such conduct would be illegal and would constitute grounds for the issuance of an injunction against such employees. Willis v. Department of Revenue, 255 Ga.

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649, 340 S.E.2d 591, 1986 Ga. LEXIS 581 (1986).

Sale under security deed where debt allegedly paid. — Petition, seeking cancellation of a security deed, and injunction against a sale under power contained therein, alleging that the debt which the deed was given to secure had been paid, was sufficient to set forth a cause of action for the relief prayed for. Perry v. Gormley, 183 Ga. 757, 189 S.E. 850, 1937 Ga. LEXIS 415 (1937).

Employment claims. — Where a former employer asserted claims identical to ones that were compulsory counterclaims in earlier suits, the trial court erred in denying a plea in abatement to all but one of the former employees pursuant to O.C.G.A. §§ 9-2-5 and 9-2-44; the trial court did not abuse its O.C.G.A. § 9-5-8 discretion in staying two prior cases pursuant to O.C.G.A. §§ 9-5-1 and 9-5-3. Smith v. Tronitec, Inc., 277 Ga. 210, 586 S.E.2d 661, 2003 Ga. LEXIS 790 (2003).

Union's improper interference with operation of business. — Court erred in refusing an interlocutory injunction to restrain defendant labor union and representatives from engaging in activities, begun and threatened to be continued, amounting to duress and intimidation, with the purpose of ruining the business of the plaintiff's employer unless plaintiff (no longer a union member) was discharged. Robinson v. Bryant, 181 Ga. 722, 184 S.E. 298, 1936 Ga. LEXIS 416 (1936).

Unauthorized sale of water outside city limits. — Court did not err in granting an injunction to restrain city from carrying out its purpose to sell and furnish water to persons residing outside the limits of the city and within the limits of a neighboring municipality, where city lacked charter authority to do so, and from applying proceeds of bonds to purposes other than those for which they were voted and validated. City of Cornelia v. Wells, 181 Ga. 554, 183 S.E. 66, 1935 Ga. LEXIS 161 (1935).

Vendor's engagement in similar business contrary to terms of sale contract. — Where a contract was made for the sale of a certain business, embodying a covenant that the vendor would not engage in the same kind or similar business in a stipulated time and within certain territorial limits, court properly granted injunction prohibiting vendor from acting as agent or employee of another engaged in such business. Strauss v. Phillips, 180 Ga. 641, 180 S.E. 123, 1935 Ga. LEXIS 515 (1935).

Restrictive covenants. — Because a driveway was a "structure" within the common meaning of that term as well as the meaning of the restrictive covenants, pursuant to O.C.G.A. §§ 13-2-2(2) and 13-2-3, the trial court did not err in finding as a matter of law that a homeowner was required to seek the homeowner association's approval before resurfacing a driveway; consequently, the trial court properly granted the homeowner association's motion for an injunction requiring the homeowner to restore the driveway to its original condition. Mitchell v. Cambridge Prop. Owners Ass'n, 276 Ga. App. 326, 623 S.E.2d 511, 2005 Ga. App. LEXIS 1025 (2005).

County could seek injunction against city annexing property. — County's interest in the determination of the county's boundaries and the duties and obligations that naturally flow therefrom is present whether the basis for challenging a municipal annexation lies in procedural deficiencies or the more substantive lack of contiguity. Therefore, a county had standing to seek an interlocutory injunction preventing a city from annexing certain property. Cherokee County v. City of Holly Springs, 284 Ga. 298, 667 S.E.2d 78, 2008 Ga. LEXIS 740 (2008).

A temporary injunction against the operation of a tattoo and body-piercing business by former employees was warranted following a determination that the employees had misappropriated their former employer's property for their own use and had profited therefrom. Owens v. Ink Wizard Tattoos, 272 Ga. 728, 533 S.E.2d 722, 2000 Ga. LEXIS 621 (2000).

Credit for time served granted by Department of Corrections. — Because the amount of credit the defendant was entitled to receive was to be computed by a pre-sentence custodian, and the duty to award the credit for time served prior to

trial fell upon the Department of Corrections, an appeal from an order denying the defendant clarification of an imposed sentence was not properly before the appeals court; moreover, any dissatisfaction with that relief would not be part of the defendant's direct appeal from the original conviction, but would be in a mandamus or injunction action against the Commissioner of the Department of Corrections. Smashey v. State, 282 Ga. App. 293, 638 S.E.2d 431, 2006 Ga. App. LEXIS 1371 (2006).

Interlocutory injunction. — Where an owner's suit did not arise out of a title insurance company's business as an insurer, pursuant to Ga. Const. 1983, Art. VI, Sec. III, Para. II, the trial court erred in finding venue under O.C.G.A. § 33-4-1(2); in addition, the grant of an interlocutory injunction was error because there was no showing that the title company had any opportunity to challenge the applicability of an amendment to add a quiet title action under O.C.G.A. § 23-3-62 to the complaint. First Am. Title Ins. Co. v. Broadstreet, 260 Ga. App. 705, 580 S.E.2d 676, 2003 Ga. App. LEXIS 473 (2003).

No abuse in granting a second faction's motion for an interlocutory injunction to restrain the first faction from attempting to act on behalf of a Vietnamese Buddhist Temple, incorporated as a nonprofit Georgia corporation, or from holding themselves out as officers, directors, or agents of the Temple as: (1) the Temple's articles of incorporation clearly allowed it to have members; and (2) the court was authorized to find that all members of the Temple were given the requisite notice of the June, 2004 meeting, and that more than 50 percent of the members appeared at the meeting and voted unanimously to elect the second faction to the board. Nguyen v. Tran, 287 Ga. App. 888, 652 S.E.2d 881, 2007 Ga. App. LEXIS 1118 (2007).

2. Cases Where Injunction Improper

Action to recover deficiency judgment after foreclosure sale. — Plaintiff debtors were not entitled to injunction to enjoin action to recover a deficiency judgment after foreclosure sale, on the ground that they sought to have an accounting, as there was no involved accounting which required the granting of an injunction for the purpose of ascertaining the amount due by the plaintiffs to the defendant. Branan v. Holding Comm'n, 183 Ga. 736, 189 S.E. 593, 1937 Ga. LEXIS 398 (1937).

Demand for tax prior to execution and levy. — As a general rule, a court of equity will not intervene to enjoin the collection of a tax where no execution has been issued and levied on any of the property of the taxpayer, even though the taxing authorities may have demanded of the taxpayer that the taxpayer pay the tax. Warren v. Suttles, 190 Ga. 311, 9 S.E.2d 172, 1940 Ga. LEXIS 456 (1940).

Rescission claim. — The trial court did not err in denying a motion for interlocutory injunction in which the appellants sought to stay two previously filed cases under O.C.G.A. § 9-5-1; the appellants' recission claim alleged fraud in the inducement and a mistaken belief, and thus it was legal, not equitable, in nature, and state and magistrate courts had jurisdiction over it. Hann v. Harpers Boutiques Int'l, 284 Ga. App. 531, 644 S.E.2d 337, 2007 Ga. App. LEXIS 361 (2007).

Disposition of property pending divorce. — The writ of injunction to restrain a husband from encumbering or disposing of his property pending a divorce and alimony suit should not be granted, where the husband is neither attempting nor threatening to sell or encumber his property, and no other equitable ground for the issuance of the writ is shown to exist. Ramsey v. Ramsey, 175 Ga. 685, 165 S.E. 624, 1932 Ga. LEXIS 307 (1932).

Disposition of property where no proof of intent to avoid alimony. — While a wife may, in a proper case, apply for an injunction to prevent the husband from alienating or encumbering his property to defeat her claim for alimony, where, there was no evidence that the husband was attempting or even contemplating the transfer or encumbrance of his property to defeat his wife's claim for alimony, it was error for the trial court to enjoin the defendant from disposing of his property and from changing the status thereof, and from withdrawing any funds from his bank account except in desig-

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nated amounts for specific purposes. Brannen v. Brannen, 208 Ga. 88, 65 S.E.2d 161, 1951 Ga. LEXIS 285 (1951).

Exercise of official functions by officer of unincorporated association. — Action by two members of an unincorporated political organization to enjoin defendant from representing defendant as the secretary and treasurer of the club, from collecting or receiving further contributions for the club, and for an accounting, was properly dismissed where there was no allegation that redress had been sought within the organization, or that the organization had refused to act. Bowden v. Kennedy, 186 Ga. 174, 197 S.E. 325, 1938 Ga. LEXIS 587 (1938).

Exercise of power of sale under security deed while action pending. — In an action for injunction to prevent the exercise of a power of sale contained in a security deed, where the plaintiff does not otherwise show sufficient cause for the grant of an interlocutory injunction, the mere pendency of an action will not require the grant of such relief upon the theory that the litigation would prevent the property from bringing its market value. Spivey v. Pope, 180 Ga. 609, 180 S.E. 118, 1935 Ga. LEXIS 503 (1935).

Landlord's interference with tenant's crops. — In a suit by a cropper against a landlord, praying for injunction against interference by the defendant with the plaintiff in working the crops on described land, and for a judgment for damages where the defendant landlord was not insolvent, and it did not appear that the plaintiff did not have an adequate remedy at law for alleged breach of the contract of landlord and cropper, the court erred in granting an injunction. Lyles v. Watson, 189 Ga. 768, 7 S.E.2d 909, 1940 Ga. LEXIS 390 (1940).

Boat docks. — Trial court abused its discretion in enjoining two brothers from using their boat docks and from applying for future boat dock permits as a subdivision's restrictive covenants did not limit the number of docks on a property; since the brothers could seek, and possibly obtain, approval from the homeowners to build additional docks, it was neither illegal nor contrary to good conscience to permit them to do so; similarly, there was no basis for prohibiting the brothers' use of the docks. Danos v. Thompson, 272 Ga. App. 69, 611 S.E.2d 678, 2005 Ga. App. LEXIS 159 (2005).

Levy on property set aside as homestead. — Court properly refused an injunction in an equitable action brought by purchasers to restrain enforcement of levy on property set apart as a homestead by bankrupt and later sold to petitioners, as the petitioners had an adequate remedy at law by filing claim to the property. Parris v. Morris Plan Co., 181 Ga. 480, 183 S.E. 61, 1935 Ga. LEXIS 132 (1935).

Monopoly in transportation contract. — Petition seeking to have contract allegedly granting a monopoly on business of transporting passengers to and from municipal airport, declared unconstitutional, and to enjoin defendants from interfering with plaintiff in the transportation of passengers from the city airport did not show an unlawful interference with the rights of the plaintiff to carry on its taxicab business upon the streets of the city under its license, and therefore failed to state a cause of action for equitable relief. Associated Cab Co. v. City of Atlanta, 204 Ga. 591, 50 S.E.2d 601, 1948 Ga. LEXIS 490 (1948).

Objections to association charter by parties not affected thereby. — Heirs objecting to probate of purported will containing devise to a hospital association were mere strangers to application for revival of association's charter, and did not show that such revival would result in any hurt or damage to them, and the court did not err in refusing the prayer for interlocutory injunction. Pattison v. Farkas, 180 Ga. 798, 180 S.E. 831, 1935 Ga. LEXIS 567 (1935).

Picketing of employer's business. — Where a single picket was posted on highway in front of the employer's business, bearing a placard which stated that the employer was unfair to the labor union, which picket did no more than walk slowly back and forth on the public highway, and was guilty of no violence, intimidation or other misconduct, the court did not err in denying the prayer of the employer for an

interlocutory injunction to prohibit such action. Hallman v. Painters Dist. Council No. 38, 203 Ga. 175, 45 S.E.2d 414, 1947 Ga. LEXIS 567 (1947).

Sale of undivided interest in land under security deed. — Where one borrows a sum of money and executes a deed to an undivided interest in certain realty to secure the repayment of the loan, the lender has a right to foreclose upon and sell the undivided interest; and a court of equity will not, unless under peculiar circumstances, enjoin the lender against enforcement of the security deed, so as to allow the debtor time to have the property partitioned. Ward v. Gerdine, 183 Ga. 722, 189 S.E. 588, 1937 Ga. LEXIS 394 (1937).

Mere suggestion than nonpayment of bond would render bondsman liable to arrest does not entitle the bondsman to the aid of the extraordinary power of injunction to restrain officers of the municipality, who have not arrested the bondsman and disclaim any intention to arrest the bondsman, and who are in no way interfering with the bondsman's person or the bondsman's property. Walden v. Sellers, 174 Ga. 774, 163 S.E. 897, 1932 Ga. LEXIS 138 (1932).

Insurer could not maintain suit for declaratory judgment and injunction preventing widow from filing suit against insurer where insurer's positions could be presented in opposition to widow's suit. Provident Life & Acc. Ins. Co. v. United Family Life Ins. Co., 233 Ga. 540, 212 S.E.2d 326, 1975 Ga. LEXIS 1371 (1975).

Allocation of funds pursuant to a referendum. — A permanent injunction was unnecessary as actions of members of a county board of commissioners in entering into an amended intergovernmental agreement to allocate funds from a Special Local Option Sales Tax (SPLOST) referendum were not illegal or contrary to equity under O.C.G.A. § 9-5-1 as the new agreement accomplished the purpose of the resolution, just by a different means. Hicks v. Khoury, 283 Ga. 407, 658 S.E.2d 616, 2008 Ga. LEXIS 242 (2008).

Injunction not appropriate method for challenging agency order. — Trial court properly denied injunctive relief against a power company because an injunction was no longer an appropriate method for challenging an agency order after the passage of the Administrative Procedure Act, which provides a statutory right of review pursuant to O.C.G.A. § 50-13-19. Fulton County Taxpayers Found., Inc. v. Ga. PSC, 287 Ga. 876, 700 S.E.2d 554, 2010 Ga. LEXIS 635 (2010).

Misappropriation action under Georgia Trade Secrets Act. — Trial court manifestly abused the court's discretion when the court granted equitable relief to a limited liability company (LLC) because there was no finding that the drawings a company used were trade secrets as defined by the Georgia Trade Secrets Act (GTSA), O.C.G.A. § 10-1-761, and by using O.C.G.A. § 9-5-1 to provide the LLC the same relief based on the same allegations it would have received had the drawings qualified as trade secrets, the trial court undermined the exclusivity of the GTSA; the key inquiry was whether the same factual allegations of misappropriation were being used to obtain relief outside the GTSA, and since the trial court's award of general equitable relief under O.C.G.A. § 9-5-1 was based on the same conduct as the GTSA claim, i.e, the misappropriation of the drawings, such relief was preempted by O.C.G.A. § 10-1-767(a). Robbins v. Supermarket Equip. Sales, LLC, 290 Ga. 462, 722 S.E.2d 55, 2012 Ga. LEXIS 133 (2012).

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Pendency of action in federal court as ground of injunction against action in state court, 24 A.L.R. 1084; 122 A.L.R. 1425.

Decline in market value of corporate stock or securities during injunction against their disposal as damages recoverable for wrongful injunction, 29 A.L.R. 727.

Injunction against repeated or continuing trespasses on real property, 32 A.L.R. 463; 60 A.L.R.2d 310.

Right to enjoin threatened or anticipated nuisance, 32 A.L.R. 724; 55 A.L.R. 880.

Right to enjoin enforcement of illegal tax, local assessment, or license fee, upon joinder of several affected thereby, 32 A.L.R. 1266; 156 A.L.R. 319.

Power to enjoin holding of an election, 33 A.L.R. 1376; 70 A.L.R. 733.

Meritorious defense as a condition of injunction against judgment for want of jurisdiction, 39 A.L.R. 414; 118 A.L.R. 1498.

Partial dissolution of injunction as breach of injunction bond, 40 A.L.R. 990.

Interference with easement of light, air, or view by structure in street or highway as ground for injunction at instance of abutting owner, 40 A.L.R. 1321.

Injunction against discharge of employee, 44 A.L.R. 1443.

Liability apart from bond and in absence of elements of malicious prosecution for wrongfully suing out injunction, 45 A.L.R. 1517.

Validity and enforceability of restrictive covenants in contracts of employment, 52 A.L.R. 1362; 67 A.L.R. 1002; 98 A.L.R. 963.

Right to injunction to restrain acts or course of conduct without the required permit or license from public, 53 A.L.R. 811.

Right of property owner to enjoin projection from building over street or alley, 55 A.L.R. 911.

Injunction as a proper remedy by licensor where license to use real property is revoked, 56 A.L.R. 1110.

Injunction on ground of inconvenience against prosecuting action in a particular state or district, 57 A.L.R. 77; 115 A.L.R. 237.

Mandatory injunction as remedy for breach of restrictive covenant affecting real property, 57 A.L.R. 336.

Right of citizen or taxpayer to enjoin waste or expenditure of state funds, 58 A.L.R. 588.

Right of railroad company to prevent operations for gas or oil or other mining operations on right of way, 61 A.L.R. 1068.

Injunction against enforcement of judgment rendered in foreign country or other state, 64 A.L.R. 1136.

Right to injunction in labor dispute as affected by misconduct of complainant, 66 A.L.R. 1090.

Right of bus company or street car company to enjoin taxicab driver from picking up intending passengers, 66 A.L.R. 1380.

Who, other than abutting owner, may maintain a suit to enjoin closing or obstructing street or highway, 68 A.L.R. 1285.

Injunction against bringing or prosecuting action in another state or country because of the danger that result would be different from that which would be reached in the jurisdiction whose law is the proper governing law as regards matters of substance, 69 A.L.R. 591.

Penalty as limit of liability on injunction bond, 70 A.L.R. 591.

Injunction to continue status quo pending statutory proceedings impeaching local improvements or assessments, 77 A.L.R. 717.

Bond as condition of injunction in suits by or in interest of state or other political unit or taxpayer, 83 A.L.R. 205.

Injunction as proper remedy against tax on exempt property, 84 A.L.R. 1315.

Power to enjoin bringing or prosecution of action under Federal Employers' Liability Act in another jurisdiction, 85 A.L.R. 1351; 113 A.L.R. 1444; 136 A.L.R. 1232; 146 A.L.R. 1118.

Right to enjoin practice of profession or conduct of business without a license or permit, 92 A.L.R. 173.

Right of one not a party to a combination or contract in restraint of trade to maintain a suit to enjoin the same or to

recover damages he suffers by reason thereof, 92 A.L.R. 185.

Right to injunction to protect easement of light and air, 93 A.L.R. 1180.

Right to mandamus as excluding remedy by injunction, 93 A.L.R. 1495.

Injunction as proper remedy to prevent unlicensed practice of law, 94 A.L.R. 359.

Validity and effect of statutes restricting remedy by injunction in industrial disputes, 97 A.L.R. 1333; 127 A.L.R. 868.

Remedy by mandatory injunction or specific performance for breach of contract to furnish one the requirements of his business, 98 A.L.R. 421.

Right to enjoin threats of suits for alleged infringement of patent, 98 A.L.R. 671.

Power to enjoin party from prosecuting or commencing an equitable suit, 102 A.L.R. 308.

Right to injunction to protect water rights as affected by fact that party seeking injunction contemplates no immediate use of rights, or by doctrine of comparative injury, 106 A.L.R. 687.

Construction and application of statutes denying remedy by injunction against assessment or collection of tax, 108 A.L.R. 184.

Jurisdiction to enjoin trespass upon real property in another state or country, 113 A.L.R. 940.

Right to enjoin removal of or interference with trees in highways, 116 A.L.R. 95.

Right to specific performance, or injunction against breach, of lease or sublease or of contract to make lease as affected by right of complainant to cancel lease before expiration of term for which other party is bound, 117 A.L.R. 256.

Right to enjoin prosecution of action in court of limited jurisdiction because of counter-rights or claims in behalf of defendant which are beyond such limited jurisdiction, 125 A.L.R. 337.

Injunction against suit in another state or country for divorce or separation, 128 A.L.R. 1467; 54 A.L.R.2d 1240.

Injunction, rather than quo warranto, as available to restrain enforcement of tax against real property upon ground involving attack upon legal existence of municipality, or upon inclusion of property within its boundaries, 129 A.L.R. 255.

Restitution as remedy for wrongful injunction, 131 A.L.R. 878.

Taxpayer's right to maintain action to enjoin wrongful expenditure of public funds, as affected by the fact that the funds in question were not raised by taxation, 131 A.L.R. 1230.

Injunction against picketing per se, where past picketing has been accompanied by violence or other improper conduct, 132 A.L.R. 1218.

Injunction against exercise of power of eminent domain, 133 A.L.R. 11; 93 A.L.R.2d 465.

Injunction by appellate court to protect subject matter of appeal or preserve status quo as between the parties, 133 A.L.R. 1105.

Taxpayer's action to enjoin payment to one alleged to hold office or position illegally, 137 A.L.R. 631.

Injunction against legislative body of state or municipality, 140 A.L.R. 439.

Injunction against acts or conduct, in street or vicinity, tending to disparage plaintiff's business or his merchandise, 144 A.L.R. 1181.

Injunction as remedy in case of trade libel, 148 A.L.R. 853.

Reversal, modification, dismissal, dissolution, or resettlement of injunction order or judgment as affecting prior disobedience as contempt, 148 A.L.R. 1024.

Interference during labor dispute with performance by common carrier or other public utility of its duties to the public as ground for injunctive relief, 149 A.L.R. 1243.

Necessity and sufficiency of effort to settle dispute as condition of right to injunction in labor dispute under statutes restricting remedy by injunction in labor disputes, 150 A.L.R. 819.

Injunction in respect of property as covering action for rent or for use and occupation, 155 A.L.R. 844.

Specific performance or injunction as proper remedy for breach of collective bargaining agreement, 156 A.L.R. 652.

Specific performance, or injunction against breach, of contract for organization or reorganization of corporation, 158 A.L.R. 997.

What amounts to seizure and holding of employer's plant, equipment, machinery,

or other property within statutory exception to inhibition on injunctions in labor disputes, 163 A.L.R. 668.

Injunction pendente lite in suit for divorce or separation, 164 A.L.R. 321.

Legality of, and injunction against, peaceable picketing by labor union, of plant whose employees are represented by another union as statutory bargaining agent, 166 A.L.R. 185.

Effect of, and remedies for, exclusion of eligible class of persons from jury list in civil case, 166 A.L.R. 1422.

Inadequacy of legal remedy as basis for equitable relief from levy of execution, 171 A.L.R. 221.

Injunction as remedy for breach of contract to employ plaintiff or give exclusive right to promote or sell defendant's product or invention, 173 A.L.R. 1198.

Power to enjoin canvassing votes and declaring result of election, 1 A.L.R.2d 588.

Capacity of taxpayers to maintain suit to enjoin submission of initiative, referendum, or recall measure to voters, 6 A.L.R.2d 557.

Injunction by state court against action in court of another state, 6 A.L.R.2d 896.

Adequacy, as regards right to injunction, of other remedy for review of order fixing public utility rates, 8 A.L.R.2d 839.

Specific performance or injunctive relief against breach of contract, other than lease or agreement thereof, or contract for services, terminable by one party but not the other, 8 A.L.R.2d 1208.

Mandatory injunction prior to hearing of case, 15 A.L.R.2d 213.

Injunctive relief against submission of constitutional amendment, statute, municipal charter, or municipal ordinance, on ground that proposed action would be unconstitutional, 19 A.L.R.2d 519.

Suspension or expulsion from social club or similar society and the remedies therefor, 20 A.L.R.2d 344.

Suspension or expulsion from professional association and the remedies therefor, 20 A.L.R.2d 531.

Decree granting or refusing injunction as res judicata in action for damages in relation to matter concerning which injunction was asked in first suit, 26 A.L.R.2d 446.

Mandatory injunction to compel removal of encroachments by adjoining landowner, 28 A.L.R.2d 679.

State's power to enjoin violation of collective labor contract as affected by federal labor relations acts, 32 A.L.R.2d 829.

State court's power to enjoin picketing as affected by Labor Management Relations Act, 32 A.L.R.2d 1026.

Injunction as remedy against removal of public office, 34 A.L.R.2d 554.

Bankruptcy court's injunction against mortgage or lien enforcement proceedings commenced, before bankruptcy, in another court, 40 A.L.R.2d 663.

Injunction as remedy against defamation of person, 47 A.L.R.2d 715.

Necessary parties defendant to independent action on injunction bond, 55 A.L.R.2d 545.

Duty to minimize damages for wrongful injunction, 66 A.L.R.2d 1131.

Specific performance of agreement, or provisions thereof, involving partnership at will, 70 A.L.R.2d 618.

Injunction to prevent violation of Sunday law, 76 A.L.R.2d 874; 10 A.L.R.4th 246.

Court's lack of jurisdiction of subject matter in granting injunction as a defense in action on injunction bond, 82 A.L.R.2d 1064.

Dismissal of injunction action or bill without prejudice as breach of injunction bond, 91 A.L.R.2d 1312.

Pollution control: preliminary mandatory injunction to prevent, correct, or reduce effects of polluting practices, 49 A.L.R.3d 1239.

Relief against school board's "busing" plan to promote desegregation, 50 A.L.R.3d 1089.

Validity, construction, and effect of "Sunday closing" or "blue" laws — modern status, 10 A.L.R.4th 246.

Recovery of damages resulting from wrongful issuance of injunction as limited to amount of bond, 30 A.L.R.4th 273.

Right of employee to injunction preventing employer from exposing employee to tobacco smoke in workplace, 37 A.L.R.4th 480.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 A.L.R.4th 603.

What constitutes plain, speedy, and efficient state remedy under Tax Injunction Act (28 USCS § 1341), prohibiting federal district courts from interfering with assessment, levy, or collection of state business taxes, 31 A.L.R. Fed. 2d 237.

9-5-2. No interference by equity in administration of criminal laws.

Equity will take no part in the administration of the criminal law. It will neither aid criminal courts in the exercise of their jurisdiction, nor will it restrain or obstruct them.

History.

Civil Code 1895, § 4914; Civil Code 1910, § 5491; Code 1933, § 55-102.

History of Section.

The language of this Code section is derived in part from the decision in Pope v. Mayor of Savannah, 74 Ga. 365 (1884).

JUDICIAL DECISIONS

Basis of section. — The general rule of this section is based upon the principle that equity is intended to supplement, and not usurp, the functions of courts of law, and that to sustain an action to restrain or relieve against proceedings for the punishment of offenses would constitute an invasion of the courts of law; and on the fact that the party has an adequate remedy at law by establishing as a defense to the prosecution that the person did not commit the act charged, or that the statute on which the prosecution is based is invalid, and in case of conviction, by taking an appeal. Hodges v. State Revenue Comm'n, 183 Ga. 832, 190 S.E. 36, 1937 Ga. LEXIS 435 (1937) (see O.C.G.A. § 9-5-2).

This section applies to both criminal laws and quasi criminal proceedings under ordinances. Baldwin v. City of Atlanta, 147 Ga. 28, 92 S.E. 630, 1917 Ga. LEXIS 31 (1917); Town of Dexter v. Western Union Tel. Co., 150 Ga. 294, 103 S.E. 430, 1920 Ga. LEXIS 151 (1920) (see O.C.G.A. § 9-5-2).

This section has been applied to municipal ordinances. Powell v. Hartsfield, 190 Ga. 839, 11 S.E.2d 33, 1940 Ga. LEXIS 591 (1940) (see O.C.G.A. § 9-5-2).

Court of equity has no jurisdiction to enjoin prosecutions for criminal offenses. Sosebee v. City of Demorest, 182 Ga. 338, 185 S.E. 330, 1936 Ga. LEXIS 348 (1936); City of Atlanta v. Miller, 191 Ga. 767, 13 S.E.2d 814, 1941 Ga. LEXIS 374 (1941).

Court of equity will not enjoin commission of crime generally. American Legion v. Miller, 183 Ga. 754, 189 S.E. 837, 1937 Ga. LEXIS 406 (1937).

The general rule is that courts exercising equity jurisdiction will not enjoin criminal prosecutions. Walnut Transf. & Storage Co. v. Harrison, 185 Ga. 720, 196 S.E. 432, 1938 Ga. LEXIS 514 (1938).

The general rule is that an injunction will not issue to restrain a criminal prosecution. Jewel Tea Co. v. City of Cartersville, 185 Ga. 799, 196 S.E. 712, 1938 Ga. LEXIS 529 (1938); Walker v. City of Carrollton, 193 Ga. 894, 20 S.E.2d 600, 1942 Ga. LEXIS 520 (1942).

Injunctions or orders in the nature of injunction are not granted by courts of equity to restrain proceedings in criminal matters. Ray v. City of Dalton, 191 Ga. 46, 11 S.E.2d 193, 1940 Ga. LEXIS 597 (1940).

Courts of equity cannot interfere with administration of criminal laws. — Courts of equity have no jurisdiction to interfere with the administration of the criminal laws of the state by injunction or otherwise. Ray v. City of Dalton, 191 Ga. 46, 11 S.E.2d 193, 1940 Ga. LEXIS 597 (1940).

Doctrine of laches is an equitable doctrine and may not result in interference in a criminal prosecution. Callahan v.

State, 179 Ga. App. 556, 347 S.E.2d 269, 1986 Ga. App. LEXIS 2645 (1986).

Rule announced in this section is likewise applicable in quasi-criminal proceedings. City of Atlanta v. Universal Film Exch., Inc., 201 Ga. 463, 39 S.E.2d 882, 1946 Ga. LEXIS 488 (1946); Atlanta Veterans Transp., Inc. v. Jenkins, 203 Ga. 457, 47 S.E.2d 324, 1948 Ga. LEXIS 351 (1948); City of Brunswick v. Anderson, 204 Ga. 515, 50 S.E.2d 337, 1948 Ga. LEXIS 480 (1948) (see O.C.G.A. § 9-5-2).

Rule of this section is applicable to prosecutions for violations of municipal ordinances, which are quasi criminal proceedings. Sosebee v. City of Demorest, 182 Ga. 338, 185 S.E. 330, 1936 Ga. LEXIS 348 (1936) (see O.C.G.A. § 9-5-2).

The general rule, that a court of equity has no jurisdiction to enjoin prosecution of offenses, applies to prosecution under municipal ordinances quasi-criminal in their nature. City of Tifton v. Cooper, 206 Ga. 379, 57 S.E.2d 196, 1950 Ga. LEXIS 346 (1950).

This rule applies in prosecutions for violations of municipal ordinances, which are punishable by fine or imprisonment. Mayor of Athens v. Co-op Cab Co., 207 Ga. 505, 62 S.E.2d 906, 1951 Ga. LEXIS 439 (1951).

The rule that equity will take no part in the administration of the criminal law also applies in quasi-criminal proceedings, including prosecutions for violations of municipal ordinances, which are punishable by fine or imprisonment. Thomas v. Mayor of Savannah, 209 Ga. 866, 76 S.E.2d 796, 1953 Ga. LEXIS 446 (1953).

Prosecutions for violations of municipal ordinances which are punishable by fine or imprisonment are quasi-criminal in nature and come within the above rule. Staub v. Mayor of Baxley, 211 Ga. 1, 83 S.E.2d 606, 1954 Ga. LEXIS 468 (1954).

O.C.G.A. § 9-5-2 does not prevent courts from enjoining enforcement of taxation statutes tangentially related to a potential misdemeanor charge. Johnsen v. Collins, 875 F. Supp. 1571, 1994 U.S. Dist. LEXIS 20214 (S.D. Ga. 1994).

Courts of equity will not prevent prosecutions for criminal offenses, whether prosecutions be violations of state statutes or municipal ordinances. City Council v. Congdon, 171 Ga. 572, 156 S.E. 212, 1930 Ga. LEXIS 508 (1930).

Except under exceptional circumstances. — Only under exceptional circumstances may equity powers be used to restrain criminal prosecutions, even though their defense may be burdensome and attended by inconvenience. Spur Distrib. Co. v. Mayor of Americus, 190 Ga. 842, 11 S.E.2d 30, 1940 Ga. LEXIS 590 (1940).

Exception to the general rule exists where property rights are involved, and the process sought to be enforced tends to destroy the property rights of another. Wofford Oil Co. v. City of Boston, 170 Ga. 624, 154 S.E. 145, 1930 Ga. LEXIS 208 (1930).

While it is true that equity will not take jurisdiction for the purpose of administering criminal law, it is just as well settled that equity will not fail to exercise its peculiar function, where it is manifest that substantial property rights are primarily and directly involved, merely because the protection of such property rights may incidentally require the control of criminal or quasi criminal prosecutions. Jewel Tea Co. v. City Council, 183 Ga. 817, 190 S.E. 1, 1937 Ga. LEXIS 421 (1937); Spur Distrib. Co. v. Mayor of Americus, 190 Ga. 842, 11 S.E.2d 30, 1940 Ga. LEXIS 590 (1940).

Motel owner's showing that the owner depended upon income from movie rentals in making the owner's decision to purchase the owner's motel and in sustaining the owner's business would establish a sufficient threat to a property interest to permit an exception to the "no interference" rule. Majmundar v. Veline, 256 Ga. 8, 342 S.E.2d 682, 1986 Ga. LEXIS 682 (1986).

Equity may intervene to prevent irreparable damage to property. — Exceptions to this general rule are those cases in which equity takes jurisdiction for the purpose of preventing irreparable injury to property or property rights, the petitioner having no remedy at law which would provide adequate protection therefor. Cantrell v. Mayor of Mt. Airy, 218 Ga. 646, 129 S.E.2d 910, 1963 Ga. LEXIS 287 (1963).

In some cases, involving special facts, injunction may be granted against the

unlawful enforcement of municipal ordinances, although they are penal in character, for the protection of property or property rights or franchises against irreparable injury; as, for instance, where, under the guise of enforcing a penal ordinance, it is manifest that prosecutions and arrests are threatened for the sole purpose of unlawfully taking or destroying property, or preventing the exercise of a franchise granted by the state. McCullough Bros. v. City of Griffin, 181 Ga. 832, 184 S.E. 599, 1936 Ga. LEXIS 444 (1936); Sosebee v. City of Demorest, 182 Ga. 338, 185 S.E. 330, 1936 Ga. LEXIS 348 (1936); Walnut Transf. & Storage Co. v. Harrison, 185 Ga. 720, 196 S.E. 432, 1938 Ga. LEXIS 514 (1938); Spur Distrib. Co. v. Mayor of Americus, 190 Ga. 842, 11 S.E.2d 30, 1940 Ga. LEXIS 590 (1940).

Equity will in a proper case, by injunction, prevent injury or destruction of property under exception to general rule that equity has no jurisdiction to enjoin prosecution under quasi-criminal municipal ordinance. City of Tifton v. Cooper, 206 Ga. 379, 57 S.E.2d 196, 1950 Ga. LEXIS 346 (1950).

The general rule, as stated in this section, does not apply where a criminal prosecution illegally threatens irreparable injury or destruction of private property, and where the petitioner has no adequate remedy at law. In such cases, equity will restrain a criminal prosecution. Hunter v. City of Atlanta, 212 Ga. 179, 91 S.E.2d 338, 1956 Ga. LEXIS 297 (1956) (see O.C.G.A. § 9-5-2).

Courts exercising equitable jurisdiction will not enjoin prosecutions under municipal ordinances, even where the ordinances are allegedly invalid and there are threats of arrest and multiplicity of prosecutions, unless it is shown that the threatened prosecutions are for the sole purpose of unlawfully taking or destroying property or the business of the plaintiff, or that they will in fact result in irreparable injury thereto, and unless the complaining party has no plain and adequate remedy at law which is as practical and efficient to the ends of justice and its prompt administration as its remedy in equity. Arnold v. Mathews, 226 Ga. 809, 177 S.E.2d 691, 1970 Ga. LEXIS 698 (1970).

Deprivation of enjoyment of legitimate property rights. — A court of equity will enjoin an unfounded prosecution for an alleged crime, and the threatened prosecution therefor, where the effect of such prosecution will injure or destroy the property of the person so prosecuted, or deprive the person of the legitimate enjoyment of the person's property or property rights, or prevent the person from pursuing the person's occupation or professions. City Council v. Congdon, 171 Ga. 572, 156 S.E. 212, 1930 Ga. LEXIS 508 (1930).

When equity acts in cases involving property and crime, it ignores criminal feature and exercises its jurisdiction solely with reference to the property or property right affected. Jewel Tea Co. v. City of Cartersville, 185 Ga. 799, 196 S.E. 712, 1938 Ga. LEXIS 529 (1938).

Exercises jurisdiction merely to protect property. — While it has been held that this rule does not apply where it is evident that criminal proceedings directly threaten private property, yet in such cases injunction was allowed not for the purpose of preventing criminal prosecutions as such, but for the protection of property. Powell v. Hartsfield, 190 Ga. 839, 11 S.E.2d 33, 1940 Ga. LEXIS 591 (1940).

Statutes prohibiting nude and sexual conduct. — Night club had a sufficient property interest in its alcoholic beverage licenses to authorize the superior court to exercise its equity jurisdiction to consider the club's challenge to enforcement of statutes prohibiting certain nude and sexual conduct on premises where alcoholic beverages are sold or dispensed for consumption on the premises. Harris v. Entertainment Sys., 259 Ga. 701, 386 S.E.2d 140, 1989 Ga. LEXIS 532 (1989).

Equity is not special or favored forum for determining validity of municipal ordinances. City of Bainbridge v. Olan Mills, Inc., 207 Ga. 636, 63 S.E.2d 655, 1951 Ga. LEXIS 487 (1951).

Court of equity will not inquire into validity or reasonableness of ordinance making penal an act for the doing of which prosecutions are threatened. City Council v. Congdon, 171 Ga. 572, 156 S.E. 212, 1930 Ga. LEXIS 508 (1930); Sosebee v. City of Demorest, 182 Ga. 338, 185 S.E.

330, 1936 Ga. LEXIS 348 (1936); City of Atlanta v. Miller, 191 Ga. 767, 13 S.E.2d 814, 1941 Ga. LEXIS 374 (1941); City of Tifton v. Cooper, 206 Ga. 379, 57 S.E.2d 196, 1950 Ga. LEXIS 346 (1950).

The general rule of this section is not changed by the fact that the prosecution may be based upon an invalid ordinance, in the absence of other circumstances to justify interference by a court of equity. This is true for the reason that the ordinance may be attacked as well by a defense to prosecution as by injunction. Jewel Tea Co. v. City of Cartersville, 185 Ga. 799, 196 S.E. 712, 1938 Ga. LEXIS 529 (1938) (see O.C.G.A. § 9-5-2).

Particularly where ordinance purely penal in nature. — Where the ordinance involved, with reference to the means provided for its enforcement, is purely penal in nature, a court has no power, upon an application for injunction against its enforcement, to inquire into its validity, either upon constitutional or other grounds, and to enjoin the city from attempting to enforce it. If the ordinance is invalid, by reason of its unconstitutionality, or for other cause, such invalidity would be a complete defense to any prosecution that might be instituted for its violation. Staub v. Mayor of Baxley, 211 Ga. 1, 83 S.E.2d 606, 1954 Ga. LEXIS 468 (1954).

Equity may question validity of ordinance where property endangered. — While equity will not ordinarily enjoin a criminal prosecution, yet where repeated prosecutions are threatened under a void municipal ordinance, and the effect of such prosecutions would tend to injure or destroy the property of the person so prosecuted, or deprive the person of the legitimate enjoyment of the person's property, equity will entertain an action to inquire into the validity of the ordinance and enjoin its enforcement. City of Atlanta v. State, 181 Ga. 346, 182 S.E. 184, 1935 Ga. LEXIS 84 (1935); Columbus, Ga. v. Granco, Inc., 240 Ga. 850, 242 S.E.2d 607, 1978 Ga. LEXIS 849 (1978).

Invalidity of ordinance alone not justification for equitable intervention. — The fact that a prosecution may be based on an invalid ordinance does not, in the absence of other circumstances, justify intervention of a court of equity changing the general rule. Spur Distrib. Co. v. Mayor of Americus, 190 Ga. 842, 11 S.E.2d 30, 1940 Ga. LEXIS 590 (1940); City of Bainbridge v. Olan Mills, Inc., 207 Ga. 636, 63 S.E.2d 655, 1951 Ga. LEXIS 487 (1951).

Fact that repeated prosecutions may ensue. — The fact that repeated arrests and prosecutions may be instituted under an invalid ordinance will not, without more, justify equitable interference. Spur Distrib. Co. v. Mayor of Americus, 190 Ga. 842, 11 S.E.2d 30, 1940 Ga. LEXIS 590 (1940); City of Bainbridge v. Olan Mills, Inc., 207 Ga. 636, 63 S.E.2d 655, 1951 Ga. LEXIS 487 (1951).

Mere inconvenience, expense, or apprehension of injury to property rights will not give equity jurisdiction. Neither will mere general allegations of irreparable injury and deprivation of property rights. Walnut Transf. & Storage Co. v. Harrison, 185 Ga. 720, 196 S.E. 432, 1938 Ga. LEXIS 514 (1938); Spur Distrib. Co. v. Mayor of Americus, 190 Ga. 842, 11 S.E.2d 30, 1940 Ga. LEXIS 590 (1940); City of Tifton v. Cooper, 206 Ga. 379, 57 S.E.2d 196, 1950 Ga. LEXIS 346 (1950).

Equity may restrain criminal nuisance at instance of state. — Equity may, in a proper case at the instance of the state, restrain an existing or threatened public nuisance, though the offender is amenable to the criminal laws of the state. American Legion v. Miller, 183 Ga. 754, 189 S.E. 837, 1937 Ga. LEXIS 406 (1937).

Action to enjoin enforcement of ordinance prohibiting hogs in city properly dismissed. — An action to enjoin prosecution for violations of a municipal ordinance prohibiting the keeping of hogs within certain areas of a city falls within the general rule that equity will not inquire into the validity or reasonableness of an ordinance making penal an act for the doing of which prosecutions are threatened. Sosebee v. City of Demorest, 182 Ga. 338, 185 S.E. 330, 1936 Ga. LEXIS 348 (1936).

Action to enjoin enforcement of ordinance regulating plumbers' licenses. — Where action is filed in a court of equity, seeking to enjoin the enforce-

ment of a municipal ordinance, requiring the passing of an examination and the securing of a proficiency card prior to engaging in plumbing work, on the ground that it is unconstitutional, and where it appears that no arrest has been made, no property levied upon, and there has been no other interference with the person or property rights of the petitioner, but that the petition is based upon a threat or mere apprehension of injury to person or property rights, it is proper to refuse an interlocutory injunction. Thomas v. Mayor of Savannah, 209 Ga. 866, 76 S.E.2d 796, 1953 Ga. LEXIS 446 (1953).

Court properly refused to enjoin enforcement of ordinance regulating barbers. — Petition seeking a judgment decreeing city ordinances attempting to regulate barbers and the barber trade unconstitutional, and to enjoin the defendants from further attempts to enforce the ordinances, had as its primary purpose the enjoining of criminal prosecutions, and was properly dismissed on demurrer (now motion to dismiss). Powell v. Hartsfield, 190 Ga. 839, 11 S.E.2d 33, 1940 Ga. LEXIS 591 (1940).

Ordinance fixing beauticians' license and fees. — Where plaintiff brought action attacking validity of an ordinance levying a business license upon beauticians and creating a board vested with the power to fix minimum prices to be charged for services by all beauty shops in that city, an injunction restraining the city from prosecuting petitioner for a violation of the ordinance was properly denied. Ray v. City of Dalton, 191 Ga. 46, 11 S.E.2d 193, 1940 Ga. LEXIS 597 (1940).

Demurrer (now motion to dismiss) was properly sustained to equitable petition brought by owner and operator of beauty shop against city, seeking to enjoin enforcement of the penal provisions of ordinance fixing hours of work and minimum prices to be charged by operators of beauty shops for specified services, and to enjoin threatened criminal prosecutions for violations thereof, where nothing was alleged to take the case out of the general rule that courts of equity will not enjoin a criminal prosecution. Anthony v. City of Atlanta, 190 Ga. 841, 11 S.E.2d 197, 1940 Ga. LEXIS 600 (1940).

Ordinance regulating gasoline station hours. — The judge did not err in refusing to grant an interlocutory injunction seeking to restrain the city from enforcing an ordinance limiting the hours of keeping open filling stations, which provided for prosecution and upon conviction for fine or imprisonment, it not appearing that the plaintiff, a filling station owner and operator, stood in any imminent danger of its property, but at most that it would be subjected to prosecution for violation of its provisions. Speed Oil Co. v. City of Dublin, 193 Ga. 325, 18 S.E.2d 627, 1942 Ga. LEXIS 395 (1942).

Ordinance fixing filling station license fees. — Allegations of petition by filling station operators asking protection from the effect of a city ordinance requiring payment by certain operators for a business license, in addition to the regular business license required of all gasoline filling stations, did not make out such a case as would take it out of the general rule that equitable powers may not be used to restrain criminal prosecution in enforcement of a municipal ordinance alleged to be invalid. Spur Distrib. Co. v. Mayor of Americus, 190 Ga. 842, 11 S.E.2d 30, 1940 Ga. LEXIS 590 (1940).

Interlocutory injunction was properly refused where electrical engineer sought to restrain enforcement of ordinance to regulate supervision of electrical energy and installation of electrical construction and appliances, alleging that certain provisions of the ordinance requiring examination and fixing other conditions were invalid, for constitutional reasons, that its enforcement against the plaintiff would deprive the plaintiff of the plaintiff's right to carry on the plaintiff's profession and to engage in the electrical contracting business, and that the plaintiff had been threatened with arrest and would be prosecuted under the penal provisions of the ordinance for each act in performing the work of an electrical contractor. Corley v. City of Atlanta, 181 Ga. 381, 182 S.E. 177, 1935 Ga. LEXIS 97 (1935).

Injunction would not lie against arrest and prosecution of alleged traveling salesman, and others of the salesman's employees, carrying on the business of taking orders for future delivery, on account of their failure to pay a city li-

cense fee for carrying on business imposed under an allegedly illegal ordinance. Mather Bros. v. City of Dawson, 188 Ga. 450, 4 S.E.2d 165, 1939 Ga. LEXIS 559 (1939).

Violations of the Open Records Act. — Where the director of a county agency alleged that the county board of commissioners violated O.C.G.A. § 50-14-3(6) of the Open Records Act, O.C.G.A. § 50-14-1 et seq., with regard to events at a closed meeting, and sought injunctive relief to prevent future violations, the trial court erred in issuing temporary and permanent injunctions ordering the board to comply with the Open Records Act in the future since the board already had a duty to obey the law and criminal penalties were available for violations of the Act. Wiggins v. Bd. of Comm'rs, 258 Ga. App. 666, 574 S.E.2d 874, 2002 Ga. App. LEXIS 1540 (2002), cert. denied, No. S03C0593, 2003 Ga. LEXIS 334 (Ga. Mar. 28, 2003).

OPINIONS OF THE ATTORNEY GENERAL

Equity will not enjoin prosecution of criminal offenses or criminal or quasi-criminal prosecution. 1957 Ga. Op. Att'y Gen. 66.

Court of equity probably would not enjoin arrest and prosecution of motorist for operating a motor vehicle without a tag, notwithstanding the motorist's contention that the motorist did not owe taxes that the motorist would be required to pay in order to obtain such tag. 1957 Ga. Op. Att'y Gen. 66.

RESEARCH REFERENCES

Am. Jur. 2d.

42 Am. Jur. 2d, Injunctions, §§ 1, 13, 26, 143 et seq.

C.J.S.

43A C.J.S., Injunctions, § 276 et seq.

ALR.

Power to enjoin officers from enforcing liquor laws, 3 A.L.R. 1484.

Injunction against search of premises for liquor, 36 A.L.R. 936.

Jurisdiction, at the instance of governmental agency, to enjoin an act amounting to a crime, 91 A.L.R. 315.

Injunction as available remedy against prosecution or arrest for conducting business or practicing profession without a license, 167 A.L.R. 915.

Preconviction procedure for raising contention that enforcement of penal statute or law is unconstitutionally discriminatory, 4 A.L.R.3d 404.

9-5-3. When court proceedings enjoined; injunctions against sheriffs' sales.

(a) Equity will not enjoin the proceedings and processes of a court of law, absent some intervening equity or other proper defense of which a party, without fault on his part, cannot avail himself at law.

(b) Writs of injunction may be issued by judges of the superior courts to enjoin sales by sheriffs, at any time before a sale takes place, in any proper case made by application for injunction.

History.

Orig. Code 1863, § 3140; Code 1868, § 3152; Code 1873, § 3218; Ga. L. 1878-79, p. 139, § 1; Code 1882, § 3218; Civil Code 1895, § 4915; Civil Code 1910, § 5492; Code 1933, § 55-103.

Cross references.

Venue for actions for injunction to stay judicial proceedings, § 9-10-30.

Law reviews.

For comment, "Antenuptial Agreements

and Divorce in Georgia: Scherer v. Scherer," see 17 Ga. L. Rev. 231 (1982).

JUDICIAL DECISIONS

Principle upon which equity interferes and grants relief is to suppress useless litigation, to prevent multiplicity of suits, to restrain oppressive litigation and to prevent irreparable mischief. Allstate Ins. Co. v. Hill, 218 Ga. 430, 128 S.E.2d 321, 1962 Ga. LEXIS 522 (1962).

Injunction does not lie where complaining party has plain and adequate remedy at law which is as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. Thomason v. Harper Motor Lines, 225 Ga. 312, 168 S.E.2d 147, 1969 Ga. LEXIS 479 (1969).

Where all relief sought can be obtained in the manner provided for by law, it is error for equity to intervene. Thomason v. Harper Motor Lines, 225 Ga. 312, 168 S.E.2d 147, 1969 Ga. LEXIS 479 (1969).

There is no ground for equity's jurisdiction if court at law has full power to grant party all relief to which the party is entitled. Morton v. Gardner, 242 Ga. 852, 252 S.E.2d 413, 1979 Ga. LEXIS 763 (1979).

When, after the holders of an alleged easement filed an action in probate court for removal of an obstruction to the easement, the owners of the alleged servient estate filed an action in superior court for a declaratory judgment, it was error, under O.C.G.A. § 9-5-3(a), for the superior court to consolidate the probate action with the superior court action as, although the probate court could not grant the temporary restraining order the owners sought, they were not entitled to it because they did not give proper notice, and the probate court had jurisdiction to decide the issue of the easement. Morris v. Mullis, 264 Ga. App. 428, 590 S.E.2d 823, 2003 Ga. App. LEXIS 1500 (2003), cert. denied, No. S04C0677, 2004 Ga. LEXIS 306 (Ga. Mar. 29, 2004).

Equity will not enjoin actions at law on grounds which would constitute good legal defense to such action. Printup v. Mitchell, 17 Ga. 558, 1855 Ga. LEXIS 147 (1855).

Injunction not granted merely because legal defense appears adequate to defeat plaintiff. — Where there is a good legal defense, the suit will not be enjoined merely because it appears that if the same facts are proved on the trial, the plaintiff could not recover. Mallory Bros. & Co. v. Cowart, 90 Ga. 600, 16 S.E. 658, 1892 Ga. LEXIS 222 (1892).

It is not necessary that equity intervene to hear and determine issues of laches, estoppel, and unjust enrichment, when it is plain that they can be asserted at law. Crowe v. State Hwy. Dep't, 216 Ga. 464, 117 S.E.2d 158, 1960 Ga. LEXIS 506 (1960).

Equity will not enjoin legal proceeding upon ground that court is without jurisdiction. Hood v. Hood, 132 Ga. 778, 64 S.E. 1074, 1909 Ga. LEXIS 403 (1909).

Since no legal judgment can be rendered upon suit proceeding without service, equity will not enjoin it. Etowah Mfg. & Mining Co. v. Dobbins & Co., 68 Ga. 823, 1882 Ga. LEXIS 127 (1882).

Equity will grant relief against action at law only to prevent injury to complaining party. Etowah Mfg. & Mining Co. v. Dobbins & Co., 68 Ga. 823, 1882 Ga. LEXIS 127 (1882).

It was not error for superior court to grant temporary injunction where necessary party was not party to suit at law pending in city court and since such court, a court of law, was without authority to make the absent necessary party a party. Miles v. Wilson, 212 Ga. 60, 90 S.E.2d 568, 1955 Ga. LEXIS 545 (1955).

Action will not be restrained at instance of strangers to it. Smith v. Cuyler, 78 Ga. 654, 3 S.E. 406, 1887 Ga. LEXIS 46 (1887).

The general rule is that an action at law will not be enjoined at the instance of one

not a party thereto, particularly where the judgment in the action will not preclude the rights of such person. Ferrell v. Wight, 187 Ga. 360, 200 S.E. 271, 1938 Ga. LEXIS 778 (1938).

Defendant in threatened foreclosure suit does not need equity to assert defense that the purchaser has been damaged by the failure of the seller to have an insurance policy on the business transferred to the purchaser. Norris v. Johnson, 209 Ga. 293, 71 S.E.2d 540, 1952 Ga. LEXIS 456 (1952).

Judge erred in enjoining city from levying and enforcing tax fi. fa. where action based on anticipated wrong in view of threats to levy the fi. fa. City of Atlanta v. King, 182 Ga. 276, 184 S.E. 807, 1936 Ga. LEXIS 332 (1936).

Where fi. fa. issued by city is levied on property for failure to pay license fee or tax, owner has plain legal remedy and the superior court should not entertain a petition for injunction to restrain enforcement of the fi. fa., as equity will not enjoin the processes of a court of law, unless the defendant cannot avail defendant's interest at law. City of Nashville v. Lanier Motor Co., 183 Ga. 742, 189 S.E. 532, 1937 Ga. LEXIS 392 (1937).

No injunction against law action on petition for accounting where accounting available at law. — Where it appears from a petition praying for an accounting that there was pending in another court a suit by the corporate defendant against the plaintiff, such court being empowered to render an accounting between the parties, and no special reason being set out why a court of equity should assume jurisdiction for such purpose, equity will not enjoin the proceedings and processes of a court of law in the absence of some intervening equity or other proper defense of which the party, without fault on the party's part, cannot avail at law. Peeples v. Peeples, 193 Ga. 358, 18 S.E.2d 629, 1942 Ga. LEXIS 397 (1942).

No injunction where subtenant may retain possession of premises pending trial of legal issue. — Where if an issue is tried in a court of law, subtenants can stay in possession by the filing of a counter affidavit and giving of a bond, the lessee and the lessee's subtenants are thus adequately protected in a proceeding at law, and there is no cause for enjoining that proceeding. Ehrlich v. Teague, 209 Ga. 164, 71 S.E.2d 232, 1952 Ga. LEXIS 442 (1952).

Institution of separate action where party could be joined in pending action. — Subcontractor, sued by general contractor for breach of contract for construction of house, was unable to justify bringing subsequent action in another county raising the same issues and joining owner of house as party defendant, as the subcontractor could not demonstrate inadequacy of legal proceedings in initial action absent an attempt to join owner of house in that action. Troop Constr. Corp. v. Davis, 249 Ga. 830, 294 S.E.2d 503, 1982 Ga. LEXIS 930 (1982).

Superior court did not err in enjoining wife from prosecuting habeas corpus action before the ordinary (now probate judge) where the superior court acquired jurisdiction before the ordinary. Breeden v. Breeden, 202 Ga. 740, 44 S.E.2d 667, 1947 Ga. LEXIS 523 (1947).

Where defendant could not raise tort counterclaim because of lack of jurisdiction it was error to refuse to enjoin proceedings in the state court so that the issues presented by the facts could be tried together. Norment v. Wofford, 246 Ga. 281, 271 S.E.2d 214, 1980 Ga. LEXIS 1080 (1980).

Unsalableness of property due to temporary depression of market values will not afford ground for injunction restraining sheriff's sale of property levied upon under an execution based on a judgment of foreclosure of a security deed, although it is alleged that certain public improvements are being made that will enhance the value of some of the property, and that there is a reasonable prospect that the depression will end in a short time, when the property may be sold for more than sufficient to pay the debt and leave a substantial balance to the debtor. Kontz v. Citizens & S. Nat'l Bank, 181 Ga. 70, 181 S.E. 764, 1935 Ga. LEXIS 27 (1935).

Stay appropriate. — Where a former employer asserted claims identical to ones that were compulsory counterclaims in earlier suits, the trial court erred in deny-

ing a plea in abatement to all but one of the former employees pursuant to O.C.G.A. §§ 9-2-5 and 9-2-44; the trial court did not abuse its O.C.G.A. § 9-5-8 discretion in staying two prior cases pursuant to O.C.G.A. §§ 9-5-1 and 9-5-3. Smith v. Tronitec, Inc., 277 Ga. 210, 586 S.E.2d 661, 2003 Ga. LEXIS 790 (2003).

RESEARCH REFERENCES

Am. Jur. 2d.

42 Am. Jur. 2d, Injunctions, § 156 et seq., 177 et seq.

Am. Jur. Pleading and Practice Forms.

14 Am. Jur. Pleading and Practice Forms, Injunctions, § 4.

C.J.S.

43A C.J.S., Injunctions, § 93 et seq.

ALR.

Right to enjoin prosecution of civil action because of matters arising pendente lite, 3 A.L.R. 1026.

Injunction against bringing or prosecuting action in another state or country because of the danger that result would be different from that which would be reached in the jurisdiction whose law is the proper governing law as regards matters of substance, 69 A.L.R. 591.

Power of equity upon ground of avoiding multiplicity of suits to enjoin prosecution of independent actions at law against same defendant by different persons on contracts, 90 A.L.R. 554.

Right to enjoin an action in another state in respect of matters adjudicated in local action or proceeding, 91 A.L.R. 570.

Right to enjoin prosecution of action in court of limited jurisdiction because of counterrights or claims in behalf of defendant which are beyond such limited jurisdiction, 125 A.L.R. 337.

9-5-4. Grounds for restraint of trespass.

Equity will not interfere to restrain a trespass, unless the injury is irreparable in damages, or the trespasser is insolvent, or other circumstances exist which, in the discretion of the court, render the interposition of the writ necessary and proper, among which shall be the avoidance of circuity and multiplicity of actions.

History.

Laws 1842, Cobb's 1851 Digest, p. 528.; Code 1863, § 3141; Code 1868, § 3153; Code 1873, § 3219; Code 1882, § 3219; Civil Code 1895, § 4916; Civil Code 1910, § 5493; Code 1933, § 55-104.

JUDICIAL DECISIONS

"Irreparable injury" defined. — Irreparable injury, is one which from the nature of the case, or the circumstances surrounding the person injured, or the financial condition of the trespasser, cannot be readily, adequately, and completely compensated for in money. Camp v. Dixon, Mitchell & Co., 112 Ga. 872, 38 S.E. 71, 1901 Ga. LEXIS 119 (1901).

Injury which destroys or renders entirely worthless property of complainant is irreparable. Camp v. Dixon, Mitchell & Co., 112 Ga. 872, 38 S.E. 71, 1901 Ga. LEXIS 119 (1901).

Injury is irreparable when it cannot be measured by pecuniary standards. Central of Ga. Ry. v. Americus Constr. Co., 133 Ga. 392, 65 S.E. 855, 1909 Ga. LEXIS 222 (1909); Colter v. Livingston, 154 Ga. 401, 114 S.E. 430, 1922 Ga. LEXIS 376 (1922).

Damages not irreparable where set out in fixed monetary amount. — Where the damages are set out in detail and fixed in money, there is no merit in contention that damage is irreparable. Ocmulgee Lumber Co. v. Mitchell, 112 Ga. 528, 37 S.E. 749, 1900 Ga. LEXIS 228 (1900).

Insolvency of trespasser is not es-

sential if the damage is irreparable. Lowe v. Holbrook, 71 Ga. 563, 1883 Ga. LEXIS 222 (1883).

Injunction may be sought only where there is manifest necessity therefor to prevent irreparable injury to some right of the plaintiff, by reason of impending acts or conduct of another. Fleisher v. Duncan, 195 Ga. 309, 24 S.E.2d 15, 1943 Ga. LEXIS 474 (1943).

Court properly denied injunction where no evidence of insolvency or irreparable injury. — Where no evidence was produced at an interlocutory hearing to support either an allegation of insolvency or of irreparable injury, the superior court did not err in refusing to grant an interlocutory injunction. Shockley v. Garner, 211 Ga. 271, 85 S.E.2d 412, 1955 Ga. LEXIS 295 (1955).

Injunction to restrain trespass will be denied where injury is reparable in damages, unless trespass is continuing. Daughtrey v. C & D Sportswear Corp., 239 Ga. 482, 238 S.E.2d 37, 1977 Ga. LEXIS 1218 (1977).

Since there was no evidence of a continuing trespass, and since the housing authority had an adequate remedy at law, summary judgment granting an injunction barring entry on the housing authority's property by a husband and wife was reversed; courts of equity jurisdiction will not intervene to allay mere apprehensions of injury, but only where the injury is imminent and irreparable and there is no adequate remedy at law. Strange v. Hous. Auth. of Summerville, 268 Ga. App. 403, 602 S.E.2d 185, 2004 Ga. App. LEXIS 931 (2004).

Equity will, by injunction, repress continuous trespass. Gainesville M.R.R. v. Tyner, 204 Ga. 535, 50 S.E.2d 108, 1948 Ga. LEXIS 465 (1948); Smith v. Wilkinson, 208 Ga. 489, 67 S.E.2d 698, 1951 Ga. LEXIS 418 (1951); Duke v. Wilder, 212 Ga. 26, 90 S.E.2d 12, 1955 Ga. LEXIS 530 (1955).

If repeated acts of wrong are done or threatened, so as to make the trespass continuous, they may be repressed by injunction. Martin v. Pattillo, 126 Ga. 436, 55 S.E. 240, 1906 Ga. LEXIS 399 (1906); Caverly v. Stovall, 143 Ga. 706, 85 S.E. 844 (1915).

Mere repetition of same trespass is insufficient, provided the case is abundantly susceptible of compensation in damages. Hatcher v. Hampton, 7 Ga. 49, 1849 Ga. LEXIS 92 (1849).

It was error for trial judge to deny injunctive relief where evidence showed repeated acts of wrongful interference by former owners of the land. Danielsville & Comer Tel. Co. v. Sanders, 209 Ga. 144, 71 S.E.2d 226, 1952 Ga. LEXIS 439 (1952).

Where defendant is not threatening to do other acts continuing trespass, refusal of judge to grant injunction will not be controlled. Ocmulgee Lumber Co. v. Mitchell, 112 Ga. 528, 37 S.E. 749, 1900 Ga. LEXIS 228 (1900).

While injunctions will not be granted to restrain completed acts, where a completed act amounts to continuing trespass, court may grant injunction restraining the defendant from a continuing violation of the rights of the plaintiff. Turner v. Standard Oil Co., 220 Ga. 498, 140 S.E.2d 208, 1965 Ga. LEXIS 547 (1965).

Injunction to restrain trespass proper where legal remedies inadequate. — While ordinarily a court of equity will not interfere to prevent a mere trespass, but as a general rule will leave the injured party to that party's legal remedy, if there is anything special in the case which renders the remedy at law inadequate or incomplete, such as, for example, when the nature of the alleged injury makes it impossible to prove the damage which would result from the trespass or when the injury complained of is such as to constitute a continuous trespass, such acts may be repressed by an injunction. City of Blue Ridge v. Kiker, 190 Ga. 206, 9 S.E.2d 253, 1940 Ga. LEXIS 469 (1940).

Mere apprehension of injury will not be sufficient to authorize issuance of injunction, where no facts are alleged to show that the apprehended injury would be irreparable in damages. Slaughter v. Land, 190 Ga. 491, 9 S.E.2d 754, 1940 Ga. LEXIS 503 (1940).

While a mere apprehension of injury will not justify equitable relief, this does not mean that one is barred from seeking

such relief until after the injury is inflicted. Newport Timber Corp. v. Floyd, 247 Ga. 535, 277 S.E.2d 646, 1981 Ga. LEXIS 786 (1981).

If injunction is sought to prevent circuity of actions, all parties to circle of actions should be enjoined, and not one only. Wells v. Rountree & Co., 117 Ga. 839, 45 S.E. 215, 1903 Ga. LEXIS 361 (1903).

Injunction will not issue to restrain trespass at suit of stranger to title or possession, even as against a wrongdoer. Mayor of Forsyth v. Hooks, 182 Ga. 78, 184 S.E. 724, 1936 Ga. LEXIS 287 (1936).

Plaintiff must show title or actual possession to maintain action for continuing trespass. — To maintain action for an injunction to prevent the defendant from committing a continuing trespass on certain lands, it was necessary for the plaintiff to show title in the plaintiff or actual possession of that portion of the tract upon which the alleged wrong was being committed. Tolnas v. Pope, 212 Ga. 50, 90 S.E.2d 420, 1955 Ga. LEXIS 542 (1955).

Mere possession without prescriptive rights insufficient to permit injunctive relief. — Where one in possession of land has no title, and that person's only relationship to the property is the person's possession acquired under circumstances such that no prescription could arise therefrom, equity will not, at the instance of one merely in possession of land, afford affirmative relief such as the grant of an injunction against interference with possession. Mayor of Forsyth v. Hooks, 182 Ga. 78, 184 S.E. 724, 1936 Ga. LEXIS 287 (1936).

Trespass may be enjoined by person in possession under color of title or in bare possession where trespasser is insolvent. Flannery & Co. v. Hightower, 97 Ga. 592, 25 S.E. 371, 1895 Ga. LEXIS 534 (1895); Powell v. Waits, 147 Ga. 619, 95 S.E. 214, 1918 Ga. LEXIS 72 (1918).

Acts of agent enjoined where continuing mismanagement of corporation endangers stock value. — Where the acts of the agent, in mismanaging the corporation, were continuous, still threatened, and directly affected the value of the stock, whether the alleged acts be deemed trespasses or waste, it was unnecessary to go further and allege that the defendant was insolvent, since equity is empowered to enjoin such acts, where they would otherwise be likely to give rise to multiplicity of separate suits by individual heirs against the agent. Shingler v. Shingler, 184 Ga. 671, 192 S.E. 824, 1937 Ga. LEXIS 617 (1937).

Damage is irreparable where claimant of judgment has property levied on contrary to the wishes of the true owner. Colter v. Livingston, 154 Ga. 401, 114 S.E. 430, 1922 Ga. LEXIS 376 (1922).

Where purchaser with notice at judicial sale is seeking to eject family which has applied for homestead, damage is irreparable and if the lower court abuses discretion in dissolving injunction too soon, the appellate court will interfere. Kilgore v. Beck, 40 Ga. 293, 1869 Ga. LEXIS 88 (1869).

Injunction will lie for owner of land bought by a county at tax sale to prevent county from reselling before expiration of the owner's redemption period where it is alleged that the county is threatening to sell the land in small tracts to numerous purchasers while the right of redemption still exists, which if done would subject the owner to a multiplicity of suits with such purchasers. Newsom v. Dade County, 177 Ga. 612, 171 S.E. 145, 1933 Ga. LEXIS 370 (1933).

It was proper under this section to enjoin widow from taking land as dower where husband had made binding contract of sale but died before executing deed. Webb v. Harp, 38 Ga. 641, 1869 Ga. LEXIS 285 (1869) (see O.C.G.A. § 9-5-4).

Where insolvent claimant is evicting owner under claim of purchase, equity will intervene. Justice v. Aikin, 104 Ga. 714, 30 S.E. 941, 1898 Ga. LEXIS 407 (1898).

Remedy of injunction is available to restrain landlord from interfering with possession of a tenant during the tenancy, when the damages are of such a nature as to be incapable of accurate com-

putation. Deriso v. Castleberry, 202 Ga. 174, 42 S.E.2d 356, 1947 Ga. LEXIS 362 (1947).

Mere apprehension of eviction by landlord insufficient cause for injunction. — Where there is no allegation of insolvency of the landlord, or no attempt to remove the tenant forcibly or without resort of the courts, equity will not afford its extraordinary remedy by injunction on the account of an apprehension by the tenant of an unauthorized eviction by the landlord. Whitson v. City of Atlanta, 177 Ga. 666, 170 S.E. 888, 1933 Ga. LEXIS 386 (1933).

Where city shuts off water supply from sprinkler system fire protector, damage is irreparable. Dodd v. City of Atlanta, 154 Ga. 33, 113 S.E. 166, 1922 Ga. LEXIS 301 (1922).

Putting trash, filth and garbage upon land of another which constitutes nuisance is irreparable damage. Lowe v. Holbrook, 71 Ga. 563, 1883 Ga. LEXIS 222 (1883).

Cutting of timber may be enjoined, though defendant is solvent, where there are frequent acts of trespass, or the circumstances indicate that the trespasses will recur from day to day. Slaughter v. Land, 190 Ga. 491, 9 S.E.2d 754, 1940 Ga. LEXIS 503 (1940); Waycross Military Ass'n v. Hiers, 209 Ga. 812, 76 S.E.2d 486, 1953 Ga. LEXIS 419 (1953).

If damages irreparable. — An injunction may issue to restrain the cutting of timber where the damages would be irreparable, or where the trespass is a continuing one. Prescott v. Herring, 212 Ga. 571, 94 S.E.2d 417, 1956 Ga. LEXIS 448 (1956).

Fact that taking oysters from bed may be crime does not prevent owner from enjoining insolvent trespassers. Jones v. Oemler, 110 Ga. 202, 35 S.E. 375, 1900 Ga. LEXIS 346 (1900).

Right of action to enjoin trespass vested in heirs of deceased landowner. — The prima facie right to bring action to enjoin a trespass upon land owned and in their possession is in plaintiffs as heirs of individual who owned the land at the time of death. Prescott v. Herring, 212 Ga. 571, 94 S.E.2d 417, 1956 Ga. LEXIS 448 (1956).

Petition inadequate where statutory grounds for restraint of trespass not alleged. — Where a petition does not allege facts showing irreparable damages nor any trespass by the defendant upon any lands claimed by the petitioner, nor that the defendant is insolvent, and does not show why a court of equity should take jurisdiction in order to avoid multiplicity of action, the petition failed to state a cause of action for any equitable relief. Shobkov v. Pennington, 217 Ga. 315, 122 S.E.2d 87, 1961 Ga. LEXIS 437 (1961).

Mere averment that damages are irreparable is a conclusion of pleader and is insufficient. Burrus v. City of Columbus, 105 Ga. 42, 31 S.E. 124, 1898 Ga. LEXIS 444 (1898).

Petition should set forth facts so that court may determine whether damages would be of an irreparable character. It is therefore necessary to determine whether, under the averments of the petition, such a case is made as would authorize a court of equity to interpose and grant the injunction prayed for. Huxford v. Southern Pine Co., 124 Ga. 181, 52 S.E. 439, 1905 Ga. LEXIS 684 (1905).

Allegation that defendant is insolvent is assertion of ultimate fact, and not legal conclusion. Shockley v. Garner, 211 Ga. 271, 85 S.E.2d 412, 1955 Ga. LEXIS 295 (1955).

Petition to enjoin trespass properly dismissed where land inadequately described. — A petition to enjoin an alleged trespass on realty, which fails to describe the land involved with that degree of certainty which will establish the identity of the land, is insufficient and will be dismissed on general demurrer (now motion to dismiss). Laurens County Bd. of Educ. v. Stanley, 187 Ga. 389, 200 S.E. 294, 1938 Ga. LEXIS 784 (1938).

It was not error to charge, in action to enjoin trespass, that petitioner must recover upon the petitioner's proven title and not upon the weakness of the defendant's title. McDonald v. Wimpy, 206 Ga. 270, 56 S.E.2d 524, 1949 Ga. LEXIS 454 (1949).

RESEARCH REFERENCES

Am. Jur. 2d.
42 Am. Jur. 2d, Injunctions, § 53 et seq.
C.J.S.
43A C.J.S., Injunctions, § 132 et seq.
ALR.
Avoidance of multiplicity of suits as ground of jurisdiction in equity of a suit by one out of possession to quiet title against persons in possession of different portions of the land in severalty, 30 A.L.R. 109.

Injunction against repeated or continuing trespasses on real property, 32 A.L.R. 463; 60 A.L.R.2d 310.

Injunction against removal of, or interference with, remains interred in burial lot, 33 A.L.R. 1432.

Interference with easement of light, air, or view by structure in street or highway as ground for injunction at instance of abutting owner, 40 A.L.R. 1321.

Owner or keeper of trespassing dog as subject to injunction or damages, 107 A.L.R. 1323.

Tort damaging real property as creating a single cause of action or multiple causes of action in respect of different portions of land of the same owner affected thereby, 117 A.L.R. 1216.

Injunction in respect of property as covering action for rent or for use and occupation, 155 A.L.R. 844.

Right of private sewerage system owner to enjoin unauthorized persons from using facilities, 76 A.L.R.2d 1329.

Propriety of injunctive relief against diversion of water by municipal corporation or public utility, 42 A.L.R.3d 426.

9-5-5. When waste enjoined.

Equity will not interfere by injunction to restrain waste when the petitioner's title is not clear. Such relief shall be granted only when the title is free from dispute.

History.
Civil Code 1895, § 4917; Civil Code 1910, § 5494; Code 1933, § 55-105.
History of Section.
The language of this Code section is derived in part from the decision in Nethery v. Payne, 71 Ga. 374 (1883).

JUDICIAL DECISIONS

Plaintiff must show title. — If the plaintiff should show title and irreparable damage, equity would interfere in the plaintiff's behalf to restrain a nuisance, trespass, etc., when defendant fails to show any fact that would break down or impeach plaintiff's title. Murphey v. Harker, 115 Ga. 77, 41 S.E. 585, 1902 Ga. LEXIS 308 (1902).

Need not show insolvency or irreparable damage to enjoin waste. — Unlike trespass under former Civil Code 1895, § 4916 (see O.C.G.A. § 9-5-4), the plaintiff did not have to show insolvency or irreparable injury to enjoin waste. Brigham v. Overstreet, 128 Ga. 447, 57 S.E. 484, 1907 Ga. LEXIS 139 (1907).

Injunction improper where plaintiff lacks title. — Injunction will not issue at the instance of a stranger to the title or possession to restrain trespass and stay waste, even against a wrongdoer. Flannery & Co. v. Hightower, 97 Ga. 592, 25 S.E. 371, 1895 Ga. LEXIS 534 (1895).

If the plaintiff has no title the plaintiff can suffer no injury, and the plaintiff is not entitled to any aid, and equity will not interfere with the enjoyment of the party

in possession. Murphey v. Harker, 115 Ga. 77, 41 S.E. 585, 1902 Ga. LEXIS 308 (1902).

RESEARCH REFERENCES

Am. Jur. 2d.
78 Am. Jur. 2d, Waste, § 27 et seq.
C.J.S.
93 C.J.S., Waste, §§ 14, 15, 25 et seq.
ALR.
Right of mortgagee to maintain suit to stay waste, 48 A.L.R. 1156.
Right of holder of tax or other lien on real property, other than mortgage, to restrain waste, 103 A.L.R. 384.
Rights and remedies of owner or lessee of oil or gas land or mineral or royalty interest therein, in respect of waste of oil or gas through operations on other lands, 4 A.L.R.2d 198.
Right of contingent remainderman to maintain action for damages for waste, 56 A.L.R.3d 677.

9-5-6. Injunction against debtors not generally available to creditors.

Creditors without liens may not, as a general rule, enjoin their debtors from disposing of property nor obtain injunctions or other extraordinary relief in equity.

History.
Civil Code 1895, § 4918; Civil Code 1910, § 5495; Code 1933, § 55-106.
History of Section.
The language of this Code section is derived in part from the decision in Kimbrell v. Walters, 86 Ga. 99, 12 S.E. 305 (1890).

JUDICIAL DECISIONS

Creditors without lien cannot enjoin their debtors from disposing of property, nor obtain injunction or other extraordinary relief in equity. Cubbedge & Hazelhurst v. Adams, 42 Ga. 124, 1871 Ga. LEXIS 19 (1871); S. Mayer & Co. v. Wood, March & Co., 56 Ga. 427, 1876 Ga. LEXIS 310 (1876); Kimbrell v. Walters, 86 Ga. 99, 12 S.E. 305, 1890 Ga. LEXIS 190 (1890); Smith v. Manning, 155 Ga. 209, 116 S.E. 813, 1923 Ga. LEXIS 40 (1923); Tanner Grocery Co. v. Stewart, 157 Ga. 412, 121 S.E. 416, 1924 Ga. LEXIS 63 (1924); Hermann v. Mobley, 172 Ga. 380, 158 S.E. 38, 1931 Ga. LEXIS 99 (1931); Newton v. Newton, 178 Ga. 192, 172 S.E. 462, 1934 Ga. LEXIS 6 (1934).

Rights of creditors. — Equity will not enjoin a defendant from the free disposal of the defendant's property on the application of a creditor who sets up no lien upon or title to the property, and who presents no other equity than the creditor's simple fear that when the creditor reduces the creditor's claim to judgment, the creditor will not be able to find property on which to levy it. Dortic v. Dugas, 52 Ga. 231, 1874 Ga. LEXIS 265 (1874); Fullerton Cotton Mills, Inc. v. Butler, 208 Ga. 521, 67 S.E.2d 722, 1951 Ga. LEXIS 425 (1951).

A general creditor cannot enjoin the receiver of a court from paying over to the creditor's debtor the fund held by the debtor until such creditor can obtain a judgment. Spence v. Solomons Co., 129 Ga. 31, 58 S.E. 463, 1907 Ga. LEXIS 297 (1907).

Creditors who have not reduced their demands to judgment, and who have no lien otherwise, cannot, as a general rule, enjoin their debtors from selling or dispos-

ing of their property. Keeter v. Bank of Ellijay, 190 Ga. 525, 9 S.E.2d 761, 1940 Ga. LEXIS 506 (1940).

Although creditor may in one action proceed for judgment on a debt and to set aside a fraudulent conveyance made by a debtor, still, under this section, creditors who have not reduced their demands to judgment, and who have no lien otherwise, cannot, as a general rule, enjoin their debtors from selling or disposing of their property. Lawrence v. Lawrence, 196 Ga. 204, 26 S.E.2d 283, 1943 Ga. LEXIS 320 (1943) (see O.C.G.A. § 9-5-6).

As a general rule, creditors without a lien may not enjoin their debtors from disposing of property or obtain other extraordinary relief in equity, such as the appointment of a receiver. Irwin v. Willis, 202 Ga. 463, 43 S.E.2d 691, 1947 Ga. LEXIS 479 (1947).

Where defendant, acting as agent for a community action program, negotiated for the purchase of five buses from plaintiff, the program paid defendant $111,176, defendant paid $10,000 to plaintiff before delivery of the buses, and, at delivery, gave plaintiff a check for $94,322 which was dishonored by the drawee bank, and before trial the trial court ordered defendant to pay the sum of $94,322 into the court registry and found the defendant in contempt of court for failing to pay the funds pursuant to the court's order, the trial court's order of payment of a debt was contrary to principles of equity, as the evidence presented did not fall within the bounds of an exception to O.C.G.A. § 9-5-6. Prosser v. Hancock Bus Sales, Inc., 256 Ga. 399, 349 S.E.2d 460, 1986 Ga. LEXIS 890 (1986).

Creditor by note not reduced to judgment has no lien. Virginia-Carolina Chem. Co. v. Provident Sav. Life Assurance Soc'y, 126 Ga. 50, 54 S.E. 929, 1906 Ga. LEXIS 311 (1906).

Creditor holding judgment lien is not prevented from enjoining debtor from disposing of property. Grossman v. Glass, 239 Ga. 319, 236 S.E.2d 657, 1977 Ga. LEXIS 897 (1977).

Creditors holding "no return" executions not entitled to injunction. — Creditors holding "no return" executions, which might have been levied but were not, were not entitled to injunction and appointment of receiver. Dodge v. Pyrolusite Manganese Co., 69 Ga. 665, 1882 Ga. LEXIS 289 (1882); Scott v. Jones, 74 Ga. 762, 1885 Ga. LEXIS 394 (1885); Barnesville Mfg. Co. v. Schofield's Sons Co., 118 Ga. 664, 45 S.E. 455, 1903 Ga. LEXIS 654 (1903); McKenzie v. Thomas, 118 Ga. 728, 45 S.E. 610, 1903 Ga. LEXIS 668 (1903); Spence v. Solomons Co., 129 Ga. 31, 58 S.E. 463, 1907 Ga. LEXIS 297 (1907); Atlanta & C. Ry. v. Carolina Portland Cement Co., 140 Ga. 650, 79 S.E. 555, 1913 Ga. LEXIS 211 (1913); Wilson v. Ward, 149 Ga. 325, 100 S.E. 205, 1919 Ga. LEXIS 234 (1919); Ayers v. Claridy, 149 Ga. 498, 101 S.E. 292, 1919 Ga. LEXIS 289 (1919); Mackie Constr. Co. v. Smith, 150 Ga. 97, 103 S.E. 414, 1920 Ga. LEXIS 54 (1920); Battle v. Royster Guano Co., 153 Ga. 122, 111 S.E. 656, 1922 Ga. LEXIS 31 (1922).

Laborer's lien is sufficient to support injunction. Orton v. Madden, 75 Ga. 83, 1885 Ga. LEXIS 73 (1885).

Where creditor has lien on only part of property, injunction can only be had against property subject thereto. Dennard v. Farmers' Merchants Bank, 149 Ga. 590, 101 S.E. 672, 1919 Ga. LEXIS 335 (1919).

There are exceptions to general rule. — While, as a general rule, creditors without lien cannot enjoin debtors from disposing of property, there are exceptions where the circumstances render the rule inapplicable. Goodroe v. C.L.C. Thomas Whse., 185 Ga. 399, 195 S.E. 199, 1938 Ga. LEXIS 443 (1938).

Former Civil Code 1910, § 5479 (see O.C.G.A. § 9-8-3) (appointment of receiver to protect assets of debtor), was exception to rule of former Civil Code 1910, § 5495 (see O.C.G.A. § 9-5-6) which stated that creditors without liens generally cannot enjoin their debtors from disposing of property. Isaac Silver & Bros. Co. v. Kalmon, 175 Ga. 244, 165 S.E. 434, 1932 Ga. LEXIS 227 (1932).

Exception where property fraudulently obtained or transferred. — An exception to the general rule is where insolvent debtor is fraudulently transferring the debtor's property to one in complicity with the debtor, who is disposing of

the property, or where property is obtained by fraudulent representations. Sands v. Marburg, 36 Ga. 534, 1867 Ga. LEXIS 85 (1867); Albany & Renssellaer Iron & Steel Co. v. Southern Agric. Works, 76 Ga. 135, 1886 Ga. LEXIS 2 (1886); Lawrence v. Lawrence, 196 Ga. 204, 26 S.E.2d 283, 1943 Ga. LEXIS 320 (1943); Peoples Loan Co. v. Allen, 199 Ga. 537, 34 S.E.2d 811, 1945 Ga. LEXIS 342 (1945); Mitchell v. Hayden, Stone, Inc., 225 Ga. 711, 171 S.E.2d 280, 1969 Ga. LEXIS 623 (1969).

Where goods purchased are being assigned to person with notice who is disposing of them, equity will interfere. Cohen & Co. v. Morris & Co., 70 Ga. 313, 1883 Ga. LEXIS 329 (1883).

A case for equitable interference is made on part of the seller, notwithstanding there is no lien or judgment where one purchases property on account by fraudulent representations, gives mortgage on it to third person, and the goods are being sold under it. Wolfe v. Claflin, 81 Ga. 64, 6 S.E. 599, 1888 Ga. LEXIS 63 (1888).

Trial court's order directing that funds be transferred into the registry of the court to ensure that the funds would be available should certain parties prevail in a lawsuit violated O.C.G.A. § 9-5-6. Patel v. Alpha Inv. Properties, Inc., 265 Ga. 597, 458 S.E.2d 476, 1995 Ga. LEXIS 501 (1995).

An employer whose employee had opened a competing business and taken the employer's trade secrets and confidential information had an adequate and complete remedy at law because it could recover money damages from the employee if the employee removed funds from the employee's competing business that rightfully belonged to the employer. Therefore, under O.C.G.A. §§ 9-5-6 and 23-1-4, a trial court erred in requiring the employee to deposit the business's funds into the registry of the court. Coleman v. Retina Consultants, P.C., 286 Ga. 317, 687 S.E.2d 457, 2009 Ga. LEXIS 700 (2009).

In rem proceeding against realty of nonresident debtor attempting to hinder creditor. — A court of equity will seize real estate located in this state, owned by a nonresident thereof, at the instance of a resident creditor of such debtor, and will cancel deeds by such debtor to a nonresident made to hinder, delay, and defraud the creditor, and will sell the property and apply the proceeds to the payment of debts of the nonresident debtor due to the resident creditor, although the creditor has no lien on such real estate or present interest therein. Reid v. Gordon, 173 Ga. 168, 159 S.E. 708, 1931 Ga. LEXIS 289 (1931).

Cancellation of fraudulent conveyances. — Petition brought against a judgment debtor and other defendants, alleging that they entered into a conspiracy in bad faith to hinder, delay, or defraud the petitioner in the collection of the petitioner's two judgments, and that in pursuance of such conspiracy various properties of the judgment debtor were secreted and fraudulent conveyances were made, and seeking to set aside such fraudulent conveyances and the appointment of a receiver and other relief, stated a cause of action against the four defendants. Peoples Loan Co. v. Allen, 199 Ga. 537, 34 S.E.2d 811, 1945 Ga. LEXIS 342 (1945).

Petition charging that defendant husband was seeking to place his property where it could not be reached by his wife (his judgment creditor) presented a situation where upon proof a court could grant prayers for setting aside alleged fraudulent conveyance and transfer to out-of-state resident, as well as alleged fraudulent claims of lien for attorneys' fees, and for appointment of a receiver to take charge of defendant's assets and, under the direction of the court, sell enough to pay the petitioner the amount now due under her two judgments. Peoples Loan Co. v. Allen, 199 Ga. 537, 34 S.E.2d 811, 1945 Ga. LEXIS 342 (1945).

Conveyance to spouse to defraud creditors will not be restrained at instance of general creditors, although the court should retain jurisdiction and investigate in the final hearing the whole case, and decide upon all the equities arising thereon. Turnipseed v. Kentucky Wagon Co., 97 Ga. 258, 23 S.E. 84, 1895 Ga. LEXIS 356 (1895); Logue & Co. v. Gardner, 152 Ga. 356, 110 S.E. 25, 1921 Ga. LEXIS 90 (1921); Lowry Co. v. Kilpatrick, 157 Ga. 91, 120 S.E. 772, 1923 Ga. LEXIS 369 (1923).

Creditors of dissolved corporation. — Where a corporation is dissolved, and

there are creditors having claims which they are entitled to have satisfied out of the assets of the corporation, a creditor of the corporation may invoke the aid of a court of equity to aid the creditor to enforce the creditor's claim so that the creditor may collect what is due the creditor or that proportion of the amount due the creditor in view of the comparative amount of the assets of the corporation and the claims of creditors. Elliot v. Macauley, 177 Ga. 96, 169 S.E. 358, 1933 Ga. LEXIS 123 (1933).

Receiver properly denied. — Lender's contention that, if the lender was not a shareholder in the restaurant business at issue, then the lender was a creditor of the business, did not furnish any additional basis for the appointment of a receiver, where the lender had made no showing of insolvency, waste, mismanagement, or other danger of loss or injury. Patel v. Patel, 280 Ga. 292, 627 S.E.2d 21, 2006 Ga. LEXIS 150 (2006).

Lien on school district draft on taxes collected. — Where creditor with lien title or interest in property had a right to equitable relief where bank loaned money to school district for current expenses and in return school district gave a draft on taxes collected, to be paid out of district taxes, for this was an equitable assignment. Baggerly v. Bainbridge State Bank, 160 Ga. 556, 128 S.E. 766, 1925 Ga. LEXIS 208 (1925).

General creditor cannot enjoin mortgage on ground that it was given on after-acquired property. Peyton v. Lamar, 42 Ga. 131, 1871 Ga. LEXIS 20 (1871).

General rule not applicable where claim based on contract of settlement. — Principle that creditors without a lien may not as a general rule obtain injunction or other extraordinary relief in equity was inapplicable to action for specific performance, injunction, and receivership where, plaintiff did not sue as a creditor, but alleged that all accounts between the parties had been settled, and that by virtue of a contract of settlement the plaintiff was entitled to a certain parity check upon its issue and delivery to the defendant. Reid v. McRae, 190 Ga. 323, 9 S.E.2d 176, 1940 Ga. LEXIS 457 (1940).

Guarantee who took no security for guarantor's undertaking could not have receiver appointed before the breach for there is only possibility of breach. Guilmartin v. Middle Ga. & A. Ry., 101 Ga. 565, 29 S.E. 189, 1897 Ga. LEXIS 269 (1897).

Insured creditor cannot enjoin debtor from transferring or encumbering property because of breach of promise to give a specific security for the loan of money. Authur v. Bank of Ball Ground, 146 Ga. 719, 92 S.E. 205, 1917 Ga. LEXIS 469 (1917).

Homestead waiver note. — Where a creditor has a homestead waiver note not reduced to judgment, and the debtor goes into bankruptcy where homestead is set aside, the creditor may obtain judgment in equity and have a receiver appointed, since bankruptcy prevents action at law. Bell v. Dawson Grocery Co., 120 Ga. 628, 48 S.E. 150, 1904 Ga. LEXIS 659 (1904).

Revivor of dormant judgment. — Where creditors are lienholders by virtue of a judgment of the superior court reviving a dormant judgment, such lien dates from the date of the judgment of revival. This being so, the case predicated on the judgment reviving the dormant judgment does not fall within the general rule as stated in this section. Carter v. Martin, 165 Ga. 890, 142 S.E. 277, 1928 Ga. LEXIS 85 (1928) (see O.C.G.A. § 9-5-6).

RESEARCH REFERENCES

Am. Jur. 2d.

21 Am. Jur. 2d, Creditors' Bills, § 4 et seq. 42 Am. Jur. 2d, Injunctions, § 24.

C.J.S.

43A C.J.S., Injunctions, § 120 et seq.

9-5-7. When breach of contract for personal services enjoined.

Generally an injunction will not issue to restrain the breach of a

contract for personal services unless the services are of a peculiar merit or character and cannot be performed by others.

History.

Civil Code 1895, § 4919; Civil Code 1910, § 5496; Code 1933, § 55-107.

History of Section.

The language of this Code section is derived in part from the decision in Burney v. Ryle & Co., 91 Ga. 701, 17 S.E. 986 (1893).

JUDICIAL DECISIONS

Under this section, services must be individual and peculiar because of special merit or unique character, for otherwise the remedy at law would be adequate; services involving exercise of power of the mind, as of writers or performers, which are peculiarly and largely intellectual, may form class in which court would interfere. Hammond v. Georgian Co., 133 Ga. 1, 65 S.E. 124, 1909 Ga. LEXIS 129 (1909) (see O.C.G.A. § 9-5-7).

Injunction is proper to prevent illegal combination from enforcing contract of personal services to hurt employer. Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 509, 50 S.E. 353, 1905 Ga. LEXIS 248 (1905).

Restrictive covenants ancillary to personal services contract distinguished. — There is a broad distinction between a breach of contract to render personal services and a violation of a restrictive covenant ancillary to such contract by which the employee agrees not to engage in a competitive business either for himself or in behalf of another after the contract with his employer has been terminated. In the former case injunction will not issue to restrain the breach of the contract, unless the services required thereby are of peculiar merit or character; while in the latter case it is immaterial that the services, which the employee has contracted not to perform for himself or another, may not be of peculiar merit or character. National Linen Serv. Corp. v. Clower, 179 Ga. 136, 175 S.E. 460, 1934 Ga. LEXIS 235 (1934).

Advertising solicitor for newspaper is not of such special skill as to modify injunction. Hammond v. Georgian Co., 133 Ga. 1, 65 S.E. 124, 1909 Ga. LEXIS 129 (1909).

Franchise contract. — A contract by merchant with manufacturer to sell its products, and no other, providing that a breach by either party would give the other a right to release, cannot be enforced by this section where merchant sells for another. Paxson v. Butterick Publishing Co., 136 Ga. 774, 71 S.E. 1105, 1911 Ga. LEXIS 218 (1911) (see O.C.G.A. § 9-5-7).

Salesman filling orders taken for one employer with products of another. — Where a salesman who is familiar with customers makes sales and then becomes employed by a rival company and is filling orders taken for first company with product of rival company, the salesman will be enjoined. Kinney v. Scarbrough Co., 138 Ga. 77, 74 S.E. 772, 1912 Ga. LEXIS 196 (1912).

Interlocutory injunction properly denied. — Trial court did not err in denying a motion filed by a funding member of limited liability companies (LLCs) for an interlocutory injunction to enjoin the manager of the LLCs for violating the member's exclusive right under operating agreements to manage apartment complexes because the member failed to show that there was not an adequate remedy at law; the motion for interlocutory injunction alleged a mere breach of a contract for personal services for which the manager could be liable in damages, and no action for either dissolution of the LLCs or appointment of a receiver had been filed, no action in regard to the parties' respective positions in the LLCs was filed until amendment of the complaint on the second day of the hearing, and the only financial damage the member alleged was the loss of funds to a corporation and the potential loss of collateral for the mem-

ber's alleged security interest. Murphy v. McMaster, 285 Ga. 622, 680 S.E.2d 848, 2009 Ga. LEXIS 444 (2009).

RESEARCH REFERENCES

Am. Jur. 2d.

42 Am. Jur. 2d, Injunctions, § 116 et seq. 22A Am. Jur. 2d, Declaratory Judgments, § 123.

C.J.S.

43A C.J.S., Injunctions, § 158 et seq.

ALR.

Validity and enforceability of restrictive covenants in contracts of employment, 52 A.L.R. 1362; 67 A.L.R. 1002; 98 A.L.R. 963.

Injunction to prevent employment of, or contract with, another, as available remedy for defendant's breach of contract to employ plaintiff or give him an exclusive right to promote or sell defendant's product or invention, 125 A.L.R. 1446; 173 A.L.R. 1198.

Validity and effect of statute restricting remedy by injunction in industrial disputes, 127 A.L.R. 868.

Necessity and sufficiency of effort to settle dispute as condition of right to injunction in labor dispute under statutes restricting remedy by injunction in labor disputes, 150 A.L.R. 819.

Governmental body's right to enjoin breach of contract for unique or extraordinary services, 161 A.L.R. 881.

Injunction as remedy for breach of contract to employ plaintiff or give exclusive right to promote or sell defendant's product or invention, 173 A.L.R. 1198.

Remedies during promisor's lifetime on contract to convey or will property at death in consideration of support or services, 7 A.L.R.2d 1166.

9-5-8. Grant of injunctions in discretion of court; power to be exercised cautiously.

The granting and continuing of injunctions shall always rest in the sound discretion of the judge, according to the circumstances of each case. This power shall be prudently and cautiously exercised and, except in clear and urgent cases, should not be resorted to.

History.

Orig. Code 1863, § 3141; Code 1868, § 3153; Code 1873, § 3220; Code 1882, § 3220; Civil Code 1895, §§ 4902, 4920; Civil Code 1910, §§ 5477, 5497; Code 1933, § 55-108.

History of Section.

The language of this section is derived in part from the decision in Tomlin v. Vanhorn, 77 Ga. 315, 3 S.E. 264 (1887).

JUDICIAL DECISIONS

Analysis

General Consideration
Discretion
Appeals
Application

General Consideration

Complainant must make case which does not rest upon doubtful or disputed principles of law; for an injunction will not usually be granted when the complainant's right thereto is not clear. In all cases the complainant must establish the existence of the fraud or fact

General Consideration (Cont'd)

on which the complainant's right to interlocutory relief is based, and show the necessity for an injunction in order to preserve rights or prevent irreparable injury. Everett v. Tabor, 119 Ga. 128, 46 S.E. 72, 1903 Ga. LEXIS 59 (1903).

Full and candid disclosure of all facts must be made in application for injunction. Tarver v. Silver, 180 Ga. 124, 178 S.E. 377, 1935 Ga. LEXIS 195 (1935).

There must be no misrepresentation or concealment of important facts, and if the plaintiff keeps in the background facts which are important to enable the court to form the court's judgment, such conduct is of itself sufficient to prevent the interposition of the court. Tarver v. Silver, 180 Ga. 124, 178 S.E. 377, 1935 Ga. LEXIS 195 (1935).

Concealment of material facts grounds for denial of injunction. — If the case shows a concealment of facts which would, if stated, materially affect the conscience of the court, the trial judge may properly refuse an injunction. Tarver v. Silver, 180 Ga. 124, 178 S.E. 377, 1935 Ga. LEXIS 195 (1935).

In application for interlocutory injunction, there should be balancing of conveniences and a consideration of whether greater harm might be done by refusing than by granting the injunction. Ballard v. Waites, 194 Ga. 427, 21 S.E.2d 848, 1942 Ga. LEXIS 591 (1942); Parker v. West View Cem. Ass'n, 195 Ga. 237, 24 S.E.2d 29, 1943 Ga. LEXIS 480 (1943); Davies v. Curry, 230 Ga. 190, 196 S.E.2d 382, 1973 Ga. LEXIS 855 (1973).

Interlocutory hearing is designed to balance conveniences of parties pending a final outcome of the case. Metropolitan Atlanta Rapid Transit Auth. v. Wallace, 243 Ga. 491, 254 S.E.2d 822, 1979 Ga. LEXIS 957 (1979).

Preliminary injunction will not issue if right to be protected is in doubt, if the right of relief asked is doubtful, or except in a clear case of right. Tarver v. Silver, 180 Ga. 124, 178 S.E. 377, 1935 Ga. LEXIS 195 (1935).

Interlocutory injunction should be refused if the injunction's grant would operate oppressively on defendant's rights, especially in such a case that the denial of the temporary injunction would not work irreparable injury to the plaintiff or leave the plaintiff practically remediless in the event it should thereafter establish the truth of its contention. Metropolitan Atlanta Rapid Transit Auth. v. Wallace, 243 Ga. 491, 254 S.E.2d 822, 1979 Ga. LEXIS 957 (1979).

Requirement of notice. — Although other parties had filed summary judgment motions regarding the disputed ownership of equipment, no one had raised the issue of injunctive relief before the hearing, and another party, who did not participate in the hearing, could not be bound by an interlocutory injunction issued against that party without notice under O.C.G.A. § 9-11-65(a)(1). Abel & Sons Concrete, LLC v. Juhnke, 295 Ga. 150, 757 S.E.2d 869, 2014 Ga. LEXIS 345 (2014).

Injunction proceedings, being extraordinary, ought to be exercised with great caution, and applied only in a very clear case and in such manner as to prevent injustice and unnecessary injury, and it is also necessary that there should be some special circumstances bringing the case under some recognized head of equity jurisdiction, and the court should therefore be guided by the fact that the burden of proof rests upon the complainant to establish the material allegations entitling the plaintiff to relief. Tarver v. Silver, 180 Ga. 124, 178 S.E. 377, 1935 Ga. LEXIS 195 (1935).

Power of injunction. — There is no power which requires greater caution, deliberation, and sound discretion or is more dangerous in a doubtful case than the issuing of an injunction. Cathcart Van & Storage Co. v. City of Atlanta, 169 Ga. 791, 151 S.E. 489, 1930 Ga. LEXIS 33 (1930).

Injunction ought not to be granted unless injury is pressing and the delay dangerous, and there is no adequate remedy at law. Cathcart Van & Storage Co. v. City of Atlanta, 169 Ga. 791, 151 S.E. 489, 1930 Ga. LEXIS 33 (1930).

Injunction is not of right but of grace; to warrant the interposition of this strongest arm of the law, the case must not be a sham, but a well-grounded complaint, the bona fides of which are unquestioned, or capable of vindication if ques-

tioned. Tarver v. Silver, 180 Ga. 124, 178 S.E. 377, 1935 Ga. LEXIS 195 (1935).

Discretion

It would be proper exercise of discretion to deny interlocutory injunction when there was no evidence to support the allegations of the petition, and an abuse of discretion to grant the injunction if there was in fact no evidence to support the petition. Kight v. Gilliard, 214 Ga. 445, 105 S.E.2d 333, 1958 Ga. LEXIS 456 (1958).

When trial judge should preserve status quo. — When the evidence is conflicting, and it appears that the injunction if granted would not operate oppressively to the defendant, but that if denied the complainant would be practically remediless in case the complainant should thereafter establish the truth of the complainant's contentions, it would be strong reason why the trial judge should exercise judicial discretion so as to preserve rights by preserving the status quo. Everett v. Tabor, 119 Ga. 128, 46 S.E. 72, 1903 Ga. LEXIS 59 (1903); Jones v. Lanier Dev. Co., 188 Ga. 141, 2 S.E.2d 923, 1939 Ga. LEXIS 775 (1939).

Trial court abused the court's discretion in enjoining a defendant from operating its marina on docks which fronted the plaintiffs' property as the injunction did not maintain the status quo and the record showed no irreparable harm to plaintiffs from defendant's continued operation of the marina. DBL, Inc. v. Carson, 262 Ga. App. 252, 585 S.E.2d 87, 2003 Ga. App. LEXIS 711 (2003), cert. denied, No. S03C1709, 2003 Ga. LEXIS 983 (Ga. Nov. 10, 2003).

Trial court did not abuse the court's discretion in balancing the equities involved, determining that a farm homeowners' association would be without remedy if it should prevail if an interlocutory injunction were not granted, determining that real estate developers would not be oppressed by maintaining the status quo and that they would have a remedy at law should they prevail, and granting an interlocutory injunction to maintain the status quo while the legal issues in the real estate development case were litigated. Kinard v. Ryman Farm Homeowners' Ass'n, 278 Ga. 149, 598 S.E.2d 479, 2004 Ga. LEXIS 531 (2004).

Grant or denial of injunction rests in sound discretion of judge, according to the circumstances of each case. Cathcart Van & Storage Co. v. City of Atlanta, 169 Ga. 791, 151 S.E. 489, 1930 Ga. LEXIS 33 (1930); Jones v. Lanier Dev. Co., 188 Ga. 141, 2 S.E.2d 923, 1939 Ga. LEXIS 775 (1939); Atkinson v. England, 194 Ga. 854, 22 S.E.2d 798, 1942 Ga. LEXIS 680 (1942); Associated Muts., Inc. v. Coe, 196 Ga. 435, 26 S.E.2d 450, 1943 Ga. LEXIS 336 (1943); Sirota v. Kay Homes, Inc., 208 Ga. 113, 65 S.E.2d 597, 1951 Ga. LEXIS 304 (1951); Danielsville & Comer Tel. Co. v. Sanders, 209 Ga. 144, 71 S.E.2d 226, 1952 Ga. LEXIS 439 (1952); Tift v. Farmers Bank, 210 Ga. 35, 77 S.E.2d 505, 1953 Ga. LEXIS 463 (1953); Lowry v. Rosenfeld, 213 Ga. 60, 96 S.E.2d 581, 1957 Ga. LEXIS 302 (1957); Bell Indus., Inc. v. Jones, 220 Ga. 684, 141 S.E.2d 533, 1965 Ga. LEXIS 606 (1965); Matthews v. Fayette County, 233 Ga. 220, 210 S.E.2d 758, 1974 Ga. LEXIS 723 (1974); Metropolitan Atlanta Rapid Transit Auth. v. Wallace, 243 Ga. 491, 254 S.E.2d 822, 1979 Ga. LEXIS 957 (1979); Staples v. Ladson, 256 Ga. 621, 351 S.E.2d 448, 1987 Ga. LEXIS 537 (1987).

Court did not abuse the court's discretion in granting stay of execution pending consideration of habeas corpus petition containing claims not previously adjudicated. Zant v. Dick, 249 Ga. 799, 294 S.E.2d 508, 1982 Ga. LEXIS 1201 (1982).

Because an order granting the interlocutory injunction did not reflect that the trial court balanced the relative equities of the parties, and in which the party seeking the relief would have had to demonstrate entitlement thereto, that order had to be reversed as the trial court abused the court's discretion. Bernocchi v. Forcucci, 279 Ga. 460, 614 S.E.2d 775, 2005 Ga. LEXIS 441 (2005).

Discretion of trial judge is based on law and evidence before the judge. Kelley v. Kelley, 228 Ga. 639, 187 S.E.2d 284, 1972 Ga. LEXIS 872 (1972).

When evidence conflicts, trial judge is vested with wide discretion. Davidson Mineral Properties, Inc. v. Gifford-Hill & Co., 235 Ga. 176, 219 S.E.2d 133, 1975 Ga. LEXIS 814 (1975).

Discretion (Cont'd)

Exercise of discretion by the trial court in granting or denying an injunction will not be interfered with absent manifest abuse, but the trial court's discretion is limited to cases in which there is a conflict in the evidence. Slaven v. City of Buford, 257 Ga. 100, 355 S.E.2d 663, 1987 Ga. LEXIS 748 (1987).

Grant or refusal of injunction on conflicting evidence is within discretion of court when right of plaintiff is in doubt. Loadman v. Davis, 210 Ga. 520, 81 S.E.2d 465, 1954 Ga. LEXIS 362 (1954); Allen v. City of Atlanta, 219 Ga. 65, 131 S.E.2d 549, 1963 Ga. LEXIS 368 (1963).

Trial judge's discretion will not be controlled. — When the evidence is in sharp conflict, the Supreme Court will not interfere to control the discretion of the trial judge in granting a temporary injunction. Mayor of Savannah v. Collins, 211 Ga. 191, 84 S.E.2d 454, 1954 Ga. LEXIS 526 (1954); Norfolk S. Ry. v. Dempsey, 267 Ga. 241, 476 S.E.2d 577.

When the evidence on the material issues is in conflict, the Supreme Court will not control the discretion vested in the trial judge in denying an interlocutory injunction. Rooks v. Meyer, 217 Ga. 727, 124 S.E.2d 634, 1962 Ga. LEXIS 370 (1962); Levenson Inv. Co. v. Whitehead, 230 Ga. 680, 198 S.E.2d 682, 1973 Ga. LEXIS 1031 (1973).

Discretion manifestly abused. — Trial judge's exercise of discretion in granting or modifying the relief prayed for will not be controlled unless manifestly abused. A. Louis & Co. v. Bamberger, Bloom & Co., 36 Ga. 589, 1867 Ga. LEXIS 99 (1867); Falvey v. Adamson, 73 Ga. 493, 1884 Ga. LEXIS 156 (1884); Tanner Grocery Co. v. Stewart, 157 Ga. 412, 121 S.E. 416, 1924 Ga. LEXIS 63 (1924); Gray v. Chason, 158 Ga. 313, 123 S.E. 290, 1924 Ga. LEXIS 143 (1924).

In hearings upon applications for interlocutory injunctions, when the evidence upon material issues of fact is in conflict, the grant or refusal of applications is within the discretion of the trial judge and the exercise of judicial discretion in granting or refusing the relief prayed for will not be controlled, unless manifestly abused. Volunteer State Life Ins. Co. v. Chapman, 173 Ga. 633, 160 S.E. 783, 1931 Ga. LEXIS 371 (1931); Associated Muts., Inc. v. Coe, 196 Ga. 435, 26 S.E.2d 450, 1943 Ga. LEXIS 336 (1943); Department of Agric. v. Country Lad Foods, Inc., 226 Ga. 631, 177 S.E.2d 38, 1970 Ga. LEXIS 618 (1970).

When evidence is conflicting, the trial judge's decision will not be reversed, unless it is apparent that the judge has abused the discretion which the law gives. Jones v. Lanier Dev. Co., 188 Ga. 141, 2 S.E.2d 923, 1939 Ga. LEXIS 775 (1939); Moon v. Clark, 192 Ga. 47, 14 S.E.2d 481, 1941 Ga. LEXIS 404 (1941); Atkinson v. England, 194 Ga. 854, 22 S.E.2d 798, 1942 Ga. LEXIS 680 (1942); Associated Muts., Inc. v. Coe, 196 Ga. 435, 26 S.E.2d 450, 1943 Ga. LEXIS 336 (1943); Sachs v. Dempsey, 203 Ga. 438, 47 S.E.2d 326, 1948 Ga. LEXIS 352 (1948); Sirota v. Kay Homes, Inc., 208 Ga. 113, 65 S.E.2d 597, 1951 Ga. LEXIS 304 (1951); Danielsville & Comer Tel. Co. v. Sanders, 209 Ga. 144, 71 S.E.2d 226, 1952 Ga. LEXIS 439 (1952); Tift v. Farmers Bank, 210 Ga. 35, 77 S.E.2d 505, 1953 Ga. LEXIS 463 (1953); Lowry v. Rosenfeld, 213 Ga. 60, 96 S.E.2d 581, 1957 Ga. LEXIS 302 (1957); Bell Indus., Inc. v. Jones, 220 Ga. 684, 141 S.E.2d 533, 1965 Ga. LEXIS 606 (1965); Matthews v. Fayette County, 233 Ga. 220, 210 S.E.2d 758, 1974 Ga. LEXIS 723 (1974); Metropolitan Atlanta Rapid Transit Auth. v. Wallace, 243 Ga. 491, 254 S.E.2d 822, 1979 Ga. LEXIS 957 (1979).

In an application for interlocutory injunction, the discretion exercised by the judge will not be controlled by the Supreme Court unless there was a manifest abuse of such discretion. Thompson v. Mutual Inv. Corp., 188 Ga. 476, 4 S.E.2d 44, 1939 Ga. LEXIS 547 (1939). See also Jones v. Camp, 208 Ga. 164, 65 S.E.2d 596, 1951 Ga. LEXIS 303 (1951); Kingsley Mill Corp. v. Edmonds, 208 Ga. 374, 67 S.E.2d 111, 1951 Ga. LEXIS 368 (1951); First Fed. Sav. & Loan Ass'n v. Owen, 210 Ga. 424, 80 S.E.2d 169, 1954 Ga. LEXIS 302 (1954); Pennsylvania Poorboy, Inc. v. Robbins Restaurant, Inc., 238 Ga. 539, 233 S.E.2d 791, 1977 Ga. LEXIS 1092 (1977); Corporation of Presiding Bishop v. Statham, 243 Ga. 448, 254 S.E.2d 833,

1979 Ga. LEXIS 932 (1979); Wheatley Grading Contractors v. DFT Invs., Inc., 244 Ga. 663, 261 S.E.2d 614, 1979 Ga. LEXIS 1364 (1979).

Refusal to grant an interlocutory injunction will not be interfered with by the Supreme Court if it appears that there was a conflict in the evidence on the issues of fact. Loadman v. Davis, 210 Ga. 520, 81 S.E.2d 465, 1954 Ga. LEXIS 362 (1954); Allen v. City of Atlanta, 219 Ga. 65, 131 S.E.2d 549, 1963 Ga. LEXIS 368 (1963); Lawrence v. Harding, 225 Ga. 148, 166 S.E.2d 336, 1969 Ga. LEXIS 406 (1969).

It is clearly settled in Georgia that the exercise of discretion by the lower court in granting and continuing (preliminary) injunctions will not be interfered with in the absence of manifest abuse. Slautterback v. Intech Mgt. Servs., 247 Ga. 762, 279 S.E.2d 701, 1981 Ga. LEXIS 887 (1981); West 80 Investors v. Checquers Inv. Assocs., 214 Ga. App. 673, 448 S.E.2d 735, 1994 Ga. App. LEXIS 1014 (1994), cert. denied, No. S95C0124, 1995 Ga. LEXIS 270 (Ga. Jan. 26, 1995).

After a former employer asserted claims identical to ones that were compulsory counterclaims in earlier suits, the trial court erred in denying a plea in abatement to all but one of the former employees pursuant to O.C.G.A. §§ 9-2-5 and 9-2-44; the trial court did not abuse the court's discretion pursuant to O.C.G.A. § 9-5-8 in staying two prior cases pursuant to O.C.G.A. §§ 9-5-1 and 9-5-3. Smith v. Tronitec, Inc., 277 Ga. 210, 586 S.E.2d 661, 2003 Ga. LEXIS 790 (2003).

Court of appeals agreed with a former employee that the trial court abused the court's discretion in granting the former employer a permanent injunction after finding that a covenant not to compete entered into by the parties, approximately 18 months into the former employee's two-year contract, was binding on that employee as neither the employer's pre-existing duty to employ the employee for two years, nor the employee's continued employment, provided sufficient consideration for the agreement. Glisson v. Global Sec. Servs., 287 Ga. App. 640, 653 S.E.2d 85, 2007 Ga. App. LEXIS 1047 (2007).

Absent any findings that the status quo was endangered or in need of preservation, and because an interlocutory injunction did not in fact preserve the status quo but forced a dog kennel owner to cease operations, the trial court abused the court's discretion in granting relief to an adjacent neighbor of the business, especially when that business had been in operation for several years without complaint. Green v. Waddleton, 288 Ga. App. 369, 654 S.E.2d 204, 2007 Ga. App. LEXIS 1209 (2007).

Abuse of discretion found. — In a landowner's action seeking a temporary restraining order, interlocutory injunction, and permanent injunction, because the description of an easement in favor of a landowner in a deed failed to provide for gates or other obstructions, the neighbor admitted to installing the gates at issue, and a dispute existed as to when the obstruction occurred relative to the grant of the easement, the trial court erred in not requiring the neighbor to remove the gates. Williams v. Trammell, 281 Ga. App. 590, 636 S.E.2d 757, 2006 Ga. App. LEXIS 1174 (2006).

Because a lessee had a license concerning a sign on the leased property, made improvements in reliance on the license, and a second lessee took ownership of the property with actual notice of the sign, the trial court abused the court's discretion in denying the lessee an interlocutory injunction barring the second lessee from interfering with the sign as the license became irrevocable; moreover, the fact that the lessee did not own the land in which the sign was located was irrelevant. Lowe's Home Ctrs., Inc. v. Garrison Ridge Shopping Ctr. Marietta, GA, L.P., 283 Ga. App. 854, 643 S.E.2d 288, 2007 Ga. App. LEXIS 213 (2007), cert. denied, No. S07C0993, 2007 Ga. LEXIS 452 (Ga. June 4, 2007).

Principle of substantial equity violated. — Large discretion is vested in a trial judge in granting an injunction, and unless some principle of substantial equity has been violated, the Supreme Court will not control that discretion. Wright v. Intercounty Properties, Ltd., 238 Ga. 492, 233 S.E.2d 160, 1977 Ga. LEXIS 1070 (1977).

Trial judge's discretion to determine whether a temporary injunction should

Discretion (Cont'd)

issue will not be disturbed unless some principle of substantial equity has been violated. Pan Am Mktg., Inc. v. Fincannon, 246 Ga. 315, 271 S.E.2d 212, 1980 Ga. LEXIS 1100 (1980).

Not abuse of discretion to continue restraint when evidence conflicts. — When the evidence is in substantial conflict on material issues, it is not an abuse of discretion for the trial judge to continue in effect a previous restraining order on the hearing for interlocutory injunction. Mayor of Hazlehurst v. Wilson, 205 Ga. 231, 52 S.E.2d 849, 1949 Ga. LEXIS 329 (1949).

Failure to exercise any discretion erroneous. — When it clearly appears from the actual language of the order that the judge failed to exercise any discretion whatever, and that the judge's refusal of an injunction was based entirely on erroneous construction of the law by holding that as a matter of law the judge could not grant an interlocutory injunction until a jury decided issues of fact made by petition and answer, such judgment was erroneous. Marion County v. McCorkle, 187 Ga. 312, 200 S.E. 285, 1938 Ga. LEXIS 781 (1938).

Discretion is limited to cases in which evidence conflicts. Corporation of Presiding Bishop v. Statham, 243 Ga. 448, 254 S.E.2d 833, 1979 Ga. LEXIS 932 (1979).

Trial court has broad discretion to decide whether to grant or deny an interlocutory injunction; however, when there is no conflict in the evidence, the judge's discretion in granting or denying the interlocutory injunction becomes circumscribed by the applicable rules of law. West v. Koufman, 259 Ga. 505, 384 S.E.2d 664, 1989 Ga. LEXIS 437 (1989).

Since there was no conflict in the evidence regarding whether an employer had made an effort to maintain certain information as secret, and the information sought to be protected was in a former employee's memory, the superior court lacked the discretion to grant an injunction. Smith v. Mid-State Nurses, Inc., 261 Ga. 208, 403 S.E.2d 789, 1991 Ga. LEXIS 214 (1991).

Deference to judge's discretion not applicable to questions of law. — Rule that the Supreme Court will not interfere with the discretion of the trial judge in granting or refusing an injunction when the evidence is conflicting does not apply when the question to be decided by the trial judge is one of law. Washington Nat'l Ins. Co. v. Mayor of Savannah, 196 Ga. 126, 26 S.E.2d 359, 1943 Ga. LEXIS 327 (1943); Griffin v. Loman, 206 Ga. 116, 56 S.E.2d 263, 1949 Ga. LEXIS 424 (1949); Sirota v. Kay Homes, Inc., 208 Ga. 113, 65 S.E.2d 597, 1951 Ga. LEXIS 304 (1951); Danielsville & Comer Tel. Co. v. Sanders, 209 Ga. 144, 71 S.E.2d 226, 1952 Ga. LEXIS 439 (1952); Bell Indus., Inc. v. Jones, 220 Ga. 684, 141 S.E.2d 533, 1965 Ga. LEXIS 606 (1965).

When, an injunction is granted or refused on an erroneous interpretation of the law, the rule giving effect to the trial judge's discretion on issues of fact, so that an affirmance would be required if the evidence as to the facts is conflicting, will not be given application. Ballard v. Waites, 194 Ga. 427, 21 S.E.2d 848, 1942 Ga. LEXIS 591 (1942).

Granting portions of interlocutory injunction held abuse of discretion. — Trial court abused the court's discretion in granting portions of an interlocutory injunction which enjoined defendant from disbursing or transferring possession or ownership of the defendant's real and personal property since there was no evidence presented that the status quo was in any way endangered and in need of preservation by means of an interlocutory injunction. Kennedy v. W.M. Sheppard Lumber Co., 261 Ga. 145, 401 S.E.2d 515, 1991 Ga. LEXIS 103 (1991).

Grant or deny temporary injunction. — When there is a direct conflict in the evidence on the material issue before the trial judge on the interlocutory hearing, the trial judge did not abuse the judge's discretion in granting an interlocutory injunction pending a final hearing of the case. First Fed. Sav. & Loan Ass'n v. Owen, 210 Ga. 424, 80 S.E.2d 169, 1954 Ga. LEXIS 302 (1954).

When the evidence is conflicting at an interlocutory hearing to determine whether or not the lower court should grant or deny a temporary injunction, it cannot be said that the court abused the court's discretion in either granting or denying the injunction. Franklin v. Sing-Wilkes, Inc, 215 Ga. 596, 112 S.E.2d 618, 1960 Ga. LEXIS 276 (1960); Forrester v. City of Gainesville, 223 Ga. 344, 155 S.E.2d 376, 1967 Ga. LEXIS 519 (1967); Columbus, Ga. v. Granco, Inc., 240 Ga. 850, 242 S.E.2d 607, 1978 Ga. LEXIS 849 (1978).

When the case turns on issues of fact and the evidence is conflicting upon those issues, it cannot be held that the trial judge has abused the judge's discretion in granting or refusing an interlocutory injunction. Milton Frank Allen Publications, Inc. v. Georgia Ass'n of Petro. Retailers, 223 Ga. 784, 158 S.E.2d 248, 1967 Ga. LEXIS 695 (1967).

Court did not abuse the court's discretion in entering an interlocutory injunction barring further disposition of the proceeds from joint bank accounts pending final disposition of the fraudulent transfer and wrongful death lawsuits because badges of fraud indicated an actual intent to hinder, delay, or defraud a decedent's estate and heirs of a full recovery. The transferor's adult child came up from Florida to withdraw the funds from joint bank accounts in Georgia three days after the transferor was arrested for the murder of the decedent. Bishop v. Patton, 288 Ga. 600, 706 S.E.2d 634, 2011 Ga. LEXIS 151, overruled in part, SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 289 Ga. 1, 709 S.E.2d 267, 2011 Ga. LEXIS 270 (2011).

Appeals

Judgment will not be disturbed by appellate court. — When there is a material conflict in the evidence, a judgment refusing an injunction will not be disturbed. Robinson v. Bryant, 181 Ga. 722, 184 S.E. 298, 1936 Ga. LEXIS 416 (1936).

Supreme Court will not reverse judgment when it appears that evidence was in conflict because such a judgment was entered in the exercise of the trial judge's discretion. Ballard v. Waites, 194 Ga. 427, 21 S.E.2d 848, 1942 Ga. LEXIS 591 (1942); Milton Frank Allen Publications, Inc. v. Georgia Ass'n of Petro. Retailers, 223 Ga. 784, 158 S.E.2d 248, 1967 Ga. LEXIS 695 (1967).

Superior court order granting interlocutory injunctive relief reversed on question of law. See Lesesne v. Mast Property Mgt., Inc., 251 Ga. 550, 307 S.E.2d 661, 1983 Ga. LEXIS 883 (1983).

Application

Interlocutory injunction properly granted in service mark infringment suit. — In a suit alleging, inter alia, the infringement of state registered service marks, the trial court properly granted the plaintiff interlocutory relief because it was undisputed that the plaintiff was the last entity to hold the named pageants prior to the interlocutory injunction hearing, regardless of any issues of registration of service marks or abandonment or assignment by the defendant; thus, the status quo was the plaintiff being the host of the events using the marks. India-American Cultural Ass'n v. iLink Professionals, Inc., 296 Ga. 668, 769 S.E.2d 905, 2015 Ga. LEXIS 149 (2015).

Convenience of parties cannot be ignored in determining whether there has been abuse of discretion in grant or denial of injunction. Jones v. Lanier Dev. Co., 188 Ga. 141, 2 S.E.2d 923, 1939 Ga. LEXIS 775 (1939).

Trial court did not abuse the court's discretion by enjoining developer from constructing condominiums because parol evidence was properly considered to show that the terms "patio home" and "cluster home," as used in the subdivision's restrictive covenants, did not include town homes or condominiums. Southland Dev. Corp. v. Battle, 272 Ga. App. 211, 612 S.E.2d 12, 2005 Ga. App. LEXIS 164 (2005), cert. denied, No. S05C1183, 2005 Ga. LEXIS 485 (Ga. June 30, 2005).

Denial of asset manager's interlocutory injunction. — Trial court did not abuse the court's discretion under O.C.G.A. § 9-5-8 in denying the asset manager's interlocutory injunction motion based on its evaluation of the under-

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lying merits of the case; denial of an interlocutory injunction based solely on an evaluation of the underlying merits of the case was not impermissible, and balancing other equities involved in the case was not required. Toberman v. Larose Ltd. P'ship, 281 Ga. App. 775, 637 S.E.2d 158, 2006 Ga. App. LEXIS 1256 (2006).

No abuse of discretion in dissolving restraining order. — At a hearing on an interlocutory injunction in which the evidence is in conflict on material issues involved, there is no abuse of discretion for the trial judge to dissolve a temporary restraining order. Green v. Fuller, 223 Ga. 204, 154 S.E.2d 220, 1967 Ga. LEXIS 466 (1967).

Trial court did not abuse the court's discretion in dissolving a restraining order since the restraining order did not preserve the status quo between the parties, and adequate resources assured that the party which commenced the suit would be compensated if that party were to prevail on the merits of the claim. Byelick v. Michel Herbelin USA, Inc., 275 Ga. 505, 570 S.E.2d 307, 2002 Ga. LEXIS 853 (2002).

Refusal to dissolve injunction was proper. — Trial court did not abuse the court's discretion in denying a hospital's motion to dissolve an interlocutory and permanent injunction entered in favor of a group of doctors prohibiting the hospital from limiting the doctors from freely exercising their clinical privileges and practice cardiology at the hospital, despite a resolution by the hospital's board of directors prohibiting the doctors from exercising the privileges as the prohibition denied the doctors certain procedural protections which could not be ignored when implementing exclusive provider contracts. Satilla Health Servs., Inc. v. Bell, 280 Ga. App. 123, 633 S.E.2d 575, 2006 Ga. App. LEXIS 764 (2006), cert. denied, No. S06C1907, 2006 Ga. LEXIS 731 (Ga. Sept. 18, 2006), cert. denied, No. S06C1906, 2006 Ga. LEXIS 701 (Ga. Sept. 18, 2006).

Individual could not complain after the individual agreed to consent order. — Individual could not complain about the denial of a motion for an interlocutory injunction because the individual agreed to a consent order enjoining both parties from entering the disputed property. Jackson v. Neese, 276 Ga. App. 724, 624 S.E.2d 139, 2005 Ga. App. LEXIS 1107 (2005), cert. denied, No. S06C0683, 2006 Ga. LEXIS 216 (Ga. Mar. 27, 2006).

Improper deactivation of medical practice's Facebook page warranted injunction. — In a dispute between a vein doctor's widow and the deceased's limited liability companies (LLCs), the trial court did not err in finding that the widow caused Facebook to de-activate The Vein Guys Facebook page and that the LLCs would suffer irreparable harm if it were not reactivated, resulting in an interlocutory injunction. The record showed a significant drop in new patients following the deactivation of the Facebook page and that even a 5 percent decrease cost the practice over $60,000 per month. Davis v. VCP South, LLC, 297 Ga. 616, 774 S.E.2d 606, 2015 Ga. LEXIS 488 (2015).

Extension of interlocutory injunction in medical malpractice case. Trial court did not abuse the court's discretion in denying a medical practice's request to extend an interlocutory injunction as a doctor relied on the expiration of the injunction to lease, staff, and outfit an office and had patients scheduled for surgery after the injunction expired; the practice received the injunction it requested and was barred by laches from obtaining additional relief in the form of an extension of the injunction. Suburban Neurosurgical Specialists, P.C. v. Jimenez, 270 Ga. App. 578, 608 S.E.2d 256, 2004 Ga. App. LEXIS 1535 (2004).

Injunction on car assessment. Trial court did not abuse the court's discretion in entering an interlocutory injunction to preserve the status quo pending an adjudication on the merits because the appellees were likely to succeed on the merits, even if the appellees did not defeat the DeKalb County Tax Commissioner's claims, as the appellees sought a declaration that ad valorem taxes on the same cars were not owed twice and it was most unlikely that relief of that nature would be denied. Scott v. Prime Sales & Leasing, Inc., 276 Ga. App. 283, 623 S.E.2d 167, 2005 Ga. App. LEXIS 1229 (2005), cert.

denied, No. S06C0525, 2006 Ga. LEXIS 279 (Ga. Apr. 25, 2006).

Injunction in contractor's case. Trial court did not improperly rely solely on the court's determination that an unsuccessful bidding contractor would be unlikely to prevail on the merits of its suit in denying the contractor's petition for an interlocutory injunction and vacation of its temporary restraining order as: (1) a school board acted within its powers in accepting, albeit late, the lowest bidder's list of subcontractors; and (2) the board was authorized to find that the bid provision requiring that a list of subcontractors be provided with a bid was immaterial and could be waived. R. D. Brown Contrs., Inc. v. Bd. of Educ. of Columbia County, 280 Ga. 210, 626 S.E.2d 471, 2006 Ga. LEXIS 112 (2006).

Given the highly competitive nature of the asphalt industry in the State of Georgia, the trial court did not err in permanently enjoining the Department of Transportation from giving unredacted copies of documents, which contained trade secrets and confidential technical specifications relating to the mix design, to a competitor of a group of contractors; further, the public could ascertain whether a contractor's asphalt product met DOT requirements by examining information on the forms, which was not included in the trial court's injunction, and the records did not fall within the exception to Open Records Act disclosure because the contractors were not required by law to submit the information to the DOT. Douglas Asphalt Co. v. E. R. Snell Contr., Inc., 282 Ga. App. 546, 639 S.E.2d 372, 2006 Ga. App. LEXIS 1458 (2006), cert. denied, No. S07C0498, 2007 Ga. LEXIS 140 (Ga. Feb. 5, 2007).

Injunctions in homeowners' association cases. As a trial court's order showed that although the trial court entered the injunction because of a resident's admissions, the court exercised the court's discretion in crafting its terms, and the injunction was not improper. Le v. Shepherd's Pond Homeowners Ass'n, 280 Ga. App. 36, 633 S.E.2d 363, 2006 Ga. App. LEXIS 741 (2006), cert. denied, No. S06C1894, 2006 Ga. LEXIS 805 (Ga. Oct. 2, 2006).

Injunction on use of property. In a case in which the trial court found that the appellant altered its lot, for the purpose of operating a used car business, creating an artificial increase in the water flowing onto the appellee's property, the decision to grant an injunction, requiring the appellant to, in part, complete a newly proposed engineering plan and barring the appellant from parking cars in the rear portion of the lot, was not an abuse of discretion under O.C.G.A. § 9-5-8; the trial court reasonably balanced the appellant's interest in operating the appellant's business and the appellee's interest in having the appellee's property free from artificial runoff. Menzies v. Hall, 281 Ga. 223, 637 S.E.2d 415, 2006 Ga. LEXIS 924 (2006).

Because the first two residential property owners presented testimonial and photographic evidence that the third property owner's act of pumping water from the pond to irrigate that owner's lawn lowered the water level, there was some evidence on which the trial court based the court's ruling prohibiting the third property owner from pumping water from the community pond, and the trial court did not abuse the court's discretion in issuing the injunction. Jones v. Morris, 325 Ga. App. 65, 752 S.E.2d 99, 2013 Ga. App. LEXIS 961 (2013).

Injunctions in employment situations. There was no abuse in denying an employer's motions for temporary and permanent injunctions to prevent its employee from violating a covenant not to compete, as the covenant contained restrictions that went further than necessary to achieve the employer's business interest, and unreasonably restricted the employee, as well as the public's right to choose the services the public preferred, which made the covenant overbroad and therefore unenforceable. Beacon Sec. Tech. v. Beasley, 286 Ga. App. 11, 648 S.E.2d 440, 2007 Ga. App. LEXIS 686 (2007).

Trial court erred, in part, by ordering an interlocutory injunction prohibiting a former employee from working in an executive capacity for a particular competitor of the former employer for one year based on the inevitable disclosure doctrine because a stand-alone claim under the doctrine, untethered from the provisions of Geor-

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gia's trade secret statute, O.C.G.A. § 10-1-760 et seq., was not cognizable in Georgia. Holton v. Physician Oncology Servs., LP, 292 Ga. 864, 742 S.E.2d 702, 2013 Ga. LEXIS 414 (2013).

Injunctions in religious organizations. No abuse in granting a second faction's motion for an interlocutory injunction to restrain the first faction from attempting to act on behalf of a Vietnamese Buddhist Temple, incorporated as a nonprofit Georgia corporation, or from holding themselves out as officers, directors, or agents of the Temple as: (1) the Temple's articles of incorporation clearly allowed it to have members; and (2) the court was authorized to find that all members of the Temple were given the requisite notice of the June 2004 meeting, and that more than 50 percent of the members appeared at the meeting and voted unanimously to elect the second faction to the board. Nguyen v. Tran, 287 Ga. App. 888, 652 S.E.2d 881, 2007 Ga. App. LEXIS 1118 (2007).

Injunctions in insurance dealings. In a breach of contract action between an insurer and an agency, the trial court did not abuse the court's discretion in granting an interlocutory injunction to the agency as, after a balancing of the equities in the agency's favor, the record supported the finding that the insurer conducted itself, to the agency's detriment, as though arbitration of the dispute had been completed and it had been absolved from complying with its post-termination obligations under the underlying agency agreement between the parties. Cotton States Mut. Ins. Co. v. Stephen Brown Ins. Agency, Inc., 290 Ga. App. 660, 660 S.E.2d 445, 2008 Ga. App. LEXIS 390 (2008), cert. denied, No. S08C1321, 2008 Ga. LEXIS 687 (Ga. Sept. 8, 2008).

Interlocutory injunction was proper against a for-profit health care insurance company that had allegedly pirated a nonprofit health care sharing ministry's customers and funds after termination of the parties' licensing contract; the ministry's loss of status as an Affordable Care Act, 42 U.S.C. § 18021 et seq., approved ministry would constitute irreparable harm. Aliera Healthcare, Inc. v. Anabaptist Healthshare, 355 Ga. App. 381, 844 S.E.2d 268, 2020 Ga. App. LEXIS 319 (2020).

Injunction when contest over medical professional and restrictive covenants. In a case in which a doctor appealed a trial court's grant of a medical practice's motion for a temporary injunction on the practice's claim that the doctor violated the non-competition provisions of the doctor's employment agreement with the group when the doctor left the group, the doctor unsuccessfully argued that the trial court erred in granting injunctive relief because the group had: (1) no legitimate business interest in enforcing the restrictive covenants; (2) released the doctor from the restrictive covenants; and (3) consented and requested that the doctor practice neurosurgery in violation of the restrictive covenants. The trial court did not abuse the court's discretion in finding that the equities weighed in favor of the group and that the status quo of not having competition by the doctor within the restricted area was preserved by the order. Pittman v. Coosa Med. Group, P.C., 300 Ga. App. 529, 685 S.E.2d 753, 2009 Ga. App. LEXIS 1145 (2009).

Injunctions concerning cemeteries. Trial court did not manifestly abuse the court's discretion by entering a permanent injunction preventing a cemetery group from implementing a rule established by a private cemetery owner to prohibit the use of concrete vaults in its cemeteries. The rule violated the Georgia Cemetery and Funeral Services Act of 2000, O.C.G.A. § 10-14-1 et seq., because the rule was not reasonable within the context of O.C.G.A. § 10-14-16(b). Savannah Cemetery Group, Inc. v. DePue-Wilbert Vault Co., 307 Ga. App. 206, 704 S.E.2d 858, 2010 Ga. App. LEXIS 1126 (2010).

Preliminary injunction properly granted. — Trial court did not abuse the court's discretion in issuing a preliminary injunction under O.C.G.A. § 9-5-8 preserving the status quo and enjoining the sale of a dialysis center to a prospective purchaser since: (1) the doctor had given a buyer an option and a non-compete clause covering the center as part of an asset sale of a dialysis center partially owned by the

doctor's wife; (2) the non-compete clause was properly examined using either the least restrictive scrutiny applicable to sales of assets or the mid-level scrutiny applicable to professional contracts; (3) the duration of the non-compete, the term of the agreement plus two years following its termination, was reasonable; (4) the dialysis centers were within the restricted area; and (5) the scope of activity restricted was reasonable as the doctor was not restricted from practicing nephrology, only in operating a dialysis center in direct competition with the buyer. Martinez v. DaVita, Inc., 266 Ga. App. 723, 598 S.E.2d 334, 2004 Ga. App. LEXIS 361 (2004).

Interlocutory injunction on taxation. On an appeal filed pursuant to O.C.G.A. § 5-6-34(a)(4) from an order enjoining a city from imposing a tax against a utility pursuant to an ordinance, the appeals court found that the interlocutory injunction was erroneously ordered, given that the ordinance had not yet posed any imminent danger to that utility's financial interest, but, only a demand for the tax had been issued. City of Willacoochee v. Satilla Rural Elec. Mbrshp. Corp., 283 Ga. 137, 657 S.E.2d 232, 2008 Ga. LEXIS 140 (2008).

Injunctions in franchise agreements. In a dispute between a car dealership franchisor and a franchisee that sought to acquire another dealership, the franchisor's right of first refusal under O.C.G.A. § 10-1-663.1 was not subject to the requirements of the Transfer Statute, O.C.G.A. § 10-1-653; the two statutes operated independently, and the trial court erred in granting an interlocutory injunction to the franchisee. Nissan N. Am., Inc. v. Walker-Jones Nissan, LLC, 345 Ga. App. 447, 812 S.E.2d 130, 2018 Ga. App. LEXIS 215 (2018).

Injunction for oral agreement on property purchase. In a suit brought by a property owner seeking to specifically perform an oral agreement to purchase a strip of real estate, the trial court properly denied the property owner's request for an interlocutory judgment based on a violation of the statute of frauds and because another held a first right of refusal over the sale/purchase of the property. However, the trial court erred by concluding that the property owner had not obtained a parol license to use the strip since the property owner had made expenditures to improve the land and, as to the right of first refusal held by another, the grant of a parol license was not the equivalent to a sale of the property to have in anyway interfered with that right. Meinhardt v. Christianson, 289 Ga. App. 238, 656 S.E.2d 568, 2008 Ga. App. LEXIS 53 (2008).

Trial court properly granted permanent injunction to enforce restrictive covenant. — Trial court properly issued a permanent injunction against a homeowner based on that homeowner's violation of a restrictive covenant by erecting a shed on the subject property because: (1) the shed was not constructed with the same material and color as the exterior of residence; (2) the structure clearly violated the covenant; and (3) enforcement of the covenant had not been waived. Glisson v. IRHA of Loganville, Inc., 289 Ga. App. 311, 656 S.E.2d 924, 2008 Ga. App. LEXIS 86 (2008).

Denial of injunction in condemnation proceeding upheld. — Trial court properly denied the property owner's injunction motion to enjoin the condemnation proceeding because the owner was not precluded from pursuing relief on a claim that the nuisance of the landfill damaged the value of the remainder of the property, but did err by finding that the motion to enjoin the county from contaminating the property was moot since payment of just compensation for the buffer did not moot the remainder of the owner's claims in the inverse condemnation action. Morgan County v. Gay, 352 Ga. App. 555, 834 S.E.2d 576, 2019 Ga. App. LEXIS 531 (2019), cert. denied, No. S20C0495, 2020 Ga. LEXIS 390 (Ga. May 4, 2020), cert. denied, No. S20C0331, 2020 Ga. LEXIS 380 (Ga. May 4, 2020).

Temporary restraining order granted when danger of dissipating assets. — If the danger of dissipating assets before an interlocutory hearing can be had is great, the court in the exercise of sound discretion may, without notice, grant a temporary restraining order or appoint a temporary receiver in order to

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preserve the status quo until the interlocutory hearing. Edwards v. United Food Brokers, Inc., 195 Ga. 1, 22 S.E.2d 812, 1942 Ga. LEXIS 686 (1942).

Given evidence of a currency importer's ownership interest in the business assets and website managed by a contractor, and the contractor's threats to do harm to the website and the importer's business, under O.C.G.A. § 9-5-8, it was not an abuse of discretion to grant a preliminary injunction placing control of the assets in the importer. Grossi Consulting, LLC v. Sterling Currency Group, LLC, 290 Ga. 386, 722 S.E.2d 44, 2012 Ga. LEXIS 76 (2012).

Dissolving temporary restraining order to allow bank foreclosure proceeding. — Trial court did not abuse the court's discretion by dissolving a temporary restraining order and allowing a bank to proceed with the bank's foreclosure action as it was within the trial court's discretion to condition the extension of injunctive relief upon the mortgagor's placement of an amount of money in escrow reflecting past-due payments on the mortgage, which the mortgagor declined to do. Morgan v. U. S. Bank Nat'l Ass'n, 322 Ga. App. 357, 745 S.E.2d 290, 2013 Ga. App. LEXIS 517 (2013).

Deposit with court is not tender to lender and injunction inappropriate. — In a wrongful foreclosure action, the trial court erred in enjoining the lender's foreclosure proceedings because the borrowers failed to tender the amount owed under the matured home equity line of credit (HELOC) agreement to the lender in order to avoid foreclosure. Deposit of the funds in the court's registry did not constitute a tender to the lender. Oconee Fed. S & L Ass'n v. Brown, 349 Ga. App. 54, 825 S.E.2d 456, 2019 Ga. App. LEXIS 109 (2019).

Modification of injunction not granted when no justification shown. — Petition to modify an interlocutory injunction cannot be granted in the absence of a meritorious showing that such modification should be made. Kelley v. Kelley, 228 Ga. 639, 187 S.E.2d 284, 1972 Ga. LEXIS 872 (1972).

No adequate remedy at law. — Because the pension funds boards of trustees decided to hire a third party administrator to administer its funds and outside counsel and because the City of Atlanta disagreed that the boards had the authority to do so and refused to recognize, implement, or cooperate with the boards' decisions, the trial court was permitted under O.C.G.A. § 9-5-8 to issue a permanent injunction against the city as no adequate remedy at law existed, and the city presented no evidence that the injunction could have potentially devastated the city treasury. City of Atlanta v. S. States Police Benevolent Ass'n, 276 Ga. App. 446, 623 S.E.2d 557, 2005 Ga. App. LEXIS 1282 (2005), cert. denied, No. S06C0609, 2006 Ga. LEXIS 314 (Ga. May 8, 2006).

Injunction in commercial tenancy. — It was error to grant a shopping mall's motion for an interlocutory injunction requiring a tenant to move to another location within the premises. The mall did not show that the status quo was endangered and in need of preservation, and indeed, the injunction did not preserve the status quo as the injunction required the tenant to vacate the tenant's current space and relocate to a smaller one; furthermore, the trial court failed to give proper consideration to the equities of the parties as there was no evidence of vital necessity or that the mall would suffer irreparable harm if the trial court denied the court's motion. Hipster, Inc. v. Augusta Mall P'ship, 291 Ga. App. 273, 661 S.E.2d 652, 2008 Ga. App. LEXIS 468 (2008).

Injunction preventing annexation of property proper. — When a county sought an interlocutory injunction preventing a city from annexing certain property, the trial court properly denied injunctive relief. The parties presented conflicting evidence regarding both the threat of harm to the county and the validity of the challenged annexation applications. Cherokee County v. City of Holly Springs, 284 Ga. 298, 667 S.E.2d 78, 2008 Ga. LEXIS 740 (2008).

RESEARCH REFERENCES

Am. Jur. 2d.
42 Am. Jur 2d, Injunctions, §§ 13 et seq., 275, 297, 324.
Am. Jur. Pleading and Practice Forms.
14 Am. Jur. Pleading and Practice Forms, Injunctions, § 4.
C.J.S.
43A C.J.S., Injunctions, §§ 19, 24 et seq., 369.
ALR.
Power to modify permanent injunction, 68 A.L.R. 1180; 136 A.L.R. 765.
Power of equity to require acceptance of damages in lieu of injunctive relief asked, 105 A.L.R. 1381.

9-5-9. Second injunction in court's discretion.

A second injunction may be granted in the discretion of the judge.

History.
Laws 1842, Cobb's 1851 Digest, p. 528.; Code 1863, § 3144; Code 1868, § 3156; Code 1873, § 3223; Code 1882, § 3223; Civil Code 1895, § 4921; Civil Code 1910, § 5498; Civil Code 1933, § 55-109.

JUDICIAL DECISIONS

Second injunction after denial of first generally only proper when new facts shown. — While a second application for an injunction may be made when an injunction was refused on the first application, such second application is addressed to the discretion of the judge, in the manner of cases falling strictly within this section, and should not, as a general rule, be granted unless based upon grounds which were unknown to the applicant at the time of the first application, and which could not, by the exercise of ordinary diligence, have been discovered by the applicant, and thus be analogous to the rules for granting a new trial upon newly discovered evidence. Blizzard v. Nosworthy, 50 Ga. 514, 1874 Ga. LEXIS 2 (1874); Conwell v. Neal, 118 Ga. 624, 45 S.E. 910, 1903 Ga. LEXIS 636 (1903) (see O.C.G.A. § 9-5-9).

Denial of an interlocutory injunction does not preclude a party from filing another request later if new evidence becomes available or the circumstances change such that there is a greater need for preliminary relief. Bishop v. Patton, 288 Ga. 600, 706 S.E.2d 634, 2011 Ga. LEXIS 151, overruled in part, SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 289 Ga. 1, 709 S.E.2d 267, 2011 Ga. LEXIS 270 (2011).

Facts known at time of first injunction. — When facts were in existence and known to the defendant at the time of the first injunction, grant of the second injunction was error, no sufficient reason appearing why such grounds were not urged upon the hearing of the application for the grant of the first injunction. Eminent Household of Columbian Woodmen v. Thornton, 135 Ga. 786, 70 S.E. 666, 1911 Ga. LEXIS 79 (1911).

Injunction cannot be granted upon substantially same facts and conditions; this is especially true with interlocutory hearings. Cox v. Mayor of Griffin, 17 Ga. 249, 1855 Ga. LEXIS 101 (1855); Glass v. Clark, 41 Ga. 544, 1871 Ga. LEXIS 137 (1871); Savannah, F. & W. Ry. v. Postal Tel. Cable Co., 113 Ga. 916, 39 S.E. 399, 1901 Ga. LEXIS 414 (1901); Clements v. Fletcher, 155 Ga. 802, 118 S.E. 201, 1923 Ga. LEXIS 166 (1923); Moody v. Williams, 157 Ga. 576, 122 S.E. 56, 1924 Ga. LEXIS 205 (1924).

While this section provides that a second injunction may be granted in the discretion of the judge, the statute does not permit the trial judge on the second

application for injunction based upon the same contentions previously made to make a ruling contrary to the law established on the previous ruling. Sandersville R.R. v. Gilmore, 212 Ga. 481, 93 S.E.2d 696, 1956 Ga. LEXIS 420 (1956) (1956;). but see Cox v. Zucker, 214 Ga. 44, 102 S.E.2d 580, 1958 Ga. LEXIS 333 (1958) (see O.C.G.A. § 9-5-9).

Two year delay in seeking an interlocutory injunction was not inconsistent with the plaintiff's claim of injury and the need for immediate relief since the plaintiffs showed that the plaintiffs had entered into a consent order in an effort to keep peace and in anticipation of an early trial date, but that trial had not taken place, and that the defendants had failed to abide by the terms of the consent order. Mathis v. Durham, 269 Ga. 753, 505 S.E.2d 724.

When first injunction was granted, but case was voluntarily dismissed, judge might grant second injunction. Parker v. Weaver, 151 Ga. 547, 107 S.E. 484, 1921 Ga. LEXIS 325 (1921).

RESEARCH REFERENCES

Am. Jur. 2d.
42 Am. Jur. 2d, Injunctions, §§ 285, 297.

Am. Jur. Pleading and Practice Forms.
14 Am. Jur. Pleading and Practice Forms, Injunctions, § 4.

C.J.S.
43A C.J.S., Injunctions, §§ 69, 70.

9-5-10. Perpetual injunction after hearing.

A perpetual injunction shall be granted only after hearing and upon a final decree.

History.
Orig. Code 1863, § 3146; Code 1868, § 3158; Code 1873, § 3225; Code 1882, § 3225; Civil Code 1895, § 4923; Civil Code 1910, § 5500; Code 1933, § 55-111.

JUDICIAL DECISIONS

Injunction should not be made permanent on interlocutory hearing. Leggett v. Alazos, 209 Ga. 477, 74 S.E.2d 69, 1953 Ga. LEXIS 290 (1953).

On hearing of application for temporary injunction judge should not grant permanent one, but only one of an ad interim character, to remain of force until the final trial. Pig'n Whistle Sandwich Shops, Inc. v. Keith, 167 Ga. 735, 146 S.E. 455, 1929 Ga. LEXIS 31 (1929).

Order granting permanent injunction on interlocutory hearing not void where modifiable. — An order making a temporary restraining order permanent, issued by a court having jurisdiction of the person and subject matter, and in a proper proceeding therefore was not void, though erroneously entered on an interlocutory hearing, where it could have been modified so as to be operative only until final trial or further order. Leggett v. Alazos, 209 Ga. 477, 74 S.E.2d 69, 1953 Ga. LEXIS 290 (1953).

RESEARCH REFERENCES

Am. Jur. 2d.
42 Am. Jur. 2d, Injunctions, §§ 264, 265, 292 et seq.
C.J.S.
43A C.J.S., Injunctions, §§ 11, 393 et seq.
ALR.
Power to modify permanent injunction, 68 A.L.R. 1180; 136 A.L.R. 765.

Propriety of permanently enjoining one guilty of unauthorized use of trade secret from engaging in sale or manufacture of device in question, 38 A.L.R.3d 572.

9-5-11. Injunctions against certain transactions outside state.

Equity may enjoin the defendant as to transactions involving fraud, trust, or contracts beyond the limits of this state.

History.
Civil Code 1895, § 4854; Civil Code 1910, § 5427; Code 1933, § 55-112.
History of Section.
The language of this Code section is derived in part from the decision in Engel v. Scheuerman, 40 Ga. 207 (1869).

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Scope of section. — This section, properly construed, limits the right to enjoin foreign transactions to cases involving fraud, trust, or contract. Laslie v. Gragg Lumber Co., 184 Ga. 794, 193 S.E. 763, 1937 Ga. LEXIS 645 (1937) (see O.C.G.A. § 9-5-11).

Action to enjoin trespass outside state improper. — A plaintiff cannot, in a court of equity of this state, maintain an action to enjoin a trespass to land located in Florida, although the defendants reside in this state. Laslie v. Gragg Lumber Co., 184 Ga. 794, 193 S.E. 763, 1937 Ga. LEXIS 645 (1937).

Fraudulent concealment of debtor's assets. — Petition charging that defendant husband was seeking to place his property where it could not be reached by his wife (his judgment creditor) presented a situation where upon proof a court of equity could grant prayers for setting aside alleged fraudulent conveyance and transfer to out-of-state resident, as well as alleged fraudulent claims of lien for attorneys' fees, and for appointment of a receiver to take charge of defendant's assets and under the direction of the court sell enough to pay the petitioner the amount now due under her two judgments. Peoples Loan Co. v. Allen, 199 Ga. 537, 34 S.E.2d 811, 1945 Ga. LEXIS 342 (1945).

Petition brought against a judgment debtor and other defendants, alleging that they entered into a conspiracy in bad faith to hinder, delay, or defraud the petitioner in the collection of the petitioner's two judgments; and that in pursuance of such conspiracy various properties of the judgment debtor were secreted and fraudulent conveyances were made; and seeking to set aside such fraudulent conveyances and the appointment of a receiver and other relief, stated a cause of action against the four defendants. Peoples Loan Co. v. Allen, 199 Ga. 537, 34 S.E.2d 811, 1945 Ga. LEXIS 342 (1945).

Court did not abuse the court's discretion in entering an interlocutory injunction barring further disposition of the proceeds from joint bank accounts pending final disposition of fraudulent transfer and wrongful death lawsuits because badges of fraud indicated an actual intent to hinder, delay, or defraud a decedent's estate and heirs of a full recovery. The transferor's adult child came up from Florida to withdraw the funds from joint bank accounts in Georgia three days after the transferor was arrested for the mur-

der of the decedent. Bishop v. Patton, 288 Ga. 600, 706 S.E.2d 634, 2011 Ga. LEXIS 151, overruled in part, SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 289 Ga. 1, 709 S.E.2d 267, 2011 Ga. LEXIS 270 (2011).

Trial court did not abuse the court's discretion by safeguarding the status quo pending final resolution of the creditor's fraudulent transfer claims against the debtors because the evidence supported a finding that the debtors had moved virtually all of the debtors' assets to a series of recently formed entities and other recipients with actual intent to hinder, delay, or defraud creditors and were likely to continue doing so in violation of the Georgia Uniform Fraudulent Transfers Act, O.C.G.A. § 18-2-74(a)(1); the purpose of the interlocutory injunction was to freeze the fraudulently transferred assets in place and prevent the debtors from putting the debtors' assets beyond the trial court's reach to satisfy an eventual judgment, thereby leaving the creditor practically remediless. SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 289 Ga. 1, 709 S.E.2d 267, 2011 Ga. LEXIS 270 (2011).

Trial court did not abuse the court's discretion in entering an interlocutory injunction to preserve the status quo pending adjudication of the merits of the creditor's action against the debtors alleging breach of contract and fraudulent transfers in violation of the Georgia Uniform Fraudulent Transfers Act, O.C.G.A. § 18-2-70 et seq., because the debtors presented no evidence of harm from the creditor's delay in amending the creditor's complaint to seek an interlocutory injunction, and the delay resulted primarily from the debtors' concealment of the debtors' actions and obstruction of the creditor's efforts to discover the details; vague assertions of harm supported by no citation to evidence in the record are insufficient to sustain a defense of laches, and there is a balance between a plaintiff's knowing that a cause of action exists and that interim injunctive relief may be needed and sitting on the plaintiff's rights to the prejudice of the defendant. SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 289 Ga. 1, 709 S.E.2d 267, 2011 Ga. LEXIS 270 (2011).

RESEARCH REFERENCES

Am. Jur. 2d.

42 Am. Jur. 2d, Injunctions, §§ 11, 292, 305.

C.J.S.

43A C.J.S., Injunctions, §§ 291, 354.

ALR.

Jurisdiction to enjoin trespass upon real property in another state or country, 113 A.L.R. 940.

Power to enjoin bringing or prosecution of action under Federal Employers' Liability Act in another jurisdiction, 136 A.L.R. 1232; 146 A.L.R. 1118.

Injunction by state court against action in court of another state, 6 A.L.R.2d 896.

Extraterritorial recognition of, and propriety of counterinjunction against, injunction against actions in courts of other states, 74 A.L.R.2d 828.

CHAPTER 6

EXTRAORDINARY WRITS

Article 1

General Provisions

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9-6-60. For what purpose quo warranto may issue; who may bring action.
9-6-61. Writ lies against civil and military officers; Governor exempt.
9-6-62. When granted; how issues of fact tried.
9-6-63. Service of writ and process.
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9-6-65. Jury trial where facts at issue; time of trial; continuances.
9-6-66. Disposition of books and papers by judgment.

Cross references.

Requirement that, in cases involving mandamus, prohibition, or quo warranto, jury return only special verdict upon request of party, § 9-11-49.

Supersedeas, Rules of the Court of Appeals of the State of Georgia, Rule 40.

ARTICLE 1

GENERAL PROVISIONS

9-6-1. Final judgment prerequisite to appeal; grant of new trial subject to review.

No appeal as to any ruling or decision in a mandamus or quo warranto proceeding or in a case involving a writ of prohibition may be

taken until there has been a final judgment in the trial court. The grant of a new trial shall be treated as a final judgment in these cases and subject to review as in other cases.

History.

Ga. L. 1882-83, p. 103, § 3; Civil Code 1895, § 4874; Civil Code 1910, § 5447; Code 1933, § 64-110; Ga. L. 1946, p. 726, § 1; Ga. L. 2016, p. 865, § 3-4/HB 927.

Editor's notes.

Ga. L. 2016, p. 865, § 1-1/HB 927, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Appellate Jurisdiction Reform Act of 2016.'"

Ga. L. 2016, p. 865, § 6-1/HB 927, not codified by the General Assembly, provides, in part, that: "Part III of this Act shall become effective on January 1, 2017, and shall apply to cases in which a notice of appeal or application to appeal is filed on or after such date."

Law reviews.

For article on the 2016 amendment of this Code section, see 33 Georgia St. U. L. Rev. 205 (2016).

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This section does not affect right to file and prosecute motion for new trial in a mandamus case, and does not limit the time within which such a motion must be disposed of. City of Macon v. Herrington, 198 Ga. 576, 32 S.E.2d 517, 1944 Ga. LEXIS 455 (1944) (see O.C.G.A. § 9-6-1).

Final judgment on prayer for mandamus prerequisite to appeal. — Order overruling demurrers (now motions to dismiss), to petition for mandamus and for injunctive relief cannot be reviewed by Supreme Court until there has been a final judgment on the prayer for a mandamus absolute. Walker v. McKenzie, 209 Ga. 653, 74 S.E.2d 870, 1953 Ga. LEXIS 345 (1953).

Direct appeal of denial of application in nature of quo warranto. — The law authorizes a direct appeal to a judgment denying an application to file an information in the nature of a quo warranto. Walker v. Hamilton, 209 Ga. 735, 76 S.E.2d 12, 1953 Ga. LEXIS 398 (1953).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

17 Am. Jur. Pleading and Practice Forms, Mandamus, § 136. 18B Am. Jur. Pleading and Practice Forms, New Trial, § 1.

ALR.

Consideration of obligor's personal-injury recovery or settlement in fixing alimony or child support, 59 A.L.R.5th 489.

ARTICLE 2

MANDAMUS

RESEARCH REFERENCES

ALR.

Allowance of attorneys' fees in mandamus proceedings, 34 A.L.R.4th 457.

9-6-20. When mandamus may issue; exceptions.

All official duties should be faithfully performed, and whenever, from

any cause, a defect of legal justice would ensue from a failure to perform or from improper performance, the writ of mandamus may issue to compel a due performance if there is no other specific legal remedy for the legal rights; provided, however, that no writ of mandamus to compel the removal of a judge shall issue where no motion to recuse has been filed, if such motion is available, or where a motion to recuse has been denied after assignment to a separate judge for hearing.

History.

Orig. Code 1863, § 3130; Code 1868, § 3142; Code 1873, § 3198; Code 1882, § 3198; Civil Code 1895, § 4867; Civil Code 1910, § 5440; Code 1933, § 64-101; Ga. L. 2009, p. 643, § 1/HB 221.

Cross references.

Petitioning for mandamus to compel auditor in superior court to certify exceptions to report of auditor, § 9-7-15.

Applications for mandamus, Rules of the Court of Appeals of the State of Georgia, Rule 31.

Law reviews.

For article discussing the inefficiency of mandamus and impeachment as remedies for judicial inaction, see 5 Ga. St. B.J. 467 (1969).

For annual survey of administrative law, see 38 Mercer L. Rev. 17 (1986).

For article, "A Taxing Exception: Southern LNG, Inc. v. MacGinnitie's Narrow Interpretation of the Mandamus Exception," see 66 Mercer L. Rev. 855 (2015).

For note, "The Case of the Vanishing Supreme Court Contest: *Barrow v. Raffensperger* Eliminates the Power of the People to Elect their Appellate, Superior, and State Court Judges," see 72 Mercer L. Rev. 957 (2021).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Specific Cases
1. Cases Where Mandamus Proper
2. Cases Where Mandamus Improper

General Consideration

Mandamus is extraordinary legal remedy. Clear Vision CATV Servs., Inc. v. Mayor of Jesup, 225 Ga. 757, 171 S.E.2d 505, 1969 Ga. LEXIS 639 (1969).

Mandamus is an extraordinary common law writ, with which equity has nothing to do. Gay v. Gilmore, 76 Ga. 725, 1886 Ga. LEXIS 101 (1886); Bowen v. Whiddon, 143 Ga. 351, 85 S.E. 122, 1915 Ga. LEXIS 434 (1915); Richmond County v. Steed, 150 Ga. 229, 103 S.E. 253, 1920 Ga. LEXIS 122 (1920); Board of Educ. v. Fowler, 192 Ga. 35, 14 S.E.2d 478, 1941 Ga. LEXIS 402 (1941).

Under this section, as a general rule, scope of mandamus is very broad, and, though it is much restricted in special instances in other Code sections, these are only exceptions to the general rule. Wofford Oil Co. v. City of Calhoun, 183 Ga. 511, 189 S.E. 5, 1936 Ga. LEXIS 142 (1936) (see O.C.G.A. § 9-6-20).

This section gives judge of superior court power to issue writs of mandamus, and makes it the judge's duty to do so from any cause whereby a defect of legal justice would ensue if a mandamus be not issued, and if there be no other specific legal remedy. Wofford Oil Co. v. City of Calhoun, 183 Ga. 511, 189 S.E. 5, 1936 Ga. LEXIS 142 (1936) (see O.C.G.A. § 9-6-20).

Provisions of this section apply to public officers only. Bregman v. Orkin Exterminating Co., 213 Ga. 561, 100 S.E.2d 267, 1957 Ga. LEXIS 442 (1957) (see O.C.G.A. § 9-6-20).

Mandamus is a remedy for official inaction. City of Atlanta v. Wright, 119

General Consideration (Cont'd)

Ga. 207, 45 S.E. 994, 1903 Ga. LEXIS 88 (1903); Touchton v. Echols County, 211 Ga. 85, 84 S.E.2d 81, 1954 Ga. LEXIS 510 (1954); Coastal Serv., Inc. v. Jackson, 223 Ga. 238, 154 S.E.2d 365, 1967 Ga. LEXIS 476 (1967).

Right to mandamus does not arise until officer defaults on duty. — The right to invoke the aid of a court to compel by mandamus the performance of an official duty cannot, as a general rule, arise until the officer is in actual default. Pearce v. Bembry, 174 Ga. 86, 162 S.E. 125, 1932 Ga. LEXIS 1 (1932).

Whether mandamus will lie will depend upon nature of official acts: if the acts are purely ministerial or purely legislative, then mandamus will be the proper procedure to determine the petitioner's rights if the petitioner has no other specific remedy; however, if the acts complained of are of a judicial nature, then the writ of certiorari will lie for the correction of any errors. Anderson v. McMurry, 217 Ga. 145, 121 S.E.2d 22, 1961 Ga. LEXIS 395 (1961).

Rule as to immunity of state does not forbid suits against officers in their official capacity to direct their official action by mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest. Stanley v. Sims, 185 Ga. 518, 195 S.E. 439, 1938 Ga. LEXIS 804 (1938).

Except in case of clear legal right, writ of mandamus is discretionary remedy. Van Valkenburg v. Stone, 172 Ga. 642, 158 S.E. 419, 1931 Ga. LEXIS 166 (1931).

In order to entitle one to mandamus, it must appear that one has a clear legal right to have the particular act performed, the doing of which one seeks to have enforced. State ex rel. Waring v. Georgia Medical Soc'y, 38 Ga. 608, 1869 Ga. LEXIS 282 (1869); Jackson v. Cochran, 134 Ga. 396, 67 S.E. 825, 1910 Ga. LEXIS 217 (1910); Adkins v. Bennett, 138 Ga. 118, 74 S.E. 838, 1912 Ga. LEXIS 214 (1912); Cureton v. Wheeler, 172 Ga. 879, 159 S.E. 283, 1931 Ga. LEXIS 233 (1931); Bowles v. Etheridge, 176 Ga. 660, 168 S.E. 769, 1933 Ga. LEXIS 246 (1933); West v. Lewis, 188 Ga. 437, 4 S.E.2d 171, 1939 Ga. LEXIS 562 (1939); Phillips v. Head, 188 Ga. 511, 4 S.E.2d 240, 1939 Ga. LEXIS 576 (1939); Wade v. Combined Mut. Cas. Co., 201 Ga. 318, 39 S.E.2d 681, 1946 Ga. LEXIS 465 (1946); Poole v. Duncan, 202 Ga. 255, 42 S.E.2d 731, 1947 Ga. LEXIS 409 (1947); Richardson v. Awtry & Lowndes Co., 204 Ga. 77, 49 S.E.2d 24, 1948 Ga. LEXIS 562 (1948); Trussell v. Martin, 207 Ga. 553, 63 S.E.2d 361, 1951 Ga. LEXIS 459 (1951); Pierce v. Rhodes, 208 Ga. 554, 67 S.E.2d 771, 1951 Ga. LEXIS 433 (1951); Veal v. Washington County Bd. of Educ., 211 Ga. 204, 84 S.E.2d 565, 1954 Ga. LEXIS 530 (1954); City of Decatur v. Fountain, 214 Ga. 225, 104 S.E.2d 117, 1958 Ga. LEXIS 379 (1958); Bradford v. Bolton, 215 Ga. 188, 109 S.E.2d 751, 1959 Ga. LEXIS 431 (1959); Garrett v. Board of Comm'rs, 215 Ga. 351, 110 S.E.2d 626, 1959 Ga. LEXIS 472 (1959); Weathers v. Stith, 217 Ga. 39, 120 S.E.2d 616, 1961 Ga. LEXIS 369 (1961); City of College Park v. Hamilton, 220 Ga. 629, 140 S.E.2d 878, 1965 Ga. LEXIS 584 (1965); Howard Simpson Realty Co. v. City of Marietta, 220 Ga. 727, 141 S.E.2d 460, 1965 Ga. LEXIS 618 (1965); Clairmont Dev. Co. v. Morgan, 222 Ga. 255, 149 S.E.2d 489, 1966 Ga. LEXIS 451 (1966); Hyman v. Pruitt, 226 Ga. 625, 176 S.E.2d 707, 1970 Ga. LEXIS 615 (1970); Allen v. Carter, 226 Ga. 727, 177 S.E.2d 245, 1970 Ga. LEXIS 655 (1970); Bailey v. Dobbs, 227 Ga. 838, 183 S.E.2d 461, 1971 Ga. LEXIS 861 (1971); McClure v. Hightower, 237 Ga. 157, 227 S.E.2d 47, 1976 Ga. LEXIS 1178 (1976).

Trial court did not err in denying an employee's request for mandamus relief, as a grievance decision entered by the employer's Bureau of Labor Relations did not create a legal requirement that the employee be reinstated to a previous position, along with the back pay sought, but instead, stated that the Bureau had no objection to any accommodation made to rectify the employee's situation; moreover, the employee's federal conspiracy conviction rendered the request for mandamus

relief moot. Williams v. City of Atlanta, 281 Ga. 478, 640 S.E.2d 35, 2007 Ga. LEXIS 25 (2007).

No legal remedy for enforcement of rights. — Mandamus lies at the instance of a citizen who has a clear specific legal right and no legal remedy for its enforcement. Napier v. Poe, 12 Ga. 170, 1852 Ga. LEXIS 108 (1852).

Mandamus against public officers is available to individual where there is no other specific legal remedy and a legal injustice will result from failure to perform a clear official duty. Evans v. White, 178 Ga. 262, 172 S.E. 913, 1934 Ga. LEXIS 27 (1934); Ex parte Ross, 197 Ga. 257, 28 S.E.2d 925, 1944 Ga. LEXIS 249 (1944).

The right to extraordinary aid of mandamus exists only where the applicant has a clear legal right to the relief sought and there is no other adequate remedy. Wright v. Forrester, 192 Ga. 864, 16 S.E.2d 873, 1941 Ga. LEXIS 563 (1941); State Hwy. Dep't v. Reed, 211 Ga. 197, 84 S.E.2d 561, 1954 Ga. LEXIS 528 (1954); Westberry v. Taylor, 215 Ga. 464, 111 S.E.2d 77, 1959 Ga. LEXIS 513 (1959); O'Callahan v. Aikens, 218 Ga. 46, 126 S.E.2d 212, 1962 Ga. LEXIS 424 (1962); Bedingfield v. Adams, 221 Ga. 69, 142 S.E.2d 915, 1965 Ga. LEXIS 384 (1965); Henderson v. Carter, 229 Ga. 876, 195 S.E.2d 4, 1972 Ga. LEXIS 812 (1972), overruled, City of Atlanta v. Barnes, 276 Ga. 449, 578 S.E.2d 110, 2003 Ga. LEXIS 258 (2003); Nesbitt v. Lewis, 235 Ga. 477, 220 S.E.2d 7, 1975 Ga. LEXIS 906 (1975); Hernandez v. Board of Comm'rs, 242 Ga. 76, 247 S.E.2d 870, 1978 Ga. LEXIS 1099 (1978).

Civil rights action. — Federal district court did not err in concluding that university professor's procedural due process claim was actionable under 42 U.S.C. § 1983 because the district court reached the plausible conclusion that the state courts may have summarily dismissed the professor's mandamus request without considering the merits thereof; while a writ of certiorari was not available to the professor upon the state court's determination that the termination proceedings were purely administrative, the professor was still entitled to seek a writ of mandamus. Laskar v. Peterson, 771 F.3d 1291, 2014 U.S. App. LEXIS 21540 (11th Cir. 2014).

Right must be complete and not inchoate. — To warrant relief by mandamus, right whose enforcement is sought must be a complete and not merely an inchoate right. Mattox v. Board of Educ., 148 Ga. 577, 97 S.E. 532, 1918 Ga. LEXIS 448 (1918).

Superior court judge has duty to issue mandamus in any cause where there is no other specific legal remedy and legal justice would be impaired if mandamus were not issued. Gay v. City of Lyons, 209 Ga. 599, 74 S.E.2d 839, 1953 Ga. LEXIS 331 (1953).

Mandamus is not available where another remedy exists. Carroll v. American Agric. Chem. Co., 175 Ga. 855, 167 S.E. 597, 1932 Ga. LEXIS 346 (1932); McGravey v. Board of Zoning Appeals, 243 Ga. 714, 256 S.E.2d 781, 1979 Ga. LEXIS 1043 (1979).

Mandamus will not lie when there is adequate and specific remedy at law; it is available only when it is exclusive. Adams v. Town of Weston, 181 Ga. 503, 183 S.E. 69, 1935 Ga. LEXIS 145 (1935); Patten v. Miller, 190 Ga. 123, 8 S.E.2d 757, 1940 Ga. LEXIS 432 (1940); Ungar v. Mayor of Savannah, 224 Ga. 613, 163 S.E.2d 814, 1968 Ga. LEXIS 868 (1968).

Mandamus is never an available remedy when there is a plain specific legal remedy. Wofford v. Porte, 212 Ga. 533, 93 S.E.2d 690, 1956 Ga. LEXIS 435 (1956); Wofford v. City of Gainesville, 212 Ga. 818, 96 S.E.2d 490, 1957 Ga. LEXIS 270 (1957), superseded by statute as stated in Southeastern Plumbing Supply Co. v. Lee, 232 Ga. 626, 208 S.E.2d 449, 1974 Ga. LEXIS 1034 (1974); Harper v. Burgess, 225 Ga. 420, 169 S.E.2d 297, 1969 Ga. LEXIS 518 (1969).

Other legal remedy must be complete. — The rule that mandamus will not be granted where there is specific legal remedy is restricted to cases where the legal remedy is equally convenient, complete, and beneficial. Adams v. Town of Weston, 181 Ga. 503, 183 S.E. 69, 1935 Ga. LEXIS 145 (1935).

Where another remedy is not well adapted to case, it will not prevent

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resort to mandamus. Adams v. Town of Weston, 181 Ga. 503, 183 S.E. 69, 1935 Ga. LEXIS 145 (1935).

Mandamus not proper where plaintiff has cause of action arising from contract. — Where the plaintiff has a right of action against the defendants to recover the amount due the plaintiff under contract, and can maintain an action at law for that purpose, the plaintiff has an adequate remedy at law, and the writ of mandamus will not lie. Burke v. Board of Educ., 182 Ga. 458, 185 S.E. 813, 1936 Ga. LEXIS 451 (1936).

One must exhaust available administrative remedies before applying for mandamus. O'Callahan v. Aikens, 218 Ga. 46, 126 S.E.2d 212, 1962 Ga. LEXIS 424 (1962).

If there is specific remedy by certiorari, remedy of mandamus does not exist. Hayes v. Brown, 205 Ga. 234, 52 S.E.2d 862, 1949 Ga. LEXIS 335 (1949); City of Dalton v. Smith, 158 Ga. App. 356, 280 S.E.2d 138, 1981 Ga. App. LEXIS 2207 (1981).

When certiorari is available, it will generally provide easier and speedier remedy than mandamus, and it is always available to review decisions of inferior judicatories. Wofford Oil Co. v. City of Calhoun, 183 Ga. 511, 189 S.E. 5, 1936 Ga. LEXIS 142 (1936).

In suit for mandamus, duty complainant seeks to have enforced must be duty arising by law either expressly or by necessary implication, and the law must not only authorize the act to be done, but must require its performance. Williamson v. Wilson, 189 Ga. 652, 7 S.E.2d 241, 1940 Ga. LEXIS 356 (1940); Tucker v. Wilson, 198 Ga. 474, 31 S.E.2d 657, 1944 Ga. LEXIS 404 (1944); Armistead v. MacNeill, 203 Ga. 204, 45 S.E.2d 652, 1947 Ga. LEXIS 584 (1947); Veal v. Washington County Bd. of Educ., 211 Ga. 204, 84 S.E.2d 565, 1954 Ga. LEXIS 530 (1954); McCallum v. Almand, 213 Ga. 701, 100 S.E.2d 924, 1957 Ga. LEXIS 492 (1957); City of College Park v. Hamilton, 220 Ga. 629, 140 S.E.2d 878, 1965 Ga. LEXIS 584 (1965).

Mandamus may issue against officials to compel due performance of official duties. McCallum v. Bryan, 213 Ga. 669, 100 S.E.2d 916, 1957 Ga. LEXIS 483 (1957); Undercofler v. Scott, 220 Ga. 406, 139 S.E.2d 299, 1964 Ga. LEXIS 570 (1964).

The writ of mandamus is issued to compel public officials to perform their official duties where there is no other adequate legal remedy. Clifton v. Berry, 244 Ga. 78, 259 S.E.2d 35, 1979 Ga. LEXIS 1122 (1979).

Because the amount of credit the defendant was entitled to receive was to be computed by a pre-sentence custodian, and the duty to award the credit for time served prior to trial fell upon the Department of Corrections, an appeal from an order denying the defendant clarification of an imposed sentence was not properly before the appeals court; moreover, any dissatisfaction with that relief would not be part of the defendant's direct appeal from the original conviction, but would be in a mandamus or injunction action against the Commissioner of the Department of Corrections. Smashey v. State, 282 Ga. App. 293, 638 S.E.2d 431, 2006 Ga. App. LEXIS 1371 (2006).

Mandamus is available only to require officers to perform duties clearly required by law. Wrightsville Consol. Sch. Dist. v. Selig Co., 195 Ga. 408, 24 S.E.2d 306, 1943 Ga. LEXIS 498 (1943); Tucker v. Wilson, 198 Ga. 474, 31 S.E.2d 657, 1944 Ga. LEXIS 404 (1944).

Mandamus is the remedy to compel a public officer or a county board to perform a duty imposed by law. City of Dalton v. Smith, 158 Ga. App. 356, 280 S.E.2d 138, 1981 Ga. App. LEXIS 2207 (1981).

Mandamus lies against officer to require performance of clear legal right. McCallum v. Bryan, 213 Ga. 669, 100 S.E.2d 916, 1957 Ga. LEXIS 483 (1957); Duncan v. Poythress, 515 F. Supp. 327, 1981 U.S. Dist. LEXIS 13950 (N.D. Ga.), aff'd, 657 F.2d 691, 1981 U.S. App. LEXIS 17330 (5th Cir. 1981).

Mandamus will compel performance in instances where duty is clear and well defined, and when no element of discretion is involved in the performance. Atlanta Title & Trust Co. v. Tidwell, 173 Ga. 499, 160 S.E. 620, 1931 Ga. LEXIS 348 (1931).

Mandamus issues if officer's discretion not involved. — Where the duties

alleged to be incumbent upon the officer involve the discretion of the officer referred to, the compulsory processes of the court will not be employed to compel the officer to perform an act concerning the performance of which the officer is vested with a discretion. Stevenson v. Bond, 177 Ga. 71, 169 S.E. 368, 1933 Ga. LEXIS 117 (1933).

Mandamus, being a process to require a public official to act, is not available to control or change the official's action taken in the exercise of discretion vested in the official by the law. Southern Bell Tel. & Tel. Co. v. Georgia Pub. Serv. Comm'n, 203 Ga. 832, 49 S.E.2d 38, 1948 Ga. LEXIS 564 (1948).

Mandamus is not an available remedy to control the official action taken in the exercise of discretion vested by law in a public officer. Persons v. Mashburn, 211 Ga. 477, 86 S.E.2d 319, 1955 Ga. LEXIS 360 (1955).

Where the duty of public officers to perform specific acts is clear and well defined and is imposed by law, and when no element of discretion is involved in performance thereof, the writ of mandamus will issue to compel their performance. Mere authorization to act is insufficient unless the law requires performance of the duty. Hartsfield v. Salem, 213 Ga. 760, 101 S.E.2d 701, 1958 Ga. LEXIS 273 (1958).

Where it is sought to compel an official act which is discretionary, the writ of mandamus generally will not issue because there is no clear legal right. Clear Vision CATV Servs., Inc. v. Mayor of Jesup, 225 Ga. 757, 171 S.E.2d 505, 1969 Ga. LEXIS 639 (1969).

Mandamus proper where officer grossly abuses discretion. — While the writ of mandamus cannot ordinarily be employed to control the discretion vested in such an officer by directing what the officer's action shall be, the exception to this general rule exists where there has been such an arbitrary and capricious use or gross abuse of discretion as will in effect amount to a failure on the part of the officer to exercise the officer's discretion at all. South View Cem. Ass'n v. Hailey, 199 Ga. 478, 34 S.E.2d 863, 1945 Ga. LEXIS 347 (1945).

Where an officer is vested with discretion, the exercise of which has been so capricious or arbitrary as to amount to its gross abuse, mandamus will lie. Wade v. Combined Mut. Cas. Co., 201 Ga. 318, 39 S.E.2d 681, 1946 Ga. LEXIS 465 (1946).

Mandamus does not lie to control the action of an officer vested with a discretion, in the absence of a gross abuse of such discretion. Touchton v. Echols County, 211 Ga. 85, 84 S.E.2d 81, 1954 Ga. LEXIS 510 (1954).

Mandamus generally does not lie except to compel performance of a public duty. Martin v. Hatfield, 251 Ga. 638, 308 S.E.2d 833, 1983 Ga. LEXIS 949 (1983).

Law must compel action. — Where no duty is imposed by law, an officer may not be compelled by writ of mandamus. Sapp v. DeLacy, 127 Ga. 659, 56 S.E. 754 (1907); Allen v. Pool, 131 Ga. 116, 62 S.E. 31, 1908 Ga. LEXIS 33 (1908); Jones v. Bank of Cumming, 131 Ga. 191, 62 S.E. 68, 1908 Ga. LEXIS 42 (1908).

Mandamus will not lie to compel public officer to do act not clearly commanded by law. Cureton v. Wheeler, 172 Ga. 879, 159 S.E. 283, 1931 Ga. LEXIS 233 (1931); Bowles v. Etheridge, 176 Ga. 660, 168 S.E. 769, 1933 Ga. LEXIS 246 (1933); Horrigan v. Rivers, 183 Ga. 141, 187 S.E. 836, 1936 Ga. LEXIS 184 (1936); Tucker v. Wilson, 198 Ga. 474, 31 S.E.2d 657, 1944 Ga. LEXIS 404 (1944).

Mandamus will not require illegal act to be done by a public official, or to compel the performance of an act where no duty is imposed by law. Trussell v. Martin, 207 Ga. 553, 63 S.E.2d 361, 1951 Ga. LEXIS 459 (1951).

Duty must exist at time mandamus sought. — Mandamus is available as a remedy where the duty to be enforced is one which exists at the time when the application for mandamus is made or the writ is granted. Duncan v. Poythress, 515 F. Supp. 327, 1981 U.S. Dist. LEXIS 13950 (N.D. Ga.), aff'd, 657 F.2d 691, 1981 U.S. App. LEXIS 17330 (5th Cir. 1981).

Mandamus is not proper remedy to compel undoing of acts already done or the correction of wrongs already perpetrated, and this is so, even though the action taken was clearly illegal. Hilton

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Constr. Co. v. Rockdale County Bd. of Educ., 245 Ga. 533, 266 S.E.2d 157, 1980 Ga. LEXIS 846 (1980).

Mandamus will not lie to compel general course of conduct and the performance of continuous duties. Richter v. Jordan, 185 Ga. 39, 193 S.E. 871, 1937 Ga. LEXIS 658 (1937); Solomon v. Brown, 218 Ga. 508, 128 S.E.2d 735, 1962 Ga. LEXIS 547 (1962).

Mandamus is not an appropriate remedy to compel a general course of official conduct for a long series of continuous acts to be performed under varying conditions. Jackson v. Cochran, 134 Ga. 396, 67 S.E. 825, 1910 Ga. LEXIS 217 (1910).

Persons holding public office may be required to perform continuing duty which their predecessors in office refused or failed to do. Undercofler v. Scott, 220 Ga. 406, 139 S.E.2d 299, 1964 Ga. LEXIS 570 (1964).

Proceeding brought under this section, is essentially personal one against respondent, and not one in rem against the office, and must necessarily be accounted as involving one's personal and pecuniary rights. Bryant v. Mitchell, 195 Ga. 135, 23 S.E.2d 410, 1942 Ga. LEXIS 713 (1942) (see O.C.G.A. § 9-6-20).

Writ of mandamus does not reach office nor can it be directed to office. It acts directly on the person of the officer or other respondent, coercing the officer in the performance of a plain duty. It is a personal action against the officer and not one in rem against the office. McCallum v. Bryan, 213 Ga. 669, 100 S.E.2d 916, 1957 Ga. LEXIS 483 (1957).

The writ of mandamus is personal and issues to the individual to compel performance, and it does not reach the office but is directed against the officer to compel the officer to perform the required legal duty. Bulloch County v. Ritzert, 213 Ga. 818, 102 S.E.2d 40, 1958 Ga. LEXIS 292 (1958).

Writ of mandamus cannot properly be issued where body sits in quasi-judicial capacity. In such a case its decisions are subject to review only by the writ of certiorari. Anderson v. McMurry, 217 Ga. 145, 121 S.E.2d 22, 1961 Ga. LEXIS 395 (1961).

Writ of mandamus should not be granted unless it would afford to applicant some material advantage. Harper v. Burgess, 225 Ga. 420, 169 S.E.2d 297, 1969 Ga. LEXIS 518 (1969).

Mandamus will not issue where the remedy is ineffectual, or where the granting of the writ would decide questions of importance to persons not parties to the proceedings and entail hardships thereon. Smith v. Hodgson, 129 Ga. 494, 59 S.E. 272, 1907 Ga. LEXIS 492 (1907).

It is improper to grant mandamus where court would aid effectuation of injustice, or where the relator does not come into court with clean hands. Ward v. Montgomery Ward & Co., 181 Ga. 228, 181 S.E. 664, 1935 Ga. LEXIS 61 (1935).

Generally, demand and refusal is a prerequisite to granting mandamus. Leonard v. House, 15 Ga. 473, 1854 Ga. LEXIS 65 (1854).

Mandamus action is commenced by original petition or application to compel due performance of an official duty, if there is no other specific legal remedy for the legal rights. Richardson v. Rector, 134 Ga. App. 116, 213 S.E.2d 488, 1975 Ga. App. LEXIS 1927 (1975).

One who assails official acts by employing remedy of mandamus must prefer specific charges. The allegations of the petition must be positive, and not made on information and belief and the facts must be pleaded with certainty. The ultimate facts upon which the right to the writ of mandamus is based should be alleged. Cox v. Little, 178 Ga. 750, 174 S.E. 332, 1934 Ga. LEXIS 165 (1934).

In order to authorize grant of mandamus absolute, plaintiff must show clear legal right and that the mandamus will be effective. Troutman v. Aiken, 213 Ga. 55, 96 S.E.2d 585, 1957 Ga. LEXIS 299 (1957).

Before a writ of mandamus will issue, applicant must show, first, that the applicant has a clear legal right to the relief sought, and second, that there is no other adequate remedy. Solomon v. Brown, 218 Ga. 508, 128 S.E.2d 735, 1962 Ga. LEXIS

547 (1962); City of College Park v. Hamilton, 220 Ga. 629, 140 S.E.2d 878, 1965 Ga. LEXIS 584 (1965).

Mandamus not issued where petition fails to allege clear legal right. — Where the laws of Georgia do not place upon a public officer the duty of performing acts sought to be required of the officer by petitioners, and the petition fails to allege a clear legal right on the part of the petitioners to require the act done which it sought to have performed, a writ of mandamus will not lie. Tucker v. Wilson, 198 Ga. 474, 31 S.E.2d 657, 1944 Ga. LEXIS 404 (1944).

Availability of mandamus relief satisfied pre-deprivation procedural due process. — Terminated firefighter's pre-deprivation procedural due process claim was barred, as a matter of law, where the firefighter had access to a remedy in state court, a writ of mandamus under O.C.G.A. § 9-6-20, and had not shown that this state law remedy would have been insufficient to satisfy due process. Cochran v. Collins, 253 F. Supp. 2d 1295, 2003 U.S. Dist. LEXIS 10247 (N.D. Ga. 2003).

Petition must allege demand for performance and refusal by official. — One of the essentials to a petition for a writ of mandamus seeking to compel a public official to perform a duty is that it be alleged that a demand has been made upon the defendant officer and that the officer has refused the demand. McDonald v. Schofield, 216 Ga. 589, 118 S.E.2d 479, 1961 Ga. LEXIS 288 (1961).

Effect of mandamus petition on limitations periods. — Inmate's federal habeas corpus petition, which was filed more than 365 days after the parole revocation the inmate was challenging, was time barred, and the inmate's earlier filing of a mandamus action under O.C.G.A. § 9-6-20 did not toll the federal limitations period because the mandamus petition, in which the inmate sought certain documents, was not a petition for collateral review that tolled the federal limitations period. Hawes v. Howerton, No. 1:05-CV-0683-BBM, 2006 U.S. Dist. LEXIS 97139 (N.D. Ga. July 6, 2006).

Petition for mandamus not moot. — After a trial court in defendant's criminal matter entered an order of nolle prosequi regarding criminal charges against defendant, a motion for discharge and acquittal, based on the claim that the trial court had failed to comply with a demand for a speedy trial under O.C.G.A. § 17-7-170, should have still been ruled on; accordingly, it was error to find that defendant's petition for a writ of mandamus, pursuant to O.C.G.A. § 9-6-20, seeking to have the trial court judge rule on the motion for discharge and acquittal, was rendered moot. Davis v. Wilson, 280 Ga. 29, 622 S.E.2d 325, 2005 Ga. LEXIS 821 (2005).

Mandamus claim dismissed prematurely. — Dismissal of an employee's complaint for mandamus was reversed as asserted against the mayor because the ordinances allegedly violated in the process of disciplining the employee were not properly before the trial court; thus, the dismissal of the mandamus claim was premature. Hildebrand v. City of Warner Robins, 354 Ga. App. 164, 840 S.E.2d 503, 2020 Ga. App. LEXIS 131 (2020).

Elements of prima facie case. — A petitioner for mandamus does not make out a prima facie case until the petitioner proves a legal duty imposed on the defendant to do the thing the petitioner is asked to do and shows a pecuniary loss to the petitioner for which the petitioner cannot be compensated in damages. Carroll v. American Agric. Chem. Co., 175 Ga. 855, 167 S.E. 597, 1932 Ga. LEXIS 346 (1932); Poole v. Duncan, 202 Ga. 255, 42 S.E.2d 731, 1947 Ga. LEXIS 409 (1947).

In a taxpayer suit against a county and officials (the county), the court upheld the grant of summary judgment to the county because the taxpayer's mandamus claims failed for the simple reason that the taxpayer adduced no evidence that any actual assessment of any particular property was other than at fair market value or that the county had failed to comply with the county's legal duty to see that all taxable property within the county is assessed and returned for taxes at the property's fair market value. SJN Props., LLC v. Fulton County Bd. of Assessors, 296 Ga. 793, 770 S.E.2d 832, 2015 Ga. LEXIS 192 (2015).

There is always prima facie presumption in favor of good faith of

General Consideration (Cont'd)

officer. Cox v. Little, 178 Ga. 750, 174 S.E. 332, 1934 Ga. LEXIS 165 (1934).

Summary judgment applicable to mandamus cases. — The fact that this chapter provides rules under which mandamus actions shall be tried would not make Ga. L. 1967, p. 226, § 25 (see O.C.G.A. § 9-11-56) inapplicable in mandamus actions, because there was no express conflict between the sections providing for mandamus actions and the section relating to summary judgment. Harrison v. Weiner, 226 Ga. 93, 172 S.E.2d 840, 1970 Ga. LEXIS 443 (1970).

Dismissal of inmate's mandamus action was error. — Trial court erred in dismissing an inmate's mandamus action pursuant to O.C.G.A. § 9-6-20, in which the defendant sought additional jail time credit, upon the inmate's failure to appear at a hearing in the matter, as the trial court failed to rule on the inmate's motion for habeas corpus ad testificandum under former O.C.G.A. § 24-10-62 (see now O.C.G.A. § 24-13-62) and, accordingly, the inmate had no ability to appear in court on the hearing date. Rozar v. Donald, 280 Ga. 111, 622 S.E.2d 850, 2005 Ga. LEXIS 862 (2005).

Petition for mandamus erroneously denied. — The trial court erroneously dismissed a litigant's petition for a writ of mandamus, and erroneously relied on dicta, in finding that orders setting a pre-trial conference in the underlying medical malpractice action were merely "housekeeping or administrative orders" that did not suspend the running of the five-year period under O.C.G.A. §§ 9-2-60(b) and 9-11-41(e). Instead, such orders tolled the running of the five-year rule if the orders were in writing, signed by the trial judge, and properly entered in the records of the trial court. Zepp v. Brannen, 283 Ga. 395, 658 S.E.2d 567, 2008 Ga. LEXIS 4 (2008).

Relief fashioned by court did not constitute mandamus. — Trial court simply granted summary judgment in favor of sign companies based on the court's finding that there were no valid ordinances regulating the construction of billboards at the time the applications by sign companies were filed and the sign companies were entitled to construct, maintain, and operate all signs for which the companies submitted applications and brought an action. The remedy fashioned by the trial court did not constitute mandamus relief because despite the cities' contrary arguments, the order did not compel the county or the cities to issue a permit as no permit was required at the time the applications were filed. Fulton County v. Action Outdoor Adver., JV, LLC, 289 Ga. 347, 711 S.E.2d 682, 2011 Ga. LEXIS 473 (2011).

Mandatory injunction was not mandamus. — Mere fact that a court order is mandatory, rather than prohibitive, does not transform injunctive relief into a writ of mandamus and an injunction is not void merely because the injunction is mandatory in nature. Moreover, a trial court may issue a mandatory injunction when mandamus relief is not available. Rigby v. Boatright, 330 Ga. App. 181, 767 S.E.2d 783, 2014 Ga. App. LEXIS 731 (2014).

Costs allocated to parties failing in action. — A proceeding under former Code 1933, § 64-101 (see O.C.G.A. § 9-6-20) fell within the statutory rule controlling civil actions at law, former Code 1933, § 24-3401 (see O.C.G.A. § 9-15-1), which stated that parties failing in such actions were liable for costs. Board of Educ. v. Fowler, 192 Ga. 35, 14 S.E.2d 478, 1941 Ga. LEXIS 402 (1941).

Trial court's entry of judgment on a jury's verdict is a judicial act and to reverse it, appeal, and not mandamus, is the proper remedy. Barber Fertilizer Co. v. Chason, 265 Ga. 497, 458 S.E.2d 631, 1995 Ga. LEXIS 517 (1995).

Applicability to Specific Cases

1. Cases Where Mandamus Proper

Mandamus is available remedy against public officials charged with duty of building schoolhouse, to compel action in the discharge of such duty. Plainfield Consol. Sch. Dist. v. Cook, 173 Ga. 447, 160 S.E. 617, 1931 Ga. LEXIS 337 (1931).

Mandamus is available remedy where refusal to authorize sale of

malt beverages is arbitrary and illegal. Tate v. Seymour, 181 Ga. 801, 184 S.E. 598, 1936 Ga. LEXIS 437 (1936).

Mandamus was available as a remedy to compel school board to call election where under former law elected terms of school district trustees had expired. Edmondson v. Holt, 176 Ga. 907, 169 S.E. 299, 1933 Ga. LEXIS 320 (1933).

City school board was properly compelled by mandamus to recognize rights of member. Akerman v. Board of Sch. Comm'rs, 118 Ga. 334, 45 S.E. 312, 1903 Ga. LEXIS 555 (1903).

Mandamus only available remedy for enforcement of contracts made by county board of education. — Since a county board of education is not a natural person, a partnership, or a body corporate which can be sued, mandamus is not only an appropriate remedy, but it is the only remedy available to the plaintiffs by which they can obtain performance of the contracts. Smith v. Maynard, 214 Ga. 764, 107 S.E.2d 815, 1959 Ga. LEXIS 335 (1959).

Recordation of county contracts in accordance with former Civil Code 1895, § 343 (see O.C.G.A. § 36-10-1) could be compelled by mandamus. Jones v. Bank of Cumming, 131 Ga. 614, 63 S.E. 36, 1908 Ga. LEXIS 166 (1908).

Mandamus to require governmental body to hold hearing. — Because the firefighter did not have a hearing, the firefighter was correct that the firefighter did not have a right to a writ of certiorari, O.C.G.A. § 5-4-1(a); however, pursuant to Georgia law, when no other specific legal remedy was available and a party had a clear right to have a certain act performed, a party could seek mandamus, O.C.G.A. § 9-6-20. Under Georgia law, this procedure could be used to compel a governmental body to act in compliance with the law, for instance to require a governmental board to hold a hearing as provided by law. East v. Clayton County, 436 Fed. Appx. 904, 2011 U.S. App. LEXIS 15925 (11th Cir. 2011).

Mandamus proper remedy for pretrial confinement credit. — Trial court's order denying the defendant's motion for credit for time served in pretrial confinement was vacated, as the defendant's remedy lied solely with the Department of Corrections and not the courts, and then if the defendant remained aggrieved thereafter, a mandamus or injunction action could be pursued. Edwards v. State, 283 Ga. App. 305, 641 S.E.2d 193, 2007 Ga. App. LEXIS 4 (2007), cert. dismissed, No. S07C0821, 2007 Ga. LEXIS 386 (Ga. May 14, 2007).

Mandamus is proper remedy for reviewing denial of conditional and special use permits, in the absence of provision in a zoning ordinance prescribing the means of judicial review. City of Atlanta v. Wansley Moving & Storage Co., 245 Ga. 794, 267 S.E.2d 234, 1980 Ga. LEXIS 939 (1980), overruled in part, City of Cumming v. Flowers, 300 Ga. 820, 797 S.E.2d 846, 2017 Ga. LEXIS 171 (2017), but see City of Cumming v. Flowers, 300 Ga. 820, 797 S.E.2d 846, 2017 Ga. LEXIS 171 (2017).

Mandamus was proper remedy to compel issuance of permits to do electrical work, which permits had been refused to plaintiff based on unreasonable and void provisions of a licensing ordinance. Sullivan v. Johnson, 189 Ga. 778, 7 S.E.2d 900, 1940 Ga. LEXIS 388 (1940).

Mandamus was proper remedy to compel acceptance of subdivision roads. — Developer was entitled to mandamus relief on its claim that a county improperly failed to accept subdivision roads because the county had sovereign immunity from the developer's claim for damages and no other legal remedy remained. Rabun County v. Mt. Creek Estates, LLC, 280 Ga. 855, 632 S.E.2d 140, 2006 Ga. LEXIS 469 (2006).

Mandamus action challenging county board's decision abandoning road. — In a mandamus action, a trial court erred by reversing a decision of a county board of commissioners to abandon a road as the trial court failed to give proper deference to the board's decision to abandon the road and substituted the court's own judgment for that of the board. Scarborough v. Hunter, 293 Ga. 431, 746 S.E.2d 119, 2013 Ga. LEXIS 613 (2013).

Mandamus authorized against county treasurer. — Mandamus would lie to compel county treasurer to pay order for services of court reporter. Lamb v.

Cases Where Mandamus Proper (Cont'd)

Toomer, 91 Ga. 621, 17 S.E. 966, 1893 Ga. LEXIS 294 (1893).

Mandamus is proper remedy to require payment by county treasurer. Daniel v. Yow, 226 Ga. 544, 176 S.E.2d 67, 1970 Ga. LEXIS 590 (1970).

Payment of part-time clerical help. — Mandamus was proper remedy to compel payment of part-time clerical help in office of clerk of superior court during term of court. Grimsley v. Twiggs County, 249 Ga. 632, 292 S.E.2d 675, 1982 Ga. LEXIS 876 (1982).

Board of commissioners may be properly compelled by mandamus to pay funds to treasurer. Aaron v. German, 114 Ga. 587, 40 S.E. 713, 1902 Ga. LEXIS 731 (1902); Board of Rds. & Revenue v. Clark, 117 Ga. 288, 43 S.E. 722, 1903 Ga. LEXIS 216 (1903).

Mandamus to compel a judge to conduct civil trials was authorized because the judge's refusal to schedule civil cases for trial for more than two years was a gross abuse of discretion and no other specific legal remedy was available. Stubbs v. Carpenter, 271 Ga. 327, 519 S.E.2d 451.

Mandamus proper to compel reinstatement of fireman following improper suspension. — Where following oral suspension by fire department, violative of the civil service act then in force, the fireman instituted a mandamus proceeding against the chief of the fire department to compel reinstatement to position as a fireman, the remedy sought was appropriate. McAfee v. Board of Firemasters, 186 Ga. 262, 197 S.E. 802, 1938 Ga. LEXIS 602 (1938).

Mandamus to enforce findings of recount committee in primary election. — When the executive committee or other authority conducting and holding a primary election for the nomination of its candidates fails or refuses to adopt, promulgate, publish, and certify to the proper authorities the findings and report of a recount committee, then the candidate for such office whose rights may be affected by such failure or refusal has a right to proceed by mandamus to enforce the findings and report of such committee, and there is jurisdiction in the superior courts of this state to hear and determine the cause, notwithstanding the political nature of the controversy. Middleton v. Moody, 216 Ga. 237, 115 S.E.2d 567, 1960 Ga. LEXIS 436 (1960).

Registered voter may compel registrars to place the voter's name on list of registered voters by mandamus. Bearden v. Daves, 139 Ga. 635, 77 S.E. 871, 1913 Ga. LEXIS 551 (1913).

Mandamus held proper to compel board of canvassers to reconvene and consolidate election returns by sole candidate. Morris v. Glover, 121 Ga. 751, 49 S.E. 786, 1905 Ga. LEXIS 62 (1905). See also Brown v. Watterson, 96 Ga. 598, 24 S.E. 141, 1895 Ga. LEXIS 141 (1895).

Mandamus appropriate to order payment of insolvent orders where county improperly commingled funds. — Where the fund designed for the payment of insolvent costs was mingled with the general funds of a county, and money arising from fines and forfeitures which was subject to orders for insolvent costs was diverted into the general fund, the judge of the superior court did not err in granting a mandamus absolute, requiring that all moneys coming into the treasury of the county should be applied to the payment of the insolvent orders of the petitioner until the same were paid in full. Citizens Bank v. Newton, 180 Ga. 860, 181 S.E. 171, 1935 Ga. LEXIS 586 (1935).

Mandamus to seek payment of judgment from city. — Petition seeking the payment of judgment from present funds of the judgment debtor city, if available, and if not available, from a tax to be levied on property within the limits of the city, stated a cause of action for mandamus. Bradford v. Bolton, 215 Ga. 188, 109 S.E.2d 751, 1959 Ga. LEXIS 431 (1959).

Mandamus properly granted in favor of plaintiff, retired fireman, for payment of monthly pension to which the fireman was legally entitled. Pierce v. Rhodes, 208 Ga. 554, 67 S.E.2d 771, 1951 Ga. LEXIS 433 (1951).

Mandamus will lie to compel members of State Board of Pardons and Paroles to consider and pass upon application for parole of a prisoner who

has served less than the minimum term of the prisoner's indeterminate sentence but more than the term required by the rules of the board in order to be eligible for consideration for parole. Riley v. Garrett, 219 Ga. 345, 133 S.E.2d 367, 1963 Ga. LEXIS 454 (1963).

Mandamus will lie where arbitrary denial of a liquor license constitutes violation of equal protection. Hernandez v. Board of Comm'rs, 242 Ga. 76, 247 S.E.2d 870, 1978 Ga. LEXIS 1099 (1978).

Mandamus will lie to compel issuance of a liquor license by a county board. Brock v. State, 65 Ga. 437, 1880 Ga. LEXIS 223 (1880).

Mandamus lies to require municipality to pay balance due on salary of petitioner, its former clerk, where such sum has been approved for payment by its mayor and council and appropriate entry made on its minutes and sufficient funds are available. Adams v. Town of Weston, 181 Ga. 503, 183 S.E. 69, 1935 Ga. LEXIS 145 (1935).

Superintendent of schools could compel, by mandamus, payment of the superintendent's salary by the board of education, as a money judgment would not furnish an adequate remedy. Mattox v. Board of Educ., 148 Ga. 577, 97 S.E. 532, 1918 Ga. LEXIS 448 (1918).

Court improperly denied mandamus to compel issuance of commission to school district trustee. — Where plaintiff, as the successful candidate in a school district election for the office of trustee, was entitled, as a matter of law, to be commissioned by the county board of education, court erred in refusing to grant a mandamus absolute to compel the issuance of a commission to the plaintiff. Ramsey v. Mingledorff, 181 Ga. 803, 184 S.E. 322, 1936 Ga. LEXIS 438 (1936).

Mayor and council failed to call special election. — The calling of an election to approve an additional tax for school purposes, being a plain duty laid upon the mayor and council by law, and their failure to perform this duty being alleged, a case demanding the writ of mandamus is pleaded, and it was error to sustain the demurrer (now motion to dismiss) to the petition and dismiss the same. Board of Educ. v. Oliver, 216 Ga. 450, 117 S.E.2d 163, 1960 Ga. LEXIS 500 (1960).

Municipal authorities could be compelled by mandamus to call election for mayor and councilmen, when the duty so to do was enjoined upon them by the municipal charter. Comer v. Epps, 149 Ga. 57, 99 S.E. 120, 1919 Ga. LEXIS 122 (1919).

Court erred in dismissing application for mandamus to compel issuance of building permit, the case being one where, without mandamus, a defect of legal justice would ensue. Wofford Oil Co. v. City of Calhoun, 183 Ga. 511, 189 S.E. 5, 1936 Ga. LEXIS 142 (1936).

Abuse of discretion to deny zoning permit where no valid reason for denial. — Where the only evidence offered in opposition to application for permit to build filling station was of property owners nearby upon grounds of danger, noise, and the depressing of the value of their property, none of which amount to a valid reason for declining the permit, it was an abuse of discretion to refuse the mandamus. Hadden v. Pierce, 212 Ga. 45, 90 S.E.2d 405, 1955 Ga. LEXIS 539 (1955).

Arbitrary denial of cemetery permit grounds for mandamus. — Where county commissioners arbitrarily and capriciously refused grant of permit to establish cemetery, under statute giving them power to grant or refuse permission, so that their action in so doing amounted to a gross abuse of the discretion which the exercise of their administrative function called for, petitioner would be entitled to invoke the remedy of mandamus, that being the only method of relief available. South View Cem. Ass'n v. Hailey, 199 Ga. 478, 34 S.E.2d 863, 1945 Ga. LEXIS 347 (1945).

Permit to park mobile home. — Where the petitioners had undergone the proper procedures necessary to acquire a permit for parking their mobile home on their lot, and the town had raised no valid reason for denial of the permit, the trial court should grant their petition for mandamus. Cain v. Town of Sparks, 256 Ga. 310, 348 S.E.2d 645, 1986 Ga. LEXIS 843 (1986).

No mandamus to review habitual offender status. — Because an administrative law judge lacked jurisdiction to

Cases Where Mandamus Proper (Cont'd)

address the issue of a driver's habitual violator status, and thus, the ruling that the driver was wrongfully declared an habitual offender was not binding on the parties, the driver was not entitled to mandamus relief ordering the Commissioner of the Department of Vehicle Services to issue a driver's license. James v. Davis, 280 Ga. 497, 629 S.E.2d 820, 2006 Ga. LEXIS 264 (2006).

Elected county superintendent, unlawfully removed from office by county board of education, could maintain mandamus against the members of the board to compel them to recognize the elected county superintendent as the person entitled to hold the office and to discharge the duties thereof; separate suit for the writ of quo warranto against the person purportedly elected by the board as a successor did not afford a complete and adequate remedy as against the board, since in that case the complainant or relator could only recover the office from the respondent and could not obtain an order requiring the members of the board to recognize him. Jones v. Nelson, 202 Ga. 732, 45 S.E.2d 62, 1947 Ga. LEXIS 542 (1947).

Jury commissioners could be compelled by mandamus to make jury list. Davis v. Arthur, 139 Ga. 74, 76 S.E. 676, 1912 Ga. LEXIS 534 (1912).

Insurance Commissioner's refusal to renew company's license grounds for mandamus. — Where the refusal of the Insurance Commissioner to renew an insurance company's license is without justification, the failure to perform this official duty will irreparably injure the company, and therefore its petition alleges a cause of action for mandamus. Bankers Life & Cas. Co. v. Cravey, 208 Ga. 682, 69 S.E.2d 87, 1952 Ga. LEXIS 313 (1952).

Mandamus held proper to compel probate court judge to enter building contract on minutes. — Mandamus will lie at the instance of the assignee of a contractor's warrant issued for erection of a courthouse to compel judge of probate court to enter building contract on the judge's minutes. Jones v. Bank of Cumming, 131 Ga. 614, 63 S.E. 36, 1908 Ga. LEXIS 166 (1908).

Compel court to put oral suppression order into writing. — Because the state failed to request that the trial court put an oral order of suppression in writing, and show that the trial court refused to do so, it did not have the right to appeal from that order; moreover, while the state could have filed a mandamus petition seeking to require the court to put the oral order in writing, it did not seek that relief. State v. Morrell, 281 Ga. 152, 635 S.E.2d 716, 2006 Ga. LEXIS 643 (2006).

Mandamus maintainable to compel publication of official statements. — Mandamus was held to be the proper remedy to compel sheriff, judge of the probate court, and clerk to continue to publish official statements in the proper newspaper. Braddy v. Whiteley, 113 Ga. 746, 39 S.E. 317, 1901 Ga. LEXIS 372 (1901); Dollar v. Wind, 135 Ga. 760, 70 S.E. 335, 1911 Ga. LEXIS 72 (1911). But see Southern Crescent Newspapers v. Dorsey, 269 Ga. 41, 497 S.E.2d 360.

Enforcement of levy by municipality held proper by mandamus. — Where town council was required by law to levy a certain tax as fixed by a board of school commissioners, and refused to do so, commissioners could force the levy by mandamus. Dennington v. Mayor of Roberta, 130 Ga. 494, 61 S.E. 20, 1908 Ga. LEXIS 324 (1908).

Acceptance by levying officer of good affidavit of illegality could be compelled by mandamus. Williams v. McArthur, 111 Ga. 28, 36 S.E. 301, 1900 Ga. LEXIS 476 (1900).

Tax receiver was properly compelled by mandamus to assess property of delinquent taxpayer. Richmond County v. Steed, 150 Ga. 229, 103 S.E. 253, 1920 Ga. LEXIS 122 (1920).

Restoration of property illegally taken on tax execution could be compelled by mandamus. Mitchell v. Hay, 37 Ga. 581, 1868 Ga. LEXIS 13 (1868).

Mandamus was proper to compel sheriff to execute deed to property sold under execution from probate court. Burckhalter v. O'Connor, 100 Ga. 366, 28 S.E. 154, 1897 Ga. LEXIS 65 (1897).

Mandamus proper to correct procedural deprivation. — Applicants for a certificate to operate a bail bond company

failed to establish a procedural due process violation because, even if the applicants had a constitutionally protected property interest in the application, the applicants had an adequate remedy at state law through mandamus under O.C.G.A. § 9-6-20 against the sheriff to remedy any alleged procedural deprivations. A.A.A. Always Open Bail Bonds, Inc. v. DeKalb County, 129 Fed. Appx. 522, 2005 U.S. App. LEXIS 7218 (11th Cir. 2005), dismissed without prejudice in part, No. 1:02-CV-2905-ODE, 2006 U.S. Dist. LEXIS 97490 (N.D. Ga. Aug. 4, 2006).

Teacher's claim that the teacher was denied procedural due process when the Georgia Professional Standards Commission refused to consider the teacher's appeal of a disciplinary action that was taken against the teacher failed because the teacher had a remedy available under O.C.G.A. § 9-6-20 in the form of a writ of mandamus. Wilbourne v. Forsyth County Sch. Dist., 306 Fed. Appx. 473, 2009 U.S. App. LEXIS 100 (11th Cir. 2009).

Former tenured teacher failed to state a claim of a procedural due process violation under 42 U.S.C. § 1983 in the nonrenewal of a teaching contract because the teacher failed to utilize available state remedies under O.C.G.A. §§ 9-6-20, 20-2-940, 20-2-942(b), and 20-2-1160(a) through petitioning the board of education for a hearing or seeking mandamus relief. Mason v. Clayton County Bd. of Educ., 334 Fed. Appx. 191, 2009 U.S. App. LEXIS 10491 (11th Cir. 2009).

Former college student failed to state a procedural due process claim based on denial of a post-deprivation hearing following the student's suspension as the student had an adequate post-deprivation remedy; mandamus under O.C.G.A. § 9-6-20 was an available state remedy. Wells v. Columbus Tech. College, 510 Fed. Appx. 893, 2013 U.S. App. LEXIS 4022 (11th Cir. 2013), cert. denied, 571 U.S. 1146, 134 S. Ct. 958, 187 L. Ed. 2d 814, 2014 U.S. LEXIS 127 (2014).

Mandamus is proper remedy for failure of public defender's office to appoint appellate counsel. — A trial court properly held that the court did not have authority to appoint appellate counsel for a defendant because, under the Georgia Indigent Defense Act of 2003, a defendant was required to direct a request for indigent representation directly to the public defender's office. It appeared that the defendant, who had been sentenced to prison, would be eligible under O.C.G.A. § 17-12-23; although the defendant claimed that the public defender's office would not heed the defendant's requests, the defendant was not without a remedy as the defendant could apply for a writ of mandamus under O.C.G.A. § 9-6-20. Bynum v. State, 289 Ga. App. 636, 658 S.E.2d 196, 2008 Ga. App. LEXIS 165 (2008).

Commissioners failing to lay off town lots could be properly compelled by mandamus. Polk v. James, 68 Ga. 128, 1881 Ga. LEXIS 328 (1881).

Mandamus against city to compel furnishing of water. — Where plaintiff brought mandamus to force city to furnish the plaintiff water after it had stopped doing so, the petition was not subject to dismissal upon the ground that plaintiff had legal remedy. City of Camilla v. Norris, 134 Ga. 351, 67 S.E. 940, 1910 Ga. LEXIS 197 (1910).

Mandamus to compel city to issue written verification for proposed solid waste handling facility. — Applicant for a solid waste handling facility was entitled to mandamus relief seeking to compel a city to issue written verification that a proposed solid waste handling facility did not violate any zoning or land use ordinances and that it was consistent with all solid waste management plans, as: (1) the city did not comply with O.C.G.A. § 12-8-31.1(a) and (b); and (2) it could not rely on its solid waste management plan to deny the written verification under O.C.G.A. § 12-8-24(g) which was consistent with the city's plan approved in 1993. McKee v. City of Geneva, 280 Ga. 411, 627 S.E.2d 555, 2006 Ga. LEXIS 164 (2006).

2. Cases Where Mandamus Improper

Mandamus is not available remedy to compel justice of peace to set aside decision or judgment rendered by the justice of the peace in the trial of a case without a jury and to compel the justice of the peace to render a different judgment.

Cases Where Mandamus Improper (Cont'd)

Hayes v. Brown, 205 Ga. 234, 52 S.E.2d 862, 1949 Ga. LEXIS 335 (1949).

Mandamus not available if appellate review available. — Superior court did not err when it denied mandamus relief to a car manufacturer that challenged a trial court order for the manufacturer to produce documents which the manufacturer claimed were privileged from discovery because reversal of the order had to be obtained pursuant to the available methods of obtaining appellate review. Ford Motor Co. v. Lawrence, 279 Ga. 284, 612 S.E.2d 301, 2005 Ga. LEXIS 302 (2005).

Mandamus relief properly denied since certification of appeals obtained. — Trial court did not err by denying a group of property owners their request for mandamus relief in the nature of finding that the county board of tax assessors certified their property tax appeals because it was undisputed that the tax appeals were physically delivered to the trial court and that it had ruled that such appeals were certified to it; thus, the property owners received the relief sought regarding certification. Newton Timber Co., L.L.L.P. v. Monroe County Bd. of Tax Assessors, 295 Ga. 29, 755 S.E.2d 770, 2014 Ga. LEXIS 189 (2014).

Mandamus not proper to seek to compel Governor to consent to suit. — Trial court was correct in denying an appellant's request to bring a mandamus action against a Governor, seeking to compel the Governor to consent to a suit against the state, to-wit, filing suit against the state without the Governor's consent, a remedy the appellant had in fact employed. Garnett v. Hamrick, 280 Ga. 523, 630 S.E.2d 384, 2006 Ga. LEXIS 356 (2006).

Mandamus unavailable to access court records. — Law firm that sought copies of a court reporter's recordings of hearings in two criminal cases was not entitled to mandamus relief from a trial court's order denying the request for copies because the law firm had an adequate remedy at law in the procedures provided in Ga. Unif. Super. Ct. R. 21, which applied to both civil and criminal cases. Merch. Law Firm, P.C. v. Emerson, 301 Ga. 609, 800 S.E.2d 557, 2017 Ga. LEXIS 438 (2017).

State court judge not entitled to mandamus ordering county to pay additional compensation. — State court judge was not entitled to mandamus relief for additional compensation under a local law and a county ordinance because the judge received all compensation and allowances as provided by law, and the judge's salary did not decrease in any way during the judge's term of office in violation of Ga. Const. 1983, Art. VI, Sec. VII, Para. V. Cowen v. Clayton County, 306 Ga. 698, 832 S.E.2d 819, 2019 Ga. LEXIS 594 (2019).

Mandamus inappropriate to compel spending of referendum funds. — Mandamus was not appropriate under O.C.G.A. § 9-6-20 as members of a county board of commissioners did not fail to perform their official duties by entering into a 2006 intergovernmental agreement to have $12 million raised by a 1999 Special Local Option Sales Tax (SPLOST) referendum used to upgrade and build two local waste water facilities as the SPLOST funds were insufficient to upgrade the county's existing centralized system of waste water treatment; the 2006 intergovernmental agreement utilized the funds for the purposes specified in the 1999 resolution under O.C.G.A. § 48-8-121(a)(1), just by a different means. Hicks v. Khoury, 283 Ga. 407, 658 S.E.2d 616, 2008 Ga. LEXIS 242 (2008).

Mandamus not issued to compel revocation of liquor license where such act discretionary. — Where under a city's charter it was discretionary whether a liquor license should be revoked, the defendants being authorized to revoke such license when they deem it necessary to the general welfare of the city, they could not be compelled by mandamus to do so. Hartsfield v. Salem, 213 Ga. 760, 101 S.E.2d 701, 1958 Ga. LEXIS 273 (1958).

No official duty to certify names of candidates. — A petition seeking only to require the Secretary of State to certify the names of certain candidates for political office to the Governor, in the absence of

any statutory law or decision of the courts of this state requiring the Secretary of State to do so, failed to show any cause for the issuance of a writ of mandamus. Tucker v. Wilson, 198 Ga. 474, 31 S.E.2d 657, 1944 Ga. LEXIS 404 (1944).

Mandamus properly denied where no allegation that abatement of nuisance inadequate to afford relief. — Where there were no allegations that the abatement of an alleged nuisance in the manner authorized by law would not afford petitioners adequate relief, writ of mandamus would not lie. State Hwy. Dep't v. Reed, 211 Ga. 197, 84 S.E.2d 561, 1954 Ga. LEXIS 528 (1954).

Mandamus properly denied where county board of education had paid plaintiff. — Where plaintiff, driver of a privately owned and personally maintained school bus, had received from county board of education more than it was required to pay the plaintiff under the act in question, and had disbursed pro rata among its school bus drivers all funds received by it for pupil transportation from all sources, the trial judge did not err in refusing to grant mandamus absolute. Veal v. Washington County Bd. of Educ., 211 Ga. 204, 84 S.E.2d 565, 1954 Ga. LEXIS 530 (1954).

Mandamus unavailable to require school board to place citizen on agenda. — A citizen was not entitled to a writ of mandamus directing a school board to place the citizen on the board's agenda because setting the agenda was a discretionary act that was not subject to mandamus and none of the statutes cited by the citizen, O.C.G.A. §§ 20-2-1160(a), 45-10-1, and 50-6-6(b), imposed a duty on the board to place the citizen on the board's agenda. James v. Montgomery County Bd. of Educ., 283 Ga. 517, 661 S.E.2d 535, 2008 Ga. LEXIS 431 (2008).

Trial court did not err in denying the plaintiff's request for a mandamus nisi because the plaintiff's request for mandamus was unsupportable as a matter of law as it was undisputed that the county board of tax assessors provided various documents in response to the plaintiff's information requests regarding property tax assessments, and the plaintiff's demands for supplementation of the responses and an explanation of those responses in a recorded meeting session strayed far beyond what was required by statute. Hansen v. DeKalb County Board of Tax Assessors, 295 Ga. 385, 761 S.E.2d 35, 2014 Ga. LEXIS 532 (2014).

Mandamus unavailable for nominee seeking to serve on electric membership corporations. — Trial court erred by granting a nominee's writ of mandamus because under O.C.G.A. § 9-6-23, mandamus did not lie to enforce purely private contract rights and the nominee's efforts to be qualified as a person to sit on the board of an electric membership corporation was a private right as board members were not public officers within the meaning of O.C.G.A. § 9-6-20. Rigby v. Boatright, 294 Ga. 253, 751 S.E.2d 851, 2013 Ga. LEXIS 996 (2013).

Mandamus properly dismissed where no legal duty imposed on official to issue salary vouchers. — Where no duty was imposed by law upon the Secretary of State to issue vouchers for salary due to members of the State Board of Barber and Hair-Dresser Examiners, the trial judge did not err in dismissing on general demurrer (now motion to dismiss), the petition of a former member of that board for a writ of mandamus to require the Secretary of State to issue a check or voucher for a balance of the salary claimed by the plaintiff. Williamson v. Wilson, 189 Ga. 652, 7 S.E.2d 241, 1940 Ga. LEXIS 356 (1940).

Mandamus improper where city's grant of conditional use permit excluded authorization to build stadium. — Trial court erred in granting mandamus relief to a school based on the city's act of granting a conditional use permit, but disallowing the school to build a football stadium as part of the permit, as the increased traffic conditions that would result if the stadium were allowed supported the action. City of Roswell v. Fellowship Christian Sch., Inc., 281 Ga. 767, 642 S.E.2d 824, 2007 Ga. LEXIS 254 (2007).

Mandamus not appropriate if state revenue commissioner could be made party to county tax appeal. — In a gas company's suit against the state revenue

Cases Where Mandamus Improper (Cont'd)

commissioner for mandamus compelling the commissioner to accept its property tax returns under O.C.G.A. §§ 48-1-2(21) and 48-5-511(a), remand was proper to determine if the company had an acceptable alternative remedy in its pending county tax appeals under O.C.G.A. § 48-5-311, as required by O.C.G.A. § 9-6-20, if the commissioner could be made a party to those appeals by joinder or some other procedure. Southern LNG, Inc. v. MacGinnitie, 294 Ga. 657, 755 S.E.2d 683, 2014 Ga. LEXIS 168 (2014).

State treasurer had no duty to pay out funds. — Petition seeking a writ of mandamus directing the state treasurer to honor and pay a warrant for state funds which the petition failed to show had been executed as required by law, so that there was no failure of the treasurer to perform the treasurer's official duty in paying a warrant properly executed and presented to the treasurer, alleged no cause of action, and was properly dismissed on demurrer (now motion to dismiss). Barwick v. Roberts, 188 Ga. 655, 4 S.E.2d 664, 1939 Ga. LEXIS 614 (1939).

Mandamus not available to compel county to pay personal injury judgment. — Writ of mandamus to compel a county to pay the entire judgment entered against a former employee was properly denied as the underlying accident claim was covered by the county's self-insurance plan; Fulton County, Ga., Code of Resolutions § 102-81(e) excluded the claim from those the county was required to pay in full, and the county was responsible only for the amount of the self-insurance limits. Thomason v. Fulton County, 284 Ga. 49, 663 S.E.2d 216, 2008 Ga. LEXIS 529 (2008).

Remedy of mandamus cannot avail where the Constitution prohibits payment of tort claims from school taxation. Sheley v. Board of Pub. Educ., 132 Ga. App. 314, 208 S.E.2d 126, 1974 Ga. App. LEXIS 1681 (1974), cert. dismissed, 233 Ga. 487, 212 S.E.2d 627, 1975 Ga. LEXIS 1354 (1975).

Writ of mandamus against taxpayer is not a remedy provided by statute for collection of taxes. Richmond County v. Steed, 150 Ga. 229, 103 S.E. 253, 1920 Ga. LEXIS 122 (1920).

Where petitioners seek to compel officials to enforce liquor laws, mandamus is improper remedy since the law provides for a citizen's arrest of the offenders or for the issuance of a warrant upon complaint by the citizen for the arrest of the violators. Mandamus will not lie where there is an adequate legal remedy. Solomon v. Brown, 218 Ga. 508, 128 S.E.2d 735, 1962 Ga. LEXIS 547 (1962).

Issuance of a retail off-premises beer and wine license by a county commission could not be compelled by a writ of mandamus. Dickerson v. Augusta-Richmond County Comm'n, 271 Ga. 612, 523 S.E.2d 310.

Inapplicable to private citizens. — Where a road was abandoned after an owner filed a petition for mandamus, the constitutionality of O.C.G.A. § 9-6-21(b) was moot; pursuant to O.C.G.A. § 9-6-20, mandamus was not applicable to a neighbor or to claims for injunctive or monetary relief. Gaw v. Telfair County Bd. of Comm'rs, 277 Ga. 157, 587 S.E.2d 50, 2003 Ga. LEXIS 836 (2003).

Mandamus unavailable to terminated teacher prior to use of administrative process. — Mandamus will not lie where it appears that the complainant has not availed oneself of the administrative remedies available under O.C.G.A. § 20-2-1160, which provides for an appeal to the State Board of Education from decisions concerning the termination of teachers pursuant to the Fair Dismissal Act. Lansford v. Cook, 252 Ga. 414, 314 S.E.2d 103, 1984 Ga. LEXIS 698 (1984).

Mandamus against sheriff to compel rearrest improper where bench warrant was adequate. — Where issuance of a bench warrant was adequate to enforce sentence, by having sheriff arrest defendant and turn the defendant over to chain-gang authorities, mandamus proceedings against the sheriff to compel the sheriff to rearrest defendant would not lie. Porter v. Garmony, 148 Ga. 261, 96 S.E. 426, 1918 Ga. LEXIS 286 (1918).

Mandamus not available to compel county to re-hire former employee to unspecified job. — Trial court erred by granting a former employee a writ of man-

damus requiring a county to give an unspecified job because there was nothing in the record establishing that an available job was sufficiently similar to the former employee's prior job as to provide a clear legal right to that job, which the former employee was required to show for the grant of a writ of mandamus. Clayton County Bd. of Comm'rs v. Murphy, 297 Ga. 763, 778 S.E.2d 193, 2015 Ga. LEXIS 693 (2015).

Mandamus not available to compel completion of illegal sale. — Where sheriff, by mistake, sold property on the first Tuesday in May, but discovered the mistake before the money was paid by the holder, the sheriff could not be compelled by mandamus to make a deed and deliver possession to the bidder on the bidder's tender of the amount of the bid. State ex. rel Collins v. Byrd, 42 Ga. 629, 1871 Ga. LEXIS 117 (1871).

County judge acting as agent of board of county commissioners cannot be compelled to perform their duties. Holtzclaw v. Riley, 113 Ga. 1023, 113 Ga. 4023, 39 S.E. 425, 1901 Ga. LEXIS 464 (1901).

No power to compel fellow judge to perform duties. — When duties are imposed on a judge of the superior court as an officer, another judge of the superior court has no power to issue a mandamus to compel performance of such duties. Justices of Inferior Court v. Orr, 12 Ga. 137, 1852 Ga. LEXIS 103 (1852).

Motion to recuse judge. — Because an affidavit in support of a judge's recusal was insufficient on its face, and the proper remedy for challenging the denial of a motion for recusal was an appeal, not an action for a writ of mandamus, the presiding judge properly denied a pro se litigant's motion to recuse and declined the litigant relief. Gray v. Manis, 282 Ga. 336, 647 S.E.2d 588, 2007 Ga. LEXIS 527 (2007).

Appointment of permanent process servers. — Mandamus did not lie to require a state court judge to appoint permanent process servers pursuant to O.C.G.A. § 9-11-4(c) since, even if the petitioners had no other specific legal remedy, the statute provided a trial court with the authority as well as the discretion to appoint disinterested persons, who are citizens of the United States and at least 18 years of age, as permanent process servers, but did not mandate that the trial court make such an appointment when the statutory requirements have been satisfied. Tamaroff v. Cowen, 270 Ga. 415, 511 S.E.2d 159.

Dismissal of assistant principal. — Where the school board had not admitted that it let an assistant principal go for unlawful reasons and the petitioner had not presented any evidence to substantiate their claim that the assistant principal was not rehired as a result of the assistant principal's exercise of constitutionally protected activities, the petitioner had not shown any facts which would remove the decision not to renew the contract from the realm of policy into the realm of law; hence, since the assistant principal had not established any right to a school board hearing under O.C.G.A. § 20-2-1160, the trial court should not have granted the petition for a writ of mandamus. Dalton City Bd. of Educ. v. Smith, 256 Ga. 394, 349 S.E.2d 458, 1986 Ga. LEXIS 889 (1986).

School district with no right to relief from State Board of Education decision. — Local school district was not entitled to mandamus relief compelling the State Board of Education (Board) to determine the amount of transportation funding it provided to the district based on the schools students actually attended because the Board's interpretation of the phrase "school to which they are assigned," in O.C.G.A. § 20-2-188(d), to mean a school in the student's attendance zone, regardless of the school attended, was reasonable and the district had no clear legal right to the relief it sought, nor did it show a gross abuse of discretion by state officials. Schrenko v. DeKalb County Sch. Dist., 276 Ga. 786, 582 S.E.2d 109, 2003 Ga. LEXIS 552 (2003).

Discovery, continuance in criminal proceedings unauthorized. — The defendant filed a suit for mandamus and prohibition against the solicitor and the judge to whom the defendant's case was assigned, seeking the solicitor's compliance with the defendant's requests for discovery, as well as a continuance of the

Cases Where Mandamus Improper (Cont'd)

criminal proceedings against the defendant until the solicitor complied with the defendant's discovery requests. Since the court was under no duty to grant a continuance and the solicitor was under no duty to provide discovery, such extraordinary relief was not authorized and the court correctly dismissed the petition for failure to state a claim. Scott v. McLaughlin, 258 Ga. 407, 369 S.E.2d 257, 1988 Ga. LEXIS 264 (1988).

To compel coverage of defense and indemnification. — Trial court's denial of a county employee's request to amend the employee's complaint to add a claim for mandamus, pursuant to O.C.G.A. § 9-6-20, was proper because the employee did not have a clear legal right to coverage of the employee's defense and indemnification in an action brought against the employee, as the county could terminate such coverage where it was found that the employee's responses to interrogatories and answers to deposition questions were inaccurate or false; accordingly, the county attorney had a reasoned and articulable basis to terminate the employee's coverage and mandamus would not have provided any relief. Baker v. Gwinnett County, 267 Ga. App. 839, 600 S.E.2d 819, 2004 Ga. App. LEXIS 805 (2004).

Mandamus to vacate convictions not available. — Mandamus seeking damages and ruling compelling officials to vacate convictions for simple battery and obstruction of an officer was not available to defendant. Lewis v. Schreeder, Wheeler & Flint, 265 Ga. 349, 455 S.E.2d 588, 1995 Ga. LEXIS 163 (1995).

Mandamus to control manner of city's entry into contracts denied. — Based on the Georgia legislature's explicitly stated intention in the Georgia Local Government Public Works Construction Law, O.C.G.A. § 36-91-1 et seq., that local laws and ordinances controlled the manner of the city's execution of and entry into contracts, a contractor was not entitled to a writ of mandamus requiring the city to execute a contract in its favor, as neither the mayor nor the city council exercised their discretionary authority to approve any award which might or might not have resulted from the competitive sealed proposals process. Duty Free Air & Ship Supply Co./Franklin Wilson Airport Concession, Inc. v. City of Atlanta, 282 Ga. 173, 646 S.E.2d 48, 2007 Ga. LEXIS 350 (2007).

Recomputation of criminal sentence. — The court correctly dismissed a petition for mandamus against the State Board of Pardons and Paroles and its chairman, seeking an order requiring them to recompute the petitioner's sentences resulting from the petitioner's convictions as a habitual violator. The duty to award credit for time served lies with the Department of Corrections, not the board. Further, mandamus lies against an official to require the performance of a clear legal duty, but does not reach the office. Harper v. State Bd. of Pardons & Paroles, 260 Ga. 132, 390 S.E.2d 592, 1990 Ga. LEXIS 161 (1990).

Mandamus to compel criminal charges. — Petition seeking mandamus to compel a prosecutor to bring a criminal perjury charge was properly denied since the claim of alleged perjury, and the effect it may have had upon the criminal trial of one of the appellants who brought the mandamus petition, were claims that should have been raised either in the context of a habeas corpus proceeding or, in the case of newly discovered evidence, through an extraordinary motion for a new trial. Mayo v. Head, 280 Ga. 793, 631 S.E.2d 108, 2006 Ga. LEXIS 354 (2006).

Discretionary nature of judge's decision. — Grant of writ of mandamus to the defendant was reversed because mandamus was not an allowable remedy since the opportunity for review via a writ of certiorari existed as to the municipal judge's decision as the municipal court's duty under O.C.G.A. § 36-32-6(c) as to the defendant's marijuana possession was a discretionary act allowing the opportunity for review via a writ. Schaeffer v. Kearney, 355 Ga. App. 449, 844 S.E.2d 515, 2020 Ga. App. LEXIS 332 (2020).

Unauthorized appeals. — Where defendant had no clear legal right to compel the judge to allow the defendant to pursue the defendant's unauthorized appeal, the trial court correctly refused to grant man-

damus. Grant v. Gaines, 265 Ga. 159, 454 S.E.2d 481, 1995 Ga. LEXIS 140 (1995), overruled in part, Jones v. Peach Trader Inc., 302 Ga. 504, 807 S.E.2d 840, 2017 Ga. LEXIS 944 (2017).

Retailer incorrectly sought mandamus relief from a board of zoning appeals' denial of its application for a variance from the county's sign ordinance because the applicable ordinance specified that a writ of certiorari was the sole means of obtaining judicial review of such a decision, and the fact that the ordinance was amended while litigation was pending did not allow the retailer to pursue mandamus, nor was certiorari an inadequate remedy because the board could not rule on the retailer's challenge to the constitutionality of the ordinance, as that argument could be raised when seeking a writ of certiorari. DeKalb County v. Wal-Mart Stores, Inc., 278 Ga. 501, 604 S.E.2d 162, 2004 Ga. LEXIS 828 (2004).

Verification letter for proposed landfill. — Trial court properly entered a declaratory judgment against a limited liability limited partnership (LLLP) and properly denied the LLLP's request for a writ of mandamus as the LLLP was not entitled to a verification letter since the county's zoning ordinance was properly enacted, and the LLLP's land was not zoned for a landfill. Mid-Georgia Envtl. Mgmt. Group, L.L.L.P. v. Meriwether County, 277 Ga. 670, 594 S.E.2d 344, 2004 Ga. LEXIS 264 (2004).

Mandamus to require in-state tuition for noncitizen students. — Noncitizen students failed to show that the Deferred Action for Childhood Arrivals (DACA) policy had the force and effect of a federal law that would support a mandamus order requiring state universities to grant the students in-state tuition, and even if DACA had the force of law, DACA did not create a clear legal duty to grant the students in-state tuition. Alford v. Hernandez, 343 Ga. App. 332, 807 S.E.2d 84, 2017 Ga. App. LEXIS 494 (2017), cert. denied, No. S18C0459, 2018 Ga. LEXIS 327 (Ga. May 7, 2018).

Mandamus cannot dictate where boundary line to be located. — Trial court erred by granting a county mandamus relief in a county boundary line dispute action pursuant to O.C.G.A. § 36-3-20 et seq. because while mandamus was authorized to compel the Georgia Secretary of State to do certain tasks, it was not authorized to dictate where the boundary line was to be located. Bibb County v. Monroe County, 294 Ga. 730, 755 S.E.2d 760, 2014 Ga. LEXIS 191 (2014).

Petition for mandamus properly dismissed. — The trial court properly dismissed a landowners' petition for mandamus filed against a judge as premature and for failing to state a claim, because the landowner opted to file the petition, but could have requested a hearing to allow the judge an opportunity to rule on the previously filed motions; the 90-day ruling period applicable to the motions pursuant to O.C.G.A. § 15-6-21(b) had not yet expired at the time the petition had been filed. Voyles v. McKinney, 283 Ga. 169, 657 S.E.2d 193, 2008 Ga. LEXIS 23 (2008).

In a case arising from a taxpayer grievance concerning whether the Fulton County Board of Tax Assessors had been diligent in determining that the stadium company had a usufruct interest in the new football stadium that was not subject to ad valorem taxation, the appellants' mandamus claim was properly dismissed because the allegations of the fourth amended petition disclosed with certainty that the appellants would not be entitled to relief under any state of provable facts asserted in support of their mandamus claim. Love v. Fulton County Bd. of Tax Assessors, 311 Ga. 682, 859 S.E.2d 33, 2021 Ga. LEXIS 294 (2021).

Discretionary standard required application. — Trial court erred by granting mandamus relief under O.C.G.A. § 9-6-20 with regard to a property owner seeking to compel a county to maintain roads in a subdivision because while the county had accepted dedication of the streets, the county still was vested with the discretion to decide whether to open all the roads or close any of the roads, and the trial court was required to determine whether the county's decisions were arbitrary, capricious, and unreasonable or a gross abuse of discretion as nowhere in the judgment was that standard articulated. Burke County v. Askin, 291 Ga. 697,

Cases Where Mandamus Improper (Cont'd)

732 S.E.2d 416, 2012 Ga. LEXIS 776 (2012).

Out of state attorney lacked standing. — Florida attorney who had been admitted pro hac vice to represent a defendant in a tire case, but whose duties were limited by the trial court due to the attorney's misleading statements, and whose client was later dismissed from the case, did not have standing to seek mandamus compelling the trial court to rule on motions under O.C.G.A. § 15-6-21(b) so the attorney could appeal the ruling as to the attorney's conduct. Fein v. Bessen, 300 Ga. 25, 793 S.E.2d 76, 2016 Ga. LEXIS 704 (2016).

OPINIONS OF THE ATTORNEY GENERAL

This section authorizes remedy of mandamus where official's discretion has been arbitrarily and capriciously exercised so as to constitute gross abuse of discretion. 1971 Op. Att'y Gen. No. 71-168. (see O.C.G.A. § 9-6-20).

Officers must keep their offices open at sufficient times to discharge their duties whether or not there is a statute which requires a particular office to be open at specific times. 1969 Op. Att'y Gen. No. 69-497.

Inadequacy of appropriated funds does not excuse duty of public official to exercise due diligence to perform the official's responsibilities. 1975 Op. Att'y Gen. No. 75-59.

Public official excused from official duty only where performance clearly impossible. — A public official of this state will be excused from carrying out an official duty upon failure of the General Assembly to appropriate funds for performance, if, but only if, the official is able to show that the resulting lack of funds, together with an inability to obtain the same, make performance impossible; failure of the General Assembly to appropriate moneys for a specific official duty might not justify a failure to perform where the official has received a general appropriation and could divert a portion thereof to carry out the official's statutory or official duty. 1969 Op. Att'y Gen. No. 69-174.

Same rule applies to interdepartmental council. — An interdepartmental council created by an Act of the General Assembly is excused from carrying out its official duties upon failure of the General Assembly to appropriate funds for performance of said duties, if, but only if, this resulting lack of funds rendered performance impossible; the court would have the power to determine whether the mandatory duties of the council could be performed or not. 1969 Op. Att'y Gen. No. 69-184.

Mandamus proper remedy to enforce marking of official vehicles. — A petition for writ of mandamus brought by a taxpayer or member of the motoring public is the proper method to enforce compliance with the statute requiring the marking of official vehicles. 1965-66 Op. Att'y Gen. No. 65-49.

RESEARCH REFERENCES

Am. Jur. 2d.

52 Am. Jur. 2d, Mandamus, § 1 et seq.

Am. Jur. Pleading and Practice Forms.

17 Am. Jur. Pleading and Practice Forms, Mandamus, §§ 2, 136.

C.J.S.

55 C.J.S., Mandamus, § 51 et seq.

ALR.

Election of remedies as between mandamus and an action for damages, 1 A.L.R. 1698.

Mandamus to compel court to assume or exercise jurisdiction where it has erroneously dismissed the cause or refused to proceed on the ground of supposed lack of jurisdiction, 4 A.L.R. 582; 82 A.L.R. 1163.

Mandamus to compel a court to take jurisdiction of a cause that it has errone-

ously dismissed for supposed insufficiency or lack of service, 4 A.L.R. 610.

Inadequacy of remedy by appeal or writ of error as affecting right to mandamus to inferior court, 4 A.L.R. 632.

Mandamus to compel a court to reinstate or proceed with the hearing of an appeal that it has erroneously dismissed, 4 A.L.R. 655.

Mandamus to compel payment of salary of public officer or employee, 5 A.L.R. 572.

Mandamus to enforce performance of public duty by officer who is subject to penalty, fine, or imprisonment, 19 A.L.R. 1382.

Contempt for disobedience of mandamus, 30 A.L.R. 148.

Unconstitutionality of statute as defense to mandamus proceeding, 30 A.L.R. 378; 129 A.L.R. 941.

Unfitness as affecting right to restoration by mandamus to office from which one has been illegally removed, 36 A.L.R. 508.

Action or suit as abating mandamus proceeding or vice versa, 37 A.L.R. 1432.

Mandamus to compel institution of proceedings to oust public officer, 51 A.L.R. 561.

Remedy by mandamus of creditor against officer who fails to levy under execution, 57 A.L.R. 836.

Mandamus to compel collection of taxes, 58 A.L.R. 117.

Enforceability by mandamus of right to inspect public records, 60 A.L.R. 1356; 169 A.L.R. 653.

Mandamus to compel general course of conduct or performance of continuing duty or series of acts, 64 A.L.R. 975.

Power, right, or duty of a court of equity to supervise or direct performance of duties of tax assessors, 78 A.L.R. 693.

Mandamus to compel consideration, acceptance, or rejection of bids for public contract, 80 A.L.R. 1382.

Mandamus to compel appropriation for payment of salary of public officer or employee, 81 A.L.R. 1253.

Mandamus as proper remedy to compel service by public utility, 83 A.L.R. 947.

Mandamus to put one in possession of office title to which is in dispute, 84 A.L.R. 1114; 136 A.L.R. 1340.

Sufficiency of allegations as regards omitted or underassessed property in petition for mandamus to compel assessment, 85 A.L.R. 1315.

Right of several having similar interests to join as relators in mandamus proceeding, 87 A.L.R. 528.

Mandamus to compel court or official to approve bond proffered in legal proceedings, 92 A.L.R. 1211.

Mandamus as a proper remedy for return of a tax illegally or erroneously exacted, 93 A.L.R. 585.

Mandamus to compel delivery of papers and records to private corporation, 93 A.L.R. 1061.

Mandamus to restore license as proper remedy where professional license has been wrongfully revoked, 95 A.L.R. 1424.

Mandamus to compel payment of state, county, municipal, or quasi municipal corporation warrant, 98 A.L.R. 442.

Right to and necessity of amendment of alternative writ of mandamus to conform to peremptory writ, 100 A.L.R. 404.

Change of incumbent of office or of personnel of board or other official body as affecting mandamus proceeding previously commenced, 102 A.L.R. 943.

Mandamus to governor, 105 A.L.R. 1124.

Determination of canvassing boards or election officials as regards counting or exclusion of ballots as subject of review by mandamus, 107 A.L.R. 618.

Court's control over mandamus as means of avoiding the enforcement of strict legal right to the detriment of the public, 113 A.L.R. 209.

Public officer or board as proper relator in mandamus proceeding to enforce duty owed primarily to individual or to other political unit or public authority, 113 A.L.R. 589.

Right to an alias writ of mandamus where a peremptory writ previously granted has been disobeyed wholly or in part, 114 A.L.R. 1286.

Mandamus as taxpayer's remedy in respect of valuation of property for taxation, 131 A.L.R. 360.

Mandamus to members or officer of Legislature, 136 A.L.R. 677.

Judicial review of decision upon application for license to practice within state by physician or surgeon from another state or country, 136 A.L.R. 742.

Mandamus to put one in possession of office title to which is in dispute, 136 A.L.R. 1340.

Mandamus to compel reinstatement of suspended or expelled members of labor union, 141 A.L.R. 617.

Right to mandamus as affected by loss of other remedy, 145 A.L.R. 1044.

Right of writ of mandamus as affected by a pending action or proceeding, or existence of injunction, to which relator is not a party, 148 A.L.R. 210.

Right to go behind money judgment against public body in a mandamus proceeding to enforce it, 155 A.L.R. 464.

Mandamus as subject to statute of limitations, 155 A.L.R. 1144.

Discretion of appellate court to refuse exercise of its original jurisdiction to issue writs of mandamus, 165 A.L.R. 1431.

Legislature's express denial of right of appeal as affecting right to review on the merits by certiorari or mandamus, 174 A.L.R. 194.

Suspension or expulsion from social club or similar society and the remedies therefor, 20 A.L.R.2d 344.

Suspension or expulsion from professional association and the remedies therefor, 20 A.L.R.2d 531.

Mandamus to compel judge or other officer to grant accused bail or to accept proffered sureties, 23 A.L.R.2d 803.

Remedies to compel municipal officials to enforce zoning regulations, 35 A.L.R.2d 1135.

Mandamus or prohibition as remedy to enforce right to jury trial, 41 A.L.R.2d 780.

Mandamus as remedy to compel assertedly disqualified judge to recuse self or to certify his disqualification, 45 A.L.R.2d 937; 56 A.L.R. Fed. 494.

Allowance of damages to successful plaintiff or relator in mandamus, 73 A.L.R.2d 903; 34 A.L.R.4th 457.

Availability of mandamus or prohibition to review order of reference to master or auditor, 76 A.L.R.2d 1120.

Stay or supersedeas on appellate review in mandamus proceeding, 88 A.L.R.2d 420.

Compelling admission to membership in professional association or society, 89 A.L.R.2d 964.

Mandamus to compel ascertainment of compensation for property taken or for injuries inflicted under the power of eminent domain, 91 A.L.R.2d 991.

Prohibition or mandamus as appropriate remedy to review ruling on change of venue in civil case, 93 A.L.R.2d 802.

Availability of mandamus or prohibition to compel or to prevent discovery proceedings, 95 A.L.R.2d 1229.

Judgment granting or denying writ of mandamus or prohibition as res judicata, 21 A.L.R.3d 206.

Mandamus to compel disciplinary investigation or action against physician or attorney, 33 A.L.R.3d 1429.

Mandamus to compel zoning officials to cancel permit granted in violation of zoning regulation, 68 A.L.R.3d 166.

Mandamus as remedy to compel disqualification of federal judge, 56 A.L.R. Fed. 494.

9-6-21. Not a private remedy; enforcement of officer's discretionary acts.

(a) Mandamus shall not lie as a private remedy between individuals to enforce private rights nor to a public officer who has an absolute discretion to act or not to act unless there is a gross abuse of such discretion. However, mandamus shall not be confined to the enforcement of mere ministerial duties.

(b) On the application of one or more citizens of any county against the county board of commissioners where by law supervision and jurisdiction is vested in such commissioners over the public roads of such counties and the overseers of the public roads complained of; or against the judge of the probate court where by law supervision,

control, and jurisdiction over such public roads is vested in the judge and the overseers of the public roads that may be complained of; or against either, both, or all of the named parties, as the facts and methods of working the public roads in the respective counties may justify, which application or action for mandamus shall show that one or more of the public roads of the county of the plaintiff's residence are out of repair; do not measure up to the standards and do not conform to the legal requirements as prescribed by law; and are in such condition that ordinary loads, with ordinary ease, cannot be hauled over such public roads, the judges of the superior courts are authorized and given jurisdiction and it is made their duty, upon such showing being made, to issue the writ of mandamus against the parties having charge of and supervision over the public roads of the county; and to compel by such proceedings the building, repairing, and working of the public roads as are complained of, up to the standard required by law, so that ordinary loads, with ordinary ease and facility, can be continuously hauled over such public roads. The judges of the superior courts shall, by proper order, in the same proceedings compel the work done necessary to build, repair, and maintain such public roads up to the standard so prescribed.

History.

Orig. Code 1863, § 3131; Code 1868, § 3143; Code 1873, § 3199; Code 1882, § 3199; Civil Code 1895, § 4868; Ga. L. 1903, p. 41, § 1; Civil Code 1910, § 5441; Code 1933, § 64-102.

Law reviews.

For annual survey of local government law, see 56 Mercer L. Rev. 351 (2004).

JUDICIAL DECISIONS

Public office, within meaning of this section, means office which has been lawfully created. Such an office must be created by the Constitution, by some statute, or by municipal ordinance passed in pursuance of legislative authority. Benson v. Hines, 166 Ga. 781, 144 S.E. 287, 1928 Ga. LEXIS 400 (1928) (see O.C.G.A. § 9-6-21).

Discretionary acts by public officers. — While mandamus is an appropriate remedy to enforce the performance by a public officer of any public duty which the officer neglects or refuses to perform, it is not available to compel the performance of an act which such an officer is not by law required to perform, but, to the contrary, is clothed with discretionary power. Douglas v. Board of Educ., 164 Ga. 271, 138 S.E. 226, 1927 Ga. LEXIS 171 (1927).

No clear legal right to mandamus where act discretionary. — Where it is sought to compel an official act which is discretionary, the writ of mandamus generally will not issue because there is no clear legal right. Clear Vision CATV Servs., Inc. v. Mayor of Jesup, 225 Ga. 757, 171 S.E.2d 505, 1969 Ga. LEXIS 639 (1969).

Except where discretion grossly abused. — Mandamus will not lie to control an officer vested with discretion which is not grossly abused. City of Atlanta v. Wright, 119 Ga. 207, 45 S.E. 994, 1903 Ga. LEXIS 88 (1903); Daniels v. Commissioners of Pilotage, 147 Ga. 295, 93 S.E. 887, 1917 Ga. LEXIS 155 (1917).

The writ of mandamus does not lie to control the conduct of an officer vested with discretion, except where the exercise of that discretion has been so capricious or arbitrary as to amount to a gross abuse. McGinty v. Gormley, 181 Ga. 644, 183 S.E. 804, 1935 Ga. LEXIS 170 (1935).

Writ of mandamus will not control officer in exercise of discretion, but will only require the officer to act, leaving the officer free to exercise the officer's own discretion. Ex parte Ross, 197 Ga. 257, 28 S.E.2d 925, 1944 Ga. LEXIS 249 (1944).

Commanding public officials to act. — Where act required to be done involves exercise of some degree of official discretion and judgment upon the part of the officer charged with its performance, mandamus may properly command the officer to act, or in other words, set the officer in motion; however, it will not further control or interfere with the officer's action, nor direct the officer to act in any specific manner. Richmond County v. Steed, 150 Ga. 229, 103 S.E. 253, 1920 Ga. LEXIS 122 (1920).

Against an officer having discretion, the writ of mandamus may, in a proper case, be issued for the purpose of setting the officer in motion, without further controlling or interfering with the officer's action. McGinty v. Gormley, 181 Ga. 644, 183 S.E. 804, 1935 Ga. LEXIS 170 (1935).

By ordering the Department of Transportation (DOT) to submit a property owner's exemption request to the Federal Aviation Administration's administrator, the superior court went too far under its mandate authority provided by O.C.G.A. § 9-6-21. The only acts it could mandate concerning the exemption procedure were the development of reasonable guidelines enabling a landowner to seek a landfill exemption and a prompt and fair consideration of an exemption request; however, the outcome of those acts had to be left to the DOT's discretion. Ga. DOT v. Peach Hill Props., Inc., 278 Ga. 198, 599 S.E.2d 167, 2004 Ga. LEXIS 542 (2004).

Where board of county commissioners refuses to exercise its discretion to regulate sale of liquors, mandamus is proper remedy to compel the board to act. Thomas v. Ragsdale, 188 Ga. 238, 3 S.E.2d 567, 1939 Ga. LEXIS 488 (1939).

Pardon and parole power discretionary. — The power of the State Board of Pardons and Paroles to grant reprieves, pardons and paroles, to commute penalties, to remove disabilities imposed by law and to remit parts of sentences is discretionary. Justice v. State Bd. of Pardons & Paroles, 234 Ga. 749, 218 S.E.2d 45, 1975 Ga. LEXIS 1246 (1975).

Mandamus will lie to compel the State Board of Pardons and Paroles to consider application of a prisoner eligible for parole. Chandler v. Ault, 234 Ga. 346, 216 S.E.2d 101, 1975 Ga. LEXIS 1128 (1975).

To enforce performance of ministerial act, obligation must be both peremptory and plainly defined; the law must not only authorize the act, but it must require the act to be done. Douglas v. Board of Educ., 164 Ga. 271, 138 S.E. 226, 1927 Ga. LEXIS 171 (1927).

Mandamus generally does not lie except to compel performance of a public duty. Martin v. Hatfield, 251 Ga. 638, 308 S.E.2d 833, 1983 Ga. LEXIS 949 (1983).

Mandamus cannot be maintained against private person. Carroll v. American Agric. Chem. Co., 175 Ga. 855, 167 S.E. 597, 1932 Ga. LEXIS 346 (1932).

No mandamus against judge acting in private capacity. — Mandamus could not be maintained against a judge who altered a bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50) after it was filed with the clerk, as the judge was acting in a private capacity. State ex rel. Hodges v. Powers, 14 Ga. 388, 1853 Ga. LEXIS 240 (1853).

Mandamus will not lie to enforce purely private contract rights, and will not lie against an individual unless some obligation in the nature of a public or quasi-public duty is imposed. Carroll v. American Agric. Chem. Co., 175 Ga. 855, 167 S.E. 597, 1932 Ga. LEXIS 346 (1932).

Mandamus will not lie to enforce any private right or duty. — There is no authority given in this state, either by statute or decision, which gives a private person the right to proceed by mandamus against a private individual for the enforcement of a private right or duty. Carroll v. American Agric. Chem. Co., 175 Ga. 855, 167 S.E. 597, 1932 Ga. LEXIS 346 (1932).

Mandamus to compel entry of judgment. — Where a juvenile court failed to

enter a written order, it failed to carry out an administrative act; therefore, mandamus was appropriate not to review the propriety of the court's denial of the filing, but to compel the judge to enter a written order from which an appeal could be taken under O.C.G.A. § 9-11-58(a) and Ga. Unif. Juv. Ct. R. 17.1. Titelman v. Stedman, 277 Ga. 460, 591 S.E.2d 774, 2003 Ga. LEXIS 1049 (2003).

Act compelled by court as act of court and not of officer. — If the act which involves the exercise of official discretion and judgment under the law is performed under the compulsory process of the court, obviously the act is the act of the court and not of the official required by law to exercise the official's discretion and judgment. Richmond County v. Steed, 150 Ga. 229, 103 S.E. 253, 1920 Ga. LEXIS 122 (1920).

False swearing in notary public application. — Mandamus would not lie to compel a magistrate to issue an arrest warrant against an individual for false swearing in a notary public application where no abuse of discretion was shown. Chisholm v. Cofer, 264 Ga. 512, 448 S.E.2d 369, 1994 Ga. LEXIS 813 (1994).

Mandamus would not lie to control vested discretion in refusal of license by pilotage commissioners, without compliance with rules of said commission. Daniels v. Commissioners of Pilotage, 147 Ga. 295, 93 S.E. 887, 1917 Ga. LEXIS 155 (1917).

Tax receiver would not be compelled to place any particular value upon delinquent's property. Richmond County v. Steed, 150 Ga. 229, 103 S.E. 253, 1920 Ga. LEXIS 122 (1920).

Mandamus would not lie to compel Comptroller General (now State Revenue Commissioner) to reject return of railroad company for municipal taxation. City of Atlanta v. Wright, 119 Ga. 207, 45 S.E. 994, 1903 Ga. LEXIS 88 (1903).

Grading of papers of examination not subject to mandamus. — Mandamus would not lie to control vested discretion in the grading of papers of examination for superintendent of schools by board of education. Wood v. Board of Educ., 137 Ga. 808, 74 S.E. 540, 1912 Ga. LEXIS 157 (1912).

Until road has been discontinued, remedy of one aggrieved, to require its repair, is mandamus, not for action for damages. Elbert County v. Swift, 2 Ga. App. 47, 58 S.E. 396, 1907 Ga. App. LEXIS 265 (1907); Shellnut v. Carroll County, 30 Ga. App. 200, 117 S.E. 333, 1923 Ga. App. LEXIS 349 (1923).

Mandamus is the only remedy of property owners where county authorities fail to keep up abandoned road and bridge which had not been discontinued or abandoned in the manner prescribed by law. Swiney v. DeKalb County, 102 Ga. App. 731, 117 S.E.2d 559, 1960 Ga. App. LEXIS 732 (1960).

Allegations that road will deteriorate not equivalent to statement of present bad condition as required by section. — A statement in a petition wherein the petitioner invokes the power of the superior court to compel the working and repair of a public road, that such road will become impassable, or will get in such condition that ordinary loads, with ordinary ease, cannot be hauled continuously over such public road, is not the equivalent of the statement that the road is already in the condition to which this section applies but is a mere conclusion based upon the probability or possibility that the road will get in such condition. Van Valkenburg v. Stone, 172 Ga. 642, 158 S.E. 419, 1931 Ga. LEXIS 166 (1931) (see O.C.G.A. § 9-6-21).

Mandamus is not proper remedy to prevent exercise of county authority's discretion to relocate county road or make changes in the location of a road. Van Valkenburg v. Stone, 172 Ga. 642, 158 S.E. 419, 1931 Ga. LEXIS 166 (1931).

Duty of county as to road maintenance. — O.C.G.A. § 9-6-21 does not require a county to do any more to an unpaved road which pre-existed an ordinance requiring the paving and grading of new streets than that which it should have done all along. Cherokee County v. McBride, 262 Ga. 460, 421 S.E.2d 530, 1992 Ga. LEXIS 876 (1992), overruled in part, Scarborough v. Hunter, 288 Ga. 687, 706 S.E.2d 650, 2011 Ga. LEXIS 144 (2011), superseded by statute as stated in, overruled in part as stated in, Scarbor-

ough v. Hunter, 293 Ga. 431, 746 S.E.2d 119, 2013 Ga. LEXIS 613 (2013).

Duty of county to complete an unfinished road. — County, which had accepted dedication of a subdivision road in 1962 but had not completed the road or maintained the road for 50 years, due to the county's mistaken belief that the road was private, was ordered to complete and maintain the road; the county's failure to complete the road was arbitrary and capricious, given the county's acceptance of subdivision plats requiring the road. As to unopened roads in the subdivision, the roads were not public under O.C.G.A. § 9-6-21(b), and the county had no obligation to maintain the road. Burke County v. Askin, 294 Ga. 634, 755 S.E.2d 747, 2014 Ga. LEXIS 166 (2014).

Discretion of commissioners in repairing main highways before completing second-class road would not be controlled where roads had been damaged by unprecedented rainfalls. Terry v. Wade, 149 Ga. 580, 101 S.E. 539, 1919 Ga. LEXIS 326 (1919).

Public road over which reasonable or ordinary loads cannot be hauled with reasonable or ordinary ease and facility, is not up to the standard required by law in this state. Commissioners of Sumter County v. McMath, 138 Ga. 351, 75 S.E. 317, 1912 Ga. LEXIS 308 (1912).

Unopened, undeveloped, proposed roads in a subdivision do not become "public roads" solely by virtue of the process of implied dedication and acceptance. Chatham County v. Allen, 261 Ga. 177, 402 S.E.2d 718, 1991 Ga. LEXIS 161 (1991).

Mandamus action challenging county board's decision abandoning road. — In a mandamus action, a trial court erred by reversing a decision of a county board of commissioners to abandon a road as the trial court failed to give proper deference to the board's decision to abandon the road and substituted the court's own judgment for that of the board. Scarborough v. Hunter, 293 Ga. 431, 746 S.E.2d 119, 2013 Ga. LEXIS 613 (2013).

No clear right to mandamus to compel in-state tuition to noncitizen students to state university. — Noncitizen students failed to show that the Deferred Action for Childhood Arrivals (DACA) policy had the force and effect of a federal law that would support a mandamus order requiring state universities to grant the students in-state tuition, and even if DACA had the force of law, DACA did not create a clear legal duty to grant the students in-state tuition. Alford v. Hernandez, 343 Ga. App. 332, 807 S.E.2d 84, 2017 Ga. App. LEXIS 494 (2017), cert. denied, No. S18C0459, 2018 Ga. LEXIS 327 (Ga. May 7, 2018).

Application. — Trial court properly did not apply O.C.G.A. § 9-6-21 to a case brought by a property owner seeking mandamus relief to compel a county to open and maintain roads in a subdivision because neither party was a citizen entitled to petition the court as required by the statute. Burke County v. Askin, 291 Ga. 697, 732 S.E.2d 416, 2012 Ga. LEXIS 776 (2012).

Refusal to comply with mandamus as contempt. — Refusal of county commissioners to comply with mandamus granted under this section was held to constitute contempt, even though proceedings were pending to discontinue road which was the subject of the mandamus proceedings. Odom v. McDilda, 155 Ga. 688, 117 S.E. 649, 1923 Ga. LEXIS 145 (1923).

RESEARCH REFERENCES

Am. Jur. 2d.

52 Am. Jur. 2d, Mandamus, §§ 17 et seq., 31 et seq., 33 et seq.

C.J.S.

55 C.J.S., Mandamus, §§ 63, 239.

ALR.

Mandamus against municipality to compel improvement or repair of street or highway, 46 A.L.R. 257.

Duty and liability of governmental body responsible for condition of street or highway for injury or damage due to cracking or upheaval of surface, 111 A.L.R. 862.

9-6-22. Enforcement of officer's duties under Title 5.

If any sheriff, clerk, or other officer fails to discharge any duty required of him by any provision of Title 5, upon petition the appellate court or the superior, state, or city court, as the case may be, may compel the performance of such duty by mandamus. No party shall lose any right by reason of the failure of the officer to discharge his duties when the party has been guilty of no fault himself and has exercised ordinary diligence to secure the discharge of such duties.

History.
Laws 1845, Cobb's 1851 Digest, p. 450.; Code 1863, § 4172; Code 1868, § 4204; Code 1873, § 4264; Code 1882, § 4264; Civil Code 1895, § 5555; Civil Code 1910, § 6169; Code 1933, § 6-918.

JUDICIAL DECISIONS

Clerks of superior and city courts are amenable to writ of mandamus to require them to perform their duties when they refuse, or for any cause fail to act. But if they act at all, however, erroneously, they are not liable to this process. Jones v. Smith, 83 Ga. App. 798, 65 S.E.2d 188, 1951 Ga. App. LEXIS 964 (1951).

Concurrent jurisdiction of courts. — Under this section, the appellate courts and the superior court have concurrent jurisdiction to compel by mandamus the performance of any duty of the officers of the superior court which may be necessary, and where the issues are such as cannot be determined by the appellate courts, it may dismiss the application and transmit the case to the superior court. Cooper v. Nisbet, 118 Ga. 872, 45 S.E. 692, 1903 Ga. LEXIS 746 (1903) (see O.C.G.A. § 9-6-22).

9-6-23. Enforcement of corporation's public duty.

A private person may by mandamus enforce the performance by a corporation of a public duty as to matters in which he has a special interest.

History.
Civil Code 1895, § 4869; Civil Code 1910, § 5442; Code 1933, § 64-103.
History of Section.
The language of this Code section is derived in part from the decision in Savannah & Ogeechee Canal Co. v. Shuman, 91 Ga. 400, 17 S.E. 937 (1893).

JUDICIAL DECISIONS

This section applies only in cases where there is "a public duty" involved. Bregman v. Orkin Exterminating Co., 213 Ga. 561, 100 S.E.2d 267, 1957 Ga. LEXIS 442 (1957) (see O.C.G.A. § 9-6-23).

Mandamus is not remedy to enforce purely private right of stockholder against corporation when the right sought to be enforced is in no way affected with a public interest. Bregman v. Orkin Exterminating Co., 213 Ga. 561, 100 S.E.2d 267, 1957 Ga. LEXIS 442 (1957).

Citizen engaged in lumber business could compel canal company to keep its canal in navigable condition, where special damage accrued to the former because of a violation of this duty. Savannah & Ogeechee Canal Co. v. Shuman, 91 Ga. 400, 17 S.E. 937, 1893 Ga. LEXIS 336 (1893).

Private party may, by mandamus, enforce performance of public duty by common carrier as to matters in which such party has a special interest. Beck & Gregg Hdwe. Co. v. Associated Transp., Inc., 210 Ga. 545, 81 S.E.2d 515, 1954 Ga. LEXIS 369 (1954).

The defendant, a common carrier, having accepted merchandise consigned to the plaintiff, it was the defendant's duty to deliver it to the plaintiff and, on refusal to do so, mandamus will lie to require a performance of the duty. Beck & Gregg Hdwe. Co. v. Associated Transp., Inc., 210 Ga. 545, 81 S.E.2d 515, 1954 Ga. LEXIS 369 (1954).

Mandamus to compel railroad company to restore street crossing. — If a railroad company takes out and discontinues an existing street crossing which it has maintained over its railroad, such conduct and action is equivalent to refusal to perform the public duty of maintaining such crossing; and, where mandamus proceedings are instituted to require the railroad company to restore and maintain the crossing in good condition, it is not prerequisite to allege a demand for performance of the duty. Atlantic Coast Line R.R. v. Donalsonville Grain & Elevator Co., 184 Ga. 291, 191 S.E. 87, 1937 Ga. LEXIS 492 (1937).

No mandamus to compel municipality to pay invalid judgment. — Mandamus will not be granted to compel municipal authorities to levy and collect a tax to pay a judgment alleged to be held by the applicants against the municipality, where it appears that the judgment relied on is not a valid judgment against it. Meyer & Co. v. Jordan, 123 Ga. 669, 51 S.E. 602, 1905 Ga. LEXIS 573 (1905).

Mandamus unavailable for nominee seeking to serve on electric membership corporation. — Trial court erred by granting a nominee's writ of mandamus because under O.C.G.A. § 9-6-23, mandamus did not lie to enforce purely private contract rights and the nominee's efforts to be qualified as a person to sit on the board of an electric membership corporation was a private right as board members were not public officers within the meaning of O.C.G.A. § 9-6-20. Rigby v. Boatright, 294 Ga. 253, 751 S.E.2d 851, 2013 Ga. LEXIS 996 (2013).

If mandamus is not proper, a mandatory injunction may be proper. — Mere fact that a court order is mandatory, rather than prohibitive, does not transform injunctive relief into a writ of mandamus, and an injunction is not void merely because it is mandatory in nature. Moreover, a trial court may issue a mandatory injunction when mandamus relief is not available. Rigby v. Boatright, 330 Ga. App. 181, 767 S.E.2d 783, 2014 Ga. App. LEXIS 731 (2014).

RESEARCH REFERENCES

Am. Jur. 2d.

52 Am. Jur. 2d, Mandamus, § 325 et seq.

C.J.S.

55 C.J.S., Mandamus, § 228 et seq.

9-6-24. What interest required to enforce public right.

Where the question is one of public right and the object is to procure the enforcement of a public duty, no legal or special interest need be shown, but it shall be sufficient that a plaintiff is interested in having the laws executed and the duty in question enforced.

History.

Code 1933, § 64-104.

Law reviews.

For article, "A Taxing Exception: Southern LNG, Inc. v. MacGinnitie's Narrow Interpretation of the Mandamus Exception," see 66 Mercer L. Rev. 855 (2015).

For annual survey of administrative law, see 67 Mercer L. Rev. 1 (2015).

JUDICIAL DECISIONS

This section is general rule applicable in all instances where question is one of public right and the object is to procure the enforcement of a public duty. Head v. Browning, 215 Ga. 263, 109 S.E.2d 798, 1959 Ga. LEXIS 448 (1959) (see O.C.G.A. § 9-6-24).

Principle announced in this section is not confined to mandamus cases. Head v. Browning, 215 Ga. 263, 109 S.E.2d 798, 1959 Ga. LEXIS 448 (1959); City of East Point v. Weathers, 218 Ga. 133, 126 S.E.2d 675, 1962 Ga. LEXIS 454 (1962) (see O.C.G.A. § 9-6-24).

Mandamus compels performance only where officer's duty to act clear. — Mandamus is an available legal remedy which may be employed only for the purpose of compelling an officer to perform a specific act where the officer's duty to do so is clear and well defined. Moore v. Robinson, 206 Ga. 27, 55 S.E.2d 711, 1949 Ga. LEXIS 417 (1949).

Citizen and taxpayer has an interest in performance of duty by public officers such as will authorize the maintenance of an action at law to compel by mandamus the performance of official duties. Colston v. Hutchinson, 208 Ga. 559, 67 S.E.2d 763, 1951 Ga. LEXIS 430 (1951).

A citizen and taxpayer of a municipality, without the necessity for showing any special injury, has standing to sue to prevent officials of the municipal corporation from taking actions or performing acts which they have no authority to do. League of Women Voters of Atlanta-Fulton County, Inc. v. City of Atlanta, 245 Ga. 301, 264 S.E.2d 859, 1980 Ga. LEXIS 775 (1980).

Citizen and taxpayer may challenge officials' refusal to vacate office. — Where a citizen, taxpayer, and voter files a petition for the writ of mandamus against the mayor and councilmen of a municipality, asserting that they are extending their terms of office and are predicating their position upon the provisions of an Act of the General Assembly, the voter has such interest and right, and sustains such injury to the voter by the enforcement of terms of the Act, as to authorize the voter to attack the Act as being unconstitutional. Manning v. Upshaw, 204 Ga. 324, 49 S.E.2d 874, 1948 Ga. LEXIS 436 (1948).

Citizen challenging legality of salary increase ordinances. — County citizen lacked standing to seek a declaratory judgment with respect to the claims challenging the legality of the salary ordinance as the citizen did not seek to enforce a public duty conferred by statute but rather sought to block the enforcement of an ordinance passed pursuant to O.C.G.A. § 36-5-24; thus, O.C.G.A. § 9-6-24 did not confer a citizen standing to challenge the validity of acts authorized by the statute or to attack the constitutionality of the statute. Williams v. DeKalb County, 308 Ga. 265, 840 S.E.2d 423, 2020 Ga. LEXIS 180 (2020).

Citizens suit seeking performance of public duty in completing park. — Citizens who challenged the use of Special Local Option Sales Tax funds had standing to seek a writ of mandamus under O.C.G.A. § 9-6-24 as the citizens alleged that governmental entities failed to perform their public duty of completing a park that was allegedly promised to voters. Rothschild v. Columbus Consol. Gov't, 285 Ga. 477, 678 S.E.2d 76, 2009 Ga. LEXIS 304 (2009).

Zoning ordinances and determinations do not confer public right to the extent that they can be attacked by anyone interested in having the laws executed and the duty in question enforced. Tate v. Stephens, 245 Ga. 519, 265 S.E.2d 811, 1980 Ga. LEXIS 842 (1980).

Tenant who held a usufruct under a lease did not have standing to seek equitable relief from a zoning determination involving the leased property. The Stuttering Foundation, Inc. v. Glynn County, 301 Ga. 492, 801 S.E.2d 793, 2017 Ga. LEXIS 526 (2017).

Party must have special interest in order to attack or enforce zoning de-

termination. Tate v. Stephens, 245 Ga. 519, 265 S.E.2d 811, 1980 Ga. LEXIS 842 (1980).

No standing under O.C.G.A. § 9-6-24 if not for enforcement of a public duty. — Appellant's petition for writ of mandamus did not meet the necessary prerequisites for appellant to exercise standing under O.C.G.A. § 9-6-24 where the petition did not seek to procure the enforcement of a public duty, rather, it sought to compel an action to correct what appellant believed to be the wrongful filing of uncertified tax liens under O.C.G.A. § 44-14-572. Brissey v. Ellison, 272 Ga. 38, 526 S.E.2d 851, 2000 Ga. LEXIS 77 (2000).

Existence of standing under the statute depended upon whether the appellees owed a public duty which appellants, as members of the public, were entitled to have enforced. Adams v. Ga. Dep't of Corr., 274 Ga. 461, 553 S.E.2d 798, 2001 Ga. LEXIS 794 (2001).

District attorney lacked standing to seek a writ of mandamus to prevent a sentencing panel from performing its official duties, based on an allegation that the legislation pursuant to which it acted was unconstitutional; the panel did not have a public duty, enforceable by means of a writ of mandamus, to initiate and pursue litigation which challenged the constitutionality of its statutory authority to reduce certain criminal sentences, however, the district attorney did have standing to seek an injunction preventing the enforcement of former O.C.G.A. § 17-10-6 on constitutional grounds. Moseley v. Sentence Review Panel, 280 Ga. 646, 631 S.E.2d 704, 2006 Ga. LEXIS 444 (2006).

Ultra vires activity by municipality established. — Participants, pension board members, and advocates were authorized to file a declaratory judgment action seeking injunctive relief on behalf of municipal pension funds against the City of Atlanta, as the participants, members, and advocates alleged ultra vires conduct by the city under O.C.G.A. § 9-6-24; the refusal by the city to recognize, implement, or cooperate with the pension boards' decisions to hire a third party administrator and an outside counsel fell outside the scope of the city's lawful powers because Georgia law did not grant the city authority to approve these decisions by the pension board. City of Atlanta v. S. States Police Benevolent Ass'n, 276 Ga. App. 446, 623 S.E.2d 557, 2005 Ga. App. LEXIS 1282 (2005), cert. denied, No. S06C0609, 2006 Ga. LEXIS 314 (Ga. May 8, 2006).

Taxpayer could seek to compel state revenue commissioner to accept tax returns. — In a gas company's suit against the state revenue commissioner for mandamus compelling the commissioner to accept its property tax returns under O.C.G.A. §§ 48-1-2(21) and 48-5-511(a), remand was proper to determine if the company had an acceptable alternative remedy in its pending county tax appeals under O.C.G.A. § 48-5-311, as required by O.C.G.A. § 9-6-20, if the commissioner could be made a party to those appeals by joinder or some other procedure. Southern LNG, Inc. v. MacGinnitie, 294 Ga. 657, 755 S.E.2d 683, 2014 Ga. LEXIS 168 (2014).

RESEARCH REFERENCES

Am. Jur. 2d.

52 Am. Jur. 2d, Mandamus, § 325 et seq.

C.J.S.

55 C.J.S., Mandamus, §§ 47, 48.

ALR.

Mandamus to compel enrollment or restoration of pupil in state school or university, 39 A.L.R. 1019.

Determination of canvassing boards or election officials as regards counting or exclusion of ballots as subject of review by mandamus, 107 A.L.R. 618.

Remedies to compel municipal officials to enforce zoning regulations, 35 A.L.R.2d 1135.

Private citizen's right to institute mandamus to compel a magistrate or other appropriate official to issue a warrant, or the like, for an arrest, 49 A.L.R.2d 1285.

9-6-25. Loss prerequisite to enforcing private right.

In order for a plaintiff to enforce a private right by mandamus he must show pecuniary loss for which he cannot be compensated in damages.

History.
Code 1933, § 64-105.
History of Section.
The language of this Code section is derived in part from the decisions in Atlantic Ice & Coal Corp. v. Town of Decatur, 154 Ga. 882, 115 S.E. 912 (1923), and Board of Comm'rs v. Montgomery, 170 Ga. 361, 153 S.E. 34 (1930).

JUDICIAL DECISIONS

This provision is not of statutory origin, but is a mere codification of a common-law principle. Head v. Waldrup, 197 Ga. 500, 29 S.E.2d 561, 1944 Ga. LEXIS 275 (1944) (see O.C.G.A. § 9-6-25).

Denial of insurance license is irreparable injury justifying mandamus. — Where the refusal of the Insurance Commissioner to renew an insurance company's license is without justification, the failure to perform this official duty will irreparably injure the company, and therefore its petition alleges a cause of action for mandamus. Bankers Life & Cas. Co. v. Cravey, 208 Ga. 682, 69 S.E.2d 87, 1952 Ga. LEXIS 313 (1952).

Voter has sufficient interest in preventing unlawful extension of term of office. — Where a citizen, taxpayer, and voter files a petition for the writ of mandamus against the mayor and councilmen of a municipality, asserting that they are extending their terms of office and refusing to call an election to elect their successors in violation of the terms of the charter of the municipality, and are predicating their position upon the provisions of an Act of the General Assembly, the voter has such interest and right, and sustains such injury to the voter by the enforcement of the terms of the Act, as to authorize the voter to attack the Act as being unconstitutional. Manning v. Upshaw, 204 Ga. 324, 49 S.E.2d 874, 1948 Ga. LEXIS 436 (1948).

Failure to receive building permit not private right requiring showing of irreparable damage. — In a mandamus action, although the official duty required is that of issuing a building permit, it is not a private right of the petitioner requiring a showing of irreparable injury under this section. Hadden v. Pierce, 212 Ga. 45, 90 S.E.2d 405, 1955 Ga. LEXIS 539 (1955) (see O.C.G.A. § 9-6-25).

Usufruct holder did not have standing to seek mandamus relief from zoning decision. — Tenant who held a usufruct under a lease did not have standing to seek equitable relief from a zoning determination involving the leased property. The Stuttering Foundation, Inc. v. Glynn County, 301 Ga. 492, 801 S.E.2d 793, 2017 Ga. LEXIS 526 (2017).

RESEARCH REFERENCES

C.J.S.
55 C.J.S., Mandamus, § 48.
ALR.
Remedy by mandamus of creditor against officer who fails to levy under execution, 57 A.L.R. 836.

Mandamus to compel consideration, allowance, or payment of claim under Workmen's Compensation Acts, 82 A.L.R. 1073.

Mandamus to compel delivery of papers and records to private corporation, 93 A.L.R. 1061.

Mandamus as taxpayer's remedy in respect of valuation of property for taxation, 131 A.L.R. 360.

Mandamus to compel reinstatement of suspended or expelled members of labor union, 141 A.L.R. 617.

Right to go behind money judgment against public body in a mandamus proceeding to enforce it, 155 A.L.R. 464.

Remedies to compel municipal officials to enforce zoning regulations, 35 A.L.R.2d 1135.

Compelling admission to membership in professional association or society, 89 A.L.R.2d 964.

9-6-26. Mandamus not granted where fruitless, nor on suspicion.

Mandamus will not be granted when it is manifest that the writ would, for any cause, be nugatory or fruitless, nor will it be granted on a mere suspicion or fear, before a refusal to act or the doing of a wrongful act.

History.

Orig. Code 1863, § 3132; Code 1868, § 3144; Code 1873, § 3200; Code 1882, § 3200; Civil Code 1895, § 4870; Civil Code 1910, § 5443; Code 1933, § 64-106.

Law reviews.

For note, "The Case of the Vanishing Supreme Court Contest: *Barrow v. Raffensperger* Eliminates the Power of the People to Elect their Appellate, Superior, and State Court Judges," see 72 Mercer L. Rev. 957 (2021).

JUDICIAL DECISIONS

Mandamus lies against officer to require performance of clear legal right. Harmon v. James, 200 Ga. 742, 38 S.E.2d 401, 1946 Ga. LEXIS 322 (1946).

Writ, if granted, should be effectual as a remedy, and, if the status would not be changed, a wise judicial discretion would justify its refusal. The court will refuse this extraordinary remedy when it will prove unavailing, and when no result will be accomplished, or the status changed, by its issuance. Harmon v. James, 200 Ga. 742, 38 S.E.2d 401, 1946 Ga. LEXIS 322 (1946).

Mandamus should not issue when this remedy would be ineffectual to change the status of the parties, or afford any material advantage to the applicant, respecting the thing demanded. Smith v. Hodgson, 129 Ga. 494, 59 S.E. 272, 1907 Ga. LEXIS 492 (1907).

Plaintiff must show that mandamus will be effective. — In order to authorize the grant of a mandamus absolute, plaintiff must show a clear legal right and that the mandamus will be effective. Troutman v. Aiken, 213 Ga. 55, 96 S.E.2d 585, 1957 Ga. LEXIS 299 (1957).

Proper remedy should be resorted to in lieu of mandamus. — Where it appears that the applicant had a remedy for any error of the judge of the probate court, the applicant cannot neglect the remedy and afterwards resort to mandamus proceedings. Sharp v. McAlpin, 162 Ga. 159, 132 S.E. 891, 1926 Ga. LEXIS 129 (1926).

Before mandamus will issue, law must not only authorize act to be done, but must require its performance, and to entitle one to the writ of mandamus, it must appear that one has a clear legal right to have performed the particular act which one seeks to have enforced. Harmon v. James, 200 Ga. 742, 38 S.E.2d 401, 1946 Ga. LEXIS 322 (1946).

Mandamus will not be allowed unless act commanded to be done is legally possible before the writ issues. Kirkland v. Lowry, 175 Ga. 240, 165 S.E. 111, 1932 Ga. LEXIS 226 (1932).

Mandamus properly denied where official duty could no longer be performed. — Where, at the time an application for mandamus was heard, the time had passed within which the official duty, the performance of which was sought to be compelled, could be performed, the court

properly denied a mandamus. Kirkland v. Lowry, 175 Ga. 240, 165 S.E. 111, 1932 Ga. LEXIS 226 (1932); Skrine v. Kim, 242 Ga. 185, 249 S.E.2d 534, 1978 Ga. LEXIS 1134 (1978).

Denial of mandamus relief improper. — Trial court erred in denying the children's petition for writ of mandamus to compel a judge to allow the children to appeal from the order dismissing their appeals because the children showed that the children had a clear legal right to file a direct appeal from the order dismissing their properly filed direct appeals and that granting mandamus relief would not be nugatory since the notices of appeal were proper and valid. Sotter v. Stephens, 291 Ga. 79, 727 S.E.2d 484, 2012 Ga. LEXIS 450 (2012).

Void unreversed judgment does not create legal impossibility. — When the petition for mandamus shows that the act the performance of which is sought is legally impossible because of an unreversed judgment of a court, and the allegations of the petition are sufficient to show the judgment to be void because it was rendered by a court which was without jurisdiction, the application for mandamus will not fail to state a cause of action because the judgment has not been successfully attacked and declared void prior to the filing of the petition for mandamus. To rule otherwise would be to require a needless multiplicity of suits in order to reach the same result. Riley v. Garrett, 219 Ga. 345, 133 S.E.2d 367, 1963 Ga. LEXIS 454 (1963).

Mandamus proceedings do not relate back to time of accrual of right thereto, and the duty to be enforced must be a duty which exists at the time when the application for mandamus is made or the writ is granted. Skrine v. Kim, 242 Ga. 185, 249 S.E.2d 534, 1978 Ga. LEXIS 1134 (1978).

Mandamus is not proper remedy to compel undoing of acts already done or the correction of wrongs already perpetrated. Coastal Serv., Inc. v. Jackson, 223 Ga. 238, 154 S.E.2d 365, 1967 Ga. LEXIS 476 (1967).

When time has passed for discharge of official duty sought to be compelled, mandamus will be denied. Skrine v. Kim, 242 Ga. 185, 249 S.E.2d 534, 1978 Ga. LEXIS 1134 (1978).

Act beyond power of officer. — It is not error to refuse to grant a mandamus to require the clerk of the superior court to deliver certain ballots and voter's lists to named persons, when it affirmatively appears that these ballots and lists are not in the clerk's possession, or to compel a reconsolidation of votes where results of an election would not be changed. Gilliam v. Green, 122 Ga. 322, 50 S.E. 137, 1905 Ga. LEXIS 199 (1905).

The state treasurer is authorized to pay out funds of the state in the treasurer's hands only upon warrants signed by the Governor and countersigned by the Comptroller General; and a petition seeking a writ of mandamus directing the state treasurer to honor and pay, when and if presented, a warrant which the petition failed to show had been executed as required by law, so that there was no failure of the treasurer to perform the treasurer's official duty in paying a warrant properly executed and presented to the treasurer, alleged no cause of action, and was properly dismissed on demurrer (now motion to dismiss). Barwick v. Roberts, 188 Ga. 655, 4 S.E.2d 664, 1939 Ga. LEXIS 614 (1939).

Where the secretary and treasurer of a town brought mandamus against the tax receiver of a county to permit the secretary and treasurer to examine the county tax returns of taxpayers who own property in the town to ascertain whether such taxpayers were making proper returns to the town for ad valorem tax purposes, the allegations in the petition affirmatively showed that the tax returns in question were not in the defendant tax receiver's possession when the petition requested permission to examine them, and there was no allegation that they were in the receiver's custody and control when litigation was instituted; hence, it failed to state a cause of action for the relief sought. Sauls v. Winters, 215 Ga. 515, 111 S.E.2d 41, 1959 Ga. LEXIS 527 (1959).

Act fruitless or nugatory. — If it should appear that an applicant to commissioners to transplant oysters in a certain county has no land in the county upon which it could be done and there is no

territory to which it could apply, there is no error in refusing a mandamus. Commissioners of McIntosh County v. Aiken Canning Co., 123 Ga. 647, 51 S.E. 585, 1905 Ga. LEXIS 567 (1905).

Untimely seeking of mandamus. — Suit by county to recover money illegally paid out of its treasury must be brought within four years, and where the petition for mandamus to force commissioners to bring suit for such recovery is brought six years afterwards, under the terms of this section, the mandamus should not issue. Swords v. Walker, 141 Ga. 450, 81 S.E. 235, 1914 Ga. LEXIS 3 (1914) (see O.C.G.A. § 9-6-26).

OPINIONS OF THE ATTORNEY GENERAL

Public official will be excused from carrying out official duty upon failure of General Assembly to appropriate funds for performance, if, but only if, the official is able to show that the resulting lack of funds, together with an inability to obtain the same, make performance impossible; failure of the General Assembly to appropriate moneys for a specific official duty might not justify a failure to perform where the official has received a general appropriation and could divert a portion thereof to carry out the official's statutory or official duty. 1969 Op. Att'y Gen. No. 69-174.

An interdepartmental council created by an Act of the General Assembly is excused from carrying out its official duties upon failure of the General Assembly to appropriate funds for performance of said duties, if, but only if, this resulting lack of funds rendered performance impossible; the court would have the power to determine whether the mandatory duties of the council could be performed or not. 1969 Op. Att'y Gen. No. 69-184.

RESEARCH REFERENCES

Am. Jur. 2d.
52 Am. Jur. 2d, Mandamus, § 20.

C.J.S.
55 C.J.S., Mandamus, § 11.

9-6-27. Time of hearing; notice; how and when issues of fact determined.

(a) Upon the presentation of an application for mandamus, if the mandamus nisi is granted the judge shall cause the same to be returned for trial not less than ten nor more than 30 days from such date. The defendant shall be served at least five days before the time fixed for the hearing.

(b) If no issue of fact is raised by the application and answer, the case shall be heard and determined by the court without the intervention of a jury.

(c) If an issue of fact is involved, it may be heard by the judge upon the consent of all parties. Otherwise, the case shall be set for trial upon the first day of the next term of the superior court as other jury cases are tried. However, if the court has a scheduled session for jury trials which will occur before the next term, the case shall stand for trial at the present term.

History.

Ga. L. 1882-83, p. 103, §§ 1, 2, 4; Civil Code 1895, §§ 4871, 4872, 4873; Civil Code 1910, §§ 5444, 5445, 5446; Code 1933, §§ 64-107, 64-108, 64-109.

JUDICIAL DECISIONS

Section intended to facilitate swift disposition. — Under law relating to mandamus, appearance and trial terms are abolished and a speedy decision upon the merits is intended and if the case involves no issue of fact, it may be heard and determined by the court; but if an issue of fact is made, it shall be in order for trial upon the first day of the next term of the superior court, as other jury cases are tried; and if the superior court is in session, or taking a recess at time fixed for trial in mandamus nisi, the same shall stand for trial at then present term. Bridges v. Poole, 176 Ga. 500, 168 S.E. 577, 1933 Ga. LEXIS 209 (1933).

Party must obtain certificate. — Parent's appeal challenging the disenrollment of the parent's children from a school based on non-residency was dismissed because the case remained pending before the trial court and the order was not otherwise directly appealable since the parent was required to comply with the interlocutory appeal procedures in order to appeal. Nance v. Houston County Sch. Dist., 359 Ga. App. 204, 857 S.E.2d 97, 2021 Ga. App. LEXIS 167 (2021).

Trial without jury where no issue of fact. — This section, in effect, provides that the judge may without a jury determine an application for mandamus when the answer to the mandamus nisi shall involve no issue of fact, but that if an issue of fact be involved the issue shall be tried before a jury. Chappell v. Small, 194 Ga. 143, 20 S.E.2d 916, 1942 Ga. LEXIS 533 (1942) (see O.C.G.A. § 9-6-27).

If issue of fact is involved in mandamus case, such issue shall be tried by jury. City of Atlanta v. McLennan, 240 Ga. 407, 240 S.E.2d 881, 1977 Ga. LEXIS 1512 (1977).

Parties to mandamus action may waive their right to jury trial either tacitly or expressly. City of Atlanta v. McLennan, 240 Ga. 407, 240 S.E.2d 881, 1977 Ga. LEXIS 1512 (1977).

Objection to evidence as presenting issue for jury without merit where parties consented to hearing in accordance with this section. City of Camilla v. Norris, 134 Ga. 351, 67 S.E. 940, 1910 Ga. LEXIS 197 (1910) (see O.C.G.A. § 9-6-27).

By introducing evidence without objection that case was for jury, party is presumed to consent to the trial of any issues of fact by judge. Talmadge v. Cordell, 170 Ga. 13, 152 S.E. 91, 1930 Ga. LEXIS 386 (1930).

Waiver of jury trial at first trial of civil case applies to retrials of the same case. City of Atlanta v. McLennan, 240 Ga. 407, 240 S.E.2d 881, 1977 Ga. LEXIS 1512 (1977).

Jury trial required where county board of education refused to confirm election of applicants as trustees of school district, where issue arose as to whether members or former board contracted for indebtedness of the school district. Bryant v. Board of Educ., 156 Ga. 688, 119 S.E. 601, 1923 Ga. LEXIS 309 (1923).

Ga. L. 1972, p. 689, §§ 1-3 (see O.C.G.A. § 9-11-4) plainly permits ordinary service of process to be used in mandamus cases as an alternative to issuing mandamus nisi under former Code 1933, §§ 64-107, 64-108, and 64-109 (see O.C.G.A. § 9-6-27). DeKalb County v. Chapel Hill, Inc., 232 Ga. 238, 205 S.E.2d 864, 1974 Ga. LEXIS 920 (1974).

O.C.G.A. § 9-6-27(a) complemented rather than conflicted with O.C.G.A. § 9-11-4(k), which expressly established that the methods of service could have been used as alternative methods of service in special statutory proceedings; a taxpayer's failure to comply with O.C.G.A. § 9-6-27(a) in a case seeking mandamus and injunctive relief against a county was immaterial, because the taxpayer served the county in the ordinary manner. Haugen v. Henry County, 277 Ga. 743, 594 S.E.2d 324, 2004 Ga. LEXIS 185, cert. denied, 543 U.S. 816, 125 S. Ct. 63, 160 L. Ed. 2d 22, 2004 U.S. LEXIS 5612 (2004).

Proper notice of hearing. — In an action by a city to, inter alia, compel a

county tax commissioner to pay school tax receipts, a trial court erred in converting a hearing on an interlocutory injunction into a final hearing on a permanent injunction and a writ of mandamus without the proper notice under O.C.G.A. § 9-6-27(a); the commissioner was only given two days' notice and also did not consent to having any mandamus issue heard by the trial court without a jury under § 9-6-27(c) or to having the request for permanent injunctive relief under O.C.G.A. § 9-11-65(a)(2) heard at the same time. Ferdinand v. City of Atlanta, 285 Ga. 121, 674 S.E.2d 309, 2009 Ga. LEXIS 83 (2009).

When no hearing required. — A litigant was not entitled to a hearing on a petition for a writ of mandamus against a judge in a defamation action against the litigant under O.C.G.A. § 9-6-27(a) because no mandamus nisi issued, and neither the litigant nor the judge requested oral argument under Ga. Unif. Super. Ct. R. 6.3. Watson v. Matthews, 286 Ga. 784, 692 S.E.2d 338, 2010 Ga. LEXIS 271 (2010).

Trial court did not err in denying the plaintiff's request for a mandamus nisi without first holding a hearing as the mandamus statute clearly authorizes the trial court to deny a request if the petition is meritless. Hansen v. DeKalb County Board of Tax Assessors, 295 Ga. 385, 761 S.E.2d 35, 2014 Ga. LEXIS 532 (2014).

Dismissal of mandamus petition proper. — O.C.G.A. § 50-18-73(a) of the Georgia Open Records Act, O.C.G.A. § 50-18-70 et seq., provides a remedy that is as complete and convenient as mandamus; thus, the trial court did not err in dismissing the individuals' petition for mandamus under O.C.G.A. § 9-6-27(b). Tobin v. Cobb County Bd. of Educ., 278 Ga. 663, 604 S.E.2d 161, 2004 Ga. LEXIS 832 (2004).

RESEARCH REFERENCES

Am. Jur. 2d.

52 Am. Jur. 2d, Mandamus, §§ 345 et seq., 383 et seq.

C.J.S.

55 C.J.S., Mandamus, §§ 319, 332.

ALR.

Summary judgment in mandamus or prohibition cases, 3 A.L.R.3d 675.

9-6-28. Appeal.

(a) Upon refusal of the court to grant the mandamus nisi, the applicant may appeal as in other cases. Either party dissatisfied with the judgment on the hearing of the answer to the mandamus nisi may likewise appeal.

(b) Mandamus cases shall be heard on appeal under the same laws and rules as apply to injunction cases.

History.

Ga. L. 1882-83, p. 103, §§ 3, 5; Civil Code 1895, §§ 4874, 4875; Civil Code 1910, §§ 5447, 5448; Code 1933, §§ 64-110, 64-111; Ga. L. 1946, p. 726, § 1; Ga. L. 2016, p. 865, § 3-5/HB 927.

Editor's notes.

Ga. L. 2016, p. 865, § 1-1/HB 927, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Appellate Jurisdiction Reform Act of 2016.'"

Ga. L. 2016, p. 865, § 6-1/HB 927, not codified by the General Assembly, provides, in part, that: "Part III of this Act shall become effective on January 1, 2017, and shall apply to cases in which a notice of appeal or application to appeal is filed on or after such date."

Law reviews.

For article on the 2016 amendment of this Code section, see 33 Georgia St. U. L. Rev. 205 (2016).

JUDICIAL DECISIONS

Supreme Court empowered to review contempt of mandamus actions. — A proceeding for contempt in violation of a mandamus absolute is so connected with the mandamus that a writ of error (now notice of appeal) to review a judgment therein should be treated as a case involving an extraordinary remedy within the constitutional provision conferring jurisdiction upon the Supreme Court. Settle v. McWhorter, 203 Ga. 93, 45 S.E.2d 210, 1947 Ga. LEXIS 553 (1947).

Court of Appeals lacking in jurisdiction. — Where petitioners brought mandamus seeking to require judge to certify a bill of exceptions (now notice of appeal), and the judgment complained of is one wherein the Supreme Court and not the Court of Appeals would have jurisdiction of an appeal in that such judgment ordered, among other things, title to land transferred by deed and a petition seeking an injunction dismissed, the petition for writ of mandamus must be dismissed since the Court of Appeals was without authority either to pass on the merits of the petition or to transfer such petition to the Supreme Court. Scott v. Hubert, 99 Ga. App. 784, 109 S.E.2d 614, 1959 Ga. App. LEXIS 963 (1959).

RESEARCH REFERENCES

Am. Jur. 2d.
52 Am. Jur. 2d, Mandamus, § 424 et seq.

C.J.S.
55 C.J.S., Mandamus, § 366. 74 C.J.S., Quo Warranto, § 89 et seq.

ARTICLE 3

PROHIBITION

9-6-40. Prohibition counterpart of mandamus.

The writ of prohibition is the counterpart of mandamus, to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction where no other legal remedy or relief is given. The granting or refusal thereof is governed by the same principles of right, necessity, and justice as apply to mandamus; provided, however, that no writ of prohibition to compel the removal of a judge shall issue where no motion to recuse has been filed, if such motion is available, or where a motion to recuse has been denied after assignment to a separate judge for hearing.

History.
Orig. Code 1863, § 3136; Code 1868, § 3148; Code 1873, § 3209a; Code 1882, § 3209a; Civil Code 1895, § 4885; Civil Code 1910, § 5458; Code 1933, § 64-301; Ga. L. 2009, p. 643, § 2/HB 221.

History of Section.
The language of this Code section is derived in part from the decisions in Seymour v. Almond, 75 Ga. 112 (1885) and City of Macon v. Anderson, 155 Ga. 607, 117 S.E. 753 (1923).

JUDICIAL DECISIONS

Petition for writ of prohibition must be filed in the appropriate superior court, and not in an appellate court, but the final decision of the superior court may be appealed to the Supreme Court for review. Carey Can., Inc. v. Head, 252 Ga.

23, 310 S.E.2d 895, 1984 Ga. LEXIS 565 (1984).

Office of writ of prohibition is to restrain subordinate courts from exceeding their jurisdiction, so that each tribunal shall confine itself to the exercise of those powers with which, under the Constitution and laws of the state, it has been entrusted. Wright v. Wood, 178 Ga. 273, 173 S.E. 138, 1934 Ga. LEXIS 33 (1934); Dover v. Greer, 180 Ga. 110, 178 S.E. 297 (1934).

Prohibition is a writ to prevent a tribunal possessing judicial powers from exercising jurisdiction over matters not within its cognizance, or from exceeding its jurisdiction in matters of which it has cognizance. Martin v. Crawford, 199 Ga. 497, 34 S.E.2d 699, 1945 Ga. LEXIS 338 (1945).

Writ of prohibition lies to arrest or prevent performance of official act unauthorized by law, but does not lie to relieve against the consequence of such an act. Pope v. Colbert, 95 Ga. 791, 22 S.E. 703, 1895 Ga. LEXIS 281 (1895); Martin v. Crawford, 199 Ga. 497, 34 S.E.2d 699, 1945 Ga. LEXIS 338 (1945).

Writ of prohibition is available only where there is lack of jurisdiction of subject matter, or where the act complained of was in excess of the jurisdiction of the court or tribunal, and it will be presumed that the processioners, having jurisdiction of the subject matter, in passing upon their own jurisdiction will not act beyond their proper legal functions. Almand v. Brock, 227 Ga. 586, 182 S.E.2d 97, 1971 Ga. LEXIS 782 (1971).

Writ of prohibition will not be granted in case where applicant is afforded any other legal remedy. Heaton v. Hooper, 134 Ga. 577, 68 S.E. 297, 1910 Ga. LEXIS 273 (1910).

The general rule is that prohibition will not lie if any other adequate remedy is available. Buie v. Buie, 175 Ga. 27, 165 S.E. 15, 1932 Ga. LEXIS 180 (1932).

The writ of prohibition is never granted where there is any other legal remedy. Wright v. Wood, 178 Ga. 273, 173 S.E. 138, 1934 Ga. LEXIS 33 (1934); Dover v. Greer, 180 Ga. 110, 178 S.E. 297 (1934).

Writ will not be granted where there was complete remedy by certiorari. Turner v. Mayor of Forsyth, 78 Ga. 683, 3 S.E. 649, 1887 Ga. LEXIS 52 (1887); Hudson v. Preston, 134 Ga. 222, 67 S.E. 800, 1910 Ga. LEXIS 159 (1910); Heaton v. Hooper, 134 Ga. 577, 68 S.E. 297, 1910 Ga. LEXIS 273 (1910); Cunningham v. Rachaels, 146 Ga. 682, 92 S.E. 208, 1917 Ga. LEXIS 439 (1917).

Writ of prohibition is not generally available for relief of grievances which may be redressed in ordinary judicial proceedings, and when the ordinary and usual remedies provided by law are applicable and available. Shantha v. Municipal Court, 240 Ga. 280, 240 S.E.2d 32, 1977 Ga. LEXIS 1475 (1977); Sacco v. State Court, 272 Ga. 214, 528 S.E.2d 514, 2000 Ga. LEXIS 262 (2000).

Writ of prohibition cannot be invoked merely because usual and ordinary remedy is indirect and inconvenient, and the writ should be granted only when it is apparent that the rights of the applicant cannot be adjudicated by any other remedy. It is not an appropriate remedy for testing the constitutionality of the law. Buie v. Buie, 175 Ga. 27, 165 S.E. 15, 1932 Ga. LEXIS 180 (1932).

Writ only available where parties' rights not otherwise protected. — It is only when there is something in the nature of the action or proceeding that makes it apparent that the rights of the parties litigant cannot be adequately protected by any other remedy than by the writ of prohibition that the writ should be granted. Martin v. Crawford, 199 Ga. 497, 34 S.E.2d 699, 1945 Ga. LEXIS 338 (1945).

Writ may enjoin contempt citation by justice of peace. — A rule for contempt against person refusing to submit to arrest, issued by justice of peace was enjoined by writ of prohibition. Ormond v. Ball, 120 Ga. 916, 48 S.E. 383, 1904 Ga. LEXIS 749 (1904).

Writ available to petitioner who was imprisoned for civil contempt. — Petitioner, who had been imprisoned for eight months after a civil contempt hearing for which there was no transcript or brief of the evidence, and who had otherwise exhausted available remedies, was entitled to the protection of the writ of prohibition. Russell v. Evans, 260 Ga. 754, 400 S.E.2d 11, 1991 Ga. LEXIS 34 (1991).

Writ applicable to probate judge to stop sanity hearing. — The writ will lie

to prevent judge of the probate court, who has appointed a lunacy commission to determine the sanity of one indicted for crime and set a time for the hearing, from proceeding further therewith. State ex rel. Graham, 135 Ga. 259, 69 S.E. 115, 1910 Ga. LEXIS 504 (1910).

Fact that party fears court will not obey laws would hardly justify an injunction in the nature of a writ of prohibition to stop it from carrying its judgment into effect. Mayor of Americus v. Mitchell, 74 Ga. 377, 1885 Ga. LEXIS 312 (1885).

Writ not applicable to legislative or administrative acts. — The writ of prohibition lies only to restrain the unlawful exercise of judicial functions by an inferior tribunal, acts of an administrative or of a legislative character not falling within its providence. Doughty, Pearson & Co. v. Walker, 54 Ga. 595, 1875 Ga. LEXIS 275 (1875); Fite v. Black, 85 Ga. 413, 11 S.E. 782, 1890 Ga. LEXIS 58 (1890).

Writ not applicable to magistrate court policy decisions. — Because the State, in the person of the District Attorney, attempted to avoid the restrictions in O.C.G.A. § 5-7-1 et seq., by attacking by way of mandamus and prohibition an alleged magistrate court policy concerning rulings made in criminal prosecutions, and because the State had no ability to appeal the policy, the trial court erred by considering the State's petition for mandamus and prohibition. Magistrate Court v. Fleming, 284 Ga. 457, 667 S.E.2d 356, 2008 Ga. LEXIS 731 (2008).

No writ of prohibition will lie against a grand jury since it is not an inferior court. Almand v. Brock, 227 Ga. 586, 182 S.E.2d 97, 1971 Ga. LEXIS 782 (1971).

Where a court of inquiry has been held and a prisoner bound over to the grand jury, a writ of prohibition will not lie to restrain the committing court, the grand jury, and the district attorney from taking further action until another court of inquiry is held. Almand v. Brock, 227 Ga. 586, 182 S.E.2d 97, 1971 Ga. LEXIS 782 (1971).

District attorney cannot be classified as an inferior court so as to be subject to a writ of prohibition. Almand v. Brock, 227 Ga. 586, 182 S.E.2d 97, 1971 Ga. LEXIS 782 (1971).

Discovery, continuance in criminal proceedings unauthorized. — The defendant filed a suit for mandamus and prohibition against the solicitor and the judge to whom the defendant's case was assigned, seeking the solicitor's compliance with the defendant's requests for discovery, as well as a continuance of the criminal proceedings against the defendant until the solicitor complied with the defendant's discovery requests. Since the court was under no duty to grant a continuance and the solicitor was under no duty to provide discovery, such extraordinary relief was not authorized and the court correctly dismissed the petition for failure to state a claim. Scott v. McLaughlin, 258 Ga. 407, 369 S.E.2d 257, 1988 Ga. LEXIS 264 (1988).

Application of laches to mandamus. — Supreme Court of Georgia concludes that case law supporting that a mandamus action can be barred by gross laches is the correct rule; thus, Crow v. McCallum, 215 Ga. 692 (1960), and its progeny were wrongly decided and overruled. Marsh v. Clarke County Sch. Dist., 292 Ga. 28, 732 S.E.2d 443, 2012 Ga. LEXIS 791 (2012).

RESEARCH REFERENCES

Am. Jur. 2d.

63C Am. Jur. 2d, Prohibition, §§ 39 et seq., 49 et seq., 73 et seq.

63C Am. Jur. 2d, Prohibition, §§ 39 et seq., 49 et seq., 73 et seq.

C.J.S.

72A C.J.S., Prohibition, § 1 et seq.

ALR.

Prohibition as proper remedy to prevent enforcement of judgment which has been reversed or modified on appeal, or from which an appeal, with supersedeas or stay, is pending, 70 A.L.R. 105.

Writ of prohibition, 77 A.L.R. 245.

Right of court upon application for prohibition to consider issues of fact dehors the record in the inferior court, 99 A.L.R. 984.

Prohibition as remedy in case of defective indictment, information, or complaint, 102 A.L.R. 298.

Constitutionality of statute as proper question for determination in prohibition proceeding, 113 A.L.R. 796.

Provisional or alternative writ or order to show cause as condition of granting peremptory or absolute writ of prohibition or mandamus, 116 A.L.R. 659.

Prohibition as available remedy to restrain performance of a ministerial act by a judicial officer, 117 A.L.R. 1398.

Assumption of jurisdiction by court before completion of administrative procedure as ground of prohibition, 132 A.L.R. 738.

Other remedies as adequate or inadequate for purposes of an application for a writ of prohibition against contempt proceedings, 136 A.L.R. 715.

Adequacy of remedy by appeal in criminal cases to preclude prohibition sought on the ground of lack or loss of jurisdiction, 141 A.L.R. 1262.

Prohibition to prevent multiplicity of proceedings, 159 A.L.R. 1283.

Mandamus or prohibition as remedy to enforce right to jury trial, 41 A.L.R.2d 780.

Availability of writ of prohibition to prevent illegal or unauthorized taking of depositions, 73 A.L.R.2d 1169.

Availability of mandamus or prohibition to review order of reference to master or auditor, 76 A.L.R.2d 1120.

Prohibition as appropriate remedy to restrain civil action for lack of jurisdiction of the person, 92 A.L.R.2d 247.

Prohibition as appropriate remedy to prevent allegedly disqualified judge from proceeding with case, 92 A.L.R.2d 306.

Prohibition or mandamus as appropriate remedy to review ruling on change of venue in civil case, 93 A.L.R.2d 802.

Prohibition as appropriate remedy to restrain civil action for lack of venue, 93 A.L.R.2d 882.

Availability of mandamus or prohibition to compel or to prevent discovery proceedings, 95 A.L.R.2d 1229.

Summary judgment in mandamus or prohibition cases, 3 A.L.R.3d 675.

Judgment granting or denying writ of mandamus or prohibition as res judicata, 21 A.L.R.3d 206.

Availability of writ of prohibition or similar remedy against acts of public prosecutor, 16 A.L.R.4th 112.

9-6-41. When writ granted; time for return; trial of fact issues.

The writ of prohibition may be granted at any time, on proper showing made. The return must be in term. Any issue of fact made thereon must be tried as in equity cases.

History.

Code 1863, §§ 3133, 3136; Code 1868, §§ 3145, 3148; Code 1873, §§ 3201, 3209a; Code 1882, §§ 3201, 3209a; Civil Code 1895, §§ 4876, 4885; Civil Code 1910, §§ 5449, 5458; Code 1933, §§ 64-301, 64-302.

History of Section.

The language of this Code section is derived in part from the decision in Mayor of Brunswick v. Dure, 59 Ga. 803 (1877).

JUDICIAL DECISIONS

Prohibition can only operate to restrain pending action or proceeding. Martin v. Crawford, 199 Ga. 497, 34 S.E.2d 699, 1945 Ga. LEXIS 338 (1945).

Before the writ of prohibition should issue, there must be some pending action or proceeding upon which the writ could apply and prohibit some act of a judicial tribunal from exercising jurisdiction over matters not within its cognizance, or from exceeding its jurisdiction in matters in which it has cognizance. Martin v. Crawford, 199 Ga. 497, 34 S.E.2d 699, 1945 Ga. LEXIS 338 (1945).

Writ of prohibition will not lie after judgment sought to be restrained has

been issued. Almand v. Brock, 227 Ga. 586, 182 S.E.2d 97, 1971 Ga. LEXIS 782 (1971).

Return of writ. — An application for the writ of prohibition may be sanctioned in vacation, but must be made returnable to the next term. Doughty, Pearson & Co. v. Walker, 54 Ga. 595, 1875 Ga. LEXIS 275 (1875) (decided prior to amendment of O.C.G.A. § 15-6-19.).

The writ of prohibition must be returned in term. Mayor of Savannah v. Grayson, 104 Ga. 105, 30 S.E. 693, 1898 Ga. LEXIS 288 (1898).

Title to public office not proper subject for relief by prohibition. — Where a petition is predicated upon the issue of title to a public office, and the prayers are for the writ of prohibition, and that a defendant be prohibited and restrained from acting as such public official, the petition cannot be held to state a cause of action for injunctive relief, for the reason that injunction is not a primary remedy to determine the question of title to public office. Martin v. Crawford, 199 Ga. 497, 34 S.E.2d 699, 1945 Ga. LEXIS 338 (1945).

RESEARCH REFERENCES

Am. Jur. 2d.
63C Am. Jur. 2d, Prohibition, §§ 39 et seq., 49 et seq., 73 et seq.
C.J.S.
72A C.J.S., Prohibition, § 1 et seq.
ALR.
Availability of writ of prohibition or similar remedy against act of public prosecutor, 16 A.L.R.4th 112.

9-6-42. Prohibition against executive and military officers; Governor exempt.

The writ of prohibition will not lie to the duly inaugurated Governor, but it lies to all other executive or military officers when acting as a judicial or quasi-judicial tribunal.

History.
Orig. Code 1863, § 3134; Code 1868, § 3146; Code 1873, § 3202; Code 1882, § 3202; Civil Code 1895, § 4877; Civil Code 1910, § 5450; Code 1933, § 64-303.

History of Section.
The language of this Code section is derived in part from the decision in Shirley v. Gardner, 160 Ga. 338, 127 S.E. 855 (1925).

RESEARCH REFERENCES

Am. Jur. 2d.
63C Am. Jur. 2d, Prohibition, § 35 et seq.
C.J.S.
72A C.J.S., Prohibition, §§ 2, 3.
ALR.
Availability of writ of prohibition as means of controlling administrative or executive boards or officers, 115 A.L.R. 3; 159 A.L.R. 627.

ARTICLE 4

QUO WARRANTO

9-6-60. For what purpose quo warranto may issue; who may bring action.

The writ of quo warranto may issue to inquire into the right of any

person to any public office the duties of which he is in fact discharging. It may be granted only after the application by some person either claiming the office or interested therein.

History.

Orig. Code 1863, § 3135; Code 1868, § 3147; Code 1873, § 3203; Code 1882, § 3203; Civil Code 1895, § 4878; Civil Code 1910, § 5451; Code 1933, § 64-201.

Law reviews.

For comment on Rogers v. Medical Ass'n, 244 Ga. 151, 259 S.E.2d 85 (1979), invalidating Georgia statute requiring Governor's appointments to Composite State Board of Medical Examiners (now Georgia Composite Medical Board) be made solely from nominees submitted by state medical society as an unconstitutional delegation of legislative authority to a private organization, see 29 Emory L.J. 1183 (1980).

For article, "2016 Georgia Corporation and Business Organization Case Law Developments," see 22 Ga. St. Bar J. 58 (April 2017).

JUDICIAL DECISIONS

Analysis

General Consideration
Parties
Application

General Consideration

Common law origins. — The ancient common-law writ of quo warranto was a writ of right by the crown and was used to prevent the usurpation of an officer or franchise. Stone v. Wetmore, 44 Ga. 495, 1871 Ga. LEXIS 410 (1871); Garrett v. Cowart, 149 Ga. 557, 101 S.E. 186, 1919 Ga. LEXIS 320 (1919).

Ancient writ of quo warranto has been materially modified by statute; there no longer exists a writ of right, but a prerequisite to the maintenance of an information in the nature of a quo warranto is leave of the court, granted on application therefor in the exercise of a sound discretion, to file the proposed information. Walker v. Hamilton, 209 Ga. 735, 76 S.E.2d 12, 1953 Ga. LEXIS 398 (1953).

An action seeking a writ of quo warranto is one of the special statutory proceedings subject to the Civil Practice Act. Anderson v. Flake, 270 Ga. 141, 508 S.E.2d 650.

This section expressly denies writ of quo warranto to person who is not either claiming office or interested therein. Collins v. Huff, 63 Ga. 207, 1879 Ga. LEXIS 167 (1879); Hardin v. Colquitt, 63 Ga. 588, 1879 Ga. LEXIS 286 (1879) (see O.C.G.A. § 9-6-60).

Under former Code 1933, § 64-201 (see O.C.G.A. § 9-6-60), writ of quo warranto applied only where the right of any person to "public office" was involved, and in former Code 1933, §§ 64-208 and 64-209 (see O.C.G.A. § 9-6-61) the remedy applied where civil officers were concerned. McDuffie v. Perkerson, 178 Ga. 230, 173 S.E. 151, 1933 Ga. LEXIS 36 (1933).

"Public office" within meaning of this section means office which has been lawfully created by the Constitution, by some statute, or by municipal ordinances passed in pursuance of legislative authority. Ritchie v. Barker, 216 Ga. 194, 115 S.E.2d 539, 1960 Ga. LEXIS 427 (1960) (see O.C.G.A. § 9-6-60).

Public office is right, authority, and duty conferred by law by which an individual is invested with some portion of the sovereign functions of the government, to be exercised by the individual for the benefit of the public. The warrant to exercise powers is conferred, not by a contract, but by the law. It finds its source and limitation in some act of expression of governmental power. McDuffie v. Perkerson, 178 Ga. 230, 173 S.E. 151, 1933 Ga. LEXIS 36 (1933).

Term "public office" embraces ideas

of tenure and of duration or continuance. But it is held that these elements are not essential where the other qualifications of officers are present. Public employments are public offices, notwithstanding the instability of the tenure by which the incumbent holds. McDuffie v. Perkerson, 178 Ga. 230, 173 S.E. 151, 1933 Ga. LEXIS 36 (1933).

Public officer defined. — An individual who has been appointed or elected in a manner prescribed by law, who has a designation or title given to the individual by law, and who exercises functions concerning the public, assigned to the individual by law, is a public officer. McDuffie v. Perkerson, 178 Ga. 230, 173 S.E. 151, 1933 Ga. LEXIS 36 (1933); Smith v. Mueller, 222 Ga. 186, 149 S.E.2d 319, 1966 Ga. LEXIS 432 (1966).

Term "public officer" involves idea of tenure, duration, fees, or emoluments, and powers, as well as that of duty. These ideas or elements cannot properly be separated and each considered abstractly. All, taken together, constitute an office. McDuffie v. Perkerson, 178 Ga. 230, 173 S.E. 151, 1933 Ga. LEXIS 36 (1933).

Quo warranto denied challenging appointment of judges. — Trial court's denial of the challenger's petition for a writ of quo warranto was affirmed because the newly created positions on the Georgia Court of Appeals qualified as vacancies under Ga. Const. 1983, Art. VI, Sec. VII, Para. III; thus, the governor had the authority to appoint judges to the vacancies created by amended O.C.G.A. § 15-3-1(a). Clark v. Deal, 298 Ga. 893, 785 S.E.2d 524, 2016 Ga. LEXIS 314 (2016).

Quo warranto denied for removal of public officer. — Trial court properly granted the judge's motion to dismiss for failure to state a claim in quo warranto and denied the challenger's leave to file an information against the judge because the challenger failed to show that removal from office through a proceeding in quo warranto was the proper remedy for an appointment that was not made promptly. Floyd v. Stone, 313 Ga. 16, 867 S.E.2d 92, 2021 Ga. LEXIS 728 (2021).

Writ of quo warranto as to private entities appointment of board of ethics members. — Trial court correctly granted the writ of quo warranto as to the four challenged members appointed to the county board of ethics by private entities as those appointments were unconstitutional as the private entities did not answer to the people as required by the Georgia Constitution and were, therefore, not authorized to wield the power to appoint public officials to the board. Delay v. Sutton, 304 Ga. 338, 818 S.E.2d 659, 2018 Ga. LEXIS 581 (2018).

Remedy by writ of quo warranto applies to all civil officers of this state, except the Governor. McDuffie v. Perkerson, 178 Ga. 230, 173 S.E. 151, 1933 Ga. LEXIS 36 (1933).

Quo warranto is a remedy to inquire into right of any person to any public office the duties of which the person is in fact discharging. Malone v. Minchew, 170 Ga. 687, 153 S.E. 773, 1930 Ga. LEXIS 221 (1930); Odom v. Jones, 176 Ga. 147, 167 S.E. 304, 1932 Ga. LEXIS 410 (1932); Sutton v. Adams, 180 Ga. 48, 178 S.E. 365, 1934 Ga. LEXIS 449 (1934).

Quo warranto has always been recognized as the proper procedure for inquiring into the right to hold public office. Conley v. Brophy, 207 Ga. 30, 60 S.E.2d 122, 1950 Ga. LEXIS 381 (1950).

Quo warranto suit may be brought to challenge eligibility to hold public office. White v. Miller, 235 Ga. 192, 219 S.E.2d 123, 1975 Ga. LEXIS 818 (1975).

Quo warranto affords adequate remedy for trial of title to public office; and where title is the sole issue, all equitable jurisdiction is ousted. Davis v. City Council, 90 Ga. 817, 17 S.E. 110, 1892 Ga. LEXIS 253 (1892); Stanford v. Lynch, 147 Ga. 518, 94 S.E. 1001, 1918 Ga. LEXIS 9 (1918); Davis v. Mathews, 169 Ga. 321, 150 S.E. 158, 1929 Ga. LEXIS 349 (1929); Hayes v. City of Dalton, 209 Ga. 286, 71 S.E.2d 618, 1952 Ga. LEXIS 466 (1952).

Issue in quo warranto proceeding is the title of incumbents to office from which they are sought to be ousted. Center v. Arp, 198 Ga. 574, 32 S.E.2d 308, 1944 Ga. LEXIS 445 (1944); Bowling v. Doyal, 206 Ga. 641, 58 S.E.2d 173, 1950 Ga. LEXIS 539 (1950).

Status of defendant at time information is filed controls on the question of whether the defendant is an usurper of

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the office. Sweat v. Barnhill, 171 Ga. 294, 155 S.E. 18, 1930 Ga. LEXIS 338 (1930).

Parties

Writ to secure ouster will not lie where office holder is no longer exercising duties of the office, or claiming title thereto. Churchill v. Walker, 68 Ga. 681, 1882 Ga. LEXIS 85 (1882); Holmes v. Sikes, 113 Ga. 530, 113 Ga. 580, 38 S.E. 978, 1901 Ga. LEXIS 309 (1901).

Quo warranto is brought by or on behalf of people for protection of public. White v. Miller, 235 Ga. 192, 219 S.E.2d 123, 1975 Ga. LEXIS 818 (1975).

To maintain proceedings to test title to public office, one must have some interest in office; while a claimant to the office has such an interest it is not essential that one be a claimant, but is sufficient if one be a resident or a taxpayer of the municipality where the office in question is that of mayor of such municipality. Walker v. Hamilton, 209 Ga. 735, 76 S.E.2d 12, 1953 Ga. LEXIS 398 (1953).

Any citizen and taxpayer may file proceedings under this section to declare public office vacant. Hathcock v. McGouirk, 119 Ga. 973, 47 S.E. 563, 1904 Ga. LEXIS 424 (1904); McDuffie v. Perkerson, 178 Ga. 230, 173 S.E. 151, 1933 Ga. LEXIS 36 (1933); McCullers v. Williamson, 221 Ga. 358, 144 S.E.2d 911, 1965 Ga. LEXIS 464 (1965) (see O.C.G.A. § 9-6-60).

Right to challenge party's right to hold office. — As a citizen and taxpayer, individual had the right to inquire into the right of the respondent to hold a public office. Huff v. Anderson, 212 Ga. 32, 90 S.E.2d 329, 1955 Ga. LEXIS 532 (1955).

Any citizen and taxpayer of a community may challenge the qualifications of a public official to hold office in that community. Highsmith v. Clark, 245 Ga. 158, 264 S.E.2d 1, 1980 Ga. LEXIS 723 (1980).

Non-profit association was not a "person" who could seek quo warranto. — Non-profit association with the purpose of focusing on public interest matters of self-defense and gun laws of the State of Georgia was not a "person" which could claim to have an interest in the offices held by the Georgia Code Revision Commission members for purposes of pursuing a writ of quo warranto under O.C.G.A. § 9-6-60. No association standing was shown because the interests the association sought to protect were not shown to be germane to its purpose. Georgiacarry.org, Inc. v. Allen, 299 Ga. 716, 791 S.E.2d 800, 2016 Ga. LEXIS 611 (2016).

Citizen and taxpayer may act in own name without intervention of public officials. — An information in nature of a writ of quo warranto may be legally instituted by a citizen and taxpayer in the citizen's own name, without the intervention of the state through its public officers. Garrett v. Cowart, 149 Ga. 557, 101 S.E. 186, 1919 Ga. LEXIS 320 (1919); Malone v. Minchew, 170 Ga. 687, 153 S.E. 773, 1930 Ga. LEXIS 221 (1930).

Proper party plaintiff in quo warranto action may be party claiming office as entitled de jure, and the necessary defendant is the officer de facto who holds and possesses it. Sutton v. Adams, 180 Ga. 48, 178 S.E. 365, 1934 Ga. LEXIS 449 (1934).

Claim must be brought against officer in personal capacity. — City councilmembers' claim to remove the mayor from office was one that must be asserted against the office holder in the officer's individual capacity, and was subject to dismissal because the mayor was not named in the mayor's individual or personal capacity. Lue v. Eady, 297 Ga. 321, 773 S.E.2d 679, 2015 Ga. LEXIS 441 (2015).

Nominee in contested election could institute and maintain quo warranto proceeding for the purpose of inquiring into the right of the other nominee to exercise the functions of the office. Thompson v. Stone, 205 Ga. 243, 53 S.E.2d 458, 1949 Ga. LEXIS 356 (1949).

Party not estopped in quo warranto proceedings by prior mandamus action against defendant. — One who institutes as a citizen and taxpayer a quo warranto proceeding, inquiring into the right of the defendant to hold a public office is not estopped from maintaining such action because the person had previously instituted, as an individual, a mandamus action against the defendant in the defendant's official capacity. Huff v. Ander-

son, 212 Ga. 32, 90 S.E.2d 329, 1955 Ga. LEXIS 532 (1955).

Pending quo warranto proceeding instituted by another not a bar. — A claimant to public office cannot be prevented from instituting quo warranto proceedings against the person holding the office claimed simply because there is pending another quo warranto proceeding, instituted by some other claimant or person interested in the office. Stephens v. Wohlwender, 197 Ga. 793, 30 S.E.2d 469, 1944 Ga. LEXIS 318 (1944).

Officer in possession, whether de facto or de jure, could not personally maintain quo warranto action, because the writ is essentially one to inquire into the right of a person to public office the duties of which the officer is in fact discharging. Sutton v. Adams, 180 Ga. 48, 178 S.E. 365, 1934 Ga. LEXIS 449 (1934).

Where quo warranto petition showed that if appointee was not entitled to office, third party would be, petitioner had no right to institute proceeding as a quo warranto proceeding cannot be converted into an election contest. Stephens v. Wohlwender, 197 Ga. 795, 30 S.E.2d 470, 1944 Ga. LEXIS 319 (1944).

Quo warranto is not exclusive remedy where person sued is not in actual possession and exercising the duties of the office, regardless of whether it might be a permissible remedy in such case. Cummings v. Robinson, 194 Ga. 336, 21 S.E.2d 627, 1942 Ga. LEXIS 573 (1942).

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A juvenile court intake officer is a public officer for purposes of a quo warranto proceeding. Brown v. Scott, 266 Ga. 44, 464 S.E.2d 607, 1995 Ga. LEXIS 959 (1995).

Quo warranto granted to remove a city attorney improperly appointed by the mayor. — Writ of quo warranto challenging a city mayor's appointment of a city attorney was properly granted because a council member's abstention on a motion to delegate the power of appointment to the mayor was no vote at all; therefore, there was no tie vote on the motion, and the mayor was not authorized to vote in its favor, leaving authority to appoint an attorney with the council, in accordance with the city charter. Jones v. Boone, 297 Ga. 437, 774 S.E.2d 668, 2015 Ga. LEXIS 494 (2015).

Quo warranto permissible where plaintiff contends selection method unconstitutional. — Where the plaintiff contends the defendants are illegally holding office because of the alleged unconstitutionality of the section of the Georgia Constitution providing for the means of their selection, quo warranto would be an adequate remedy. Boatright v. Brown, 222 Ga. 497, 150 S.E.2d 680, 1966 Ga. LEXIS 527 (1966).

Quo warranto rather than injunction proper remedy to determine title to office. — Where the title to an office is involved, quo warranto, or a petition in the nature of a quo warranto, is the proper remedy, rather than an equitable petition for injunction. Sweat v. Barnhill, 170 Ga. 545, 153 S.E. 364, 1930 Ga. LEXIS 186 (1930).

While injunction is a proper remedy to restrain public officers from acting illegally, or without authority, yet where the basic and underlying purpose of a suit is really to declare a public office vacant, or to test the title to the office, a proceeding in the nature of quo warranto under this section is adequate to determine the issue. Rogers v. Croft, 203 Ga. 654, 47 S.E.2d 739, 1948 Ga. LEXIS 372 (1948); Boatright v. Brown, 222 Ga. 497, 150 S.E.2d 680, 1966 Ga. LEXIS 527 (1966) (see O.C.G.A. § 9-6-60).

Equity will not interfere by injunction to determine title to public office, because the remedy of a proceeding in the nature of quo warranto under this section is adequate. (see O.C.G.A. § 9-6-60). Hagood v. Hamrick, 223 Ga. 600, 157 S.E.2d 429, 1967 Ga. LEXIS 620 (1967).

Proceedings by injunction may be properly used to protect possession of officers de facto against the interference of claimants whose title is disputed, until the latter shall establish their title by the judicial proceeding provided by law. Sutton v. Adams, 180 Ga. 48, 178 S.E. 365, 1934 Ga. LEXIS 449 (1934).

Quo warranto is not exclusive remedy where persons rightfully in office

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desire protection against intrusion and interference from one having no right or authority in the premises, but who will nevertheless so intrude and interfere, unless restrained by judicial action. In such case the writ of quo warranto, though itself a speedy remedy, could not supply that immediate and preventive relief which could be granted through the writ of injunction, and thus would not be as complete or effectual. Cummings v. Robinson, 194 Ga. 336, 21 S.E.2d 627, 1942 Ga. LEXIS 573 (1942).

Quo warranto is not proper remedy for official misconduct. McDonough v. Bacon, 143 Ga. 283, 84 S.E. 588, 1915 Ga. LEXIS 393 (1915); Turner v. Wilburn, 206 Ga. 149, 56 S.E.2d 285, 1949 Ga. LEXIS 432 (1949).

There is no statute in this state specifically prescribing procedure in quo warranto proceeding. Milton v. Mitchell, 139 Ga. 614, 77 S.E. 821, 1913 Ga. LEXIS 547 (1913).

Judge may issue rule nisi to show cause why quo warranto should not issue. — In all cases of applications to file an information in the nature of a quo warranto, the judge to whom it is presented is authorized to issue a rule to show cause why it should not be granted, and upon a return of the rule to hear and consider evidence relevant to the matter involved. Walker v. Hamilton, 209 Ga. 735, 76 S.E.2d 12, 1953 Ga. LEXIS 398 (1953).

It is discretionary with court whether application for quo warranto is granted. Walker v. Hamilton, 209 Ga. 735, 76 S.E.2d 12, 1953 Ga. LEXIS 398 (1953).

Judgment in quo warranto proceeding against incumbent nullifies any attempted official act after judgment, but such a proceeding does not affect the previous official acts of the incumbent. Center v. Arp, 198 Ga. 574, 32 S.E.2d 308, 1944 Ga. LEXIS 445 (1944).

Member of county board of education is public officer within this section. Stanford v. Lynch, 147 Ga. 518, 94 S.E. 1001, 1918 Ga. LEXIS 9 (1918); Clarke v. Long, 152 Ga. 619, 111 S.E. 31, 1922 Ga. LEXIS 234 (1922) (see O.C.G.A. § 9-6-60).

Offices of mayor and council of incorporated town are public offices within the purview of this section. Rogers v. Croft, 203 Ga. 654, 47 S.E.2d 739, 1948 Ga. LEXIS 372 (1948) (see O.C.G.A. § 9-6-60).

Grand jurors not public officers. — In this state, the grand jury is lacking in the element of tenure and duration which must exist in order to qualify its members as public officers. McDuffie v. Perkerson, 178 Ga. 230, 173 S.E. 151, 1933 Ga. LEXIS 36 (1933).

All persons who perform duties in connection with superior court are not necessarily public officers. McDuffie v. Perkerson, 178 Ga. 230, 173 S.E. 151, 1933 Ga. LEXIS 36 (1933).

Officer, member, or employee of political party is not public officer. Ritchie v. Barker, 216 Ga. 194, 115 S.E.2d 539, 1960 Ga. LEXIS 427 (1960).

Residents, voters, and taxpayers of town have interest in offices of mayor and council such as would entitle them to maintain a quo warranto proceeding to inquire into the right of certain individuals to occupy such offices. Rogers v. Croft, 203 Ga. 654, 47 S.E.2d 739, 1948 Ga. LEXIS 372 (1948).

Chairman of State Democratic Executive Committee subject to quo warranto. — Since state statutes have given the office of Chairman of the State Democratic Executive Committee of Georgia a status in law at least equivalent to that of an office in a corporation, it is subject to the writ of quo warranto to the same extent as such an office, and this is true although the political party itself is not a corporation. Morris v. Peters, 203 Ga. 350, 46 S.E.2d 729, 1948 Ga. LEXIS 316 (1948); Ritchie v. Barker, 216 Ga. 194, 115 S.E.2d 539, 1960 Ga. LEXIS 427 (1960).

Commission of officer by Governor will not defeat quo warranto. Hathcock v. McGouirk, 119 Ga. 973, 47 S.E. 563, 1904 Ga. LEXIS 424 (1904).

Office of clerk of board of county commissioners is subject to quo warranto proceedings by a claimant to that office. Worthy v. Cheatham, 142 Ga. 440, 83 S.E. 113, 1914 Ga. LEXIS 741 (1914).

Quo warranto affords adequate remedy for trial of title membership

in county board of education. Townsend v. Carter, 174 Ga. 759, 164 S.E. 49, 1932 Ga. LEXIS 132 (1932).

Sufficiency of quo warranto petition. — Quo warranto proceedings are governed under the general rules applicable to all civil actions, and it was error for the trial court to dismiss a petition for failure to state a claim without making relevant queries under the rules. Anderson v. Flake, 267 Ga. 498, 480 S.E.2d 10.

Quo warranto petition sufficient to show incumbent's ineligibility for office of recorder. — Where the charter of a city provided that the recorder must have resided for two years in the city, an application for leave to file an information in the nature of a quo warranto and the accompanying petition which contained allegations disputing the respondents two year's residence were sufficient to show the ineligibility of the respondent to hold the office of recorder and to state a cause of action for the issuance of the writ. Blake v. Middlebrooks, 182 Ga. 500, 185 S.E. 786, 1936 Ga. LEXIS 471 (1936).

Quo warranto proceeding permissible to claim title to county executive committeeman position. — In view of the legal status that has been attached to the office of county executive committeeman by statute in this state, a quo warranto proceeding in which the relator claims title to such office, and seeks to recover it from a rival claimant, is not subject to demurrer (now motion to dismiss) as asserting a purely political right. Ritchie v. Barker, 216 Ga. 194, 115 S.E.2d 539, 1960 Ga. LEXIS 427 (1960).

College professor not subject to quo warranto. — Professor and departmental chairman of the criminal justice department of a state college, as well as the director of the Criminal Justice Institute at that college, did not hold a "public office" within the meaning of O.C.G.A. § 9-6-60. MacDougald v. Phillips, 262 Ga. 778, 425 S.E.2d 652, 1993 Ga. LEXIS 293 (1993).

Issuance of quo warranto improper. — Trial court erred in granting a citizen a writ of quo warranto revoking county board of equalization (BOE) members' appointments because although BOE members were public officers subject to quo warranto, the citizen's petition for a writ of quo warranto was subject to dismissal when the citizen did not seek leave of court prior to filing the complaint; although the trial court purported to award, in the alternative, a permanent injunction prohibiting the members from serving on the BOE until they were statutorily qualified, such relief was improper as an alternative to the writ of quo warranto. Everetteze v. Clark, 286 Ga. 11, 685 S.E.2d 72, 2009 Ga. LEXIS 643 (2009).

Leave of court must be granted to seek writ of quo warranto. — Former city attorney followed correct procedure to obtain a writ of quo warranto by filing an application for leave of court to file an information in the nature of a quo warranto, and the trial court issued a rule nisi granting leave to file the petition; the order granting leave was not improper because the order was signed by the clerk of court, because under O.C.G.A. § 15-6-61(a)(3), the clerk was authorized to sign orders at the direction of a superior court judge. Jones v. Boone, 297 Ga. 437, 774 S.E.2d 668, 2015 Ga. LEXIS 494 (2015).

Judge's petition for a writ of quo warranto challenging the qualifications of members of the Judicial Qualifications Commission was due to be dismissed because the judge failed to obtain leave of court to file the petition for quo warranto as required by the plain language of the quo warranto statute, O.C.G.A. § 9-6-60. Crawford v. Balli, 355 Ga. App. 297, 844 S.E.2d 236, 2020 Ga. App. LEXIS 314 (2020).

RESEARCH REFERENCES

Am. Jur. 2d.
65 Am. Jur. 2d, Quo Warranto, §§ 13 et seq., 45 et seq., 105 et seq.
Am. Jur. Pleading and Practice Forms.
21 Am. Jur. Pleading and Practice Forms, Quo Warranto, § 2.
C.J.S.
74 C.J.S., Quo Warranto, § 14 et seq.
ALR.
Teacher as an officer whose right may be tested by quo warranto, 30 A.L.R. 1423.
Quo warranto to test results of primary election, 86 A.L.R. 246.
Quo warranto to test right to serve as grand or petit juror, 91 A.L.R. 1009.
Quo warranto as remedy in field of taxation, 109 A.L.R. 342.
Power of district, county, or prosecuting attorney to bring action of quo warranto, 131 A.L.R. 1207; 153 A.L.R. 899.
Injunction as remedy against removal of public office, 34 A.L.R.2d 554.
Right of private person not claiming office to maintain quo warranto proceedings to test title to or existence of public office, 51 A.L.R.2d 1306.

9-6-61. Writ lies against civil and military officers; Governor exempt.

The question of who is the lawful Governor of this state may not be tried by quo warranto, but the writ of quo warranto will lie to all other civil or military officers.

History.
Orig. Code 1863, § 3134; Code 1868, § 3146; Ga. L. 1871-72, p. 41, § 1; Code 1873, §§ 3202, 3206; Ga. L. 1875, p. 104, § 1; Code 1882, §§ 3202, 3206, 3208a; Civil Code 1895, §§ 4877, 4881, 4883; Civil Code 1910, §§ 5450, 5454, 5456; Code 1933, §§ 64-208, 64-209.

JUDICIAL DECISIONS

Writ applicable to civil officers. — Under former Code 1933, § 64-201 (see O.C.G.A. § 9-6-60), the writ of quo warranto applied only where the right of any person to a "public office" was involved, and in former Code 1933, § 64-208 and 64-209 (see O.C.G.A. § 9-6-61) the remedy applied where civil officers were concerned. McDuffie v. Perkerson, 178 Ga. 230, 173 S.E. 151, 1933 Ga. LEXIS 36 (1933).

Quo warranto will not lie to try title to office not shown to have legal existence. Sutton v. Adams, 180 Ga. 48, 178 S.E. 365, 1934 Ga. LEXIS 449 (1934).

RESEARCH REFERENCES

Am. Jur. 2d.
65 Am. Jur. 2d, Quo Warranto, §§ 19 et seq., 26 et seq..
C.J.S.
74 C.J.S., Quo Warranto, § 58.
ALR.
Officer holding over without authority after expiration of his term as a de facto officer, 71 A.L.R. 848.
Admissibility of election ballots in quo warranto proceedings, 71 A.L.R.2d 353.

9-6-62. When granted; how issues of fact tried.

The writ of quo warranto may be granted at any time, on proper

showing made. Any issue of fact made thereon must be tried as in equity cases.

History.
Orig. Code 1863, § 3133; Code 1868, § 3145; Code 1873, § 3201; Code 1882, § 3201; Civil Code 1895, § 4876; Civil Code 1910, § 5449; Code 1933, § 64-205.

History of Section.
The language of this Code section is derived in part from the decision in Mayor of Brunswick v. Dure, 59 Ga. 803 (1877).

JUDICIAL DECISIONS

Appeal of verdict contrary to evidence. — In a quo warranto case involving issues of fact, where upon the trial there is a verdict disposing of those issues, and the party to whom the finding of the jury is adverse makes a motion for a new trial, one of the grounds being that the verdict is contrary to the evidence, which motion upon hearing is overruled, the losing party may except to the judgment overruling the party's motion and bring the case to the Supreme Court for review. Henderson v. Young, 179 Ga. 540, 176 S.E. 388, 1934 Ga. LEXIS 331 (1934).

RESEARCH REFERENCES

Am. Jur. 2d.
65 Am. Jur. 2d, Quo Warranto, §§ 13 et seq., 45 et seq., 105 et seq.

C.J.S.
74 C.J.S., Quo Warranto, §§ 38, 39.

9-6-63. Service of writ and process.

(a) As used in this Code section, the term "personal service" means service by placing a copy of the writ and process in the quo warranto proceeding in the hands of the defendant.

(b) The writ and process in a quo warranto proceeding shall be served on the defendant personally.

(c) Service of the writ and process in such proceeding upon a resident of this state who is temporarily residing or sojourning outside this state may be perfected in the same manner as is provided for service of process by publication as set forth in paragraph (1) of subsection (f) of Code Section 9-11-4 or personal service outside the state as set forth in paragraph (2) of subsection (f) of Code Section 9-11-4. When service is perfected upon any such person as provided for in the aforesaid Code section, then the person shall be bound by the final decision of the proceedings as fully as though the person had been personally served within this state.

History.
Code 1933, § 64-202.1, enacted by Ga. L. 1964, p. 766, § 1; Ga. L. 2000, p. 1225, § 2.

JUDICIAL DECISIONS

Third parties. — In an action seeking quo warranto, because the trial court's order was not directed at a party not served, and did not require that party to do anything, a third party lacked any legal right to complain that the party was not served. City of College Park v. Wyatt, 282 Ga. 479, 651 S.E.2d 686, 2007 Ga. LEXIS 728 (2007).

RESEARCH REFERENCES

Am. Jur. 2d.
65 Am. Jur. 2d, Quo Warranto, § 47.

C.J.S.
74 C.J.S., Quo Warranto, § 40.

9-6-64. How issues of law determined; time for final determination; appeal; application to issues of fact.

(a) In all applications for writs of quo warranto, of informations in the nature of quo warranto, or of proceedings by such writs to determine the right to hold office, where the case presented by the applicant involves only questions of law, the same may be determined, as are equitable proceedings, by the judge of the superior court before whom the case was begun; and the judge shall so order all the proceedings connected with and usual in such cases that the final determination shall be had by him within ten days from the commencement of the action, application, or proceeding. If either party to the application or proceeding desires to except to the final decision of the judge of the superior court, he shall file an appeal as in other cases, and the duties of the clerk shall be the same as in other cases.

(b) All the provisions of subsection (a) of this Code section are extended to proceedings quo warranto, or writs of that nature, involving issues of fact to be tried by a jury, when the same can be applied; but nothing in the subsection shall be construed to affect any rights or remedies in this class of cases which are not covered thereby.

History.
Ga. L. 1871-72, p. 41, §§ 1, 2; Code 1873, §§ 3206, 3208; Code 1882, §§ 3206, 3208; Civil Code 1895, §§ 4881, 4882; Civil Code 1910, §§ 5454, 5455; Code 1933, §§ 64-206, 64-207; Ga. L. 1946, p. 746, § 1.

JUDICIAL DECISIONS

Law authorizes direct appeal to judgment denying application to file an information in the nature of a quo warranto. Walker v. Hamilton, 209 Ga. 735, 76 S.E.2d 12, 1953 Ga. LEXIS 398 (1953).

Appeal of declaratory judgment seeking quo warranto relief. — A declaratory judgment action seeking relief quo warranto regarding rights to positions on board of directors of nonprofit corporation appealed in Court of Appeals must be transferred to Supreme Court as only it has jurisdiction of all cases involving extraordinary remedies. Morales v. Sevananda, Inc., 162 Ga. App. 854, 293

S.E.2d 387, 1982 Ga. App. LEXIS 2363 (1982).

Submission to jury does not deprive judge of power to direct verdict. — In quo warranto proceedings, the fact that the judge submits the case to the jury to pass on questions of fact raised by the pleadings will not deprive the judge of power to direct a verdict that is demanded under the pleadings and evidence. Compton v. Hix, 184 Ga. 749, 193 S.E. 252, 1937 Ga. LEXIS 634 (1937).

Jury trial was not required in a proceeding to declare a vacancy in the office of city solicitor where the only issue was whether the solicitor was an elected official. This was a question of law. Hornsby v. Campbell, 267 Ga. 511, 480 S.E.2d 189.

In a quo warranto proceeding, because the only real point of contention concerned a question of law, specifically whether the city was empowered to remove a board member, and the answer to that question lied within the board's enabling legislation and bylaws, the trial court did not err in failing to conduct an evidentiary hearing. City of College Park v. Wyatt, 282 Ga. 479, 651 S.E.2d 686, 2007 Ga. LEXIS 728 (2007).

Although a jury trial was required in a quo warranto proceeding if there were factual questions at issue, O.C.G.A. § 9-6-65, a jury trial was not required when the only issues concerned questions of law, pursuant to O.C.G.A. § 9-6-64(a); because the facts surrounding a city council's vote and a mayor's appointment of a city attorney were not in dispute, the writ was properly decided by a superior court judge. Jones v. Boone, 297 Ga. 437, 774 S.E.2d 668, 2015 Ga. LEXIS 494 (2015).

RESEARCH REFERENCES

Am. Jur. 2d.

65 Am. Jur. 2d, Quo Warranto, §§ 105 et seq., 109 et seq., 119 et seq..

C.J.S.

74 C.J.S., Quo Warranto, §§ 37, 80 et seq., 89 et seq.

ALR.

Propriety of default judgment against defendant, without introduction of evidence, in quo warranto proceeding, 92 A.L.R.2d 1121.

9-6-65. Jury trial where facts at issue; time of trial; continuances.

In cases where the facts alleged are denied by the defendant or defendants on oath, the judge shall forthwith, in the usual manner, draw a jury of 12 to try the issue of fact, and the judge shall have the power to fix a day for trial of the issue of fact with an order that the sheriff shall notify the parties of the time and place of trial. The date fixed for the trial shall not be less than ten nor more than 30 days from the date of the order. The judge shall have the discretion to continue the hearing from day to day, as provided for in other cases.

History.

Ga. L. 1868, p. 130, § 2; Code 1873, § 3205; Code 1882, § 3205; Civil Code 1895, § 4880; Civil Code 1910, § 5453; Code 1933, § 64-204.

JUDICIAL DECISIONS

Judge's findings of fact may stand where correct upon evidence. — Where an issue of fact was tried before a judge without objection, the judge's findings being correct upon the evidence tendered, the judgment based thereon will not be reversed though there was no jury as provided in this section. Crawley v.

Knight, 108 Ga. 132, 33 S.E. 948, 1899 Ga. LEXIS 201 (1899) (see O.C.G.A. § 9-6-65).

Submission to jury does not deprive judge of power to direct verdict. — In quo warranto proceedings, the fact that the judge submits the case to the jury to pass on questions of fact raised by the pleadings will not deprive the judge of power to direct a verdict that is demanded under the pleadings and evidence. Compton v. Hix, 184 Ga. 749, 193 S.E. 252, 1937 Ga. LEXIS 634 (1937).

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Although a jury trial was required in a quo warranto proceeding if there were factual questions at issue, O.C.G.A. § 9-6-65, a jury trial was not required when the only issues concerned questions of law, pursuant to O.C.G.A. § 9-6-64(a); because the facts surrounding a city council's vote and a mayor's appointment of a city attorney were not in dispute, the writ was properly decided by a superior court judge. Jones v. Boone, 297 Ga. 437, 774 S.E.2d 668, 2015 Ga. LEXIS 494 (2015).

Appeal of verdict contrary to evidence. — In a quo warranto case involving issues of fact, where upon the trial there is a verdict disposing of those issues, and the party to whom the finding of the jury is adverse makes a motion for a new trial, one of the grounds being that the verdict is contrary to the evidence, which motion upon hearing is overruled, the losing party may except to the judgment overruling the party's motion and bring the case to the Supreme Court for review. Henderson v. Young, 179 Ga. 540, 176 S.E. 388, 1934 Ga. LEXIS 331 (1934).

RESEARCH REFERENCES

Am. Jur. 2d.
65 Am. Jur. 2d, Quo Warranto, §§ 105, 108.

C.J.S.
74 C.J.S., Quo Warranto, § 80 et seq.

9-6-66. Disposition of books and papers by judgment.

Whenever the right to any office is decided, the judgment fixing the right shall further provide for the delivery to the person held to be entitled to the office of all the books and papers of every sort belonging to the office, which judgment shall be enforced as decrees in equity are enforced.

History.
Ga. L. 1871-72, p. 41, § 2; Code 1873, § 3209; Code 1882, § 3209; Civil Code 1895, § 4884; Civil Code 1910, § 5457; Code 1933, § 64-202.

Cross references.
Duty of public officer to deliver all books, papers, and other office property to his qualified successor, § 45-6-7 et seq.

RESEARCH REFERENCES

Am. Jur. 2d.
65 Am. Jur. 2d, Quo Warranto, § 109 et seq.

C.J.S.
74 C.J.S., Quo Warranto, § 84 et seq.

CHAPTER 7

AUDITORS

Sec.		Sec.	
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Cross references.

Procedure for appeal from decision of superior court reviewing decision of auditor, § 5-6-35.

Appointment of special master to conduct condemnation proceedings, § 22-2-100 et seq.

Law reviews.

For article, "Auditors—A Beacon in Complex Litigation," see 25 Ga. St. B.J. 208 (1989).

JUDICIAL DECISIONS

All provisions in Code with respect to auditors are to be strictly construed; for if the report of the auditor is not excepted to, the court frames such a verdict or decree as may be proper. Barber v. Southern Serv. Corp., 182 Ga. 124, 185 S.E. 93, 1936 Ga. LEXIS 296 (1936).

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Equity, §§ 194 et seq., 207 et seq.
ALR.
Conclusiveness of or weight attached to findings of fact of master in chancery, 33 A.L.R. 745.

9-7-1. Duties of auditor.

The duties heretofore performed by a master in the superior court shall be performed by an auditor.

History.
Ga. L. 1894, p. 123, § 3; Ga. L. 1895, p. 47, § 1; Civil Code 1895, § 4581; Civil Code 1910, § 5127; Code 1933, § 10-101.
Cross references.
Appointment and powers of special master in superior court for determination of just and adequate compensation in eminent domain proceeding, § 22-2-100 et seq.
Law reviews.
For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

JUDICIAL DECISIONS

Masters in equity cases, both special and standing, have been abolished since the approval of Ga. L. 1894, p. 123. Sengstacke v. American Missionary Ass'n, 196 Ga. 539, 26 S.E.2d 891, 1943 Ga. LEXIS 376 (1943).

Appointment improper. — In an action for judicial dissolution of an LLC, breach of contract, and breach of fiduciary duty, the trial court abused the court's discretion in appointing the special master/auditor under Ga. Unif. Super. Ct. R. 46 and O.C.G.A. § 9-7-1 et seq., since the appointed person was performing an impermissible combination of roles by acting as an investigator, witness, and judge of fact and law, which were at odds with the role of special master. A&M Hospitalities, LLC v. Alimchandani, 359 Ga. App. 271, 856 S.E.2d 704, 2021 Ga. App. LEXIS 180 (2021).

Form of order. — Trial court did not err by issuing an order because the court did not actually name and appoint an auditor and/or special master but, rather, the order simply granted the request for an auditor and directed the parties to submit the names of three possible auditors from whom the trial court could eventually make an appointment; thus, the matters mandated under Ga. Unif. Super. Ct. R. 46 did not have to be followed. Potts v. Rueda, 345 Ga. App. 389, 813 S.E.2d 412, 2018 Ga. App. LEXIS 120 (2018), cert. denied, No. S18C1081, 2018 Ga. LEXIS 721 (Ga. Oct. 22, 2018).

Appeal from review of auditor's report. — Where the auditor did not submit a final report containing separate findings of fact and conclusions of law for the superior court's review, the judgment of the court was directly appealable. McCaughey v. Murphy, 267 Ga. 64, 473 S.E.2d 762.

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Equity, §§ 194 et seq., 207 et seq.
ALR.
Conclusiveness of or weight attached to findings of fact of master in chancery, 33 A.L.R. 745.

9-7-2. When facts referred to auditor; on application and notice; on court's own motion.

Upon application of either party, after notice to the opposite party, the judge of the superior court, in equitable proceedings if the case shall require it, may refer any part of the facts to an auditor to investigate and report the result to the court. Furthermore, the judge may, upon his own motion, when in his judgment the facts and circumstances of any such case require it, refer the same to an auditor.

History.

Ga. L. 1894, p. 123, § 3; Ga. L. 1895, p. 47, § 1; Civil Code 1895, § 4581; Civil Code 1910, § 5127; Code 1933, § 10-101.

Law reviews.

For article, "Special Master; Mastering the Pretrial Discovery Process," see 12 Ga. St. B.J. 22 (2007).

JUDICIAL DECISIONS

Whether auditor shall be appointed is, as general rule, in discretion of court; and, unless there has been an abuse of such discretion, the appointment by the court of an auditor will not be disturbed. Ten-Fifty Ponce De Leon Co. v. Citizens' & S. Nat'l Bank, 170 Ga. 642, 153 S.E. 751, 1930 Ga. LEXIS 213 (1930).

Proper case may be referred to auditor over objections of parties. Lamar v. Allen, 108 Ga. 158, 33 S.E. 958, 1899 Ga. LEXIS 205 (1899).

Causes properly referable to auditors are those involving long and complicated commercial transactions supposed to require too much time for careful investigation and accurate computations to be properly referred to a jury. Barber v. Southern Serv. Corp., 182 Ga. 124, 185 S.E. 93, 1936 Ga. LEXIS 296 (1936).

Party who prays for reference to auditor will not thereafter be heard to complain that cause was so referred; nor is it within the right of any party to select or reject any particular person to be appointed by the court. Edwards v. National Fin. Co., 172 Ga. 884, 159 S.E. 256, 1931 Ga. LEXIS 235 (1931).

Judge is not required to submit entire case to auditor. Branch v. Branch, 194 Ga. 575, 22 S.E.2d 124, 1942 Ga. LEXIS 617 (1942).

All or any part of facts may be referred to auditor, but such a reference is a matter resting largely in the discretion of the court, and the exercise of such discretion will not be interfered with unless abused. Mobley v. Faulk, 42 Ga. App. 314, 156 S.E. 40, 1930 Ga. App. LEXIS 381 (1930).

Question of prejudice to be raised before auditor. — The auditor having been appointed by the court in the exercise of its prerogative, the question of prejudice, bias, or other disqualification of the auditor should have been raised before the auditor personally and before the auditor's decision in the first instance. Edwards v. National Fin. Co., 172 Ga. 884, 159 S.E. 256, 1931 Ga. LEXIS 235 (1931).

Suit for losses due to alleged mismanagement. — Where the suit was against bank directors for losses due to alleged mismanagement, it was not an abuse of discretion for the presiding judge to overrule a motion to refer the proceeding to an auditor, and submit the case to a jury. Mobley v. Faulk, 42 Ga. App. 314, 156 S.E. 40, 1930 Ga. App. LEXIS 381 (1930).

Appointment of auditor in divorce proceeding where jury trial requested. — Where one spouse made a proper demand for a jury trial which was not otherwise waived, it was reversible error for the court to enter a final judgment based upon the findings of an auditor, without a trial by jury. Franklin v. Franklin, 267 Ga. 82, 475 S.E.2d 890.

OPINIONS OF THE ATTORNEY GENERAL

Establishment of special master to hear divorce matters improper. — Establishing a special master, employed by the court to hear evidence in a divorce settlement and paid from court funds, is not permissible in view of the mechanisms capable of handling this type of problem already in place under O.C.G.A. § 9-7-2 and in view of the lack of specific statutory basis for such an expense of court under O.C.G.A. § 15-6-24. 1984 Op. Att'y Gen. No. U84-19.

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Equity, §§ 194 et seq., 207 et seq.

9-7-3. Appointment of auditor in matters of account; on application and notice; on court's own motion.

In all cases in the superior, state, or city courts involving matters of account, if the case shall require it, the judge may appoint an auditor to investigate the matters of account and report the result to the court upon the application of either party and after notice to the opposite party, or upon his own motion when in his judgment the facts and circumstances of any such case require it.

History.
Ga. L. 1895, p. 47, § 1; Civil Code 1895, § 4582; Civil Code 1910, § 5128; Code 1933, § 10-102; Ga. L. 2007, p. 47, § 9/SB 103.

Law reviews.
For article, "The Civil Jurisdiction of State and Magistrate Courts," see 24 Ga. St. B. J. 29 (1987).

For article, "2019 Georgia Corporation and Business Organization Case Law Developments," see 25 Ga. St. B.J. 30 (June 2020).

JUDICIAL DECISIONS

Causes properly referable to auditors are those involving long and complicated commercial transactions supposed to require too much time for careful investigation and accurate computations to be properly referred to a jury. Barber v. Southern Serv. Corp., 182 Ga. 124, 185 S.E. 93, 1936 Ga. LEXIS 296 (1936).

All or any part of the facts may be referred to auditor, but such a reference is a matter resting largely in the discretion of the court, and the exercise of such discretion will not be interfered with unless abused. Mobley v. Faulk, 42 Ga. App. 314, 156 S.E. 40, 1930 Ga. App. LEXIS 381 (1930).

Discretion of court. — The reference of a case to an auditor under this section rests largely in the discretion of the court; and unless this discretion is abused, it will not be interfered with. Teasley v. Bradley, 120 Ga. 373, 47 S.E. 925, 1904 Ga. LEXIS 558 (1904); Mayor of Gainesville v. Jaudon, 145 Ga. 299, 89 S.E. 210, 1916 Ga. LEXIS 286 (1916); Spencer v. Northwestern Nat'l Ins. Co., 27 Ga. App. 710, 109 S.E. 510, 1921 Ga. App. LEXIS 376 (1921) (see O.C.G.A. § 9-7-3).

Power of court to appoint auditor extends to both law and equity cases. Hicks v. Atlanta Trust Co., 187 Ga. 623, 1 S.E.2d 669, 1939 Ga. LEXIS 441 (1939).

An accounting may be had at law. Gifford v. Jackson, 223 Ga. 155, 154 S.E.2d 224, 1967 Ga. LEXIS 454, trans-

ferred, 115 Ga. App. 773, 156 S.E.2d 105, 1967 Ga. App. LEXIS 1249 (1967).

Since accounting may be had at law, mere prayer for accounting does not invoke equity powers of a court. Peeples v. Peeples, 193 Ga. 358, 18 S.E.2d 629, 1942 Ga. LEXIS 397 (1942).

Appointment of auditor. — In an action to judicially dissolve a limited liability company, the defendant's claim that the trial court erred by appointing the receiver without making a finding that there was a clear and urgent need for such extraordinary relief as placing the company in a receivership failed because the trial court appointed an auditor to investigate matters of account, not a receiver. A&M Hospitalities, LLC v. Alimchandani, 351 Ga. App. 310, 828 S.E.2d 615, 2019 Ga. App. LEXIS 263 (2019), cert. denied, No. S19C1563, 2020 Ga. LEXIS 111 (Ga. Feb. 10, 2020).

Accounting available in county court proceeding. — Since the Civil Court of Fulton County has concurrent jurisdiction with the superior court, except in cases involving injuries to the person or the reputation and in those cases where jurisdiction is vested in the superior court by the Constitution, if required, an auditor can be appointed under this section and an accounting had at law. McDonough Constr. Co. v. Ormewood Apts., Inc., 212 Ga. 620, 94 S.E.2d 733, 1956 Ga. LEXIS 468 (1956) (see O.C.G.A. § 9-7-3).

In a declaratory judgment action for dissolution of a partnership, an accounting, and damages, direct appeal of a sua sponte order for the appointment of an auditor was appropriate. Parmar v. Khera, 215 Ga. App. 71, 449 S.E.2d 894, 1994 Ga. App. LEXIS 1115 (1994).

Suit for accounting case, on appeal, must be transferred to Court of Appeals from Supreme Court, where the alleged facts show no unusual complication in the transactions or other ground for equitable relief additional to the relief which might be afforded by an accounting and judgment at law. Universal Garage Co. v. Fowler, 184 Ga. 604, 192 S.E. 299, 1937 Ga. LEXIS 596 (1937), transferred, 57 Ga. App. 668, 196 S.E. 198, 1938 Ga. App. LEXIS 363 (1938).

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Equity, §§ 194 et seq., 207 et seq.

9-7-4. Appointment of person agreed on.

In all cases where the parties agree upon the person to be appointed as auditor, the court shall appoint such person.

History.
Ga. L. 1894, p. 123, § 23; Civil Code 1895, § 4603; Civil Code 1910, § 5147; Code 1933, § 10-502.

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Equity, §§ 194 et seq., 207 et seq.

9-7-5. Where hearing held; notice of hearing; auditor's oath.

Except by the written consent of all parties, the auditor shall not hear evidence or argument outside the county in which the case is proceeding. He shall give both parties or their counsel reasonable notice of the

time and place of hearing and shall be sworn to render a true report according to the law and the evidence without favor or affection to either party.

History.
Ga. L. 1894, p. 123, § 4; Civil Code 1895, § 4584; Civil Code 1910, § 5130; Code 1933, § 10-104.

JUDICIAL DECISIONS

Auditor's failure to take oath. — The failure to take and file the oath prescribed by this section is such an irregularity as can be waived by the parties and in any event should be taken advantage of by a motion to recommit the report to the auditor, which must be filed within 20 days after the filing of the report and notice thereof. Bickerstaff v. Turner, 188 Ga. 37, 2 S.E.2d 643, 1939 Ga. LEXIS 790 (1939); Grant v. Grant, 202 Ga. 40, 41 S.E.2d 534, 1947 Ga. LEXIS 344 (1947) (see O.C.G.A. § 9-7-5).

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Equity, § 206.
C.J.S.
20 C.J.S., Counties, § 140. 30A C.J.S., Equity, §§ 480, 537.

9-7-6. Powers of auditor generally.

In all cases, unless modified by the order of appointment, in addition to the matter specially referred, the auditor shall have power to hear motions, allow amendments, and pass upon all questions of law and fact. He shall have power to subpoena and swear witnesses and compel the production of papers.

History.
Ga. L. 1894, p. 123, § 3; Civil Code 1895, § 4583; Civil Code 1910, § 5129; Code 1933, § 10-103.

JUDICIAL DECISIONS

First sentence of this section permits auditor to pass on all issues as are made by or grow out of the pleadings. Hearn v. Laird, 103 Ga. 271, 29 S.E. 973, 1898 Ga. LEXIS 108 (1898); Weaver v. Cosby, 109 Ga. 310, 34 S.E. 680, 1899 Ga. LEXIS 643 (1899) (see O.C.G.A. § 9-7-6).

Qualifications of auditor. — In the hearing before the auditor, the auditor generally takes the place of the judge, and the position, in equitable proceedings, should be confined to lawyers of ability. Barber v. Southern Serv. Corp., 182 Ga. 124, 185 S.E. 93, 1936 Ga. LEXIS 296 (1936).

Judicial immunity of auditor. — Where a partner in an accounting company has clearly been named auditor by the trial court pursuant to O.C.G.A. § 9-7-1 et seq., the partner is accordingly cloaked with judicial immunity. Arthur Andersen & Co. v. Wilson, 256 Ga. 849, 353 S.E.2d 466, 1987 Ga. LEXIS 631 (1987).

Use of leading questions lies in auditor's discretion. Rusk v. Hill, 117 Ga.

722, 45 S.E. 42, 1903 Ga. LEXIS 319 (1903).

Auditor may permit amendments to pleadings. Cureton v. Cureton, 120 Ga. 559, 48 S.E. 162, 1904 Ga. LEXIS 640 (1904); First State Bank v. Avera, 123 Ga. 598, 51 S.E. 665, 1905 Ga. LEXIS 553 (1905).

Auditor is without jurisdiction to strike amendment to pleadings which was allowed by court before the case was referred to the auditor. Rusk v. Hill, 117 Ga. 722, 45 S.E. 42, 1903 Ga. LEXIS 319 (1903).

At conclusion of hearing, amendment cannot be made as matter of right. McCord v. City of Jackson, 135 Ga. 176, 69 S.E. 23, 1910 Ga. LEXIS 468 (1910).

Failure of auditor to rule on demurrer (now motion to dismiss) will not afford ground of complaint to plaintiff who was permitted to introduce evidence in support of the plaintiff's petition. Wilkes v. Carter, 149 Ga. 240, 99 S.E. 860, 1919 Ga. LEXIS 213 (1919).

Granting of motion to adjourn hearing is within auditor's discretion. Johnson v. Thomas, 144 Ga. 69, 86 S.E. 236, 1915 Ga. LEXIS 53 (1915).

Appellate review. — Since the law confers such ample powers upon an auditor, the Supreme Court, in reviewing the proceedings in a case which has been referred to an auditor, then passed upon by the chancellor, may reasonably be inclined, if the chancellor approves the auditor's report, to treat the conclusion reached in such a case as supported by the judgment of two courts. Barber v. Southern Serv. Corp., 182 Ga. 124, 185 S.E. 93, 1936 Ga. LEXIS 296 (1936).

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Equity, § 194 et seq.

ALR.
Power of successor or substituted master or referee to render decision or enter judgment on testimony heard by predecessor, 70 A.L.R.3d 1079.

9-7-7. Contempt referred to superior court.

In cases of contempt by either party, a witness, or other persons, upon application to the court making the appointment, the judge thereof shall take such proceedings and impose such penalty as the facts authorize or require.

History.
Ga. L. 1894, p. 123, § 3; Civil Code 1895, § 4583; Civil Code 1910, § 5129; Code 1933, § 10-103.

9-7-8. Contents of report — Rulings, findings, and conclusions.

After hearing the evidence and argument, the auditor shall file the evidence and a report in which he shall clearly and separately state all rulings made by him, classify and state his findings, and report his conclusions upon the law and facts.

History.
Ga. L. 1894, p. 123, § 7; Civil Code 1895, § 4587; Civil Code 1910, § 5133; Code 1933, § 10-203.

JUDICIAL DECISIONS

Auditor's report akin to jury verdict. — In most instances, an auditor's report is viewed in the same respect and effect as the verdict of a jury. Norair Eng'r

Corp. v. Saint Joseph's Hosp., 147 Ga. App. 595, 249 S.E.2d 642, 1978 Ga. App. LEXIS 2864 (1978).

Rulings on evidence are rulings of law and should be stated as such. Southern Pine Co. v. Dickey, 136 Ga. 662, 71 S.E. 1110, 1911 Ga. LEXIS 170 (1911).

Auditor's brief of the evidence may be concise and clear. Fowler v. Davis, 120 Ga. 442, 47 S.E. 951, 1904 Ga. LEXIS 581 (1904).

Alternative report may be filed. Hudson v. Hudson, 98 Ga. 147, 26 S.E. 482, 1895 Ga. LEXIS 620 (1895); Borders v. Vance, 134 Ga. 85, 67 S.E. 543, 1910 Ga. LEXIS 123 (1910).

Form of report. — The auditor's findings of fact and of law should be separately classified: (1) to avoid undue influence on the jury; and (2) to aid the parties in formulating their exceptions to the auditor's report. Norair Eng'g Corp. v. Saint Joseph's Hosp., 163 Ga. App. 167, 290 S.E.2d 145, 1982 Ga. App. LEXIS 2435 (1982).

Form of auditor's report can be dispensed with by agreement of the parties. King v. Steel Bldrs., Inc., 91 Ga. App. 203, 85 S.E.2d 466, 1954 Ga. App. LEXIS 896 (1954).

There is nothing in this section or chapter to provide that the form of an auditor's report which stated only factual conclusions, and contained no brief of evidence, agreed to by all parties and under the stipulations, is void and illegal. King v. Steel Bldrs., Inc., 91 Ga. App. 203, 85 S.E.2d 466, 1954 Ga. App. LEXIS 896 (1954) (see O.C.G.A. § 9-7-8).

It is not good objection to the approval of auditor's report that counsel was served with incorrect copy. Buttrill v. Buttrill, 179 Ga. 759, 177 S.E. 576, 1934 Ga. LEXIS 397 (1934).

Judge retains control of trial despite auditor's report. — Although O.C.G.A. § 9-7-8 contemplates that the auditor's report shall be a complete disposition of all legal and factual issues which is final (subject to specified review), the superior court judge has inherent power to control the course of the trial, especially in equity cases. Carmichael v. Carmichael, 248 Ga. 216, 282 S.E.2d 71, 1981 Ga. LEXIS 937 (1981).

Rulings of neither auditor nor special master are immediately final. Sweat v. Georgia Power Co., 235 Ga. 281, 219 S.E.2d 384, 1975 Ga. LEXIS 855 (1975).

Rule of special master. — Although the relationship and accountability of a special master to the court is that of an auditor, a special master is not obligated to render a report in the manner prescribed in this section containing the special master's findings and conclusions upon the law and the facts. Sweat v. Georgia Power Co., 235 Ga. 281, 219 S.E.2d 384, 1975 Ga. LEXIS 855 (1975) (see O.C.G.A. § 9-7-8).

Jury instructions. — In the trial of a case which was submitted to an auditor, who made the auditor's findings of law and fact, to which exceptions were filed, it was not ground for new trial for the court to charge the jury the law as contained in this section which relate to the duties of an auditor; such charge was not confusing or misleading to the jury, nor erroneous for any reason assigned. Harrison v. Mayo, 169 Ga. 799, 151 S.E. 484, 1930 Ga. LEXIS 35 (1930) (see O.C.G.A. § 9-7-8).

Presenting auditor's report to the jury. — Trial court did not err in refusing to present the noncompliant auditor's report to the jury because the report, which erroneously commingled the factual findings and legal conclusions, would impose a disadvantage and prejudice a camp in the camp's efforts to obtain a fair resolution of the camp's exceptions before a jury, and the parties stipulated to a procedure in which the case would be decided without recommitting the auditor's report for correction. Camp Cherokee, Inc. v. Marina Lane, LLC, 316 Ga. App. 366, 729 S.E.2d 510, 2012 Ga. App. LEXIS 563 (2012).

RESEARCH REFERENCES

Am. Jur. 2d.

27A Am. Jur. 2d, Equity, § 207 et seq.

C.J.S.

20 C.J.S., Counties, § 216 et seq.

9-7-9. Contents of report — Motions and rulings; transcript; documentary evidence.

The auditor shall make an accurate report of all motions made before him and of his rulings thereon, and either the auditor or a party shall have the evidence and proceedings recorded by a court reporter. Any original document introduced in evidence shall be properly identified and attached to the report.

History.
Ga. L. 1894, p. 123, § 5; Civil Code 1895, § 4585; Civil Code 1910, § 5131; Code 1933, § 10-201.

JUDICIAL DECISIONS

Stenographic report as auditor's brief of evidence. — An auditor may file with a report under this section, as a brief of the oral evidence, the questions and answers of witnesses as transcribed from a stenographic report of the case. Linder v. Whitehead, 125 Ga. 115, 53 S.E. 588, 1906 Ga. LEXIS 69 (1906) (see O.C.G.A. § 9-7-9).

An auditor may file a stenographic report of the oral testimony and may file the original documents introduced in evidence instead of briefing them and the same may be approved by the court as an auditor's brief of the evidence. McKenzie v. Perdue, 67 Ga. App. 202, 19 S.E.2d 765, 1942 Ga. App. LEXIS 353, rev'd, 194 Ga. 356, 21 S.E.2d 705, 1942 Ga. LEXIS 587 (1942).

The auditor's brief of evidence filed in connection with the auditor's report is to be considered a brief although it may embody the stenographic report of the testimony in full. McKenzie v. Perdue, 67 Ga. App. 202, 19 S.E.2d 765, 1942 Ga. App. LEXIS 353, rev'd, 194 Ga. 356, 21 S.E.2d 705, 1942 Ga. LEXIS 587 (1942).

Incorporation of evidence by reference to various documents filed with clerk of courts is improper. Southern Pine Co. v. Dickey, 136 Ga. 662, 72 S.E. 1110 (1911).

Form of auditor's report can be dispensed with by agreement of the parties. King v. Steel Bldrs., Inc., 91 Ga. App. 203, 85 S.E.2d 466, 1954 Ga. App. LEXIS 896 (1954).

There is nothing in this section or chapter to provide that the form of an auditor's report which stated only factual conclusions, and contained no brief of evidence, agreed to by all parties and under the stipulations, is void and illegal. King v. Steel Bldrs., Inc., 91 Ga. App. 203, 85 S.E.2d 466, 1954 Ga. App. LEXIS 896 (1954) (see O.C.G.A. § 9-7-9).

Requirement of brief of evidence is met where brief is agreed upon by parties and approved by judge seven months after the report is filed even though there is nothing in the record to show that the auditor made the brief. Eatonton Oil & Auto Co. v. Greene County, 53 Ga. App. 145, 185 S.E. 296, 1936 Ga. App. LEXIS 28 (1936).

Jury instructions. — In the trial of a case which was submitted to an auditor, who made the auditor's findings of law and fact, to which exceptions were filed, it was not ground for new trial for the court to charge the jury the law as contained in this section which relate to the duties of an auditor; such charge was not confusing or misleading to the jury, nor erroneous for any reason assigned. Harrison v. Mayo, 169 Ga. 799, 151 S.E. 484, 1930 Ga. LEXIS 35 (1930) (see O.C.G.A. § 9-7-9).

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Equity, § 207 et seq.

C.J.S.
20 C.J.S., Counties, § 216 et seq.

9-7-10. Contents of report — Evidence deemed inadmissible.

All evidence offered but deemed inadmissible by the auditor shall nevertheless be reported by the auditor; and if, upon exception filed to his ruling thereon, the evidence is adjudged to be admissible, the same may be considered upon the trial of exceptions of fact.

History.
Ga. L. 1894, p. 123, § 6; Civil Code 1895, § 4586; Civil Code 1910, § 5132; Code 1933, § 10-202.

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Equity, § 207 et seq.
C.J.S.
20 C.J.S., Counties, § 216 et seq. Evidence, § 159 et seq. 32 C.J.S., Evidence, §§ 376, 377.

9-7-11. Written notice of filing report.

Upon filing his report, the auditor shall give both parties or their counsel written notice thereof.

History.
Ga. L. 1894, p. 123, § 8; Civil Code 1895, § 4588; Civil Code 1910, § 5134; Code 1933, § 10-204.

JUDICIAL DECISIONS

Mailing notice. — A written notice signed by the auditor, deposited in the mail, directed to counsel at counsel's place of business, and actually delivered there to the counsel's clerk, is sufficient compliance with this section. Littleton & Lamar v. Patton & Co., 112 Ga. 438, 37 S.E. 755, 1900 Ga. LEXIS 188 (1900) (see O.C.G.A. § 9-7-11).

Incorrect copy of report not grounds of good objection. — It is not a good objection to the approval of an auditor's report that counsel was served with an incorrect copy. Buttrill v. Buttrill, 179 Ga. 759, 177 S.E. 576, 1934 Ga. LEXIS 397 (1934) (see O.C.G.A. § 9-7-11).

Judgment not set aside where counsel had actual knowledge of report. — Where the evidence adduced is sufficient to show that counsel for the defendant had actual knowledge that the report was filed in the clerk's office, the failure of the auditor to give the formal written notice required by this section does not constitute a good ground for setting aside a judgment based on the report, for the purpose of considering certain exceptions of law and fact filed to the report more than 20 days after it was filed and a copy served on the defendant. (see O.C.G.A. § 9-7-11). Bickerstaff v. Turner, 188 Ga. 37, 2 S.E.2d 643, 1939 Ga. LEXIS 790 (1939).

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Equity, § 207 et seq.
C.J.S.
20 C.J.S., Counties, § 216 et seq.

9-7-12. Report prima facie true.

The report of the auditor shall be prima facie the truth, either party having the liberty to except thereto.

History.
Ga. L. 1894, p. 123, § 3; Ga. L. 1895, p. 47, § 1; Civil Code 1895, § 4581; Civil Code 1910, § 5127; Code 1933, § 10-101.

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Equity, § 207 et seq.

9-7-13. When report recommitted.

(a) For indefiniteness, omissions, errors of calculation, failure to report evidence, errors of law, or other proper cause, the judge may recommit the report for such further action as may be proper.

(b) In such cases, the evidence shall be confined to such issues as the judge, in the order of recommitment, may indicate. If ordered to be taken de novo, the parties may agree as to what portion of the original report shall be retained in lieu of reintroduction.

History.
Ga. L. 1894, p. 123, § 13; Civil Code 1895, § 4593; Civil Code 1910, § 5139; Code 1933, § 10-305.

JUDICIAL DECISIONS

This section provides that judge may recommit for reasons mentioned, or other proper cause, and this may be done for a hearing de novo. Selman v. Faver, 210 Ga. 616, 81 S.E.2d 834, 1954 Ga. LEXIS 382 (1954) (see O.C.G.A. § 9-7-13).

Trial judge may recommit insufficient report for further proceedings. Sattes-Weimer Lumber Co. v. Bowen, 146 Ga. 156, 90 S.E. 861, 1916 Ga. LEXIS 637 (1916).

Pending determination of exceptions to auditor's report, court may recommit for clarification and to supply omissions. McKenzie v. Perdue, 67 Ga. App. 202, 19 S.E.2d 765, 1942 Ga. App. LEXIS 353, rev'd, 194 Ga. 356, 21 S.E.2d 705, 1942 Ga. LEXIS 587 (1942).

Recommitment lies in the discretion of the judge. Trentham v. Bluthenthal & Bickart, 118 Ga. 530, 45 S.E. 421, 1903 Ga. LEXIS 606 (1903).

O.C.G.A. § 9-7-13 makes it discretionary with the judge whether to recommit and, if so, to what extent. Carmichael v. Carmichael, 248 Ga. 216, 282 S.E.2d 71, 1981 Ga. LEXIS 937 (1981).

The question of recommitting an auditor's report for corrective action is a matter of discretion for the judge. The judge may do so on the judge's own motion in appropriate situations, or the judge may recommit on the motion of either party, or the parties may — by their action or inactions — waive the remedy of recommittal. Carmichael v. Carmichael, 248 Ga. 216, 282 S.E.2d 71, 1981 Ga. LEXIS 937 (1981).

Recommitment not always necessary. — Under this section, the court is not required to recommit for errors of law or errors of calculation, or unauthorized findings of fact, for errors in those respects may be pointed out in exceptions to the findings and a judgment of the court thereon invoked. Pearce v. Smith, 160 Ga. 337, 127 S.E. 764, 1925 Ga. LEXIS 151

(1925); Henderson v. Lott, 170 Ga. 261, 152 S.E. 98, 1930 Ga. LEXIS 434 (1930); Musselwhite v. Ricks, 55 Ga. App. 58, 189 S.E. 597, 1936 Ga. App. LEXIS 427 (1936) (see O.C.G.A. § 9-7-13).

Effect of recommitment. — When the court recommits pursuant to this section, it is neither an approval nor disapproval of the exceptions. Sanford v. Tanner, 114 Ga. 1005, 41 S.E. 668, 1902 Ga. LEXIS 860 (1902) (see O.C.G.A. § 9-7-13).

Grounds for recommitment distinguishable from grounds for exception. — Where the ground upon which the motion is predicated is failure to separately state the ruling, or classify and state findings, or for lack of fullness in report, this section prevails, and the remedy is not by exceptions. Weldon v. Hudson, 120 Ga. 699, 48 S.E. 130, 1904 Ga. LEXIS 679 (1904); Jones v. Nolan, 120 Ga. 588, 48 S.E. 166, 1904 Ga. LEXIS 647 (1904); Collinsville Granite Co. v. Phillips, 123 Ga. 830, 51 S.E. 666, 1905 Ga. LEXIS 608 (1905); Fricker v. Americus Mfg. & Imp. Co., 124 Ga. 165, 52 S.E. 65, 1905 Ga. LEXIS 683 (1905); McCord v. City of Jackson, 135 Ga. 176, 69 S.E. 23, 1910 Ga. LEXIS 468 (1910); Smith v. Smith, 135 Ga. 582, 69 S.E. 1110, 1911 Ga. LEXIS 6 (1911); Southern Pine Co. v. Dickey, 136 Ga. 662, 71 S.E. 1110, 1911 Ga. LEXIS 170 (1911); Smith v. Wilkinson, 143 Ga. 741, 85 S.E. 875, 1915 Ga. LEXIS 603 (1915) (see O.C.G.A. § 9-7-13).

If an auditor's report fails to find all the facts, or to cover all the issues, advantage should be taken by motion to recommit, rather than by an exception which if sustained would leave the matter where it began. Benton v. Roberts, 53 Ga. App. 121, 185 S.E. 292, 1936 Ga. App. LEXIS 22 (1936).

Exceptions should go to what the auditor reported, not to what the auditor did not report; if the auditor's report was not full enough, the defendants should have prayed the court for an order recommitting the report, so that the alleged omissions could have been supplied in the regular and legal manner. Bussell v. Glenn, 197 Ga. 816, 30 S.E.2d 617, 1944 Ga. LEXIS 334 (1944).

Recommitment was proper where report failed to set out separate items which went to make up the gross sums found against the respective defendants. Greer v. Andrews, 133 Ga. 193, 65 S.E. 416, 1909 Ga. LEXIS 189 (1909).

Failure to file brief of evidence grounds for recommitment. — Where it appears that the auditor filed no brief of the evidence with the auditor's report, the auditor's failure to file such report would be ground for a motion to recommit the report to the auditor to remedy this defect. Smith v. Moore, 93 Ga. App. 797, 92 S.E.2d 822, 1956 Ga. App. LEXIS 866 (1956).

Failure to determine solvency also grounds for recommitment. — When the auditor failed to find or decide whether or not the parties were solvent or insolvent, this was a failure to report with sufficient fullness on one of the issues and the court could, in its discretion, on its own motion, recommit the matter. Benton v. Roberts, 53 Ga. App. 121, 185 S.E. 292, 1936 Ga. App. LEXIS 22 (1936).

Where the auditor reported that there was not sufficient evidence to determine the issue of insolvency, this was not a definite finding of material fact, but it was rather a failure to report a finding on the issue; the judge, in the absence of exceptions, could recommit this report for a definite and certain decision by the auditor on the issue of insolvency. Benton v. Roberts, 53 Ga. App. 121, 185 S.E. 292, 1936 Ga. App. LEXIS 22 (1936).

Auditor's failure to take oath may prompt motion to recommit. — The failure to take and file the oath prescribed by former Code 1933, § 10-104 (see O.C.G.A. § 9-7-5), in the case of auditors appointed by the court, was such an irregularity as can be waived by the parties and in any event should be taken advantage of by a motion to recommit the report to the auditor, which must be filed within 20 days after the filing of the report and notice thereof. Bickerstaff v. Turner, 188 Ga. 37, 2 S.E.2d 643, 1939 Ga. LEXIS 790 (1939).

Recommittal proper for ruling on res judicata. — If defendants desired and were entitled to a specific ruling on a plea of res judicata, their remedy was to ask that the case be recommitted. Bussell

v. Glenn, 197 Ga. 816, 30 S.E.2d 617, 1944 Ga. LEXIS 334 (1944).

Recommittal to auditor proper where judgment as to exceptions reversed on appeal. — When the judgment of the superior court, overruling the exceptions to the auditor's findings of fact and of law, was reversed by the Supreme Court without directions, the effect was to vacate the erroneous judgment of the trial court and to grant a hearing de novo before the auditor upon the issues of fact involved and on all questions of law not settled by the decision of the Supreme Court; and the trial court did not err in denying the motions of the plaintiffs in error for final judgments, and in recommitting the cases to the auditor for a new hearing and trial de novo, as per said order. Selman v. Faver, 210 Ga. 616, 81 S.E.2d 834, 1954 Ga. LEXIS 382 (1954).

Where petition expressly prayed for removal of executrix and auditor made no finding, there was an "omission" and the judge had power on the judge's own motion to refer the case back to the auditor for a specific finding. McKenzie v. Perdue, 67 Ga. App. 202, 19 S.E.2d 765, 1942 Ga. App. LEXIS 353, rev'd, 194 Ga. 356, 21 S.E.2d 705, 1942 Ga. LEXIS 587 (1942).

Motion for recommittal must specify errors with particularity. — A motion for recommittal must specify with particularity wherein the report of the auditor may be indefinite, confusing, or contradictory. Haygood v. Smith, 80 Ga. App. 461, 56 S.E.2d 310, 1949 Ga. App. LEXIS 862 (1949).

Time of filing motion and notice. — The motion to recommit an auditor's report must be filed within 20 days after the report is filed, and written notice thereof given by the auditor to the parties. Littleton & Lamar v. Patton & Co., 112 Ga. 438, 37 S.E. 755, 1900 Ga. LEXIS 188 (1900); Smith v. Smith, 135 Ga. 582, 69 S.E. 1110, 1911 Ga. LEXIS 6 (1911).

Motion for recommittal combined with exceptions. — Under the circumstances, the fact that the defendants combined their motion for recommittal with their exceptions of law and fact to the auditor's report, while not good practice in pleading, was not ground for dismissal of the entire pleading. Haygood v. Smith, 80 Ga. App. 461, 56 S.E.2d 310, 1949 Ga. App. LEXIS 862 (1949).

Not error to deny motion to set aside judgment once court approves report. — Where the auditor filed a report with the court, and one party subsequently filed a motion to recommit, but the judge entered an order approving the report, the judge did not err in denying a motion to set aside the judgment because the motion to recommit was still pending. Oliver v. Union Inv. Co., 177 Ga. 571, 170 S.E. 674, 1933 Ga. LEXIS 359 (1933).

Presenting auditor's report to the jury. — Trial court did not err in refusing to present the noncompliant auditor's report to the jury because the report, which erroneously commingled the factual findings and legal conclusions, would impose a disadvantage and prejudice a camp in the camp's efforts to obtain a fair resolution of the camp's exceptions before a jury, and the parties stipulated to a procedure in which the case would be decided without recommitting the auditor's report for correction. Camp Cherokee, Inc. v. Marina Lane, LLC, 316 Ga. App. 366, 729 S.E.2d 510, 2012 Ga. App. LEXIS 563 (2012).

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Equity, § 207 et seq.

9-7-14. Time for filing exceptions; classification; extension on application; what exceptions to specify.

(a) Within 20 days after the report is filed and notice is given to the parties, either party may file exceptions to be classified separately as "exceptions of law" and "exceptions of fact."

(b) The trial judge may, in his discretion, on application of any party and without notice to the other party or parties, grant and issue an order extending the time for filing exceptions to an auditor's report. Extensions shall be freely granted in cases involving complicated facts or accounts, complicated issues of law, or lengthy records, so as to allow adequate time for preparation of exceptions thereto. All applications for extensions of time must be made before the expiration of the period of time for filing exceptions as originally prescribed or as extended by previous order of the court. The order granting any extension of time shall be promptly filed with the clerk of the trial court who shall promptly give notice thereof to all other parties involved in the case.

(c) Exceptions to auditors' reports need not set out therein portions of the record in the original case, nor of the auditor's report, nor of the evidence reported by the auditor. It shall not be necessary that the grounds of any exceptions be complete in themselves. It shall be sufficient, for purposes of this Code section, if the exceptions point out by title and paragraph number such part of the pleadings, and by page number such part of the auditor's report, and such parts of the evidence reported by the auditor as are necessary to an understanding of the errors complained of.

History.
Ga. L. 1894, p. 123, § 9; Civil Code 1895, § 4589; Civil Code 1910, § 5135; Code 1933, § 10-301; Ga. L. 1964, p. 697, § 1.

JUDICIAL DECISIONS

Editor's notes. — This section was completely revised by Ga. L. 1964, p. 697, § 1. The revisions made pertained chiefly to the details required to be set forth in exceptions to auditor's reports. Prior law required that portions of the record and auditor's reports be set forth in detail. Notes to cases decided prior to 1964 have been retained where language does not appear contradictory to that of the present section. To the extent that a case requires detailed exceptions, it is no longer good law.

Purpose of section. — Complicated character of cases referred to auditors and lengthy records are reasons for rules of this section. Merchants Nat'l Bank v. Armstrong, 107 Ga. 479, 33 S.E. 473, 1899 Ga. LEXIS 98 (1899); Hudson v. Hudson, 119 Ga. 637, 46 S.E. 874, 1904 Ga. LEXIS 317 (1904); McDuffie v. Merchants' & Citizens' Bank, 177 Ga. 695, 170 S.E. 805, 1933 Ga. LEXIS 393 (1933) (see O.C.G.A. § 9-7-14).

This section is mandatory, and makes no exception in favor of a person who is prevented by providential cause from filing the person's exceptions within the time prescribed. Littleton & Lamar v. Patton & Co., 112 Ga. 438, 37 S.E. 755, 1900 Ga. LEXIS 188 (1900) (see O.C.G.A. § 9-7-14).

Exceptions permitted to auditor's report. — When the issues of both law and fact in an equity cause are referred to an auditor, the auditor takes the place of the jury and the judge, and is pro hac vice the chancellor. To the auditor's report exceptions can be filed, to be separately classified as exceptions of law and exceptions of fact. Lefkoff v. Sicro, 193 Ga. 292, 18 S.E.2d 464, 1942 Ga. LEXIS 371 (1942); Thomas v. Fred W. Amend Co., 196 Ga. 455, 26 S.E.2d 415, 1943 Ga. LEXIS 329 (1943).

Exceptions only proper way to assign error to auditor's report. — It is not permissible in a bill of exceptions (now

notice of appeal) to assign error on the findings made by an auditor; the way to reach error therein is to file exceptions thereto in the trial court, and, if they be not approved by the judge, to assign error on the judge's ruling. Sengstacke v. American Missionary Ass'n, 196 Ga. 539, 26 S.E.2d 891, 1943 Ga. LEXIS 376 (1943).

Exceptions to auditor's report may complain only of errors made by auditor (not trial court) and the record before the auditor must show the matter to which exception is taken. Simonton Constr. Co. v. Pope, 95 Ga. App. 211, 97 S.E.2d 590, 1957 Ga. App. LEXIS 756, 1957 Ga. App. LEXIS 964 (1957), rev'd, 213 Ga. 360, 99 S.E.2d 216, 1957 Ga. LEXIS 383 (1957), overruled, Georgia-Carolina Brick & Tile Co. v. Brown, 153 Ga. App. 747, 266 S.E.2d 531, 1980 Ga. App. LEXIS 1965 (1980).

Auditor's failure to file brief of evidence not grounds for exception. — Where it appears that the auditor filed no brief of the evidence with the auditor's report, the auditor's failure to file such report would be ground for a motion to recommit the report to the auditor to remedy this defect, but it is not ground for exception to the report under this section. Smith v. Moore, 93 Ga. App. 797, 92 S.E.2d 822, 1956 Ga. App. LEXIS 866 (1956) (see O.C.G.A. § 9-7-14).

Failure to file exceptions within statutory time period of Ga. L. 1964, p. 697, § 1 (see O.C.G.A. § 9-7-14) cannot be cured by later amendments made after the expiration of the time period. Application of Ga. L. 1972, p. 689, § 6 (see O.C.G.A. § 9-11-15) under these circumstances would frustrate the purpose of the time limitation period and allow a party to do indirectly what cannot be done directly. Wise, Simpson, Aiken & Assoc. v. Rosser White Hobbs Davidson McClellan Kelly, Inc., 146 Ga. App. 789, 247 S.E.2d 479, 1978 Ga. App. LEXIS 2533 (1978).

Amendment may set up exception, after 20 days, if good reason therefor appears. Robert R. Sizer & Co. v. G. T. Melton & Sons, 129 Ga. 143, 58 S.E. 1055, 1907 Ga. LEXIS 323 (1907); Faucett v. Rogers, 152 Ga. 168, 108 S.E. 798, 1921 Ga. LEXIS 32 (1921).

If exceptions can be amended at all after 20 days, this cannot be done unless good cause is shown why they were not filed within the time provided by law. Moon v. Moon, 105 Ga. App. 597, 125 S.E.2d 560, 1962 Ga. App. LEXIS 988 (1962).

Motion to recommit report of auditor is in its essence an exception to the auditor's report which under this section must be made within 20 days after such report is filed and notice thereof given. Collins v. Lyon, Lyon & Co., 222 Ga. 6, 148 S.E.2d 428, 1966 Ga. LEXIS 380 (1966) (see O.C.G.A. § 9-7-14).

Motion to recommit auditor's report must be made within 20 days after such report is filed and notice thereof given, but the trial judge is authorized to extend the 20-day period for filing exceptions to an auditor's report when an application therefor is made to the judge prior to the expiration of 20 days after such report is filed and notice thereof given. Collins v. Lyon, Lyon & Co., 222 Ga. 6, 148 S.E.2d 428, 1966 Ga. LEXIS 380 (1966).

Motion to recommit made after 20 days too late unless extension previously granted. — Where no application for any extension of time for filing exceptions is made and the motion to recommit the auditor's report is not made until 22 days after such report was filed and notice thereof given, then the motion to recommit is made too late to be considered. Collins v. Lyon, Lyon & Co., 222 Ga. 6, 148 S.E.2d 428, 1966 Ga. LEXIS 380 (1966).

Exceptions under this section should contain all facts and rulings necessary to show harmful error. They should not be so incomplete as to force the court to search through the record to find error. Mason v. Commissioners of Rds. & Revenues, 104 Ga. 35, 30 S.E. 513, 1898 Ga. LEXIS 278 (1898); Hudson v. Hudson, 119 Ga. 637, 46 S.E. 874, 1904 Ga. LEXIS 317 (1904); Baxter & Co. v. Camp, 126 Ga. 354, 55 S.E. 1036 (1906); Ward v. Florence, 44 Ga. App. 767, 162 S.E. 872, 1932 Ga. App. LEXIS 490 (1932); Mobley v. Morris, 45 Ga. App. 201, 164 S.E. 167, 1932 Ga. App. LEXIS 227 (1932); McDuffie v. Merchants' & Citizens' Bank, 177 Ga. 695, 170 S.E. 805, 1933 Ga.

LEXIS 393 (1933) (decided under Code 1933, § 10-301, prior to revision by Ga. L. 1964, p. 697, § 1).

Exceptions to report not stricken where alleged errors clearly delineated. — Exceptions to an auditor's report should not be stricken on demurrer (now motion to dismiss) when they point out the alleged errors in such manner that the nature of the same can be clearly and readily understood when considered in connection with the findings of the auditor to which such exceptions refer; but it is not erroneous to strike exceptions not meeting the requirement just indicated. Ward v. Florence, 44 Ga. App. 767, 162 S.E. 872, 1932 Ga. App. LEXIS 490 (1932); Mobley v. Morris, 45 Ga. App. 201, 164 S.E. 167, 1932 Ga. App. LEXIS 227 (1932) (decided under Code 1933, § 10-301, prior to revision by Ga. L. 1964, p. 697, § 1).

General exceptions fail to clearly specify error. — Exceptions to findings of law by an auditor that the findings are "contrary to law, contrary to equity, and contrary to law and equity," fail to clearly and distinctly specify the errors complained of. Woodward v. Williams Bros. Lumber Co., 176 Ga. 107, 167 S.E. 169, 1932 Ga. LEXIS 398 (1932) (decided under Code 1933, § 10-301, prior to revision by Ga. L. 1964, p. 697, § 1).

Exception improperly classified. — Where an exception is improperly classified as an exception of fact, a motion to dismiss or strike the exception will be sustained, where no amendment is offered. Tippin v. Perry, 122 Ga. 120, 50 S.E. 35, 1905 Ga. LEXIS 123 (1905); Moss v. Chappell, 126 Ga. 196, 54 S.E. 968, 1906 Ga. LEXIS 361 (1906).

Burden on one excepting to show error. — An auditor's report being prima facie correct, and the burden being on one excepting to show error, it is incumbent upon the auditor to set forth or attach the evidence necessary to pass upon any exception of law or fact that requires a consideration of evidence, or at least to point out the location of such evidence in the auditor's report. Brown v. Parks, 190 Ga. 540, 9 S.E.2d 897, 1940 Ga. LEXIS 517 (1940).

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Equity, §§ 224 et seq., 227. 66 Am. Jur. 2d, Records and Recording Laws, § 67.

C.J.S.
76 C.J.S., Records, §§ 4, 8.

9-7-15. Exceptions to matters outside record; certification by auditor or return with objections; application for mandamus; notice and hearing; effect of mandamus absolute.

(a) Exceptions as to any matter not appearing on the face of the record, in the transcript of the evidence and proceedings, or in the report itself, shall be certified to be true by the auditor within 40 days after the report is filed. If the auditor determines that any such exception is not true or does not contain all of the necessary facts, he shall return the same within ten days to the party or his attorney with his objections in writing. If these objections are met and removed within ten days, he may then certify the same, specifying the cause of delay.

(b) If for any cause the exceptions are not certified by the auditor, without fault of the party or his attorney, the party or his attorney may apply to the judge of the superior court within 30 days from the

tendering of the exceptions and on petition obtain a mandamus nisi directed to the auditor.

(c) The petition for a mandamus nisi shall set out a substantial copy of the exceptions, and shall be verified by the party or his counsel, or supported by other proof as to the truth of the facts stated therein. The mandamus nisi shall be served upon the auditor within ten days after the same is signed by the judge and shall be made returnable not more than 30 days after signing. The opposite party shall have notice of the time and place of hearing the mandamus nisi and may resist the application for a mandamus absolute. If there is a traverse filed to the answer, the same shall be determined by a jury. If the mandamus is made absolute, the order shall have the effect, to that extent, of amending the report of the auditor.

History.

Ga. L. 1894, p. 123, §§ 10, 11; Civil Code 1895, §§ 4590, 4591, 4592; Civil Code 1910, §§ 5136, 5137, 5138; Code 1933, §§ 10-302, 10-303, 10-304.

JUDICIAL DECISIONS

Exceptions as to matters not in record must be verified. — Exceptions to an auditor's report, as to any matter not appearing upon the face of the record or brief of evidence or in the report itself, must be verified by the auditor as true. If a report affords no means of verification, the exception cannot be considered. Patterson v. Burtz, 39 Ga. App. 139, 146 S.E. 330, 1929 Ga. App. LEXIS 225 (1929); Robinson v. Reese, 175 Ga. 574, 165 S.E. 744, 1932 Ga. LEXIS 293 (1932).

Exceptions of law must be based on grounds verified by auditor's report or the auditor's certificate. Waycross Air-Line R.R. v. Offerman & W.R.R., 119 Ga. 983, 47 S.E. 582, 1904 Ga. LEXIS 427 (1904).

Exceptions to admission of evidence not considered where cause not in record nor exceptions certified. — Exceptions to an auditor's report claiming error in rulings on the admission of evidence cannot be considered where it did not appear on the face of the record or brief of evidence or in the report itself what the evidence was, what the objection was, and what the ruling was, and where recitals in exceptions not certified by the auditor to be true were insufficient. Eatonton Oil & Auto Co. v. Greene County, 53 Ga. App. 145, 185 S.E. 296, 1936 Ga. App. LEXIS 28 (1936); Bussell v. Glenn, 197 Ga. 816, 30 S.E.2d 617, 1944 Ga. LEXIS 334 (1944).

RESEARCH REFERENCES

Am. Jur. 2d.

52 Am. Jur. 2d, Mandamus, §§ 315 et seq.

C.J.S.

55 C.J.S., Mandamus, §§ 69, 145, 173, 207, 266.

9-7-16. Exceptions of law for judge.

Exceptions of law shall be for the exclusive consideration of the judge.

History.
Ga. L. 1894, p. 123, § 14; Civil Code 1895, § 4594; Civil Code 1910, § 5140; Code 1933, § 10-401.

JUDICIAL DECISIONS

Judge has exclusive consideration only over exceptions of law. — While the judge has the exclusive consideration of exceptions of law to an auditor's report, in all actions at law, exceptions of fact to the auditor's report shall be passed upon by the jury. Philips v. L.A. Miller & Sons, 57 Ga. App. 561, 196 S.E. 276, 1938 Ga. App. LEXIS 336 (1938).

No power to disallow exceptions of fact unless jury trial waived. — When exceptions of fact to an auditor's report in an action at law are filed, the court has no power to disallow them and dispose of the case without the intervention of a jury, unless the parties expressly waive their right to trial by jury. Philips v. L.A. Miller & Sons, 57 Ga. App. 561, 196 S.E. 276, 1938 Ga. App. LEXIS 336 (1938).

Judge may overrule exception of law dependent on defective evidence. — In an equity case, it is ground to overrule an exception of fact to an auditor's report, when the exception involves consideration of the evidence, that the exception does not contain or have attached as an exhibit the evidence necessary to be considered in connection therewith; and in such a case the same ground is sufficient to justify the judge in overruling exceptions of law to the findings of law when they are dependent upon the evidence. Sengstacke v. American Missionary Ass'n, 196 Ga. 539, 26 S.E.2d 891, 1943 Ga. LEXIS 376 (1943).

Trial court authorized to reject auditor's erroneous ruling. — Trial court did not err in reversing an auditor's decision because the trial court was authorized to reject the auditor's erroneous legal rulings. Camp Cherokee, Inc. v. Marina Lane, LLC, 316 Ga. App. 366, 729 S.E.2d 510, 2012 Ga. App. LEXIS 563 (2012).

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Equity, §§ 199, 200.
27A Am. Jur. 2d, Equity, §§ 199, 200.

C.J.S.
4 C.J.S., Appeal and Error, § 222.

9-7-17. When exceptions of fact tried by jury; burden of proof; right to open and conclude.

In all law cases where an auditor is appointed, exceptions of fact to his report shall be passed upon by the jury as in other issues of fact, and in equity cases by the jury when approved by the judge. The burden of proving error in the report of the auditor shall be upon the party making the exceptions, who shall have the right to open and conclude the argument. In all cases where both parties file exceptions of fact, the party against whom judgment would be rendered if the report were approved shall be entitled to open and conclude the argument.

History.
Ga. L. 1894, p. 123, §§ 15-17; Ga. L. 1895, p. 47, § 3; Civil Code 1895, §§ 4595, 4596, 4597; Civil Code 1910, §§ 5141, 5142, 5143; Code 1933, §§ 10-402, 10-403, 37-1103.

JUDICIAL DECISIONS

Constitutionality. — The provisions in this section are not unconstitutional. Bank of Lumpkin v. Farmers State Bank, 167 Ga. 766, 146 S.E. 754, 1929 Ga. LEXIS 33 (1929) (see O.C.G.A. § 9-7-17).

Distinction between trial at law and equity. — In actions at law the right to jury requires that exceptions of fact to an auditor's report shall be submitted to a jury. There is no such provision as to equity cases. Weed v. Gainesville, Jefferson & S.R.R., 119 Ga. 576, 46 S.E. 885, 1904 Ga. LEXIS 292 (1904).

Provision for right to jury trial is clearly mandatory in actions at law. This provision cannot be waived except by express consent of the parties. Green & Sutton v. Valdosta Guano Co., 121 Ga. 131, 48 S.E. 984, 1904 Ga. LEXIS 39 (1904); Guarantee Trust & Banking Co. v. Dickson, 23 Ga. App. 720, 99 S.E. 313, 1919 Ga. App. LEXIS 311 (1919).

All exceptions of fact presented to jury in actions at law. — While the judge has the exclusive consideration of exceptions of law to an auditor's report, in all actions at law, exceptions of fact to the auditor's report shall be passed upon by the jury. Philips v. L.A. Miller & Sons, 57 Ga. App. 561, 196 S.E. 276, 1938 Ga. App. LEXIS 336 (1938).

Referral to jury matter of constitutional right. — All proper exceptions of fact to a report of an auditor in law cases must, as a matter of constitutional right, be referred to a jury. Rabun v. Wynn, 92 Ga. App. 228, 88 S.E.2d 478, 1955 Ga. App. LEXIS 560 (1955).

A jury verdict on the exceptions of fact to an auditor's report is a constitutional prerequisite to a valid judgment, where there is no semblance of a waiver of the jury in this record. Simonton Constr. Co. v. Pope, 213 Ga. 360, 99 S.E.2d 216, 1957 Ga. LEXIS 383 (1957).

In law cases, court has no right to strike exceptions of fact and enter judgment without verdict of a jury. Georgia Power Co. v. Parker, 48 Ga. App. 807, 173 S.E. 730, 1934 Ga. App. LEXIS 206 (1934); Philips v. L.A. Miller & Sons, 57 Ga. App. 561, 196 S.E. 276, 1938 Ga. App. LEXIS 336 (1938).

Alleged errors of fact by auditor in finding the damages in not allowing any credit for discounts were questions which should have been submitted to a jury, and it was error for the trial judge to dismiss these exceptions. Haygood v. Smith, 80 Ga. App. 461, 56 S.E.2d 310, 1949 Ga. App. LEXIS 862 (1949).

It is reversible error for trial court in a law case to fail to refer to jury exceptions of fact filed to the auditor's report. Regal Textile Co. v. Feil, 189 Ga. 581, 6 S.E.2d 908, 1940 Ga. LEXIS 340 (1940); Manry v. Hendricks, 66 Ga. App. 442, 18 S.E.2d 97, 1941 Ga. App. LEXIS 531 (1941).

A court committed reversible error in a suit where an auditor was appointed, in sustaining the plaintiff's motion to disapprove and disallow the defendant's exceptions to the auditor's findings of fact, and in not submitting such exceptions to the jury, where the case was one at law. Manry v. Hendricks, 66 Ga. App. 442, 18 S.E.2d 97, 1941 Ga. App. LEXIS 531 (1941).

Jury trial expressly waived. — When exceptions of fact to an auditor's report in an action at law are filed, the court has no power to disallow them and dispose of the case without the intervention of a jury, unless the parties expressly waive their right to trial by jury. Philips v. L.A. Miller & Sons, 57 Ga. App. 561, 196 S.E. 276, 1938 Ga. App. LEXIS 336 (1938).

Exceptions of fact in a law case must be decided by a jury unless the jury trial is expressly waived. This does not mean merely an implied waiver but that there must be an express waiver. Simonton Constr. Co. v. Pope, 213 Ga. 360, 99 S.E.2d 216, 1957 Ga. LEXIS 383 (1957).

It is error to allow jury to pass on questions not raised by any exception of fact. Musselwhite v. Ricks, 55 Ga. App. 58, 189 S.E. 597, 1936 Ga. App. LEXIS 427 (1936).

Right to trial by jury under this section in equity cases is statutory only. There is no constitutional provision.

Bemis v. Armour Packing Co., 105 Ga. 293, 31 S.E. 173, 1898 Ga. LEXIS 504 (1898) (see O.C.G.A. § 9-7-17).

Judge has discretion to submit exceptions to jury in equity cases. — Under this section, in equity cases submitted to an auditor to whose report exceptions of law and fact are filed, the trial judge can, in the judge's discretion, decline to submit exceptions of fact to a jury, unless the judge approves them. Henderson v. Lott, 170 Ga. 261, 152 S.E. 98, 1930 Ga. LEXIS 434 (1930) (see O.C.G.A. § 9-7-17).

Exceptions are submitted only when approved by judge. — In an equitable proceeding, exceptions of fact to an auditor's report are to be submitted to the jury only when approved by the trial judge. De La Perriere v. Williams, 175 Ga. 339, 165 S.E. 214 (1932); Mitchell v. Turner, 190 Ga. 485, 9 S.E.2d 621, 1940 Ga. LEXIS 478 (1940).

In equitable proceedings, if exceptions of fact are filed, and the judge approves the same, the same shall be submitted to the jury. Lefkoff v. Sicro, 193 Ga. 292, 18 S.E.2d 464, 1942 Ga. LEXIS 371 (1942).

Court not to interfere with trial judge's discretion in equity cases where not abused. — In equity cases, the appellate court will not interfere with the discretion of a trial judge in disapproving exceptions of fact to an auditor's report, unless it appears that there has been a manifest abuse of such discretion. Parsons v. Fox, 179 Ga. 605, 176 S.E. 642, 1934 Ga. LEXIS 341 (1934); Christian v. Bremer, 199 Ga. 285, 34 S.E.2d 40, 1945 Ga. LEXIS 303 (1945).

The Supreme Court will not control the discretion of the trial judge in overruling exceptions of fact to an auditor's report in an equity case, unless there was no evidence to support the auditor's findings. Allen v. Davis, 195 Ga. 167, 23 S.E.2d 665, 1942 Ga. LEXIS 724 (1942).

If evidence supports findings, it is not abuse of discretion to disapprove exceptions of fact; but, if the evidence does not support the report of the auditor, it would be an abuse of discretion or error to disapprove the exceptions. Henderson v. Lott, 170 Ga. 261, 152 S.E. 98, 1930 Ga. LEXIS 434 (1930); Parsons v. Fox, 179 Ga. 605, 176 S.E. 642, 1934 Ga. LEXIS 341 (1934).

In an equity case, there is no abuse of discretion on the part of the trial judge in refusing to approve an exception of fact, where the evidence is sufficient to support the finding of fact as made by the auditor. De La Perriere v. Williams, 175 Ga. 339, 165 S.E. 214 (1932).

An order overruling exceptions will not be reversed by the appellate court if the findings of the auditor are supported by any evidence, even though the evidence may be conflicting. Mitchell v. Turner, 190 Ga. 485, 9 S.E.2d 621, 1940 Ga. LEXIS 478 (1940); Horkan v. Great Am. Indem. Co., 211 Ga. 690, 88 S.E.2d 13, 1955 Ga. LEXIS 429 (1955).

Burden of proof on appellant to show auditor's findings unsupported. — Where error is assigned upon the refusal of the judge to approve an exception of fact to an auditor's report in an equity case, the burden is upon the appellant to show to the satisfaction of the Supreme Court that the finding of the auditor is unsupported by evidence, the presumption being that the finding is correct; and, where it does not distinctly appear that the finding is unsupported, the judgment refusing to approve the exceptions of fact will be affirmed. Christian v. Bremer, 199 Ga. 285, 34 S.E.2d 40, 1945 Ga. LEXIS 303 (1945).

Nature of claim for partnership accounting, dissolution, or injunction. — No provision in the Georgia Uniform Partnership Act or Georgia Limited Partnership Act changes a claim for an accounting, dissolution, or injunction into a legal action or grants a partner the right to a jury trial. Williams v. Tritt, 262 Ga. 173, 415 S.E.2d 285, 1992 Ga. LEXIS 333 (1992).

Manner of approval by judge. — This section does not require any formal judgment of approval of the exceptions of fact, and when the judge submits to the jury the issue raised by an exception, the submission of the issue thus made is the equivalent of an approval. At best, the failure of the judge to formally approve the exceptions of fact before submitting the case to the jury is a mere harmless irregularity. Russell v. Mohr-Weil Lumber

Co., 115 Ga. 35, 41 S.E. 275, 1902 Ga. LEXIS 299 (1902); Malette v. Wright, 120 Ga. 735, 48 S.E. 229, 1904 Ga. LEXIS 693 (1904) (see O.C.G.A. § 9-7-17).

Right to open and conclude argument. — Under this section, the burden being upon a party excepting to an auditor's report, the party has the right to open and conclude the argument, although the party submits to the jury all the evidence contained in the report of the auditor, and the other party submits none. Schmidt v. Mitchell, 117 Ga. 6, 43 S.E. 371, 1903 Ga. LEXIS 128 (1903) (see O.C.G.A. § 9-7-17).

RESEARCH REFERENCES

Am. Jur. 2d.

27A Am. Jur. 2d, Equity, §§ 207 et seq., 213 et seq.

27A Am. Jur. 2d, Equity, §§ 207 et seq., 213 et seq.

9-7-18. Trial on the record; what additional evidence introduced; what evidence excluded.

In all cases where exceptions of fact are submitted to the jury, the same shall be determined upon the testimony reported by the auditor. Only so much of the evidence as is material and pertinent to the issue then on trial shall be read to the jury. Admissible material evidence introduced and not reported and evidence improperly excluded shall also be submitted to the jury and all inadmissible evidence shall be excluded from their consideration.

History.

Ga. L. 1894, p. 123, §§ 18, 20; Civil Code 1895, §§ 4598, 4600; Civil Code 1910, §§ 5144, 5146; Code 1933, §§ 10-404, 10-406.

JUDICIAL DECISIONS

Scope of section. — Under O.C.G.A. § 9-7-18 "only so much of the evidence reported as is material and pertinent to the issue then on trial" need go to the jury. Carmichael v. Carmichael, 248 Ga. 216, 282 S.E.2d 71, 1981 Ga. LEXIS 937 (1981).

9-7-19. When new testimony considered; application; notice; rights of opposite party.

(a) No new testimony shall be considered, except in those cases where, according to the principles of law, a new trial would be granted for newly discovered evidence.

(b) Application to introduce such original and newly discovered evidence shall be made to the judge before the argument on the exceptions, if the same is then known, with a statement of the party and his attorney setting out the expected testimony and facts authorizing it to be admitted as newly discovered evidence.

(c) The opposite party shall be served with notice of the application. If the same is admitted, the opposite party shall be entitled to a

continuance. On the trial he shall be entitled to introduce original testimony in rebuttal of the newly discovered evidence.

History.
Ga. L. 1894, p. 123, § 19; Civil Code 1895, § 4599; Civil Code 1910, § 5145; Code 1933, § 10-405.

JUDICIAL DECISIONS

Admittance of newly discovered evidence. — Trial court did not err in granting a camp's request to present new evidence as to the camp's damages because the evidence of the damages incurred after the auditor's proceedings amounted to newly discovered evidence. Camp Cherokee, Inc. v. Marina Lane, LLC, 316 Ga. App. 366, 729 S.E.2d 510, 2012 Ga. App. LEXIS 563 (2012).

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Equity, § 231.

C.J.S.
30A C.J.S., Equity, §§ 552, 555, 556.

9-7-20. Form of jury's verdict.

In all cases the jury shall find for or against each exception submitted, seriatim.

History.
Ga. L. 1894, p. 123, § 20; Civil Code 1895, § 4600; Civil Code 1910, § 5146; Code 1933, § 10-406.

JUDICIAL DECISIONS

Only function of jury in trial of exceptions of fact to auditor's report is to pass upon issues of fact raised by exceptions. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304, 1939 Ga. LEXIS 729 (1939).

Each exception seriatim. — Where the jury fails to find according to this section, the verdict will be set aside. Harris v. Lumpkin, 136 Ga. 47, 70 S.E. 869, 1911 Ga. LEXIS 409 (1911) (see O.C.G.A. § 9-7-20).

Court is not required to pass seriatim on each exception where reference is made to it without the intervention of a jury. Murray v. Hawkins, 144 Ga. 613, 67 S.E. 1068 (1916).

Failure of party to object to reception of verdict will not preclude the party from subsequently attacking it. Whitfield-Baker Co. v. Anderson, 147 Ga. 242, 93 S.E. 406, 1917 Ga. LEXIS 142 (1917).

9-7-21. Court to frame judgment or decree.

(a) If the auditor's report is not excepted to, the court shall frame a judgment or decree thereon as may be proper.

(b) If exceptions are filed, after the same have been considered and passed upon by the court or the jury, or both, as the case may be, the court shall order a judgment or a decree in accordance with the report and the changes made by the court or the jury, unless the same shall require a recommitment.

History.
Ga. L. 1894, p. 123, § 21; Civil Code 1895, § 4601; Civil Code 1910, § 5147; Code 1933, § 10-407.

RESEARCH REFERENCES

Am. Jur. 2d.
27A Am. Jur. 2d, Equity, § 207 et seq.

9-7-22. Auditor's fees.

(a) The fees of an auditor to whom a case, whether legal or equitable, has been referred shall be determined and fixed by the trial judge making the referral or by any other judge having jurisdiction of the case and serving in the place and stead of the trial judge. The fees so determined and fixed may be apportioned between and among the parties at the discretion of the judge.

(b) The court with consent of the parties may fix the fees of the auditor in advance and incorporate the same in the order making the appointment.

(c) The fees of an auditor, as determined and fixed by the judge, shall be included in and made a part of the judgment of the court. The fees of the auditor shall be assessed as court costs and shall be paid prior to the filing of any appeal from the judgment of the court; provided, however, that if such fees have not been determined and assessed at the time of filing any such appeal, the same shall be paid within 30 days from the date of assessment.

History.
Ga. L. 1894, p. 123, § 22; Civil Code 1895, §§ 4602, 4603; Civil Code 1910, §§ 5148, 5149; Code 1933, §§ 10-501, 10-502; Ga. L. 1963, p. 620, § 1; Ga. L. 1982, p. 3, § 9; Ga. L. 1988, p. 408, § 1.

Law reviews.
For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

JUDICIAL DECISIONS

Construction with Quiet Title Act. — Provisions of O.C.G.A. § 9-7-22(c) requiring the payment of auditors' fees prior to the filing of an appeal did not apply to special masters appointed under the Quiet Title Act, O.C.G.A. § 23-3-60 et seq., pursuant to O.C.G.A. §§ 23-3-43 and 23-3-63, and an appeal was not dismissed due to failure to pay the special master's fees. Davis v. Harpagon Co., LLC, 300 Ga. App. 644, 686 S.E.2d 259 (2009) was overruled to the extent it was to the contrary. Nix v. 230 Kirkwood Homes, LLC, 300 Ga. 91, 793 S.E.2d 402, 2016 Ga. LEXIS 727 (2016).

Apportionment of fees. — In the allowance of auditor's fees under this section, the court may in its discretion apportion the fees between the parties. Moore v. Dickenson & Williams, 117 Ga. 887, 45 S.E. 241, 1903 Ga. LEXIS 380 (1903); Central of Ga. Ry. v. Central Trust Co.,

135 Ga. 472, 135 Ga. 473, 69 S.E. 708, 1910 Ga. LEXIS 7 (1910) (see O.C.G.A. § 9-7-22).

Apportionment will stand unless judge abuses discretion. — In an equitable proceeding, it is within the discretion of the trial judge to award the costs of court as the facts may warrant; and, unless the judge's discretion is abused in so doing, the judge's judgment will not be disturbed. Logan v. Mobley, 170 Ga. 615, 153 S.E. 763, 1930 Ga. LEXIS 207 (1930).

In equity cases, the judge in the judge's discretion may apportion an auditor's fee between the parties, or even award it against the successful party; and the Supreme Court will not interfere unless discretion has been abused. Hicks v. Atlanta Trust Co., 187 Ga. 314, 200 S.E. 301, 1938 Ga. LEXIS 787 (1938); Brown v. Parks, 190 Ga. 540, 9 S.E.2d 897, 1940 Ga. LEXIS 517 (1940).

Judge did not abuse judicial discretion in dividing auditor's fee and stenographic costs equally between parties, where it did not appear that the defendant administrator participated in any alleged fraud by the claimant wife in procuring the letters of administration, and the orders and proceedings for an accounting showed that there were matters of bona fide disputes between the parties, as to a part of which the defendant administrator prevailed. Brown v. Parks, 190 Ga. 540, 9 S.E.2d 897, 1940 Ga. LEXIS 517 (1940).

Entire fee may be taxed upon either party. Fitzpatrick v. McGregor, 133 Ga. 332, 65 S.E. 859, 1909 Ga. LEXIS 211 (1909).

This section provides how fee may be fixed in advance. Avera Loan & Inv. Co. v. National Sur. Co., 32 Ga. App. 319, 123 S.E. 45, 1924 Ga. App. LEXIS 367 (1924) (see O.C.G.A. § 9-7-22).

Fees need to be included in final judgment. — In an action concerning dissolution of an LLC, pretermitting whether the order was sufficiently specific for the appellate court to decide whether the trial court considered the factors in Ga. Unif. Super. Ct. R. 46(H)(3) or whether the court abused the court's discretion in allocating the entirety of the fees to the defendants under Rule 46 and O.C.G.A. § 9-7-22(a), the trial court erred by requiring the defendants to pay the special master's fees prior to final judgment because the fees were in the nature of costs and needed to be included in the final judgment. A&M Hospitalities, LLC v. Alimchandani, 359 Ga. App. 271, 856 S.E.2d 704, 2021 Ga. App. LEXIS 180 (2021).

RESEARCH REFERENCES

Am. Jur. 2d.

27A Am. Jur. 2d, Equity, § 196.
27A Am. Jur. 2d, Equity, § 196.

ALR.

Amount of master's fee in divorce proceedings, 89 A.L.R.2d 377.

9-7-23. Compensation of reporter; by whom paid.

(a) The compensation of the court reporter for recording the evidence and proceedings in all cases before an auditor shall be as provided by law for civil cases.

(b) The court reporter shall be compensated as provided by law for furnishing transcripts of the evidence and proceedings. The compensation shall be paid by the parties to the case. The reporter, for additional transcripts of evidence and proceedings furnished by him, shall be paid by the party requesting the same as agreed between the parties and, in the event of a disagreement, shall be paid as provided by law.

History.
Code 1933, § 10-503, enacted by Ga. L. 1963, p. 349, § 1.

Cross references.
Promulgation of rules by the judicial council relating to fees of court reporters, § 15-5-21.

RESEARCH REFERENCES

C.J.S.
82 C.J.S., Stenographers, §§ 14, 20.

CHAPTER 8

RECEIVERS

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9-8-1.	Appointment of receiver — Grounds generally.	9-8-8.	Receiver an officer of court; subject to court's orders or removal.
9-8-2.	Appointment of receiver — To protect trust or joint property.	9-8-9.	To which court receivers of corporations amenable.
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9-8-4.	Caution to be exercised in appointing receiver.	9-8-11.	Liability of receiver where bank fails.
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9-8-6.	Lienholders made parties; divestment by receiver's sale.	9-8-13.	Award of attorneys' and receivers' fees; how determined.
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Cross references.

Taking of possession of business and property of financial institution by Department of Banking and Finance, § 7-1-150 et seq.

Right of bondholder to apply for receivership upon default by county or municipality in payment of principal or interest on revenue bond, § 36-82-67 et seq.

Law reviews.

For annual survey on business associations, see 71 Mercer L. Rev. 15 (2019).

9-8-1. Appointment of receiver — Grounds generally.

When any fund or property is in litigation and the rights of either or both parties cannot otherwise be fully protected or when there is a fund or property having no one to manage it, a receiver of the same may be appointed by the judge of the superior court having jurisdiction thereof.

History.

Ga. L. 1855-56, p. 219, § 2; Code 1863, § 271; Code 1868, § 265; Code 1873, § 274; Code 1882, § 274; Civil Code 1895, § 4900; Civil Code 1910, § 5475; Code 1933, § 55-301.

Law reviews.

For article, "The Civil Jurisdiction of State and Magistrate Courts," see 24 Ga. St. B. J. 29 (1987).

For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

For article, "2014 Georgia Corporation and Business Organization Case Law Developments," see 20 Ga. St. Bar. J. 26 (April 2015).

JUDICIAL DECISIONS

This section had its origin as far back as 1855. Mitchell v. LaGrange Banking & Trust Co., 166 Ga. 675, 144 S.E. 267, 1928 Ga. LEXIS 375 (1928) (see O.C.G.A. § 9-8-1).

Purpose of receivership pending litigation. — The purpose of appointing a receiver pending the litigation is the preservation of the property and the rights of the parties. Bigbee v. Summerour, 101 Ga. 201, 28 S.E. 642, 1897 Ga. LEXIS 195 (1897).

The purpose of a receivership is to preserve the property contested for pendente lite until the final disposal of all questions, legal or equitable, involved in the action. Parrish v. Rigell, 183 Ga. 218, 188 S.E. 15, 1936 Ga. LEXIS 206 (1936); Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580, 1939 Ga. LEXIS 596 (1939); Jones v. Wilson, 195 Ga. 310, 24 S.E.2d 34, 1943 Ga. LEXIS 481 (1943); Conner v. Yawn, 200 Ga. 500, 37 S.E.2d 541, 1946 Ga. LEXIS 417 (1946); Liddell v. Johnson, 213 Ga. 752, 101 S.E.2d 755, 1958 Ga. LEXIS 271 (1958).

This section also provides for appointment of receiver when there is fund or property having no one to manage it. Waycross Military Ass'n v. Hiers, 209 Ga. 812, 76 S.E.2d 486, 1953 Ga. LEXIS 419 (1953) (see O.C.G.A. § 9-8-1).

Receiver is appropriate under this section where person managing property seems inimical to its best interests. Warner v. Warner, 237 Ga. 462, 228 S.E.2d 848, 1976 Ga. LEXIS 1265 (1976) (see O.C.G.A. § 9-8-1).

Words "having no one to manage it" in this section, have reference, not to a mere physical management, but to a proper and efficient management. Mere physical management by an unfriendly or irresponsible person might conceivably be worse than no management at all, because it may amount to mismanagement and waste, if not destruction and total loss. Parrish v. Rigell, 183 Ga. 218, 188 S.E. 15, 1936 Ga. LEXIS 206 (1936); Waycross Military Ass'n v. Hiers, 209 Ga. 812, 76 S.E.2d 486, 1953 Ga. LEXIS 419 (1953); Farrar v. Pesterfield, 216 Ga. 311, 116 S.E.2d 229, 1960 Ga. LEXIS 454 (1960) (see O.C.G.A. § 9-8-1).

Construction with statutory provisions. — Order assigning a case to another judge pursuant to Ga. Unif. Super. Ct. R. 3.3 did not violate O.C.G.A. §§ 9-8-1, 9-8-5, and 9-11-24 as: (1) neither O.C.G.A. § 9-11-24 nor O.C.G.A. § 9-8-1 applied to the assignment; (2) the receiver transferred the property to a corporation before it was sold to a limited liability company (LLC), and the receiver was not named as a defendant; (3) the appellate court was unable to determine the extent that the property remained subject to orders in the receiver case, and equitable remedies affected the rights of the receiver; (4) the LLC's action was against the corporation and its managing declarant, not the receiver, and included claims for monetary damages; and (5) the managing declarant failed to show a legal or factual basis for questioning the assigned judge's staffing to support the complex litigation. Leventhal v. Cumberland Dev., LLC, 267 Ga. App. 886, 600 S.E.2d 616, 2004 Ga. App. LEXIS 661 (2004).

Appointment of receiver is always equitable remedy. Tumlin v. Vanhorn, 77 Ga. 315, 3 S.E. 264, 1887 Ga. LEXIS 110 (1887); West v. Mercer, 130 Ga. 357, 60 S.E. 859, 1908 Ga. LEXIS 275 (1908).

Appointment is improper where only legal rights are involved and the party has an adequate remedy at law. Jordan v. Beal, 51 Ga. 602, 1874 Ga. LEXIS 208 (1874); South Carolina & Ga. R.R. v. Augusta S.R.R., 107 Ga. 164, 33 S.E. 36, 1899 Ga. LEXIS 29 (1899).

Trial court abused its discretion by sua sponte appointing a receiver absent any statutory basis for the appointment. Patel v. Alpha Inv. Properties, Inc., 265 Ga. 597, 458 S.E.2d 476, 1995 Ga. LEXIS 501 (1995).

Appointment unwarranted where fund not in litigation. — In an action by an insurer as subrogee of its insured to recover money paid for a fire loss, appointment of a receiver to take charge of funds received by the defendant from sale of the defendant's residence and other assets was not warranted because the funds did

not constitute a "fund or property which is in litigation." Chrysler Ins. Co. v. Dorminey, 271 Ga. 555, 522 S.E.2d 232.

Appointment of receiver does not affect nature of any primary right, but is simply a means by which primary rights may be more efficiently preserved, protected, and enforced in judicial proceedings; it adjudicates and determines the right of no party to the proceeding, and grants no final relief directly or indirectly. Rogers v. Rogers, 180 Ga. 300, 178 S.E. 698, 1935 Ga. LEXIS 248 (1935).

Appointment does not affect title. — Appointment of a receiver determines no right as between the parties, nor does it affect the title in anyway. Jones v. Wilson, 195 Ga. 310, 24 S.E.2d 34, 1943 Ga. LEXIS 481 (1943); Conner v. Yawn, 200 Ga. 500, 37 S.E.2d 541, 1946 Ga. LEXIS 417 (1946).

Appointment of receiver to protect assets. — Because a question of fact as to the existence of an investor's ownership interest in a company was created by evidence that the company owner admitted that the investor owned 47 percent of the company, and based on evidence that the owner was sending company funds to Greece, the trial court erred in granting summary judgment to the owner and in denying the investor's request for a receiver to protect the investor's investment on the basis of a lack of interest in the company. McElvaney v. Roumelco, LLC, 331 Ga. App. 729, 771 S.E.2d 419, 2015 Ga. App. LEXIS 225 (2015), cert. denied, No. S15C1202, 2015 Ga. LEXIS 616 (Ga. Sept. 8, 2015).

Receiver's duty is to administer assets in such manner as to receive their highest value for the benefit of the estate and of creditors. Northeast Factor & Disct. Co. v. Mortgage Invs., Inc., 107 Ga. App. 705, 131 S.E.2d 221, 1963 Ga. App. LEXIS 962 (1963).

Receiver, a fiduciary, is held to higher standard than that of people dealing in the market place. Northeast Factor & Disct. Co. v. Mortgage Invs., Inc., 107 Ga. App. 705, 131 S.E.2d 221, 1963 Ga. App. LEXIS 962 (1963).

Judge of superior court is authorized, in proper case, to appoint receiver upon interlocutory hearing; in such a case, the receiver merely takes the property in custodia legis for the purpose of preserving the status until a jury can pass upon the case. Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580, 1939 Ga. LEXIS 596 (1939).

Failure to obtain leave to file suit against receivers. — Dismissal of the plaintiff's lawsuit against the receivers was upheld because the plaintiff failed to obtain leave from the trial court in the lawsuit against a former business partner before filing a separate lawsuit against the receivers appointed in that case. Considine v. Murphy, 297 Ga. 164, 773 S.E.2d 176, 2015 Ga. LEXIS 354 (2015).

Appointment of receiver proper in small business situation. — In an action involving a business dispute between joint owners, the trial court did not manifestly abuse the court's discretion in finding that the appointment of a receiver was justified because the plaintiff showed that the defendants attempted to assert sole control over the business assets in which the plaintiff had an ownership interest by unilaterally dissolving the parties' LLC and operating through a separate entity. Nayyar v. Bhatia, 348 Ga. App. 789, 824 S.E.2d 675, 2019 Ga. App. LEXIS 81 (2019).

Appointment of receivers and their duties are matters within discretion of court and not the subject of agreement of the parties. Cochran v. Eason, 227 Ga. 316, 180 S.E.2d 702, 1971 Ga. LEXIS 688 (1971).

The appointment of a receiver necessary for the protection of the litigant's interests is a matter resting in the discretion of the trial court. Dixie-Land Iron & Metal Co. v. Piedmont Iron & Metal Co., 235 Ga. 503, 220 S.E.2d 130, 1975 Ga. LEXIS 912 (1975).

The appointment of a receiver is a matter left to the trial court's discretion. Shaw v. Cousins Mtg. & Equity Invs., 142 Ga. App. 773, 236 S.E.2d 919, 1977 Ga. App. LEXIS 2137 (1977), overruled, Mock v. Canterbury Realty Co., 152 Ga. App. 872, 264 S.E.2d 489, 1980 Ga. App. LEXIS 1639 (1980).

Trial court had the authority to appoint a receiver over the two corporations in a case involving a dispute over the owner-

ship rights in an internet-based software program since the matter was in litigation and it appeared that the rights of the first partner could not be otherwise fully protected because it appeared that the two corporations were committing financial improprieties related to an initial order for relief that the trial court granted to protect the rights of the parties involved. D.C. Micro Dev. v. Lange, 259 Ga. App. 611, 578 S.E.2d 251, 2003 Ga. App. LEXIS 218 (2003).

Appointment can be made without request. — The appointment of a receiver rests in the discretion of the trial court and can be made for the protection of the parties even though there is no prayer for a receiver made in the complaint. McGarrah v. Bank of S.W. Ga., 117 Ga. 556, 43 S.E. 987, 1903 Ga. LEXIS 295 (1903); Dixie-Land Iron & Metal Co. v. Piedmont Iron & Metal Co., 233 Ga. 970, 213 S.E.2d 897, 1975 Ga. LEXIS 1500 (1975).

Necessity for receiver must be clear. — A receiver should not be appointed to take possession of property unless it is clearly made to appear that a receiver is required in order to protect the rights of those interested in the property. Bird v. General Disct. Corp., 194 Ga. 282, 21 S.E.2d 651, 1942 Ga. LEXIS 578 (1942); Jones v. Wilson, 195 Ga. 310, 24 S.E.2d 34, 1943 Ga. LEXIS 481 (1943).

Absent necessity, no change in property status pending final decree. — No matter how strong the apparent equity of a complainant may be, if there is no necessity for a receivership, the courts will not change the status until final decree. Jones v. Wilson, 195 Ga. 310, 24 S.E.2d 34, 1943 Ga. LEXIS 481 (1943); Furr v. Jordan, 196 Ga. 862, 27 S.E.2d 861, 1943 Ga. LEXIS 434 (1943); Conner v. Yawn, 200 Ga. 500, 37 S.E.2d 541, 1946 Ga. LEXIS 417 (1946); Jue v. Joe, 207 Ga. 119, 60 S.E.2d 442, 1950 Ga. LEXIS 428 (1950); Liddell v. Johnson, 213 Ga. 752, 101 S.E.2d 755, 1958 Ga. LEXIS 271 (1958).

Where evidence is conflicting, trial court's discretion to appoint receiver is broad. Warner v. Warner, 237 Ga. 462, 228 S.E.2d 848, 1976 Ga. LEXIS 1265 (1976).

If no evidence of need, not abuse of discretion to deny receivership. — Where there is no evidence to sustain averments that property in dispute will be damaged or injured before judgment, it is not abuse of discretion to refuse to appoint a receiver. National Casket Co. v. Clark, 181 Ga. 6, 181 S.E. 146, 1935 Ga. LEXIS 7 (1935).

Grant of receivership subject to review by Supreme Court. — The grant or refusal of a receivership is a matter largely within the discretion of the trial court, but the exercise of the right is reviewable by the Supreme Court. Friedlander v. Friedlander Bros., 175 Ga. 477, 165 S.E. 426, 1932 Ga. LEXIS 277 (1932).

Judicial discretion controls unless abuse. — Where the rights of either party would be endangered for the lack of a receiver, the discretion of the trial court in appointing a receiver will not be disturbed unless there is manifest abuse of discretion. Mitchell v. LaGrange Banking & Trust Co., 166 Ga. 675, 144 S.E. 267, 1928 Ga. LEXIS 375 (1928).

The discretion of the trial court will not be disturbed unless manifestly abused. Parrish v. Rigell, 183 Ga. 218, 188 S.E. 15, 1936 Ga. LEXIS 206 (1936); Farrar v. Pesterfield, 216 Ga. 311, 116 S.E.2d 229, 1960 Ga. LEXIS 454 (1960); Anthony v. Anthony, 237 Ga. 872, 230 S.E.2d 752, 1976 Ga. LEXIS 1430 (1976).

Task of appellate court is to affirm trial judge unless the trial judge abused discretion by appointing receiver. Warner v. Warner, 237 Ga. 462, 228 S.E.2d 848, 1976 Ga. LEXIS 1265 (1976).

Large discretion is vested in the trial court in granting injunctions and appointing receivers; and unless some principle of substantial equity has been violated, the appellate court will not control the judge's discretion unless clearly abused. Crockett v. Wilson, 184 Ga. 539, 192 S.E. 19, 1937 Ga. LEXIS 569 (1937).

Allegation of insolvency without more does not authorize appointment of receiver and injunction against defendant's disposing of its assets. Stalvey v. Pedi Joy Shoes Corp., 220 Ga. 489, 140 S.E.2d 264, 1964 Ga. LEXIS 591 (1964).

Receiver may be appointed where corporate shareholders deadlocked. — Where stock of corporation is owned in equal shares by two contending parties, which condition threatens to result in

destruction of business, and it appears that parties cannot agree upon management of business, and under existing circumstances neither one is authorized to impose its views upon the other, court of equity may appoint receiver to preserve property of corporation, administer it, and, if necessary, dispose thereof for protection of creditors and owners. Farrar v. Pesterfield, 216 Ga. 311, 116 S.E.2d 229, 1960 Ga. LEXIS 454 (1960).

Appointment of receiver proper to protect assets. — Trial court did not abuse the court's discretion in issuing an interlocutory injunction enjoining officers from disposing of any of the documents or assets of a corporation and continuing a receivership because the officers controlled the assets that were a subject of the litigation, raising the possibility that the assets could be dissipated before the litigation is resolved; although the officers made several vague arguments about the powers granted to the receiver, the officers failed to show that the trial court abused the court's discretion in granting those powers. Pittman v. State, 288 Ga. 589, 706 S.E.2d 398, 2011 Ga. LEXIS 149 (2011).

While the borrowers argued that the appointment of a receiver was improper because the bank had an adequate remedy at law, the supreme court presumed that there was sufficient evidence to support the appointment, such as evidence that the assets at issue were being dissipated. Alstep, Inc. v. State Bank & Trust Co., 293 Ga. 311, 745 S.E.2d 613, 2013 Ga. LEXIS 595 (2013).

Receivership was proper for the subsidiary of a non-profit health care sharing ministry given allegations that a licensing contract had been terminated but that the former licensee was continuing to control the subsidiary's customers and funds, and funds were needed to pay health care costs. Aliera Healthcare, Inc. v. Anabaptist Healthshare, 355 Ga. App. 381, 844 S.E.2d 268, 2020 Ga. App. LEXIS 319 (2020).

Receivership permissible in suits between cotenants of real estate. — In a suit between cotenants of real estate to obtain equitable relief with respect to the common property, a receiver may be appointed where the plaintiff's title or right is probable and a receivership is necessary for the preservation of the subject matter of the suit or for the protection of the interests of the parties therein pending the litigation. Waycross Military Ass'n v. Hiers, 209 Ga. 812, 76 S.E.2d 486, 1953 Ga. LEXIS 419 (1953); Warner v. Warner, 237 Ga. 462, 228 S.E.2d 848, 1976 Ga. LEXIS 1265 (1976).

Receivership permissible between adverse claimants to property. — Under this section, when any property is in dispute and the rights of one or both parties cannot otherwise be fully protected, the court may appoint a receiver to hold the property pending the final decision of the case; in such cases, the defendant, though a bona fide claimant, may be compelled to deliver the property into the possession of the receiver, pending the final adjudication of the defendant's rights. Braswell v. Palmer, 191 Ga. 262, 11 S.E.2d 889, 1940 Ga. LEXIS 629 (1940) (see O.C.G.A. § 9-8-1).

In a suit between adverse claimants to property, a proper case for the appointment of a receiver is made when the right or title of the moving party is probable and a receivership is necessary for the preservation of the subject matter of the suit or for the protection of the interests of the parties pending the litigation. Anthony v. Anthony, 237 Ga. 872, 230 S.E.2d 752, 1976 Ga. LEXIS 1430 (1976).

Evidence of partner's misappropriation of law firm property justified appointment of receiver. — Evidence that a partner misappropriated a law firm's funds before the partners decided to dissolve the firm; borrowed money on the firm's line of credit without the other partner's permission and without notifying the bank that the firm was going to be dissolved; and took records from the firm, including most personal injury files, supported the appointment of a receiver under O.C.G.A. §§ 9-8-1 and 9-8-3. Fulp v. Holt, 284 Ga. 751, 670 S.E.2d 785, 2008 Ga. LEXIS 1019 (2008).

Partition may be accomplished by receivership. — There is no reason why partition in equity may not be fully and effectually accomplished through and by

receivership. Waycross Military Ass'n v. Hiers, 209 Ga. 812, 76 S.E.2d 486, 1953 Ga. LEXIS 419 (1953).

Permanent receiver not appointed for incompetent. — There is no provision of law which authorizes the appointment of a "permanent" receiver in the sense that the receiver might manage the affairs of the alleged incompetent until the incompetent's mental restoration, no matter how long delayed, or until the incompetent's death. All of the duties which might be performed by such a receiver could be equally performed by a legal guardian, who would not only have the right, but the obligation, to possess oneself of the property and assets of the ward and manage the incompetent's affairs. Parrish v. Rigell, 183 Ga. 218, 188 S.E. 15, 1936 Ga. LEXIS 206 (1936).

Receiver properly denied. — Since the evidence did not show that the rights of the parties could not be fully protected without the appointment of a receiver, a trial court did not err in refusing to appoint a receiver; a lender did not present any evidence of insolvency, waste, mismanagement, or misappropriation of assets on the part of the owners of a restaurant. Patel v. Patel, 280 Ga. 292, 627 S.E.2d 21, 2006 Ga. LEXIS 150 (2006).

Trial court's order denying a shareholder's request for the appointment of a receiver for a corporation under O.C.G.A. § 9-8-1 was proper because there was no showing that the appointment of a receiver could have reversed an improper tax election by the corporation and, although the corporation's president inaccurately represented before 2000 that the president was the sole owner of the corporation, the corporate structure had clearly been recognized since that time, and it was not shown that these prior representations affected the current or future operation of the corporation; further, although the funds for a building's purchase were paid from the president's personal account, it was undisputed that the building was now owned by the corporation, and the evidence was that improper corporate expenditures had been adjusted in the audit so as to ensure that the shareholder's proper share of the corporation was accurately measured. There was no showing that the president or the corporation were insolvent, or that the shareholder would not have been able to ultimately gain the shareholder's appropriate share of the corporation's value. Treu v. Humanism Inv., Inc., 284 Ga. 657, 670 S.E.2d 409, 2008 Ga. LEXIS 987 (2008).

Trial court may entertain suit by executors for direction, and still appoint receivers to execute directions given therein; the two powers of the court are given equal recognition in the Code, and are not antagonistic, but are coordinate and consistent. Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580, 1939 Ga. LEXIS 596 (1939).

RESEARCH REFERENCES

Am. Jur. 2d.

65 Am. Jur. 2d, Receivers, §§ 1 et seq., 11 et seq., 54 et seq., 60 et seq., 83 et seq.

Am. Jur. Pleading and Practice Forms.

21 Am. Jur. Pleading and Practice Forms, Receivers, § 2.

C.J.S.

75 C.J.S., Receivers, §§ 1 et seq., 19 et seq., 142 et seq.

ALR.

When receiver of corporation deemed to be vested with title to assets so as to entitle him to sue in a foreign jurisdiction, 3 A.L.R. 262; 29 A.L.R. 1495.

Appointment of receiver as excuse for nonperformance of contract, 3 A.L.R. 627; 12 A.L.R. 1079; 33 A.L.R. 499.

Appointment of receiver for solvent corporation at instance of minority stockholders under statute permitting appointment of receiver when the court deems it necessary to secure ample justice to the parties, 5 A.L.R. 368.

Continuance of business by receiver at loss, 12 A.L.R. 292.

Applicability of penal statutes to railroad receivers, 15 A.L.R. 1372.

Imposition of franchise or excise tax on corporation in hands of receiver, 18 A.L.R. 700; 26 A.L.R. 426.

Receivership proceedings as suspending statute of limitations, 21 A.L.R. 961.

Failure to obtain permission to sue receiver as affecting jurisdiction of action, 29 A.L.R. 1460.

Claim in receivership for breach of contract which was still executory when receiver was appointed, 33 A.L.R. 508.

Conduct pending receivership as contempt of court, 39 A.L.R. 6; 48 A.L.R. 241.

Power of receiver of private corporation to issue receivers' certificates, 40 A.L.R. 244.

Right of receiver to take property in summary manner or by summary proceedings from strangers to the record, 40 A.L.R. 903; 43 A.L.R. 1340.

Inherent power of equity, at instance of a stockholder, to appoint receiver for, or to wind up, a solvent, going corporation, on ground of fraud, mismanagement, or dissensions, 43 A.L.R. 242; 61 A.L.R. 1212; 91 A.L.R. 665.

Leave of court as essential to foreclosure of mortgage on property in hands of receiver, 43 A.L.R. 1357.

Right of receiver who is himself an attorney to employ another attorney at the expense of the estate, 64 A.L.R. 1541.

Friendly or consent receiverships, 84 A.L.R. 1443; 90 A.L.R. 406.

Power of court to appoint receiver in a suit for divorce or separation, 95 A.L.R. 902.

Liability of mortgagee or mortgaged property for expenses of receivership not sought by him, or for expenditures by receiver in connection with the property, 104 A.L.R. 990.

Power of court to appoint receiver of future earnings of husband in order to enforce judgment for alimony, 106 A.L.R. 588.

Necessity as condition of appointment of receiver pendente lite of showing of probability that plaintiff will be entitled to judgment, 109 A.L.R. 1212.

Appointment of receiver after dissolution or expiration of charter of corporation, 109 A.L.R. 1526.

Appointment of receiver after decree or judgment, 111 A.L.R. 500.

Discharge of receiver as affecting pending action against him or judgment therein, 112 A.L.R. 142.

Receiver as within social security and unemployment compensation acts, 143 A.L.R. 984.

Citizenship of receiver as test of diversity of citizenship for purposes of jurisdiction of federal court, 148 A.L.R. 804.

Right of receiver or other liquidator, or court appointing him, to contest or pass upon the merits or amount of claim, as concluded by pendency in another forum of action on claim or judgment thereon, 168 A.L.R. 671.

Appointment of receiver at instance of plaintiffs in tort action, 4 A.L.R.2d 1278.

Appointment of receiver in proceedings arising out of dissolution of partnership or joint adventure, otherwise than by death of partner or at instance of creditor, 23 A.L.R.2d 583.

Action for malicious prosecution based on institution of involuntary bankruptcy, insolvency, or receivership proceedings, 40 A.L.R.3d 296.

Appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation, 34 A.L.R.4th 698.

9-8-2. Appointment of receiver — To protect trust or joint property.

Equity may appoint receivers to take possession of and protect trust or joint property and funds whenever the danger of destruction and loss shall require such interference.

History.

Orig. Code 1863, § 3031; Code 1868, § 3043; Code 1873, § 3098; Code 1882, § 3098; Civil Code 1895, § 4901; Civil Code 1910, § 5476; Code 1933, § 55-302.

JUDICIAL DECISIONS

Jurisdiction over marital property in suit for divorce. — Since a state court hearing a suit for divorce and division of property asserts quasi in rem jurisdiction over the marital property, where the court's order providing for the sale of the property and division of the proceeds had not yet been complied with, that court still had and continued to exercise quasi in rem jurisdiction over the property, and the federal district court therefore had no power to appoint a receiver to effectuate the sale of the property as required by the divorce decree. Cavalino v. Cavalino, 601 F. Supp. 74, 1984 U.S. Dist. LEXIS 21168 (N.D. Ga. 1984).

This section was applied where insolvent husband occupied joint property to exclusion of his wife after a divorce. Baggs v. Baggs, 55 Ga. 590, 1876 Ga. LEXIS 424 (1876) (see O.C.G.A. § 9-8-2).

In suit between cotenants of real estate, receiver may be appointed where the plaintiff's title or right is probable and a receivership is necessary for the preservation of the subject matter of the suit or for the protection of the interests of the parties therein pending the litigation. Waycross Military Ass'n v. Hiers, 209 Ga. 812, 76 S.E.2d 486, 1953 Ga. LEXIS 419 (1953).

Probable loss or injury must be shown. — Even a dispute among cotenants will not constitute ground for a receivership in this state unless there is the element of probable loss or injury to the complainants. Astin v. Carden, 194 Ga. 758, 22 S.E.2d 481, 1942 Ga. LEXIS 650 (1942); Liddell v. Johnson, 213 Ga. 752, 101 S.E.2d 755, 1958 Ga. LEXIS 271 (1958).

Receiver appointed where insolvent cotenant holds to exclusion of others. — A receiver may be appointed to take possession of undivided valuable property held by an insolvent tenant in common to the exclusion of the other cotenants. Williams v. Jenkins, 11 Ga. 595, 1852 Ga. LEXIS 68 (1852).

A court of equity has jurisdiction to appoint a receiver at the instance of one tenant in common against the cotenants, who are in possession of undivided valuable property, receiving the whole of the rents and profits, and excluding their companion from the receipt of any portion thereof, when such cotenants are insolvent. Liddell v. Johnson, 213 Ga. 752, 101 S.E.2d 755, 1958 Ga. LEXIS 271 (1958).

Receivership improper where cotenant solvent and no need shown. — Where, on the trial of an equitable petition for the partition of real estate and accounting between tenants in common, the evidence shows that the defendant against whom the charges of mismanagement were made is solvent, and no necessity for a receivership is proved, it is error to appoint receivers to take possession of and to hold and manage the property in question pending final disposition of the case. Liddell v. Johnson, 213 Ga. 752, 101 S.E.2d 755, 1958 Ga. LEXIS 271 (1958).

Partnership assets. — A receiver may be appointed to take charge of assets of a partnership after dissolution where the partners disagreed as to values of property, and mutual charges of mismanagement were alleged. Terrell v. Goddard, 18 Ga. 664, 1855 Ga. LEXIS 255 (1855); Boyce v. Burchard, 21 Ga. 74, 1857 Ga. LEXIS 8 (1857); Bennett v. Smith, 108 Ga. 466, 34 S.E. 156, 1899 Ga. LEXIS 275 (1899); Pritchett v. Kennedy, 140 Ga. 248, 78 S.E. 902, 1913 Ga. LEXIS 94 (1913).

Where the surviving partner continued the business beyond the time allowed by law, the partner's possession will not be disturbed if the partner is solvent and can comply with any decree of the deceased partner's estate. Huggins v. Huggins, 117 Ga. 151, 43 S.E. 759, 1903 Ga. LEXIS 181 (1903).

Appointment of receiver may be authorized by refusal of trustee to perform trust. McDougald v. Dougherty, 11 Ga. 570, 1852 Ga. LEXIS 67 (1852).

Appointment of receiver if property is in danger of being wasted or

misapplied to the detriment of creditors. Jones v. Dougherty, 10 Ga. 273, 1851 Ga. LEXIS 101 (1851).

Appointment of receiver if purchaser has innocently placed valuable improvements on trust property. Malone v. Buice, 60 Ga. 152, 1878 Ga. LEXIS 406 (1878).

Receiver appointed where trustee dies or resigns. — A receiver may be appointed to protect property after death or resignation of a trustee. J.G. Bailie & Bro. v. McWhorter, 56 Ga. 183, 1876 Ga. LEXIS 235 (1876); Robert v. Tift, 60 Ga. 566, 1878 Ga. LEXIS 540 (1878); McFerran, Shallcross & Co. v. Davis, 70 Ga. 661, 1883 Ga. LEXIS 393 (1883).

When receiver appointed pending action to remove trustee. — A receiver will not be appointed pending an action to remove a testamentary trustee, unless it is feared that property will not be forthcoming to answer the decree. Poythress v. Poythress, 16 Ga. 406, 1854 Ga. LEXIS 198 (1854).

Sales by trustee without consent of beneficiary. — Where the court granted a trustee the power to sell property, and the beneficiaries bring a bill to set aside the sale because they had not consented thereto, if sale has been rescinded, the court may appoint the trustee as receiver to sell the property. Burwell v. Farmers & Merchants Bank, 119 Ga. 633, 46 S.E. 885, 1904 Ga. LEXIS 315 (1904).

Foreclosure of trust deed. — Where property mortgaged by a trust deed is subject to an impending tax sale, a receiver may be appointed at the instance of a bondholder where the trustee refuses to foreclose. Etna Steel & Iron Co. v. Hamilton, 137 Ga. 232, 73 S.E. 8, 1911 Ga. LEXIS 368 (1911).

RESEARCH REFERENCES

Am. Jur. 2d.

65 Am. Jur. 2d, Receivers, §§ 11 et seq., 23 et seq.

C.J.S.

75 C.J.S., Receivers, §§ 24 et seq., 29, 30.

ALR.

Appointment of receiver after decree or judgment, 111 A.L.R. 500.

Right to appointment of receiver in action between persons owning or claiming to own undivided or successive interests in property or fund, 127 A.L.R. 1228.

9-8-3. Appointment of receiver — To hold assets liable for debt; appointment without notice; terms.

Equity may appoint a receiver to take possession of and hold, subject to the direction of the court, any assets charged with the payment of debts where there is manifest danger of loss, destruction, or material injury to those interested. Under extraordinary circumstances, a receiver may be appointed before and without notice to the trustee or other person having charge of the assets. The terms on which a receiver is appointed shall be in the discretion of the court.

History.

Orig. Code 1863, § 3080; Code 1868, § 3092; Code 1873, § 3149; Code 1882, § 3149; Civil Code 1895, § 4904; Civil Code 1910, § 5479; Code 1933, § 55-305.

Law reviews.

For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

JUDICIAL DECISIONS

Former Civil Code 1910, § 5479 (see O.C.G.A. § 9-8-3) was an exception to rule of former Civil Code 1910, § 5495 (see O.C.G.A. § 9-5-6) which stated that creditors without liens generally cannot enjoin their debtors from disposing of property. Isaac Silver & Bros. Co. v. Kalmon, 175 Ga. 244, 165 S.E. 434, 1932 Ga. LEXIS 227 (1932).

Appointment of receiver determines no right as between parties, nor does it affect the title in any way. The purpose of a receivership is to preserve the property contested for pendente lite until the final disposal of all questions, legal or equitable. Jones v. Wilson, 195 Ga. 310, 24 S.E.2d 34, 1943 Ga. LEXIS 481 (1943).

Appointment discretionary. — The power of appointment under this section is discretionary and will not be interfered with unless abused. Rhodes v. Lee, 32 Ga. 470, 1861 Ga. LEXIS 212 (1861); Reid v. Reid, 38 Ga. 24, 1868 Ga. LEXIS 42 (1868); Cohen v. Meyers, Cohen & Co., 42 Ga. 45 (1871); Esterlund v. Dye, 56 Ga. 284, 1876 Ga. LEXIS 266 (1876); Gunby v. Thompson, 56 Ga. 316, 1876 Ga. LEXIS 279 (1876); McCaskill v. Warren, 58 Ga. 286, 1877 Ga. LEXIS 82 (1877); Hammack v. Simmons, 102 Ga. 575, 27 S.E. 668, 1897 Ga. LEXIS 605 (1897) (see O.C.G.A. § 9-8-3).

Large discretion is vested in the trial court in granting injunctions and appointing receivers; and unless some principle of substantial equity has been violated, the appellate court will not control the judge's discretion unless clearly abused. Crockett v. Wilson, 184 Ga. 539, 192 S.E. 19, 1937 Ga. LEXIS 569 (1937).

Appointment of receiver can be made regardless of prayer therefore. — The appointment of a receiver rests in the discretion of the trial court and can be made for the protection of the parties even though there is no prayer for a receiver made in the complaint. Dixie-Land Iron & Metal Co. v. Piedmont Iron & Metal Co., 233 Ga. 970, 213 S.E.2d 897, 1975 Ga. LEXIS 1500 (1975).

Receiver appointed only where need clearly shown. — A receiver should not be appointed to take possession of property unless it is clearly made to appear that a receiver is required in order to protect the rights of those interested in the property. Bird v. General Disct. Corp., 194 Ga. 282, 21 S.E.2d 651, 1942 Ga. LEXIS 578 (1942); Jones v. Wilson, 195 Ga. 310, 24 S.E.2d 34, 1943 Ga. LEXIS 481 (1943).

Evidence of partner's misappropriation of law firm property justified appointment of receiver. — Evidence that a partner misappropriated a law firm's funds before the partners decided to dissolve the firm; borrowed money on the firm's line of credit without the other partner's permission and without notifying the bank that the firm was going to be dissolved; and took records from the firm, including most personal injury files, supported the appointment of a receiver under O.C.G.A. §§ 9-8-1 and 9-8-3. Fulp v. Holt, 284 Ga. 751, 670 S.E.2d 785, 2008 Ga. LEXIS 1019 (2008).

Evidence sufficient to authorize appointment of receiver. — Appointment of receiver authorized where there was evidence that the uncompleted house subject to materialmen's liens had been vandalized and left unrepaired and was at risk of further damage and where the possibility of fraudulent collusion between the owner and the construction company existed. Kruzel v. Leeds Bldg. Prods., Inc., 266 Ga. 765, 470 S.E.2d 882, 1996 Ga. LEXIS 351 (1996).

Receivership was proper for the subsidiary of a non-profit health care sharing ministry given allegations that a licensing contract had been terminated but that the former licensee was continuing to control the subsidiary's customers and funds, and funds were needed to pay health care costs. Aliera Healthcare, Inc. v. Anabaptist Healthshare, 355 Ga. App. 381, 844 S.E.2d 268, 2020 Ga. App. LEXIS 319 (2020).

Receiver ordinarily should not be appointed without notice and hearing; however, it can be done under extraordinary circumstances. Dixie-Land Iron & Metal Co. v. Piedmont Iron &

Metal Co., 233 Ga. 970, 213 S.E.2d 897, 1975 Ga. LEXIS 1500 (1975).

Court may create temporary receivership without notice. — As soon as a court of equity has before it a petition as to persons or a subject matter of which it has jurisdiction, it can, without notice, grant a temporary restraining order, or appoint temporary receivers. Williams v. Jenkins, 11 Ga. 595, 1852 Ga. LEXIS 68 (1852); Webb v. Hicks, 117 Ga. 335, 43 S.E. 738, 1903 Ga. LEXIS 229 (1903).

If the danger of dissipating assets before an interlocutory hearing can be had is great, the court in the exercise of sound discretion may, without notice, grant a temporary restraining order or appoint a temporary receiver in order to preserve the status quo until the interlocutory hearing. Edwards v. United Food Brokers, Inc., 195 Ga. 1, 22 S.E.2d 812, 1942 Ga. LEXIS 686 (1942).

When responsible party is nonresident or resident evading service, court may appoint temporary receiver for the assets within the jurisdiction of the court. Bettis v. Leavitt, 230 Ga. 607, 198 S.E.2d 296, 1973 Ga. LEXIS 1002 (1973).

If there is danger of dissipating assets, appointment of receiver may be ex parte. Dixie-Land Iron & Metal Co. v. Piedmont Iron & Metal Co., 235 Ga. 503, 220 S.E.2d 130, 1975 Ga. LEXIS 912 (1975).

Emergency appointment without notice based on equitable principles. — The last sentence of this section, permitting appointment of a receiver without notice, under extraordinary circumstances is merely confirmatory of the equitable principle authorizing the appointment of receivers in cases of urgent emergency. Mann v. Gaddie, 158 F. 42, 1907 U.S. App. LEXIS 3972 (5th Cir. 1907) (see O.C.G.A. § 9-8-3).

Joinder of parties. — Nothing in O.C.G.A. § 9-8-3 requires the joining of all creditors to an action seeking a receiver. Lemans Assocs. v. Lemans Apts., 268 Ga. 396, 489 S.E.2d 831.

Uninsured building not "manifest danger of loss" justifying appointment. — The fact that the building is uninsured, and in the event of its destruction by fire the land could not be sold for a sum sufficient to pay the amount claimed, does not constitute such a "manifest danger of loss," as would warrant an appointment of a receiver. Ray v. Carlisle, 125 Ga. 316, 54 S.E. 119, 1906 Ga. LEXIS 149 (1906).

Appointment not justified if administrator failed to support beneficiaries according to terms of will, even though the administrator and the administrator's sureties were insolvent. Harrup v. Winslet, 37 Ga. 655, 1868 Ga. LEXIS 31 (1868).

Appointment not justified if appointment to provide fund for meeting obligations, which it is probable will arise in future at a time when a corporation will have no solvent stockholder. Tichenor v. Williams Block Pavement Co., 1116 Ga. 303, 42 S.E. 505 (1902).

To authorize appointment of receiver for property conveyed by bill of sale to secure debt, upon the application of the grantee, both insolvency of the grantor and inadequacy of the security must appear. Wicks v. Community Loan & Inv. Corp., 189 Ga. 620, 7 S.E.2d 385, 1940 Ga. LEXIS 372 (1940).

Receiver not appointed for secured property where no proof of inadequate security or debtor's insolvency. — As a general rule, a receiver will not be appointed for property embraced in security deed, upon the application of the holder thereof, in the absence of allegation and satisfactory proof of the inadequacy of the security and insolvency of the debtor. Dickson v. Hutchinson, 173 Ga. 644, 161 S.E. 139, 1931 Ga. LEXIS 374 (1931).

Appointment of receiver for secured property not determinative of final rights thereto. — The appointment of a receiver for property on behalf of one holding a security deed thereto, in aid of a suit on the indebtedness, does not determine the rights of the parties or adjudicate the issues or right and title to the property or the income thereof, the purpose of a receivership being merely to preserve the property and its income, pendente lite, and to await final judgment of the court. Prudential Ins. Co. of Am. v.

Byrd, 188 Ga. 527, 4 S.E.2d 175, 1939 Ga. LEXIS 563 (1939).

Evidence supported depositing all fees originated by law firm with receiver. — Although a partnership agreement entitled each of the two law partners to one-half of the fees generated by the law firm, evidence that one partner had misappropriated some of the firm's funds authorized the trial court to order that all fees originated by that firm be deposited with the receiver. Fulp v. Holt, 284 Ga. 751, 670 S.E.2d 785, 2008 Ga. LEXIS 1019 (2008).

Absent agreement, failure to insure secured property not grounds for receivership. — In absence of a covenant by debtor to keep insured buildings on a farm embraced in a security deed, fact that debtor has permitted insurance on the dwelling to lapse does not authorize the appointment of a receiver, in the absence of allegation that the debtor is insolvent and that the lands embraced in the security deed are not worth the secured debt; nor does fact that the defendant has abandoned the farm and is allowing the same to lie idle authorize the appointment of a receiver, in the absence of an allegation of the debtor's insolvency and of the inadequacy of the security. Dickson v. Hutchinson, 173 Ga. 644, 161 S.E. 139, 1931 Ga. LEXIS 374 (1931).

Appointment of receiver appropriate to protect creditor-wife's interest in property of debtor-husband. — Petition charging that defendant husband was seeking to place his property where it could not be reached by his wife (his judgment creditor) presented a situation where upon proof a court could grant prayers for setting aside alleged fraudulent conveyance and transfer to out-of-state resident, as well as alleged fraudulent claims of lien for attorneys' fees, and for appointment of a receiver to take charge of defendant's assets and under the direction of the court sell enough to pay the petitioner the amount now due under her two judgments. Peoples Loan Co. v. Allen, 199 Ga. 537, 34 S.E.2d 811, 1945 Ga. LEXIS 342 (1945).

Appointment of receiver not disturbed where there is conflicting evidence of fraud and insolvency. — Where the grantee in the deed is a nonresident, and the petitioner in the cross-action alleged a conspiracy to defraud the petitioner, participated in by the grantor and the grantee's purported agent, and the evidence is conflicting in many material particulars as to insolvency and fraud, the judgment granting the injunction and appointing a receiver at the interlocutory hearing will not be disturbed. Levitsky v. Turk, 182 Ga. 873, 187 S.E. 107, 1936 Ga. LEXIS 584 (1936).

Receiver could be appointed even when question remained as to investor's interest in company. — Because a question of fact as to the existence of an investor's ownership interest in a company was created by evidence that the company owner admitted that the investor owned 47 percent of the company, and based on evidence that the owner was sending company funds to Greece, the trial court erred in granting summary judgment to the owner and in denying the investor's request for a receiver to protect the investor's investment on the basis of a lack of interest in the company. McElvaney v. Roumelco, LLC, 331 Ga. App. 729, 771 S.E.2d 419, 2015 Ga. App. LEXIS 225 (2015), cert. denied, No. S15C1202, 2015 Ga. LEXIS 616 (Ga. Sept. 8, 2015).

Appeal from order directing accounting. — O.C.G.A. § 5-6-34(a)(3), allowing direct appeal of a judgment or order "directing that an accounting be had," does not provide for a direct appeal of all orders appointing an auditor; thus, the relief requested in the complaint must be reviewed to determine the appropriateness of a direct appeal. Parmar v. Khera, 215 Ga. App. 71, 449 S.E.2d 894, 1994 Ga. App. LEXIS 1115 (1994).

Receiver appointed where vendee of property insolvent. — When the vendee of property is insolvent and is receiving the rents and profits, the vendor retaining purchase-money notes, a receiver will be appointed to take charge of the property, and to hold the proceeds thereof until final decree. Crockett v. Wilson, 184 Ga. 539, 192 S.E. 19, 1937 Ga. LEXIS 569 (1937).

Receivership permissible pending bankruptcy proceedings where homestead exemption waived. — While pending the bankruptcy proceeding the creditor cannot maintain a suit at law

against the debtor to obtain a judgment against the debtor in personam, but where claim of a creditor is evidenced by a promissory note in which the debtor waives the debtor's exemption of homestead, the debtor is estopped by the debtor's waiver to claim an exemption as against the creditor, and the latter has a remedy in a court of equity to obtain a judgment in rem against the exempted property, subjecting it to the debtor's claim; and where the property is of personalty of a perishable nature, or such that it will be destroyed in the use, the court may enjoin the debtor from disposing of the property, and appoint a receiver to take charge of it until a judgment in rem can be obtained. Nelson v. Brannon, 182 Ga. 195, 184 S.E. 870, 1936 Ga. LEXIS 314 (1936).

Where a creditor holds a note containing a waiver of homestead exemption and assignment of property, equity may afford the creditor a remedy by injunction to prevent the bankrupt from receiving the property, and appointment of a receiver to apply to the bankruptcy court for possession of the property to be administered by the court of equity. Such an equitable proceeding, instituted after filing of the petition in bankruptcy and before the property is set apart, is not premature on the ground that it is an unauthorized interference with the jurisdiction of the bankruptcy court. Lyle v. Roswell Store, Inc., 187 Ga. 386, 200 S.E. 702, 1938 Ga. LEXIS 797 (1938).

Receivership permissible to collect balance due on promissory notes. — In a suit by dealer against manufacturer and several transferees, instituted before maturity of notes, on the basis of the dealer's equitable interest therein, to enjoin further payment of the notes by the makers, and for appointment of a receiver to collect the balance due on the notes and apply the proceeds after discharge of the debt due to the finance company, which the dealer had guaranteed, the judge did not err on the pleadings and the evidence, in granting an injunction and appointing a receiver. Walter E. Heller & Co. v. Capital City Supply Co., 193 Ga. 695, 19 S.E.2d 729, 1942 Ga. LEXIS 462 (1942).

Receivership permissible where insolvent grantor of secured land sued by spouse. — Where a grantor in a security deed is insolvent, and since the execution of such deed the land has depreciated to a value which is less than the debt, and where after a default by the grantor, who is a married man living upon the property with his wife, a suit is brought by the wife against him and the grantee for recovery of the land, and such suit is being defended upon sufficient grounds by the grantee, the court, at the instance of the grantee, may appoint a receiver to take charge of the land and to collect the rents and profits thereof pending the outcome of the land suit. Sheffield v. Sheffield, 177 Ga. 202, 170 S.E. 83, 1933 Ga. LEXIS 148 (1933).

Court properly refused receivership where no evidence that alleged fraudulent transferee insolvent. — Where plaintiff, claiming to have a judgment against the owner of an equitable interest in described personal property, and alleging that the property was in the possession of another as a fraudulent transferee from such owner, prayed for appointment of a receiver to seize and sell the property and distribute the proceeds according to such priority of claims as the court might determine, there being no allegation or evidence that the alleged fraudulent transferee was insolvent, the court did not err in refusing to appoint a receiver. Blanchard v. Atlanta Casket Co., 184 Ga. 722, 193 S.E. 178, 1937 Ga. LEXIS 627 (1937).

Manifest danger of loss, destruction or material injury found. — Finding of "manifest danger of loss, destruction, or material injury" to the former owner of an apartment was warranted by evidence that payments on a promissory note had not been made for nine months, there were unauthorized distributions from the property, substantial repairs were required, and there were insufficient funds to pay taxes and insurance. Lemans Assocs. v. Lemans Apts., 268 Ga. 396, 489 S.E.2d 831.

Trial court did not abuse its discretion in finding that a danger existed that the two corporations were causing "loss, destruction, or material injury" to the first partner's interests by not abiding by a previous court order entered to protect the parties in a dispute over the ownership of an internet-based software program. The

evidence suggested the possibility that the corporations' assets were being diverted and that assets might be dissipated before the case could be resolved constituted an "extraordinary circumstance," authorizing the trial court to appoint a receiver without formal notice. D.C. Micro Dev. v. Lange, 259 Ga. App. 611, 578 S.E.2d 251, 2003 Ga. App. LEXIS 218 (2003).

RESEARCH REFERENCES

Am. Jur. 2d.

65 Am. Jur. 2d, Receivers, §§ 1 et seq., 11 et seq.,, 23 et seq.

C.J.S.

75 C.J.S., Receivers, §§ 1 et seq., 21, 49 et seq.

ALR.

Right to appointment of receiver in action to enforce mechanics' lien, 1 A.L.R. 1466.

Insurance: appointment of receiver, bankruptcy or insolvency proceedings, or assignment for benefit of creditors as change in interest, title, or possession within fire policy, 17 A.L.R. 382.

Right of mortgagee to receiver, 26 A.L.R. 33; 36 A.L.R. 609; 55 A.L.R. 533; 87 A.L.R. 1008; 111 A.L.R. 730; 82 A.L.R.2d 1075.

Rights in receivership proceeding as between mortgagee and creditor furnishing supplies required or used for operation, maintenance, and upkeep, of railroad or street railway, where there has been diversion of current earnings to benefit of mortgagee, 40 A.L.R. 8.

Right of lessor to compensation out of estate for use of premises by receiver or assignee for creditors without adopting lease, 43 A.L.R. 734.

Priority of claim for rent during occupancy by receiver over statutory preference, 55 A.L.R. 278.

Right of receiver of conditional vendee to avail himself of defect in execution, or filing, or failure to file, contract, 61 A.L.R. 975.

Right to and conditions of appointment of receiver of rents and profits for protection of one liable for deficiency of mortgage debt, 78 A.L.R. 872.

Fire insurance: insolvency of, or appointment of receiver for, insurer as affecting subsequent losses, 79 A.L.R. 1267.

Claim of lessor or privy against receiver of lessee in respect of leasehold which latter elects not to take over, 84 A.L.R. 892; 111 A.L.R. 556.

Priority over preexisting lien or encumbrance of claims for damages arising from operation of railroad before appointment of receiver, 90 A.L.R. 664.

Power of receiver or liquidating officer of insolvent bank or trust company to borrow and pledge assets and power of court to authorize him to do so, 91 A.L.R. 1119.

Mortgagor in possession as liable to receiver for occupational rent; right to receiver as affected by mortgagor being in possession, 91 A.L.R. 1236.

Receiver of insolvent lessee, who elects to take over the lease, as holding under privity of estate within rule allowing termination of assignee's liability by reassignment of lease, 95 A.L.R. 379.

Right of bondholder who is party defendant in suit to foreclose mortgage to apply for appointment of receiver, 103 A.L.R. 1228.

Failure to take judgment for deficiency in suit to foreclose mortgage brought after appointment of receiver or trustee in bankruptcy of mortgagor as affecting right to its allowance as claim in insolvency or bankruptcy proceedings, 104 A.L.R. 1141.

Appointment of receiver of property of individual debtor or partnership on application of simple contract creditor without lien, 109 A.L.R. 279.

Appointment of receiver after decree or judgment, 111 A.L.R. 500.

Power of receiver or liquidator or trustee in bankruptcy to exchange collateral, 112 A.L.R. 476.

Right to appointment of receiver in action between persons owning or claiming to own undivided or successive interests in property or fund, 127 A.L.R. 1228.

Time when interest ceases to run upon obligation secured by lien transferred to proceeds of sale of the property free from liens in receivership, bankruptcy, or other proceedings, 134 A.L.R. 846.

Appointment of receiver at instance of plaintiffs in tort action, 4 A.L.R.2d 1278.

Allowance and priority of wage claims of employees of operating receiver, 27 A.L.R.2d 720.

Propriety of appointing receiver, at behest of mortgagee, to manage or operate property during foreclosure action, 82 A.L.R.2d 1075.

What constitutes waste justifying appointment of receiver of mortgaged property, 55 A.L.R.3d 1041.

9-8-4. Caution to be exercised in appointing receiver.

The power of appointing receivers should be prudently and cautiously exercised and except in clear and urgent cases should not be resorted to.

History.

Civil Code 1895, § 4902; Civil Code 1910, § 5477; Code 1933, § 55-303.

History of Section.

The language of this Code section is derived in part from the decision in Tumlin v. Vanhorn, 77 Ga. 315, 3 S.E. 264 (1887).

JUDICIAL DECISIONS

Receivers should by no means be lightly appointed. Warner v. Warner, 237 Ga. 462, 228 S.E.2d 848, 1976 Ga. LEXIS 1265 (1976).

Appointment of receiver is allowable only in extreme cases, and under circumstances where the interest of creditors is exposed to manifest peril. Bainbridge Power Co. v. Ivey, 173 Ga. 18, 159 S.E. 660, 1931 Ga. LEXIS 247 (1931); Templeman v. Templeman, 173 Ga. 743, 161 S.E. 261, 1931 Ga. LEXIS 392 (1931); White v. Malone, 174 Ga. 886, 164 S.E. 672, 1932 Ga. LEXIS 163 (1932); Stephens v. Stephens, 220 Ga. 22, 136 S.E.2d 726, 1964 Ga. LEXIS 437 (1964).

Appointment of receiver to prevent imminent wrong. — The high prerogative act of taking property out of the hands of one, and putting it in pound, under the order of a judge, ought not be taken, except to prevent manifest wrong imminently impending. Templeman v. Templeman, 173 Ga. 743, 161 S.E. 261, 1931 Ga. LEXIS 392 (1931); Frankel v. Frankel, 212 Ga. 643, 94 S.E.2d 728, 1956 Ga. LEXIS 478 (1956); Cleveland v. Tully, 232 Ga. 377, 207 S.E.2d 18, 1974 Ga. LEXIS 957 (1974).

Appointment of receiver proper to protect assets. — Trial court did not abuse the court's discretion in issuing an interlocutory injunction enjoining officers from disposing of any of the documents or assets of a corporation and continuing a receivership because the officers controlled the assets that were a subject of the litigation, raising the possibility that the assets could be dissipated before the litigation is resolved; although the officers made several vague arguments about the powers granted to the receiver, the officers failed to show that the trial court abused the court's discretion in granting those powers. Pittman v. State, 288 Ga. 589, 706 S.E.2d 398, 2011 Ga. LEXIS 149 (2011).

There must be some necessity for appointment of receiver, in way of protecting rights of parties by preserving the property or assets. The necessity for a receiver must clearly appear, and a receiver will not be appointed where no advantage to the party seeking a receiver can be gained thereby. Bainbridge Power Co. v. Ivey, 173 Ga. 18, 159 S.E. 660, 1931 Ga. LEXIS 247 (1931).

A receiver should not be appointed to take possession of property unless it is clearly made to appear that a receiver is required in order to protect the rights of those interested in the property. Bird v. General Disct. Corp., 194 Ga. 282, 21 S.E.2d 651, 1942 Ga. LEXIS 578 (1942); Jones v. Wilson, 195 Ga. 310, 24 S.E.2d 34, 1943 Ga. LEXIS 481 (1943).

Appointment of auditor not receiver. — In an action to judicially dissolve a limited liability company, the defendant's claim that the trial court erred by appointing the receiver without mak-

ing a finding that there was a clear and urgent need for such extraordinary relief as placing the company in a receivership failed because the trial court appointed an auditor to investigate matters of account, not a receiver. A&M Hospitalities, LLC v. Alimchandani, 351 Ga. App. 310, 828 S.E.2d 615, 2019 Ga. App. LEXIS 263 (2019), cert. denied, No. S19C1563, 2020 Ga. LEXIS 111 (Ga. Feb. 10, 2020).

Absent necessity, no change in property status pending final decree. — No matter how strong the apparent equity of the complainant may be, if there is no necessity for a receivership, the courts will not change the status until final decree. Jones v. Wilson, 195 Ga. 310, 24 S.E.2d 34, 1943 Ga. LEXIS 481 (1943); Furr v. Jordan, 196 Ga. 862, 27 S.E.2d 861, 1943 Ga. LEXIS 434 (1943); Conner v. Yawn, 200 Ga. 500, 37 S.E.2d 541, 1946 Ga. LEXIS 417 (1946); Jue v. Joe, 207 Ga. 119, 60 S.E.2d 442, 1950 Ga. LEXIS 428 (1950); Liddell v. Johnson, 213 Ga. 752, 101 S.E.2d 755, 1958 Ga. LEXIS 271 (1958).

Allegation that defendant is insolvent is insufficient alone to require appointment of receiver. Insurance Ctr., Inc. v. Hamilton, 218 Ga. 597, 129 S.E.2d 801, 1963 Ga. LEXIS 270 (1963).

Fact alone that defendant's assets lie outside state also insufficient. — Where the defendant has property and assets outside this state, that fact alone does not authorize the appointment of a receiver. Bainbridge Power Co. v. Ivey, 173 Ga. 18, 159 S.E. 660, 1931 Ga. LEXIS 247 (1931).

Where evidence is conflicting, trial court's discretion to appoint receiver is broad. Warner v. Warner, 237 Ga. 462, 228 S.E.2d 848, 1976 Ga. LEXIS 1265 (1976).

Court may appoint temporary receiver before interlocutory hearing. — If the danger of dissipating assets before an interlocutory hearing can be had is great, the court in the exercise of sound discretion may, without notice, grant a temporary restraining order or appoint a temporary receiver in order to preserve the status until the interlocutory hearing. Edwards v. United Food Brokers, Inc., 195 Ga. 1, 22 S.E.2d 812, 1942 Ga. LEXIS 686 (1942).

Assets not taken from estate representative except where danger of loss. — A receiver should not be appointed to take the assets out of the hands of the legally appointed representatives of an estate except in cases of manifest danger of loss or destruction, or material injury to the assets. Pinson v. Beamer, 179 Ga. 503, 176 S.E. 376, 1934 Ga. LEXIS 319 (1934); Furr v. Jordan, 196 Ga. 862, 27 S.E.2d 861, 1943 Ga. LEXIS 434 (1943).

Administrator's bond may provide sufficient protection to heirs. — Where the heirs allege that the administratrix of the estate is guilty of fraud and collusion with respect to the sale of property, and that a receiver should be appointed to reclaim and resell the property, but the heirs do not want to prevent the ultimate sale of the property, the question is merely one of damage resulting from an alleged breach of duty by the administratrix. In this case, her bond as administratrix would furnish an adequate remedy to the heirs, since they could not possibly be in such danger of loss or injury as to require either a receivership or an injunction for the protection of their interests. Conner v. Yawn, 200 Ga. 500, 37 S.E.2d 541, 1946 Ga. LEXIS 417 (1946).

Administrator's failure to manage estate held insufficient grounds for receivership. — Allegations that there was a farm on a tract of land belonging to an estate of which petitioners were heirs, and that since the administrator had moved away and ceased to manage the estate, there was no one looking after it, were not sufficient to authorize the appointment of a receiver. Griner v. Wilson, 181 Ga. 432, 182 S.E. 592, 1935 Ga. LEXIS 114 (1935).

Receiver properly denied. — Since the evidence did not show that the rights of the parties could not be fully protected without the appointment of a receiver, a trial court did not err in refusing to appoint a receiver; a lender did not present any evidence of insolvency, waste, mismanagement, or misappropriation of assets on the part of the owners of a restaurant. Patel v. Patel, 280 Ga. 292, 627 S.E.2d 21, 2006 Ga. LEXIS 150 (2006).

Trial court's order denying a shareholder's request for the appointment of a receiver for a corporation under O.C.G.A. § 9-8-1 was proper because there was no showing that the appointment of a receiver could have reversed an improper tax election by the corporation and, although the corporation's president inaccurately represented before 2000 that the president was the sole owner of the corporation, the corporate structure had clearly been recognized since that time, and it was not shown that these prior representations affected the current or future operation of the corporation; further, although the funds for a building's purchase were paid from the president's personal account, it was undisputed that the building was now owned by the corporation, and the evidence was that improper corporate expenditures had been adjusted in the audit so as to ensure that the shareholder's proper share of the corporation was accurately measured. There was no showing that the president or the corporation were insolvent, or that the shareholder would not have been able to ultimately gain the shareholder's appropriate share of the corporation's value. Treu v. Humanism Inv., Inc., 284 Ga. 657, 670 S.E.2d 409, 2008 Ga. LEXIS 987 (2008).

Receivership permissible in suits between cotenants of real estate. — In a suit between cotenants of real estate to obtain equitable relief with respect to the common property, a receiver may be appointed where the plaintiff's title or right is probable and a receivership is necessary for the preservation of the subject matter of the suit or for the protection of the interests of the parties therein pending the litigation. Waycross Military Ass'n v. Hiers, 209 Ga. 812, 76 S.E.2d 486, 1953 Ga. LEXIS 419 (1953); Warner v. Warner, 237 Ga. 462, 228 S.E.2d 848, 1976 Ga. LEXIS 1265 (1976).

Necessity must be shown. — Where, on the trial of an equitable petition for the partition of real estate and accounting between tenants in common, the evidence shows that the defendant against whom the charges of mismanagement were made is solvent, and no necessity for a receivership is proved, it is error to appoint receivers to take possession of and to hold and manage the property in question pending final disposition of the case. Liddell v. Johnson, 213 Ga. 752, 101 S.E.2d 755, 1958 Ga. LEXIS 271 (1958).

Receivership improper where no clear evidence of defendant's misuse. — Where the defendant was a wealthy person, and there was no evidence tending to show that the defendant was selling, concealing, wasting, mismanaging, or making any effort to dispose of or encumber any part of the defendant's holdings or had any intention to do so, there was no clear and urgent necessity for the appointment of receivers, and it was an abuse of judicial discretion and therefore erroneous for the trial judge to place the defendant's property in receivership. Frankel v. Frankel, 212 Ga. 643, 94 S.E.2d 728, 1956 Ga. LEXIS 478 (1956).

Receivership improper if defendant offers bond to assure value of assets. — Where a suit is brought in equity for appointment of a receiver to preserve assets of defendant, the mere fact that certain funds belonging to the defendants were under lien of garnishment, that the hotel building was exposed by broken windows and other damage by the fire, and that there were a number of suits pending because of injuries to guests, did not, in view of the owner's written offer to protect and preserve all the property and give bond to insure its fulfillment, authorize the appointment of a receiver. Irwin v. Willis, 202 Ga. 463, 43 S.E.2d 691, 1947 Ga. LEXIS 479 (1947).

Receiver properly appointed after dissolution of limited liability company sought. — After proceedings for dissolution of a limited liability company (LLC) were brought under O.C.G.A. § 14-11-603, the trial court properly appointed a neutral receiver to manage the affairs of the LLC during the pendency of further proceedings. The parties, who each owned half shares in the LLC, could not agree about the management of the LLC and its financial affairs, and even when accountants were hired to conduct an audit of the LLC, a meaningful accounting could not be done because the parties provided conflicting, incomplete, and inconsistent information to the accountants. Ga. Rehab. Ctr., Inc. v. Newnan Hosp., 283 Ga. 335,

658 S.E.2d 737, 2008 Ga. LEXIS 256 (2008).

No transcript meant court assumed receiver proper. — In a case involving the appointment of a receiver to sell certain real property owned by a property owner in order to satisfy a judgment a creditor obtained against the property owner, the state supreme court had to assume, in the absence of a transcript, that there was sufficient competent evidence to support the trial court's findings. Popham v. Yancey, 284 Ga. 467, 667 S.E.2d 353, 2008 Ga. LEXIS 744 (2008).

RESEARCH REFERENCES

Am. Jur. 2d.
66 Am. Jur. 2d, Receivers, § 11 et seq.

C.J.S.
75 C.J.S., Receivers, § 16 et seq.

9-8-5. Intervention of persons asserting equitable remedies.

Where property has been placed in the hands of a receiver, all persons properly seeking to assert equitable remedies against such assets shall become parties to the case by intervention and shall prosecute their remedies therein.

History.
Civil Code 1895, § 4903; Civil Code 1910, § 5478; Code 1933, § 55-304.

History of Section.
The language of this Code section is derived in part from the decisions in National Bank v. Richmond Factory, 91 Ga. 284, 18 S.E. 160 (1893) and Empire Lumber Co. v. Kiser & Co., 91 Ga. 643, 17 S.E. 972 (1893).

Law reviews.
For article discussing origin and construction of Georgia provision concerning creditors' rights and receivership, see 14 Ga. L. Rev. 239 (1980).

JUDICIAL DECISIONS

Court may permit independent equitable proceeding, instead of requiring petitioner to intervene in a cause of action in which the same court had previously appointed a receiver, where it appears that the petition in the former proceeding had merely been filed but had never been served, and that an intervention in the prior proposed proceeding would have afforded the petitioner no relief. City Bank & Trust Co. v. Graf, 175 Ga. 340, 165 S.E. 238, 1932 Ga. LEXIS 247 (1932).

Intervention not required where plaintiff's and defendant's interests identical. — Where the interests of the plaintiff and the defendant in the receivership proceedings are identical, the proceedings are collusive, and are an exception to the general rule that parties must intervene in receivership proceedings to enforce liens on the property in the hands of the receiver. City Bank & Trust Co. v. Graf, 175 Ga. 340, 165 S.E. 238, 1932 Ga. LEXIS 247 (1932).

Where plaintiff failed to intervene, the plaintiff could not have order discharging receivers vacated and set aside, especially where the plaintiff delayed filing the plaintiff's petition for considerably over a year after the receivers were discharged; nor could the plaintiff have that judgment set aside so as to reinstate the receivership and have an accounting for the money that the plaintiff paid to one of the receivers, so that the plaintiff could insist upon the plaintiff's right to a judgment against the receivers and against the surety on their bond. Castleberry v. Long, 176 Ga. 293, 167 S.E. 883, 1933 Ga. LEXIS 62 (1933).

Where shareholders and former directors seek to intervene in a receivership proceeding 15 months after the judgment they wish to set aside was rendered and after all depositors and creditors of the

defunct bank have been paid, there was no abuse of discretion in denying their motion. Cipolla v. FDIC, 244 Ga. 444, 260 S.E.2d 482, 1979 Ga. LEXIS 1274 (1979).

Construction with statutory provisions. — Order assigning a case to another judge pursuant to Ga. Unif. Super. Ct. R. 3.3 did not violate O.C.G.A. §§ 9-8-1, 9-8-5, and 9-11-24 as: (1) neither O.C.G.A. § 9-11-24 nor O.C.G.A. § 9-8-1 applied to the assignment; (2) the receiver transferred the property to a corporation before it was sold to a limited liability company (LLC), and the receiver was not named as a defendant; (3) the appellate court was unable to determine the extent that the property remained subject to orders in the receiver case, and equitable remedies affected the rights of the receiver; (4) the LLC's action was against the corporation and its managing declarant, not the receiver, and included claims for monetary damages; and (5) the managing declarant failed to show a legal or factual basis for questioning the assigned judge's staffing to support the complex litigation. Leventhal v. Cumberland Dev., LLC, 267 Ga. App. 886, 600 S.E.2d 616, 2004 Ga. App. LEXIS 661 (2004).

Disposal of interest after filing suit may block intervention. — Where the plaintiff in the main suit had transferred all the plaintiff's interest to a third person before the filing of the petitions for intervention, it was not error to sustain a motion, made at the instance of counsel for defendant and the transferee, to dismiss the main petition and disallow the intervention. Branan v. Baxter & Co., 122 Ga. 222, 50 S.E. 45, 1905 Ga. LEXIS 157 (1905).

Plaintiff lacks right to complain of disallowance. — Fact that court disallowed an intervention filed by a third person in an equitable proceeding affords to the plaintiff therein no legal ground of complaint. Gammage v. Powell, 101 Ga. 540, 28 S.E. 969, 1897 Ga. LEXIS 260 (1897).

Intervenor takes case as the intervenor finds it, and where the relief prayed grows out of a decree rendered before the filing of the intervention, the intervenor cannot be heard to attack the decree on any ground which might properly have been the subject matter of a plea by the defendant. Seaboard Air-Line Ry. v. Knickerbocker Trust Co., 125 Ga. 463, 54 S.E. 138, 1906 Ga. LEXIS 195 (1906).

An intervening creditor in an equitable suit takes the pleadings as made by the original party as the intervening creditor finds them when made a party thereto. United Bonded Whse., Inc. v. Jackson, 208 Ga. 552, 67 S.E.2d 761, 1951 Ga. LEXIS 429 (1951).

Intervening bondholder could not object to stockholder dismissing its exceptions to auditor's finding as to there being no usury, nor use the exceptions as the basis for an appeal to the appellate court. Weed v. Gainesville, Jefferson & S.R.R., 119 Ga. 576, 46 S.E. 885, 1904 Ga. LEXIS 292 (1904).

Intervenors must bear portion of litigation expenses. — Under the rules of equity pleading, parties having claims against property in the hands of a receiver are admitted as intervenors upon their own application as parties plaintiff, only upon condition that they aver a willingness to bear their portion of the expense of litigation; this is the condition upon which they are admitted as parties upon their own prayer, and being so admitted, courts of equity have power to tax them with their pro rata share of the expenses of litigation. United Bonded Whse., Inc. v. Jackson, 208 Ga. 552, 67 S.E.2d 761, 1951 Ga. LEXIS 429 (1951).

RESEARCH REFERENCES

Am. Jur. 2d.

66 Am. Jur. 2d, Receivers, §§ 244 et seq., 247.

C.J.S.

75 C.J.S., Receivers, §§ 122 et seq., 296 et seq.

9-8-6. Lienholders made parties; divestment by receiver's sale.

Persons holding liens on property in the hands of a receiver may be

made parties to the case at any time. Unless otherwise provided in the order, liens upon the property held by any parties to the record, shall be dissolved by the receiver's sale and transferred to the funds arising from the sale of the property.

History.
Civil Code 1895, § 4911; Civil Code 1910, § 5486; Code 1933, § 55-312.
History of Section.
The language of this Code section is derived in part from the decisions in Akerman v. Moon, 81 Ga. 688, 8 S.E. 321 (1888), Sullivan v. McDonald, 86 Ga. 78, 12 S.E. 215 (1890), and Trautwein v. McKinnon, 90 Ga. 301, 16 S.E. 85 (1892).
Law reviews.
For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

JUDICIAL DECISIONS

Sale by receiver could not divest lien of judgment of person not a party. McLaughlin v. Taylor, 115 Ga. 671, 42 S.E. 30, 1902 Ga. LEXIS 525 (1902); Denny v. Broadway Nat'l Bank, 118 Ga. 221, 44 S.E. 982, 1903 Ga. LEXIS 506 (1903).

RESEARCH REFERENCES

Am. Jur. 2d.
66 Am. Jur. 2d, Receivers, §§ 119 et seq., 206 et seq., 217.
C.J.S.
75 C.J.S., Receivers, §§ 281 et seq., 308.
ALR.
Power of court to authorize or direct receiver (or trustee in bankruptcy) to sell property free from liens, 35 A.L.R. 255; 78 A.L.R. 458; 120 A.L.R. 921.

9-8-7. Investment of funds in receivership.

The presiding judge, in his discretion under the law, may order any funds, in the hands of a receiver or any other officer of court, while awaiting the termination of protracted litigation, to be invested as provided in the case of executors and administrators.

History.
Orig. Code 1863, § 272; Code 1868, § 266; Code 1873, § 275; Code 1882, § 275; Civil Code 1895, § 4905; Civil Code 1910, § 5480; Code 1933, § 55-306.

JUDICIAL DECISIONS

Investment must be under direction of court. — Receiver who merely has possession and holds shall hold subject to the direction of the court, and the discretion of all trustees in the use of money is considerably narrowed; thus to invest even in state bonds, a receiver must have orders. Puckett v. Chambers, 66 Ga. App. 513, 18 S.E.2d 20, 1941 Ga. App. LEXIS 540 (1941), aff'd, 194 Ga. 401, 21 S.E.2d 713, 1942 Ga. LEXIS 588 (1942).

RESEARCH REFERENCES

Am. Jur. 2d.
66 Am. Jur. 2d, Receivers, § 96 et seq.
C.J.S.
75 C.J.S., Receivers, §§ 172, 192, 193.
ALR.
Power of receiver or liquidating officer of insolvent bank or trust company to borrow, and pledge assets, and power of court to authorize him to do so, 82 A.L.R. 1228; 91 A.L.R. 1119.

9-8-8. Receiver an officer of court; subject to court's orders or removal.

(a) The receiver is an officer and servant of the court appointing him, is responsible to no other tribunal than the court, and must in all things obey its direction.

(b) The receiver shall discharge his trust according to the orders or decrees of the court appointing him. He is at all times subject to its orders and may be brought to account and removed at its pleasure.

History.
Orig. Code 1863, §§ 273, 3081; Code 1868, §§ 267, 3093; Code 1873, §§ 276, 3150; Code 1882, §§ 276, 3150; Civil Code 1895, §§ 4906, 4908; Civil Code 1910, §§ 5481, 5483; Code 1933, §§ 55-307, 55-309.
Cross references.
Officers of court generally, § 15-13-1 et seq.

JUDICIAL DECISIONS

Court may modify orders of appointment. — Since the receiver is an officer of the court, the receiver is under the control of the judge, and if the order appointing the receiver operates harshly or disastrously, the judge may modify it upon proper application. Graham v. Fuller Elec. Co., 75 Ga. 878, 1885 Ga. LEXIS 261 (1885).

Receiver is officer of court and the property held is in custodia legis and the court has power to control it. Field v. Jones, 11 Ga. 413, 1852 Ga. LEXIS 56 (1852); Zorn v. Wheatley & Co., 61 Ga. 437, 1878 Ga. LEXIS 146 (1878); Tindall v. Westcott, 113 Ga. 1114, 39 S.E. 450, 1901 Ga. LEXIS 508 (1901); Shaw v. Caldwell, 229 Ga. 87, 189 S.E.2d 684, 1972 Ga. LEXIS 509 (1972), superseded by statute as stated in Aon Risk Servs. v. Commercial & Military Sys. Co., 270 Ga. App. 510, 607 S.E.2d 157, 2004 Ga. App. LEXIS 1423 (2004).

A receiver is an officer of the court and is not an agent or subject to the control of anyone else; hence, the actions of the receiver in the receiver's operation of the property could not be imputed to anyone else. Holiday Inns, Inc. v. Newton, 157 Ga. App. 436, 278 S.E.2d 85, 1981 Ga. App. LEXIS 1859 (1981).

It is duty of court to protect property held by its receiver and this may be done by injunction. Marshall v. Lockett, 76 Ga. 289, 1886 Ga. LEXIS 17 (1886).

Failure to obtain leave to file suit against receivers. — Dismissal of the plaintiff's lawsuit against the receivers was upheld because the plaintiff failed to obtain leave from the trial court in the lawsuit against a former business partner before filing a separate lawsuit against the receivers appointed in that case. Considine v. Murphy, 297 Ga. 164, 773 S.E.2d 176, 2015 Ga. LEXIS 354 (2015).

Duty to protect assets includes power to compel delivery of the property to the receiver. Cobb v. Black, 34 Ga. 162, 1865 Ga. LEXIS 20 (1865).

Court may, in its discretion, direct receiver to bring suit to protect the

property. Hardwock v. Hook, 8 Ga. 354, 1850 Ga. LEXIS 61 (1850); Sterling Elec. Co. v. Augusta Tel. & Elec. Co., 124 Ga. 371, 52 S.E. 541, 1905 Ga. LEXIS 717 (1905).

Receiver cannot be sued without permission of court appointing the receiver. Hollifield v. Wrightsville &. T.R.R., 99 Ga. 365, 27 S.E. 715, 1896 Ga. LEXIS 409 (1896).

Suits against court-appointed receivers. — If a trial court appoints a receiver under O.C.G.A. § 14-2-1431(c), not under O.C.G.A. § 9-8-8, nothing precludes an intervening party from suing the receiver, particularly when the harm at issue cannot be resolved by the receiver's removal. Vautrot v. West, 272 Ga. App. 715, 613 S.E.2d 19, 2005 Ga. App. LEXIS 183 (2005).

Receiver has no authority to dispose of property in the receiver's hands, in absence of order or decree authorizing the disposal from the court under which the receiver holds appointment. Gray v. Bradford, 194 Ga. 492, 22 S.E.2d 43, 1942 Ga. LEXIS 599 (1942).

Court will not authorize receiver to sell assets in the receiver's custody without receiving value therefor. The court has no authority to do so. Northeast Factor & Disct. Co. v. Mortgage Invs., Inc., 107 Ga. App. 705, 131 S.E.2d 221, 1963 Ga. App. LEXIS 962 (1963).

Receiver and court presumed to act properly in sale of assets. — It is presumed that both the receiver and the judge of the court, in the making and confirmation of the sale, have faithfully discharged their duty. Northeast Factor & Disct. Co. v. Mortgage Invs., Inc., 107 Ga. App. 705, 131 S.E.2d 221, 1963 Ga. App. LEXIS 962 (1963).

Expansion of receiver's powers to effectuate court ordered duties. — Trial court properly entered an order expanding the powers of a receiver who was appointed to oversee the operation of a limited liability company (LLC) during the pendency of a judicial dissolution of the LLC where the order was based on an affidavit the receiver submitted that indicated the receiver was unable to fulfill the receiver's duties due to the actions of one of the 50% owners of the LLC. Ga. Rehab. Ctr., Inc. v. Newnan Hosp., 284 Ga. 68, 663 S.E.2d 204, 2008 Ga. LEXIS 543 (2008).

Court, by continuing receivership, had jurisdiction to make final disposition of property according to the respective interests of the parties, and to this end could order a division by sale, if necessary. Roberts v. Federal Land Bank, 180 Ga. 832, 181 S.E. 180, 1935 Ga. LEXIS 573 (1935).

Receiver cannot place property in the receiver's possession beyond jurisdiction of court, with no authority for doing so, and thereby free the receiver from accounting to the court appointing the receiver for the funds entrusted to the receiver, at least to the extent of claims outstanding against the fund. Broyles v. Baumstark, 87 Ga. App. 155, 73 S.E.2d 257, 1952 Ga. App. LEXIS 636 (1952).

Receiver under duty to report business or property loss to court. — If it should become apparent that, under the receivership, the business is operating at a loss, it would be the duty of the receiver, or of any interested party, to report that fact promptly to the court and seek further instructions and directions in the matter. Tri-State Broadcasting Co. v. Pesterfield, 216 Ga. 381, 116 S.E.2d 556, 1960 Ga. LEXIS 478 (1960).

Notice in proceedings for removal of receiver. — It is only in cases where the receiver's conduct is called in question and where it is sought to make the receiver liable, or where the receiver is called upon to account or to make return, that the receiver is entitled to notice or to a hearing in proceedings to revoke the order of appointment. Howard v. Lowell Mach. Co., 75 Ga. 325, 1885 Ga. LEXIS 126 (1885).

RESEARCH REFERENCES

Am. Jur. 2d.

66 Am. Jur. 2d, Receivers, §§ 1 et seq.,, 57 et seq., 93 et seq., 176 et seq.

C.J.S.

75 C.J.S., Receivers, §§ 93 et seq., 142 et seq., 170.

ALR.
Duty of receiver to apply to court before making outlays for improvement, repairs, or upkeep of property, 79 A.L.R. 164.

9-8-9. To which court receivers of corporations amenable.

Receivers of corporations shall be amenable to and shall make their returns to the superior court of the county where they reside at the time of the appointment.

History.
Orig. Code 1863, § 275; Code 1868, § 269; Code 1873, § 278; Code 1882, § 278; Civil Code 1895, § 4912; Civil Code 1910, § 5487; Code 1933, § 55-313.

RESEARCH REFERENCES

Am. Jur. 2d.
66 Am. Jur. 2d, Receivers, §§ 176 et seq., 182 et seq., 188 et seq., 192 et seq.

C.J.S.
75 C.J.S., Receivers, § 142 et seq.

9-8-10. Receiver's bond.

The judge of the superior court, in his discretion, may require a receiver to give bond conditioned for the faithful discharge of the trust reposed. If bond is so required, the judge shall fix the amount thereof and shall determine the sufficiency of the security. The judge shall also regulate the compensation paid to the receiver.

History.
Orig. Code 1863, § 274; Code 1868, § 268; Code 1873, § 277; Code 1882, § 277; Civil Code 1895, § 4907; Civil Code 1910, § 5482; Code 1933, § 55-308.

JUDICIAL DECISIONS

Amount of bond discretionary with court. — Whether the security required of the receiver is sufficient is a matter of discretion. McDougald v. Dougherty, 11 Ga. 570, 1852 Ga. LEXIS 67 (1852).

While receivers ought generally to be required to give security, where the parties in interest apply for receiver's appointment, and are in all respects capable of judging the competency and responsibility of the person appointed, they may unquestionably waive security; however, in the case of infants, the court ought to look closely into the matter and see that their interests are secure, and if the receiver is not entirely responsible, security ought to be required. Johns v. Johns, 23 Ga. 31, 1857 Ga. LEXIS 213 (1857).

Appointment of receivers was not erroneous because of refusal of court to comply with request by added defendant to require plaintiffs to give bond for protection against any damage that the plaintiff might sustain as a result of such receivership, nor, under the particular facts of the case, was it error to refuse to allow the defendant to give bond in lieu of the appointment of receivers for the corporate stock in question. Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580, 1939 Ga. LEXIS 596 (1939).

Failure to give bond not an abuse of discretion. — Because officers failed to move in the trial court for the state to post a bond under the Georgia Racketeer Influenced and Corrupt Organization Act, O.C.G.A. § 16-14-6(b), the officers' claim that the trial court erred in not requiring the state to post a bond would not be considered on appeal; the officers did

move for the receiver to post a bond, but the trial court had discretion whether or not to require the receiver to give bond for the faithful discharge of the trust reposed, O.C.G.A. § 9-8-10, and the trial court did not abuse that discretion. Pittman v. State, 288 Ga. 589, 706 S.E.2d 398, 2011 Ga. LEXIS 149 (2011).

RESEARCH REFERENCES

Am. Jur. 2d.
65 Am. Jur. 2d, Receivers, § 42.
C.J.S.
75 C.J.S., Receivers, §§ 75, 472 et seq.
ALR.
Leave of court as prerequisite to action on statutory bond, 2 A.L.R. 563.

9-8-11. Liability of receiver where bank fails.

Where funds are in the hands of a receiver pending a final disposition, the receiver may deposit the funds into a bank or trust company which is insured by the Federal Deposit Insurance Corporation, Federal Savings and Loan Insurance Corporation, or successor entities. If the receiver fails to utilize such an insured bank or trust company, he shall be personally liable for any resulting loss.

History.
Civil Code 1895, § 4909; Civil Code 1910, § 5484; Code 1933, § 55-310.
History of Section.
The language of this Code section is derived in part from the decision in Ricks v. Broyles, 78 Ga. 610, 3 S.E. 772 (1887).

JUDICIAL DECISIONS

Same principles apply to receiver appointed by court as apply to county treasurer or other official as to depositing money in banks. Phillips v. Lamar, 27 Ga. 228, 1859 Ga. LEXIS 43 (1859); Ricks v. Broyles, 78 Ga. 610, 3 S.E. 772, 1887 Ga. LEXIS 38 (1887); Armstrong v. Walton, 147 Ga. 781, 95 S.E. 714, 1918 Ga. LEXIS 144 (1918).

RESEARCH REFERENCES

Am. Jur. 2d.
66 Am. Jur. 2d, Receivers, § 180 et seq.
C.J.S.
75 C.J.S., Receivers, § 190 et seq.
ALR.
Receiver's personal liability for negligence in failing to care for or maintain property in receivership, 20 A.L.R.3d 967.

9-8-12. Garnishment not available against receiver.

A receiver shall not be subject to the process of garnishment.

History.
Orig. Code 1863, § 3475; Code 1868, § 3495; Code 1873, § 3553; Code 1882, § 3553; Civil Code 1895, § 4910; Civil Code 1910, § 5485; Code 1933, § 55-311.

JUDICIAL DECISIONS

Status of clerk holding funds to await final distribution is analogous to that of receiver, who is not subject to the process of garnishment, rather than to the status of a sheriff, who is subject to such process. Bird v. Harris, 63 Ga. 433, 1879 Ga. LEXIS 239 (1879); Chance v. Simpkins, 22 Ga. App. 148, 95 S.E. 739, 1918 Ga. App. LEXIS 205 (1918).

RESEARCH REFERENCES

Am. Jur. 2d.
6 Am. Jur. 2d, Attachment and Garnishment, § 175 et seq. 65 Am. Jur. 2d, Receivers, § 162 et seq.

C.J.S.
38 C.J.S., Garnishment, § 293 et seq. 75 C.J.S., Receivers, §§ 130 et seq., 493, 494.

9-8-13. Award of attorneys' and receivers' fees; how determined.

(a) In all cases where a receiver is appointed under the laws of this state to take charge of the assets of any person, firm, or corporation and a fund is brought into court for distribution, the court having jurisdiction thereof shall award to counsel filing the petition and representing the moving creditor or creditors, out of the fund, no greater sum as fees for services rendered in filing the petition and bringing the fund into court than the services are actually worth, taking as a basis therefor the amount represented by the counsel in the original petition and the assets brought into the hands of the receiver by the services of counsel not including the assets turned over to the receiver by defendants under order of the court.

(b) In all cases where a receiver is appointed to take charge of the assets of any person, firm, or corporation, the court having jurisdiction thereof shall award to the receiver as full compensation for his services, out of the fund coming into his hands, not more than 8 percent of the first $1,000.00, 4 percent of the excess up to $5,000.00, 3 percent of the amount above $5,000.00 and not exceeding $10,000.00, and 2 percent of all sums over $10,000.00. Where the business of an insolvent person, firm, or corporation is continued and conducted by a receiver, the judge may allow such compensation as may be reasonable for such services in lieu of commissions, not exceeding the compensation paid by persons in the usual and regular conduct of such business.

(c) In all cases, the presiding judge or other competent tribunal shall allow such compensation to the attorney or attorneys filing the original petition and to the receiver or receivers appointed thereunder as their services are reasonably worth.

History.
Ga. L. 1897, p. 55, §§ 1, 2; Ga. L. 1898, p. 86, §§ 1, 2; Civil Code 1910, §§ 5488, 5489; Code 1933, §§ 55-314, 55-315.

JUDICIAL DECISIONS

Proper construction of phrase, "not including assets turned over to the receiver by defendants under order of the court," is that it refers to assets other than those "brought into the hands of the receiver by the services of counsel." The statute must be given this construction; otherwise the two expressions as to the "assets" to be considered would be so antagonistic as to nullify each other. Greyling Realty Corp. v. Lawson, 179 Ga. 188, 175 S.E. 453, 1934 Ga. LEXIS 251 (1934) (see O.C.G.A. § 9-8-13).

Assets have not been "brought into the hands of the receiver by the services of such counsel," where defendants are possessed of assets of which the plaintiffs and their counsel are entirely ignorant and which are therefore not within the contemplation of the petition. Greyling Realty Corp. v. Lawson, 179 Ga. 188, 175 S.E. 453, 1934 Ga. LEXIS 251 (1934).

This section merely states "a basis" for fees and does not exclude consideration of other things which must be material in determining what the services are "actually worth." Greyling Realty Corp. v. Lawson, 179 Ga. 188, 175 S.E. 453, 1934 Ga. LEXIS 251 (1934) (see O.C.G.A. § 9-8-13).

Power of courts of equity to fix compensation of their own receivers is well established, and results necessarily from the relation which the receiver sustains to the court, the receiver being its officer or agent, deriving the receiver's functions only from that source; in the absence, therefore, of any legislation regulating the receiver's salary or compensation, the matter is left entirely to the determination of the court from which the receiver derives the receiver's appointment. Edwards v. United Food Brokers, Inc., 196 Ga. 241, 26 S.E.2d 348, 1943 Ga. LEXIS 325 (1943).

Attorney fees can be awarded only when receivership is granted. Reserve Life Ins. Co. v. Ayers, 105 Ga. App. 804, 126 S.E.2d 448, 1962 Ga. App. LEXIS 1044 (1962).

From receivership assets, the judge may award reasonable counsel fees to the attorney whose service brought the fund into court for the benefit of those creditors who share in its distribution; and this applies to counsel for the debtor where counsel's service is beneficial rather than injurious to the client's creditors. Chas. S. Martin Distrib. Co. v. Cooper, 211 Ga. 64, 84 S.E.2d 1, 1954 Ga. LEXIS 475 (1954).

Shareholder action for judicial dissolution. — In an action by plaintiff-shareholder seeking judicial dissolution due to a shareholder deadlock, plaintiff was not entitled to attorney's fees under O.C.G.A. § 9-8-13 since the court did not appoint a receiver and bring a fund into court for distribution. Industrial Distrib. Group, Inc. v. Waite, 268 Ga. 115, 485 S.E.2d 792.

Compensation of receiver determined by court. — The compensation of the receiver, and the party or parties to be charged with the payment of the compensation, are matters to be determined exclusively by the court from which the receiver receives appointment. Hall v. Stulb, 126 Ga. 521, 55 S.E. 172, 1906 Ga. LEXIS 430 (1906).

Because the corporations and the corporates' principals did not comply with Ga. Ct. App. R. 25(c)(2) by providing legal authority to support their contentions, the trial court properly set the receiver's fees pursuant to O.C.G.A. § 9-8-13, half of which was to be paid by the corporations and the corporations' principal jointly and severally. D.C. Micro Dev., Inc. v. Briley, 310 Ga. App. 309, 714 S.E.2d 11, 2011 Ga. App. LEXIS 557 (2011).

Post-remand order awarding the receiver $8,000.00 in additional fees under O.C.G.A. § 9-8-13 was affirmed because the trial court did not abuse the court's discretion following the receiver's counsel filing an affidavit and invoices detailing the additional fees and expenses incurred in protecting the receiver's interests and defending against the ex-husband's challenges after remand of the case; no manifest abuse of discretion was shown. Sponsler v. Sponsler, 353 Ga. App. 627, 838 S.E.2d 921, 2020 Ga. App. LEXIS 56 (2020), cert. denied, No. S20C0952, 2020 Ga. LEXIS 722 (Ga. Sept. 8, 2020).

Award of attorney's fee is matter in discretion of court in which the receivership is obtained. Broyles v. Baumstark, 87 Ga. App. 155, 73 S.E.2d 257, 1952 Ga. App. LEXIS 636 (1952).

Determination of nature of services and excessiveness and apportionment of fees rests largely in discretion of trial court. First Fed. Sav. & Loan Ass'n v. Stephens, 226 Ga. 867, 178 S.E.2d 170, 1970 Ga. LEXIS 715 (1970).

Trial court's award of receiver's fee not disturbed unless discretion abused. — The taxing of administrative expense in equitable proceedings is left to the discretion of the trial judge, and the trial judge's action in such matters will not be disturbed unless a manifest abuse of such discretion is shown. Edwards v. United Food Brokers, Inc., 196 Ga. 241, 26 S.E.2d 348, 1943 Ga. LEXIS 325 (1943).

No abuse of discretion where fees not unreasonably excessive. — No matter what amounts a judge might have settled upon for fees under this section, if the judge did not exceed the range in which there could be room for reasonable and experienced minds to differ, the Supreme Court cannot declare an abuse of discretion. Greyling Realty Corp. v. Lawson, 179 Ga. 188, 175 S.E. 453, 1934 Ga. LEXIS 251 (1934) (see O.C.G.A. § 9-8-13).

Agreement to pay compensation to receiver by interested party is void unless approved by court. Hall v. Stulb, 126 Ga. 521, 55 S.E. 172, 1906 Ga. LEXIS 430 (1906).

Temporary receiver appointed without notice to defendant is not entitled to compensation out of property where the appointment was subsequently vacated and plaintiff's petition dismissed. Aetna Steel & Iron Co. v. Hamilton, 133 Ga. 85, 65 S.E. 145, 1909 Ga. LEXIS 156 (1909).

If appointment of temporary receiver at instance of plaintiff is rescinded as improvident, taking of compensation against plaintiff is not abuse of discretion. Capital City Tobacco Co. v. Anderson, 138 Ga. 667, 75 S.E. 1040, 1912 Ga. LEXIS 650 (1912).

Considerations which should control in fixing compensation are the value of the property in controversy; the particular benefit derived from the receiver's efforts and attention; time, labor, skill required, and experience in the proper performance of the duties imposed; their fair value measured by common business standards; and the degree of integrity and dispatch with which the work of the receivership is conducted. Edwards v. United Food Brokers, Inc., 196 Ga. 241, 26 S.E.2d 348, 1943 Ga. LEXIS 325 (1943).

In appraising value of services of plaintiffs' counsel, number of things should be considered, including the amount of the indebtedness to the plaintiffs and other creditors, the value of the assets or funds brought into court by the services of the attorneys, the intricacy of the facts and circumstances and of the legal questions involved, the degree of professional skill and ability required and exercised, the time and labor necessarily expended, and the benefit to the plaintiffs and the class represented. Greyling Realty Corp. v. Lawson, 179 Ga. 188, 175 S.E. 453, 1934 Ga. LEXIS 251 (1934).

It was not error for court to deny application of attorneys for allowance of fees where a suit was brought by individual holders of bonds issued by a corporation in receivership, and the suit resulted in no benefit to the corporation or to its bondholders, either by increasing the funds in the hands of the receivers or by subjecting additional property to the receivership. Christian Women's Benevolent Ass'n v. Atlanta Trust Co., 181 Ga. 576, 183 S.E. 551, 1936 Ga. LEXIS 386 (1936).

Error to amend order fixing counsel's fees at request of bankruptcy trustee. — Where court made an order fixing fees of counsel for the receiver and where, pending the receivership case, the firm was adjudicated a bankrupt in a bankruptcy court, and the trustee in bankruptcy thereafter filed an intervention in the receivership case, praying that the judgment awarding fees to counsel be modified, it was error to amend the first order fixing the fees of counsel by reducing them. Joel v. Nix, 175 Ga. 96, 165 S.E. 10, 1932 Ga. LEXIS 197 (1932).

RESEARCH REFERENCES

Am. Jur. 2d.
66 Am. Jur. 2d, Receivers, §§ 137 et seq., 144 et seq., 147 et seq., 173.
C.J.S.
75 C.J.S., Receivers, § 468 et seq.
ALR.
Priority of receiver's compensation over expenses, taxes, or receiver's certificates, 24 A.L.R. 1174.
Right of invalidly appointed receiver to compensation as such, 34 A.L.R. 1356.
Liability of one procuring appointment of receiver for expenses of receivership, 68 A.L.R. 878.
Attorneys' fees or other expenses incurred in unsuccessfully resisting appointment or attempting removal of receiver for corporation as proper claim against receiver, 89 A.L.R. 1531.
Power, after institution of bankruptcy proceedings, of court in which receivership or assignment proceedings have previously been begun, to allow or pay fees or other compensation or expenses connected therewith, 90 A.L.R. 1217.
Priority as between receiver's fees and wages earned during receivership, 128 A.L.R. 385.
Costs and other expenses incurred by fiduciary whose appointment was improper as chargeable against estate, 4 A.L.R.2d 160.
Reimbursement of expenses, other than for professional services, to official creditors' committees, or members thereof, in Chapter 11 bankruptcy proceedings, under Bankruptcy Reform Act of 1978 (11 USCS §§ 101 et seq.), 109 A.L.R. Fed. 842.

9-8-14. Expenses of giving bond allowable as cost of administration.

(a) Receivers who are required by law to give bond as such who have given as security on such bonds one or more guaranty companies, surety companies, fidelity insurance companies, or fidelity and deposit companies, as authorized by law, may include as part of their lawful expenses or costs of administration such reasonable sum or sums paid to the company or companies for the suretyship not exceeding 1 percent per annum on the amount of the bond as the court, judge, or other officer by whom they were appointed allows.

(b) Any court, judge, or other officer whose duty it is to pass upon the account of any person or corporation required to execute a bond with surety or sureties, whenever the person or corporation has given any such company or companies as security as provided in subsection (a) of this Code section, shall allow in the settlement of the account a reasonable sum for the expenses and premiums incurred in securing the surety, not exceeding the amounts specified in the subsection.

History.
Ga. L. 1903, p. 75, § 1; Civil Code 1910, §§ 4071, 4072; Code 1933, §§ 55-316, 55-317.

RESEARCH REFERENCES

Am. Jur. 2d.
66 Am. Jur. 2d, Receivers, §§ 137 et seq., 144 et seq., 147 et seq., 173.
C.J.S.
75 C.J.S., Receivers, §§ 376, 473 et seq.

CHAPTER 9

ARBITRATION

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Article 2

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9-9-60. "Medical malpractice claim" defined.
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9-9-62. Petition for arbitration; arbitration order and appointment of referee; conditions precedent to enforceability.
9-9-63. Tolling of statute of limitations; when action permitted after filing of petition for arbitration.
9-9-64. Appointment of reporter; duties; compensation.
9-9-65. Arbitration submission; irrevocability absent consent.
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9-9-67. Arbitrators — How chosen.
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9-9-69. Arbitrators — Oath and affidavit.
9-9-70. Postponement of arbitration.
9-9-71. Adjournments by arbitrators; no meeting outside group.
9-9-72. Discovery.
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9-9-76. Rules governing examination of witnesses and admission of evidence.
9-9-77. Administration of oaths by referee.
9-9-78. Findings by arbitrators; concurrence of two sufficient.
9-9-79. Copy of findings furnished parties; entry of original on court's minutes; effect and enforcement; clerk's fees.

Sec.
9-9-80. Finality of findings absent appeal; appeals to superior courts; transmittal of record; when findings set aside; disposition of case; supersedeas.
9-9-81. Costs; how taxed.
9-9-82. Compensation of arbitrators and referee.
9-9-83. Civil and criminal immunity of arbitrators.
9-9-84. [Repealed] Governor's Commission on Obstetrics.

Law reviews.

For annual survey of contract law, see 35 Mercer L. Rev. 87 (1983).

For article, "The Civil Jurisdiction of State and Magistrate Courts," see 24 Ga. St. B. J. 29 (1987).

For comment, "Refocusing Liquidated Damages Law for Real Estate Contracts: Returning to the Historical Roots of the Penalty Doctrine," see 39 Emory L.J. 267 (1990).

For article on construction law, see 42 Mercer L. Rev. 25 (1990).

For annual survey on law of contracts, see 42 Mercer L. Rev. 125 (1990).

For annual survey article on contract law, see 45 Mercer L. Rev. 109 (1993).

For annual survey article discussing developments in construction law, see 51 Mercer L. Rev. 181 (1999).

For annual survey of insurance law, see 56 Mercer L. Rev. 253 (2004).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Bias of Arbitrator, 2 POF2d 709.

Establishing Statutory Grounds to Vacate an Arbitration Award in Nonjudicial Arbitration, 27 POF3d 103.

Invalidity of Foreign Arbitration Agreement or Arbitral Award, 31 POF3d 495.

The Arbitration Contract — Making It and Breaking It, 83 POF3d 1.

U.L.A.

Uniform Arbitration Act (U.L.A.), § 1 et seq.

ALR.

Validity of statute or rule providing for arbitration of fee disputes between attorneys and their clients, 17 A.L.R.4th 993.

Liability of organization sponsoring or administering arbitration to parties involved in proceeding, 41 A.L.R.4th 1013.

Attorney's submission of dispute to arbitration, or amendment of arbitration agreement, without client's knowledge or consent, 48 A.L.R.4th 127.

ARTICLE 1

GENERAL PROVISIONS

Editor's notes.

Ga. L. 1988, p. 903, effective July 1, 1988, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of §§ 9-9-1 through 9-9-11 and was based on Orig. Code 1863, §§ 2824 — 2834, 4157; Code 1868, §§ 2832 — 2842, 4189; Code 1873, §§ 2883 — 2893, 4248; Code 1882, §§ 2883 — 2893, 4248; Civil Code 1895, §§ 4474 — 4485; Civil Code 1910, §§ 5019 — 5030; Code 1933, §§ 7-101 — 7-111. Part 1 of the present article formerly existed as Part 3 of Article 2 of this chapter.

Law reviews.

For article, "Of Courts and Statutes and Sanitary Landfills," see 21 Ga. St. B.J. 72 (1984).

For article, "Res Judicata and Collateral Estoppel: New Defenses in Construction Litigation?," see 21 Ga. St. B.J. 108 (1985).

For article, "Proposed Changes in the Arbitration Law of Georgia," see 23 Ga. St. B.J. 152 (1987).

For article, "Five Things Every Attorney Should Consider Before Approving Construction Contracts for Owners, Developers or Lenders," see 23 Ga. St. B.J. 134 (1987).

For article, "International Arbitration in Georgia," see 16 (No. 6) Ga. St. B.J. 13 (2011).

For annual survey on construction law, see 66 Mercer L. Rev. 27 (2014).

Part 1

Arbitration Code

Law reviews.

For article, "International Arbitration in Georgia," see 16 (No. 6) Ga. St. B.J. 13 (2011).

For annual survey on construction law, see 66 Mercer L. Rev. 27 (2014).

JUDICIAL DECISIONS

Federal arbitration law does not preempt the entire field of state arbitration law in all cases involving commerce; state law may apply where parties agree to be bound by state arbitration law, so long as that law does not conflict with the federal Arbitration Act, 9 U.S.C. § 1 et seq., North Augusta Assocs. v. 1815 Exchange, Inc., 220 Ga. App. 790, 469 S.E.2d 759 (1996).

Applicability. — This part did not apply to an appraisal arising out of an appraisal clause in an insurance contract. Eberhardt v. Georgia Farm Bureau Mut. Ins. Co., 223 Ga. App. 478, 477 S.E.2d 907.

Strict construction. — The Arbitration Act, O.C.G.A. § 9-9-1 et seq., is in derogation of common law and must be strictly construed and not extended beyond its plain terms. Pinnacle Constr. Co. v. Osborne, 218 Ga. App. 366, 460 S.E.2d 880, 1995 Ga. App. LEXIS 710 (1995).

Retroactivity. — The application of the Georgia Arbitration Code, O.C.G.A. § 9-9-1 et seq., to a dispute arising after its effective date to contracts entered into at an earlier date was contemplated in its enactment; the law does not provide a new remedy or repair any obligation under the contract and its application to such a dispute does not violate the constitutional prohibition against retroactive laws. Weyant v. MacIntyre, 211 Ga. App. 281, 438 S.E.2d 640, 1993 Ga. App. LEXIS 1457 (1993), cert. denied, No. S94C0456, 1994 Ga. LEXIS 368 (Ga. Feb. 3, 1994).

Relationship to materialmen's liens. — Operation of Arbitration Code and materialmen's lien law is interdependent and compatible. H.R.H. Prince Ltc. Faisal M. Saud v. Batson-Cook Co., 161 Ga. App. 219, 291 S.E.2d 249, 1982 Ga. App. LEXIS 1824 (1982).

9-9-1. Short title.

This part shall be known and may be cited as the "Georgia Arbitration Code."

History.

Code 1933, § 7-301, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-80; Code 1981, § 9-9-1, as redesignated by Ga. L. 1988, p. 903, § 1.

Law reviews.

For note, "'A Manifest Disregard of Arbitration?' An Analysis of Recent Georgia Legislation Adding 'Manifest Disregard of the Law' to the Georgia Arbitration Code as a Statutory Ground for Vacatur," see 39 Ga. L. Rev. 259 (2004).

For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004).

For article, "Methods for Discovery in Arbitration," see 13 Ga. St. B.J. 22 (2008).

For survey article on construction law, see 60 Mercer L. Rev. 59 (2008).

For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

For article, "International Arbitration in Georgia," see 16 (No. 6) Ga. St. B.J. 13 (2011).

For annual survey on construction law, see 66 Mercer L. Rev. 27 (2014).

JUDICIAL DECISIONS

Editor's notes. — In light of similarity to the provisions, decisions under former Code Section 9-9-80 are included in the annotations for this Code section.

Compelled arbitration based on contract. — Trial court erred in finding that, in an asset management contract under which a manager was engaged to administer an owner's real estate assets, the choice of remedies which the parties intended was between arbitration and litigation because the contract unambiguously provided that their choice was between termination for default on notice and arbitration after a good faith 30-day effort to resolve their dispute; thus, the manager was entitled to compel arbitration. JOJA Partners, LLC v. Abrams Props., 262 Ga. App. 209, 585 S.E.2d 168, 2003 Ga. App. LEXIS 865 (2003), cert. denied, No. S03C1672, 2003 Ga. LEXIS 964 (Ga. Nov. 10, 2003).

Arbitration provision unenforceable. — Where homebuyers did not initial a sales contract's arbitration provision, it could not have been enforced, and even if it could have been enforced, the homebuyers did not agree in writing to submit to arbitration as required by the agreement; since the homebuyers, in their case against the homebuilder, did not sue pursuant to the warranty or sign any document agreeing to submit to the arbitration provision, that provision in the warranty applied only, if at all, through the sale agreement, which gave no notice of the warranty's mandatory arbitration provision, and the trial court erred in ordering the parties to arbitration. Laird v. Risbergs, 266 Ga. App. 107, 596 S.E.2d 412, 2004 Ga. App. LEXIS 308 (2004).

Trial court's role. — Pursuant to both O.C.G.A. § 9-9-1 et seq. and the federal Arbitration Act, 9 U.S.C. § 1 et seq., the trial court properly considered the scope of the arbitrable issues in an employment agreement wherein companies sought to enjoin one of their executives from taking a position with their competitor, both for reasons of potential disclosure of trade secrets and confidential information and due to a non-competition covenant in the employment agreement. Although a court should not pass on the merits of an arbitrable controversy but rather merely determine the arbitrability thereof pursuant to O.C.G.A. § 9-9-4(d) and (e), the trial court properly found that the non-compete covenant was overly broad and therefore unenforceable, and it was not included in either the temporary restraining order issued against the executive's employment with the competitor or the order compelling arbitration. BellSouth Corp. v. Forsee, 265 Ga. App. 589, 595 S.E.2d 99, 2004 Ga. App. LEXIS 111 (2004), cert. denied, No. S04C1078, 2004 Ga. LEXIS 425 (Ga. May 24, 2004).

Because the jurisdictional issues the subcontractor raised could not be resolved until after a de novo examination of whether the parties agreed to arbitrate their dispute, the superior court's order confirming an arbitration award had to be vacated, and the case remanded, and if the court found that the parties agreed to the version of their subcontractor's agreement which contained the choice of forum and arbitration clause, personal jurisdiction and venue were proper and the arbitrator's award was to be confirmed. Panhandle Fire Prot., Inc. v. Batson Cook Co., 288 Ga. App. 194, 653 S.E.2d 802, 2007 Ga. App. LEXIS 1163 (2007).

Failure to specify formula for relief. — Vacatur of the arbitrator's award was upheld because while the lack of an amount was not fatal to the arbitrator's award, paragraph three of the arbitrator's injunctive relief in the final award failed to provide a specific formula for the general partner and the controlling stockholder's obligation to reimburse the company. Wells v. Wells-Wilson, 360 Ga. App.

646, 860 S.E.2d 185, 2021 Ga. App. LEXIS 368 (2021).

Mandatory arbitration clause not prohibited in attorney client contract. — Regardless of whether the attorney violated an ethic's rule by entering into a mandatory arbitration clause in an engagement agreement without first apprising the company of advantages and disadvantages of arbitration, the clause was not void as against public policy as no court has held that such clause may never lawfully be included in an attorney-client contract. Innovative Images, LLC v. Summerville, 309 Ga. 675, 848 S.E.2d 75, 2020 Ga. LEXIS 599 (2020).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

2A Am. Jur. Pleading and Practice Forms, Arbitration and Award, §§ 2, 98.

ALR.

Validity and effect under state law of arbitration agreement provision for alternative method of appointment of arbitrator where one party fails or refuses to follow appointment procedure specified in agreement, 75 A.L.R.5th 595.

Enforceability of arbitration clauses in collective bargaining agreements as regards claims under federal civil rights statutes, 152 A.L.R. Fed. 75.

Validity and effect under Federal Arbitration Act (9 USCA § 1 et seq.) of arbitration agreement provision for alternative method of appointment of arbitrator where one party fails or refuses to follow appointment procedure specified in agreement, 159 A.L.R. Fed. 1.

9-9-2. Applicability; exclusive method.

(a) Part 3 of Article 2 of this chapter, as it existed prior to July 1, 1988, applies to agreements specified in subsection (b) of this Code section made between July 1, 1978, and July 1, 1988. This part applies to agreements specified in subsection (b) of this Code section made on or after July 1, 1988, and to disputes arising on or after July 1, 1988, in agreements specified in subsection (c) of this Code section.

(b) Part 3 of Article 2 of this chapter, as it existed prior to July 1, 1988, shall apply to construction contracts, contracts of warranty on construction, and contracts involving the architectural or engineering design of any building or the design of alterations or additions thereto made between July 1, 1978, and July 1, 1988, and on and after July 1, 1988, this part shall apply as provided in subsection (a) of this Code section and shall provide the exclusive means by which agreements to arbitrate disputes arising under such contracts can be enforced.

(c) This part shall apply to all disputes in which the parties thereto have agreed in writing to arbitrate and shall provide the exclusive means by which agreements to arbitrate disputes can be enforced, except the following, to which this part shall not apply:

(1) Agreements coming within the purview of Article 2 of this chapter, relating to arbitration of medical malpractice claims;

(2) Any collective bargaining agreements between employers and labor unions representing employees of such employers;

(3) Any contract of insurance, as defined in Code Section 33-1-2;

provided, however, that nothing in this paragraph shall impair or prohibit the enforcement of or in any way invalidate an arbitration clause or provision in a contract between insurance companies;

(4) Any other subject matters currently covered by an arbitration statute;

(5) Any loan agreement or consumer financing agreement in which the amount of indebtedness is $25,000.00 or less at the time of execution;

(6) Any contract for the purchase of consumer goods, as defined in Title 11, the "Uniform Commercial Code," under subsection (1) of Code Section 11-2-105 and subsection (a) of Code Section 11-9-102;

(7) Any contract involving consumer acts or practices or involving consumer transactions as such terms are defined in subsection (a) of Code Section 10-1-392, relating to definitions in the "Fair Business Practices Act of 1975";

(8) Any sales agreement or loan agreement for the purchase or financing of residential real estate unless the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement. This exception shall not restrict agreements between or among real estate brokers or agents;

(9) Any contract relating to terms and conditions of employment unless the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement; or

(10) Any agreement to arbitrate future claims arising out of personal bodily injury or wrongful death based on tort.

History.

Code 1933, § 7-302, enacted by Ga. L. 1978, p. 2270, § 1; Ga. L. 1979, p. 393, § 1; Code 1981, § 9-9-81; Code 1981, § 9-9-2, as redesignated by Ga. L. 1988, p. 903, § 1; Ga. L. 1997, p. 1556, § 1; Ga. L. 2001, p. 362, § 25; Ga. L. 2009, p. 1001, § 1/HB 189; Ga. L. 2013, p. 141, § 9/HB 79; Ga. L. 2019, p. 337, § 1-94/SB 132.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 2018, "paragraph (1) of" was deleted following "as defined in" in paragraph (c)(3).

Editor's notes.

Ga. L. 2009, p. 1001, § 6, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall be applicable to all contracts for private collection of child support payments entered into on or after July 1, 2009.

Law reviews.

For annual survey of labor and employment law, see 56 Mercer L. Rev. 291 (2004).

For annual survey of construction law, see 57 Mercer L. Rev. 79 (2005).

For annual survey of insurance law, see 58 Mercer L. Rev. 181 (2006).

For article, "Georgia Condominium Law: Beyond the Condominium Act," see 13 Ga. St. B.J. 24 (2007).

For survey article on insurance law, see 59 Mercer L. Rev. 195 (2007).

For survey article on real property law, see 60 Mercer L. Rev. 345 (2008).

For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code Section 9-9-81 are included in the annotations for this Code section.

Applicability. — O.C.G.A. Pt. 1, A. 1, Ch. 9, T. 9 did not apply to an appraisal arising out of an appraisal clause in an insurance contract. Eberhardt v. Georgia Farm Bureau Mut. Ins. Co., 223 Ga. App. 478, 477 S.E.2d 907.

Federal Arbitration Act, 9 U.S.C. § 1 et seq., controlled over state law and policy with respect to signature requirements in arbitration agreements. Primerica Fin. Servs., Inc. v. Wise, 217 Ga. App. 36, 456 S.E.2d 631, 1995 Ga. App. LEXIS 361 (1995), cert. denied, No. S95C1206, 1995 Ga. LEXIS 923 (Ga. July 14, 1995).

Where an arbitration clause in a sales contract for a mobile home incorporated the federal Arbitration Act, 9 U.S.C. § 1 et seq., it preempted the provision of O.C.G.A. § 9-9-2 making agreements to arbitrate disputes arising out of consumer transactions unenforceable. Pate v. Melvin Williams Manufactured Homes, Inc., 198 B.R. 841, 1996 Bankr. LEXIS 873 (Bankr. S.D. Ga. 1996).

State law and policy with respect to the signature requirement of O.C.G.A. § 9-9-2(c)(9) must yield to the paramount federal law where the arbitration agreement requires the Federal Arbitration Act, 9 U.S.C. § 1 et seq., to apply. Langfitt v. Jackson, 284 Ga. App. 628, 644 S.E.2d 460, 2007 Ga. App. LEXIS 377 (2007).

O.C.G.A. § 9-9-2(c)(9), requiring that arbitration clauses be separately initialed, and O.C.G.A. § 9-9-2(c)(10), exempting personal bodily injury claims from arbitration, were preempted by the Federal Arbitration Act, 9 U.S.C. § 1 et seq., in an employment dispute between an employee and a brokerage firm. Davidson v. A. G. Edwards & Sons, Inc., 324 Ga. App. 172, 748 S.E.2d 300, 2013 Ga. App. LEXIS 769 (2013), cert. denied, No. S14C0284, 2014 Ga. LEXIS 147 (Ga. Feb. 24, 2014).

No application when no employer-employee relationship. — When a seller of companies challenged a covenant not to compete and an arbitration clause in the purchase agreement, O.C.G.A. § 9-9-2 did not govern the agreement between the seller and the purchaser because the seller and purchaser did not share an employer-employee relationship. Weiner v. Tootsie Roll Indus., 412 Fed. Appx. 224, 2011 U.S. App. LEXIS 2136 (11th Cir. 2011).

Relation to Convention on the Recognition of Foreign Arbitral Awards. — Georgia-based investment company's argument that an arbitration agreement was unenforceable under O.C.G.A. § 9-9-2 failed, as Congress's adoption of the Convention on the Recognition of Foreign Arbitral Awards, which expresses a strong international policy in favor of enforcing commercial arbitration agreements and concomitantly limits the affirmative defenses to only those universally recognized under the Convention, supersedes state-based anti-arbitration defenses otherwise available in the domestic context by operation of the McCarran-Ferguson Act. Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I, Inc., 466 F. Supp. 2d 1293, 2006 U.S. Dist. LEXIS 91036 (N.D. Ga. 2006).

Fair Business Practices Act claim covered by arbitration clause. — Trial court erred in refusing to compel arbitration as to all counts of buyers' complaint against a seller to recover damages for construction defects in the buyers' new home because the claim the buyers asserted under the Fair Business Practices Act of 1975, O.C.G.A. § 10-1-390 et seq., was covered by the arbitration clause of the parties' agreement since the arbitration clause of the agreement was specifically included within the ambit of the Georgia Arbitration Code (GAC) by

O.C.G.A. § 9-9-2(c)(8) when the parties initialed the arbitration clause as required by the GAC; because the GAC applied to the agreement's arbitration clause by reason of § 9-9-2(c)(8), the arbitration clause was not excluded from the GAC by the "consumer transactions" exception of O.C.G.A. § 9-9-2(c)(7). Order Homes, LLC v. Iverson, 300 Ga. App. 332, 685 S.E.2d 304, 2009 Ga. App. LEXIS 967 (2009).

Agreement not preempted by federal law. — The federal Arbitration Act, 9 U.S.C. § 1 et seq., did not preempt application of the Georgia Arbitration Code in an action involving an agreement covering employment of a doctor by a Georgia professional corporation. Columbus Anesthesia Group v. Kutzner, 218 Ga. App. 51, 459 S.E.2d 422, 1995 Ga. App. LEXIS 652 (1995), cert. denied, No. S95C1814, 1995 Ga. LEXIS 1188 (Ga. Nov. 8, 1995).

Denial of a title insurer's motion to compel arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., was upheld, as under 15 U.S.C. § 1012(b) of the McCarran-Ferguson Act, O.C.G.A. § 9-9-2(c) of the Georgia Arbitration Code (GAC) was a law for the purpose of regulating the business of insurance and not preempted by the FAA; inter alia, the GAC affected the insurer-insured relationship by invalidating the parties' chosen mode of contract enforcement, affected the transferring or spreading of risk by introducing the possibility of jury verdicts, regulated an integral part of the parties' relationship by subjecting all policy disputes to a possible jury trial, and applied only to the insurance industry. McKnight v. Chicago Title Ins. Co., 358 F.3d 854, 2004 U.S. App. LEXIS 1436 (11th Cir. 2004).

Sanitary landfill operation contract. — A sanitary landfill may be likened to a long-term construction project in that most aspects of conventional construction activity are undertaken; in order for a sanitary landfill to be operated in compliance with state and federal laws and regulations, in a sense it must be continually under construction. Therefore, a contract in which one agrees to operate a landfill in compliance with applicable state and federal laws and regulations is a "construction contract" within the ordinary meaning of the term and, therefore, within the intent of the Georgia Arbitration Code for Construction Contracts. Camp v. City of Columbus, 252 Ga. 120, 311 S.E.2d 834, 1984 Ga. LEXIS 622 (1984) (decided under former O.C.G.A. § 9-9-81).

Contract for demolition and salvage of two buildings was not a construction for the purposes of former O.C.G.A. § 9-9-80 et seq. Price & Sons Grading Co. v. Associated Iron & Metal Co., 171 Ga. App. 270, 319 S.E.2d 105, 1984 Ga. App. LEXIS 2188 (1984) (decided under former O.C.G.A. § 9-9-81).

Agreements for the sale of new houses built by the seller are subject to the requirement that arbitration provisions be initialed by the parties. Pinnacle Constr. Co. v. Osborne, 218 Ga. App. 366, 460 S.E.2d 880, 1995 Ga. App. LEXIS 710 (1995).

Where homebuyers did not initial a sales contract's arbitration provision, it could not have been enforced, and even if it could have been enforced, the homebuyers did not agree in writing to submit to arbitration as required by the agreement; since the homebuyers, in their case against the homebuilder, did not sue pursuant to the warranty or sign any document agreeing to submit to the arbitration provision, that provision in the warranty applied only, if at all, through the sale agreement, which gave no notice of the warranty's mandatory arbitration provision, and the trial court erred in ordering the parties to arbitration. Laird v. Risbergs, 266 Ga. App. 107, 596 S.E.2d 412, 2004 Ga. App. LEXIS 308 (2004).

Initialing arbitration clause in home buyers' warranty not required. — It was not necessary that an arbitration provision in a home buyer's warranty be initialed for the provision to be enforceable. O.C.G.A. § 9-9-2(c)(8), requiring initialing, did not apply to home buyers' warranties; moreover, under a choice of law clause, the warranty was governed by the Federal Arbitration Act, which preempted Georgia's initialing requirement. Harrison v. Eberhardt, 287 Ga. App. 561, 651 S.E.2d 826, 2007 Ga. App. LEXIS 1023 (2007).

A builder's warranty was not a home sale or loan contract and, therefore, subparagraph (c)(8) of O.C.G.A. § 9-9-2 did not apply to require the parties' initials beside the warranty's arbitration provision. Haynes v. Fincher, 241 Ga. App. 179, 525 S.E.2d 405.

Alleged tortious act of home seller not subject to arbitration. — Though the parties entered a valid and binding agreement to arbitrate all disputes under the Georgia Arbitration Code, O.C.G.A. § 9-9-1 et seq., the Code was never intended to encompass personal injury or wrongful death actions; indeed O.C.G.A. § 9-9-2(c)(1) and (c)(10) expressly excluded such subject matter from coverage. Therefore, claims by home buyers' that the home seller negligently failed to construct, install, and inspect their house for carbon monoxide, which poisoned them and caused them tortious injury, was not subject to binding arbitration and the home seller's motion to compel such arbitration was properly denied. Dream Maker Constr., Inc. v. Murrell, 268 Ga. App. 721, 603 S.E.2d 72, 2004 Ga. App. LEXIS 1003 (2004), cert. denied, No. S04C2070, 2004 Ga. LEXIS 971 (Ga. Oct. 25, 2004).

Arbitration clause valid for long term care facility. — Appellate court reversed the trial court's decision that an Arbitration Agreement was unconscionable, and affirmed the trial court's decision to reject the aunt's claims that the Arbitration Agreement was not valid because it lacked consideration, that enforcement was precluded by the federal Medicaid Act and implementing regulations, that FAA did not apply, and that the Arbitration Agreement was not enforceable because it precluded vindication of the nephew's rights under Georgia's Bill of Rights for Residents of Long-Term Care Facilities, O.C.G.A. § 31-8-100 et seq. CL SNF, LLC v. Fountain, 364 Ga. App. 371, 875 S.E.2d 370, 2022 Ga. App. LEXIS 314 (2022).

Agreement to submit to binding arbitration. — Where, after litigation had commenced, the parties signed a consent order expressly agreeing to submit to binding arbitration, they waived their right to a jury trial upon entry of the order by the court, and reference in the order to a local rule of court did not render the arbitration of the parties' claims nonbinding. Ekereke v. Obong, 265 Ga. 728, 462 S.E.2d 372, 1995 Ga. LEXIS 854 (1995).

Owner agreed to binding arbitration of a dispute concerning the construction of a house because, although the owner did not sign the warranty application, the owner signed a request for arbitration form, completed a "Construction Defects to Be Arbitrated Form," and signed an acknowledgment before participating in the arbitration that allowed the arbitrator to issue an award "in accordance with the arbitration provisions in the warranty booklet," which provided for binding arbitration. Witherington v. Adkins, 271 Ga. App. 837, 610 S.E.2d 561, 2005 Ga. App. LEXIS 98 (2005), cert. denied, No. S05C1105, 2005 Ga. LEXIS 488 (Ga. June 30, 2005).

Trial court did not err in dismissing a spouse's claims against a builder on the ground that the spouse was equitably estopped from asserting claims for negligent construction and breach of warranty since the spouse was subject to the arbitration clause contained in a purchase-and-sale agreement the other spouse entered into with the builder because the claims of negligent construction and breach of warranty arose under, and presumed the existence of, the purchase-and-sale agreement, and the claims were so intertwined with the other spouse's claims against the builder that the spouse was estopped from avoiding arbitration. Moreover, the husband and wife asserted the same claims against the builders, thus requiring the spouse to assert the spouse's claims in the same forum as the husband eliminated the potential for varying decisions, discreditable to the administration of justice. Helms v. Franklin Builders, Inc., 305 Ga. App. 863, 700 S.E.2d 609, 2010 Ga. App. LEXIS 764 (2010).

Arbitration limited to agreed issues. — Where a stipulation in a home building agreement called for submission to arbitration of disputes relating to construction of the home, the arbitrator was without any authority to arbitrate any issue relating to conveyance of the property. Goodrich v. Southland Homes Corp.,

214 Ga. App. 790, 449 S.E.2d 154, 1994 Ga. App. LEXIS 1067 (1994).

A trial court did not err in dismissing a complaint, which sought to try the issues of breach of fiduciary duty asserted by plaintiffs, as the parties, at least implicitly, if not expressly, agreed to submit the fiduciary duty claims to arbitration, which were thereafter denied by the arbitration award. Although plaintiffs initially sought to exclude the fiduciary duty claims from the arbitration, plaintiffs presented evidence on the elements of a breach of fiduciary duty and asserted that those claims were before the arbitrator. Ansley Marine Constr., Inc. v. Swanberg, 290 Ga. App. 388, 660 S.E.2d 6, 2008 Ga. App. LEXIS 170 (2008), cert. denied, No. S08C1260, 2008 Ga. LEXIS 673 (Ga. Sept. 8, 2008).

Construction contract subject to arbitration. — An agreement styled as a "Home Building Agreement" was a construction contract rather than a residential real estate contract and thus was subject to the Georgia Arbitration Code, O.C.G.A. § 9-9-1 et seq. Goodrich v. Southland Homes Corp., 214 Ga. App. 790, 449 S.E.2d 154, 1994 Ga. App. LEXIS 1067 (1994).

Arbitration agreements in insurance policies. — Because Georgia law invalidated an arbitration agreement in an insurance policy, the trial court did not err by denying the insured's motion seeking to compel arbitration and stay a suit. Georgia law was not preempted by federal law in this case. Cont'l Ins. Co. v. Equity Residential Props. Trust, 255 Ga. App. 445, 565 S.E.2d 603, 2002 Ga. App. LEXIS 642 (2002), cert. denied, No. S02C1476, 2002 Ga. LEXIS 711 (Ga. Sept. 6, 2002).

A provision in a state's arbitration code excepting insurance contracts is a law regulating the business of insurance for purposes of the McCarran-Ferguson Act, and O.C.G.A. § 9-9-2(c)(3) is a law enacted to regulate the business of insurance within the meaning of the McCarran-Ferguson Act; thus, O.C.G.A. § 9-9-2(c)(3) is excepted from preemption by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. McKnight v. Chicago Title Ins. Co., 358 F.3d 854, 2004 U.S. App. LEXIS 1436 (11th Cir. 2004).

Based on the facts that selling memberships in automobile clubs was insurance under O.C.G.A. § 33-1-2(2) (now paragraph (4)) and that application of the Federal Arbitration Act (FAA), 9 USC §§ 1-16, would impair O.C.G.A. § 9-9-2(c)(3), the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, preempted the FAA and prohibited enforcement of the parties' arbitration agreement. Love v. Money Tree, Inc., 279 Ga. 476, 614 S.E.2d 47, 2005 Ga. LEXIS 419 (2005).

Conclusion that the insured party's claims alleging fraud, breach of contract, and violations of the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., were rendered moot by application of the appraisal clause was contrary to law; this would have converted the appraisal clause into an arbitration clause, which would have been impermissible under O.C.G.A. § 9-9-2(c)(3) in contracts between insured parties and insurers. McGowan v. Progressive Preferred Ins. Co., 281 Ga. 169, 637 S.E.2d 27, 2006 Ga. LEXIS 884 (2006).

Though agreement between insurer and Chapter 11 debtor had a binding arbitration clause, insurer's motion to dismiss debtor's complaint seeking recovery of overpaid premiums to benefit bankruptcy estate was overruled because agreement was an "insurance contract" to which anti-arbitration provision in O.C.G.A. § 9-9-2(c)(3), which was enforceable per McCarran-Ferguson Act, 15 U.S.C. § 1012(b), applied. Davis v. Zurich Am. Ins. Co. (In re TFI Enters.), No. 05-40683 RFH, No. 08-4005, 2008 Bankr. LEXIS 1059 (Bankr. M.D. Ga. Apr. 9, 2008).

O.C.G.A. § 9-9-2(c)(3) invalidates arbitration agreements in insurance contracts as defined in O.C.G.A. § 33-1-2, with the exception that it does not prohibit enforcement of arbitration agreements in contracts between insurance companies; simply stated, in Georgia a contract of insurance is not subject to arbitration unless the contract is between insurance companies. Davis v. Zurich Am. Ins. Co. (In re TFI Enters.), No. 05-40683 RFH, No. 08-4005, 2008 Bankr. LEXIS 1059 (Bankr. M.D. Ga. Apr. 9, 2008).

Mandatory arbitration clause not prohibited in attorney client contract. — Regardless of whether the attorney violated an ethic's rule by entering

into a mandatory arbitration clause in an engagement agreement without first apprising the company of advantages and disadvantages of arbitration, the clause was not void as against public policy as no court has held that such clause may never lawfully be included in an attorney-client contract. Innovative Images, LLC v. Summerville, 309 Ga. 675, 848 S.E.2d 75, 2020 Ga. LEXIS 599 (2020).

Notice of right to seek stay of arbitration. — No prejudice resulted from failure of demand for arbitration to give notice of the right to seek a stay of arbitration where the party had notice of the arbitration hearing and participated therein without objection. Goodrich v. Southland Homes Corp., 214 Ga. App. 790, 449 S.E.2d 154, 1994 Ga. App. LEXIS 1067 (1994).

Disputes arising after July 1, 1988. — Although the shareholders' agreement involved in the action was executed in 1983, it contained a specific, written agreement to arbitrate as contemplated by subsection (c) of O.C.G.A. § 9-9-2 and, thus, the statutory arbitration provisions were binding on the parties. Weyant v. MacIntyre, 211 Ga. App. 281, 438 S.E.2d 640, 1993 Ga. App. LEXIS 1457 (1993), cert. denied, No. S94C0456, 1994 Ga. LEXIS 368 (Ga. Feb. 3, 1994).

Agreement including terms and conditions of employment unenforceable. — The arbitration provision in an agreement establishing a doctor's ownership interests in a professional corporation, and including the terms and conditions of the doctor's employment, was unenforceable under the Georgia Arbitration Code, O.C.G.A. § 9-9-1 et seq. Columbus Anesthesia Group v. Kutzner, 218 Ga. App. 51, 459 S.E.2d 422, 1995 Ga. App. LEXIS 652 (1995), cert. denied, No. S95C1814, 1995 Ga. LEXIS 1188 (Ga. Nov. 8, 1995).

Arbitration clause unenforceable in employment contract where not initialed by signatories. — Although an arbitration provision in an employment agreement was found to be unenforceable because it was not initialed by all of the signatories, as required by O.C.G.A. § 9-9-2(c)(9), the remainder of the agreement was enforceable because it was severable from the arbitration clause; it was found that the contract was severable under O.C.G.A. § 13-1-8(a) because it contained multiple promises based upon multiple consideration. ISS Int'l Serv. Sys. v. Widmer, 264 Ga. App. 55, 589 S.E.2d 820, 2003 Ga. App. LEXIS 999 (2003), cert. denied, No. S04C0544, 2004 Ga. LEXIS 216 (Ga. Mar. 1, 2004).

The arbitration clause in the employment agreement was unenforceable because, although the signatories initialed the bottom of every page of the agreement, the signatories did not specifically initial the arbitration clause as required by O.C.G.A. § 9-9-2; thus, the trial court erred in dismissing the employee's complaint and compelling arbitration. Vasudeva v. Dagnew, 361 Ga. App. 244, 862 S.E.2d 326, 2021 Ga. App. LEXIS 404 (2021).

Independent contractors. — Trial court erred in finding that, in an asset management contract under which a manager was engaged to administer an owner's real estate assets, an arbitration provision could not be enforced because the parties had not initialed it, because the statutory provision requiring initialing, O.C.G.A. § 9-9-2(c)(9), only applied to employment contracts, and the parties' contract was not an employment contract because the manager was explicitly retained as an independent contractor. JOJA Partners, LLC v. Abrams Props., 262 Ga. App. 209, 585 S.E.2d 168, 2003 Ga. App. LEXIS 865 (2003), cert. denied, No. S03C1672, 2003 Ga. LEXIS 964 (Ga. Nov. 10, 2003).

Failure to specify formula for relief. — Vacatur of the arbitrator's award was upheld because while the lack of an amount was not fatal to the arbitrator's award, paragraph three of the arbitrator's injunctive relief in the final award failed to provide a specific formula for the general partner and the controlling stockholder's obligation to reimburse the company. Wells v. Wells-Wilson, 360 Ga. App. 646, 860 S.E.2d 185, 2021 Ga. App. LEXIS 368 (2021).

Health care power of attorney does not confer authority to sign arbitration agreement. — Health care facility's motion to compel arbitration of a child's

wrongful death claim was properly denied. As a durable health care power of attorney a parent gave the child did not authorize the child to bind the parent to arbitration, the agreement to arbitrate signed by the child was unenforceable. Life Care Ctrs. of Am. v. Smith, 298 Ga. App. 739, 681 S.E.2d 182, 2009 Ga. App. LEXIS 704 (2009), cert. denied, No. S09C1873, 2010 Ga. LEXIS 165 (Ga. Feb. 8, 2010).

9-9-3. Effect of arbitration agreement.

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit any controversy thereafter arising to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award.

History.

Code 1933, § 7-303, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-82; Code 1981, § 9-9-3, as redesignated by Ga. L. 1988, p. 903, § 1.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Code Section 9-9-82 are included in the annotations for this Code section.

Federal Arbitration Act controlled confirmation of award. — Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., rather than Georgia law, controlled confirmation of an arbitration award made pursuant to the FAA; an order confirming an arbitration award was reversed and the case was remanded for reconsideration in light of the FAA. Adage, Inc. v. Bank of Am., N.A., 267 Ga. App. 877, 600 S.E.2d 829, 2004 Ga. App. LEXIS 800 (2004).

Right to enforcement of arbitration clause. — In an action by a subcontractor against general contractor based on a contract containing an arbitration clause, where there was an arbitrable dispute, it was error for the trial court to deny the general contractor's motion to enforce the arbitration clause. Bishop Contracting Co. v. Center Bros., 213 Ga. App. 804, 445 S.E.2d 780, 1994 Ga. App. LEXIS 753 (1994), cert. denied, No. S94C1677, 1994 Ga. LEXIS 1119 (Ga. Oct. 17, 1994).

In a dispute over construction of a home in which the homeowners sought rescission, an arbitration clause in the parties' contract providing that the parties agreed to submit any controversy to arbitration was enforceable without regard to the controversy's justiciable character under O.C.G.A. § 9-9-3. D. S. Ameri Constr. Corp. v. Simpson, 271 Ga. App. 825, 611 S.E.2d 103, 2005 Ga. App. LEXIS 186 (2005).

Construction company's claim that a grocery store owner's representative who signed a contract which contained an agreement to arbitrate lacked the power to sign under the Equal Dignity Rule, pursuant to O.C.G.A. § 10-6-2, as the authority to sign the agreement and the agreement itself, had to be in writing under O.C.G.A. § 9-9-3, lacked merit, as the contract clearly provided that the representative was acting on behalf of the owner, and, further, the company was not the proper party to dispute the agent's authority under O.C.G.A. § 10-6-2; rather, that statute was for the principal's use to dispute an agent's authority to act on the principal's behalf. Barron Reed Constr. v. 430, LLC, 275 Ga. App. 884, 622 S.E.2d 83, 2005 Ga. App. LEXIS 1131 (2005), cert. denied, No. S06C0441, 2006 Ga. LEXIS 232 (Ga. Mar. 27, 2006).

Based on the clear terms of an arbitration clause in a timber harvesting contract between a landowner and a timber harvesting contractor, the trial court did not err in compelling the contractor into arbitration as the contract had not expired, arbitration of a tort claim was not in-

volved, and the language within the contract clearly covered the issues the landowner sought to arbitrate. Pickle v. Rayonier Forest Res., L.P., 282 Ga. App. 295, 638 S.E.2d 344, 2006 Ga. App. LEXIS 1264 (2006), cert. denied, No. S07C0435, 2007 Ga. LEXIS 218 (Ga. Feb. 26, 2007).

Trial court erred in refusing to compel arbitration as to all counts of the buyers' complaint against a seller to recover damages for construction defects in the buyers' new home because the arbitration clause in the parties' agreement was broad enough to cover the buyers' claims for equitable rescission; the buyers did not attack the validity of the agreement to arbitrate but instead argued that the entire contract should be rescinded due to fraud. Order Homes, LLC v. Iverson, 300 Ga. App. 332, 685 S.E.2d 304, 2009 Ga. App. LEXIS 967 (2009).

Parties entered into a valid, enforceable agreement to arbitrate the underlying dispute; by executing the Affiliation Resolution, defendant agreed to accept the Discipline—a collection of rules and procedure and organization—which contained a conflict resolution provision. The underlying dispute was a non-doctrinal dispute as it was a property dispute arising from, or related to, defendant's withdrawal from plaintiff, consequently it was subject to the conflict resolution provision; further, legal constraints external to the parties' agreement did not foreclose arbitration. General Conf. of the Evangelical Methodist Church v. Evangelical Methodist Church of Dalton, 807 F. Supp. 2d 1291, 2011 U.S. Dist. LEXIS 100450 (N.D. Ga. 2011).

Trial court erred by denying a client's motion to compel arbitration of the claim against a debt settlement corporation for violations of the debt adjusting statutes, O.C.G.A. § 18-5-1 et seq., because the arbitration provision in the debt settlement agreement mandated arbitration of all disputes and claims between the parties related to the agreement and the claim that the corporation violated statutes regulating the business of debt adjusting was connected to the debt settlement agreement. Penso Holdings, Inc. v. Cleveland, 324 Ga. App. 259, 749 S.E.2d 821, 2013 Ga. App. LEXIS 829 (2013).

Arbitration could proceed even if other promises unenforceable. — In a golf course developer's appeal from an arbitration award, the developer's argument that a prior arbitration had concluded that the arbitration clause was unenforceable was rejected because the prior arbitration merely found a lack of mutuality of obligation as to other promises and parties; also, the agreement contained a severability clause, allowing the arbitration clause to stand even if other promises were illegal. Perry Golf Course Dev., LLC v. Columbia Residential, LLC, 337 Ga. App. 525, 786 S.E.2d 565, 2016 Ga. App. LEXIS 332 (2016).

Binding settlement reached. — Minor's exemption under O.C.G.A. § 13-5-3 from contractual liability is a personal privilege which others may not assert as a defense; binding settlement agreement was reached between an insurer and a minor injured party even though: (1) a contract of a minor is voidable under O.C.G.A. § 13-3-20(a); (2) judicial approval pursuant to O.C.G.A. § 29-2-16 postdated the settlement agreement; and (3) no guardian had been appointed for the minor at the time the agreement was reached. Grange Mut. Cas. Co. v. Kay, 264 Ga. App. 139, 589 S.E.2d 711, 2003 Ga. App. LEXIS 1422 (2003), cert. denied, No. S04C0557, 2004 Ga. LEXIS 313 (Ga. Mar. 29, 2004).

Relationship to materialmen's lien enforcement. — Appellee was entitled to protect its rights to materialmen's lien by filing claim of lien and by filing petition to foreclose said lien at same time it pursued its arbitration rights under contract. H.R.H. Prince Ltc. Faisal M. Saud v. Batson-Cook Co., 161 Ga. App. 219, 291 S.E.2d 249, 1982 Ga. App. LEXIS 1824 (1982) (decided under former § 9-9-82).

Waiver. — Where a bank filed a multicount counterclaim to a petroleum company's complaint alleging mismanagement of the company's account, engaged in extensive discovery, and did not demand arbitration for nine months, it waived its right to demand arbitration, and the trial court erred when it granted the bank's motion to dismiss the company's action so the parties could arbitrate their dispute. Griffis v. Branch Banking & Trust Co., 268 Ga. App. 588, 602 S.E.2d 307, 2004 Ga. App. LEXIS 966 (2004).

RESEARCH REFERENCES

ALR.

Claim of fraud in inducement of contract as subject to compulsory arbitration clause contained in contract, 11 A.L.R.4th 774.

Awarding attorneys' fees in connection with arbitration, 60 A.L.R.5th 669.

Enforcement of arbitration agreement contained in construction contract by or against nonsignatory, 100 A.L.R.5th 481.

9-9-4. Application to court; venue; service of papers; scope of court's consideration; application for order of attachment or preliminary injunction.

(a)(1) Any application to the court under this part shall be made to the superior court of the county where venue lies, unless the application is made in a pending court action, in which case it shall be made to the court hearing that action. Subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.

(2) All applications shall be by motion and shall be heard in the manner provided by law and rule of court for the making or hearing of motions, provided that the motion shall be filed in the same manner as a complaint in a civil action.

(b) Venue for applications to the court shall lie:

(1) In the county where the agreement provides for the arbitration hearing to be held; or

(2) If the hearing has already been held, in the county where it was held; or

(3) In the county where any party resides or does business; or

(4) If there is no county as described in paragraph (1), (2), or (3) of this subsection, in any county.

(c)(1) A demand for arbitration shall be served on the other parties by registered or certified mail or statutory overnight delivery, return receipt requested.

(2) The initial application to the court shall be served on the other parties in the same manner as a complaint under Chapter 11 of this title.

(3) All other papers required to be served by this part shall be served in the same manner as pleadings subsequent to the original complaint and other papers are served under Chapter 11 of this title.

(d) In determining any matter arising under this part, the court shall not consider whether the claim with respect to which arbitration is sought is tenable nor otherwise pass upon the merits of the dispute.

(e) The superior court in the county in which an arbitration is pending, or, if not yet commenced, in a county specified in subsection (b) of this Code section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.

History.

Code 1933, § 7-305, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-84 [repealed]; Code 1981, § 9-9-4, as redesignated by Ga. L. 1988, p. 903, § 1; Ga. L. 2000, p. 1589, § 3.

Editor's notes.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Law reviews.

For survey article on construction law, see 60 Mercer L. Rev. 59 (2008).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Code Section 9-9-84 are included in the annotations for this Code section.

Venue. — The state arbitration law, O.C.G.A. § 9-9-1 et seq., due to preemption by the federal arbitration code, 9 U.S.C. § 1 et seq., when interstate commerce is involved, will never be applicable where one party is not from Georgia. Tampa Motel Mgt. Co. v. Stratton of Fla., Inc., 186 Ga. App. 135, 366 S.E.2d 804, 1988 Ga. App. LEXIS 276 (1988).

Limited discovery permitted. — Even though a confirmation proceeding is not a civil action, the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, governing discovery applies; thus, limited discovery relating to affirmative defenses to confirmation of an arbitration award may be permitted. Hardin Constr. Group, Inc. v. Fuller Enters., Inc., 265 Ga. 770, 462 S.E.2d 130, 1995 Ga. LEXIS 719 (1995).

Motion to set aside arbitration award can be brought in pending suit. — Owners timely moved to set aside an arbitration award on their breach of contract and fraud claims arising out of the construction of a house because they sought to set aside the award in a judicial foreclosure suit concerning the house. Witherington v. Adkins, 271 Ga. App. 837, 610 S.E.2d 561, 2005 Ga. App. LEXIS 98 (2005), cert. denied, No. S05C1105, 2005 Ga. LEXIS 488 (Ga. June 30, 2005).

Role of court. — Pursuant to both O.C.G.A. § 9-9-1 et seq. and the Federal Arbitration Act, 9 U.S.C. § 1 et seq., the trial court properly considered the scope of the arbitrable issues in an employment agreement wherein companies sought to enjoin one of their executives from taking a position with their competitor, both for reasons of potential disclosure of trade secrets and confidential information and due to a non-competition covenant in the employment agreement. Although a court should not pass on the merits of an arbitrable controversy but rather merely determine the arbitrability thereof, pursuant to O.C.G.A. § 9-9-4(d) and (e), the trial court properly found that the non-compete covenant was overly broad and therefore unenforceable, and it was not included in either the temporary restraining order issued against the executive's employment with the competitor or the order compelling arbitration. BellSouth Corp. v. Forsee, 265 Ga. App. 589, 595 S.E.2d 99, 2004 Ga. App. LEXIS 111 (2004), cert. denied, No. S04C1078, 2004 Ga. LEXIS 425 (Ga. May 24, 2004).

Because the jurisdictional issues the subcontractor raised could not be resolved until after a de novo examination of whether the parties agreed to arbitrate their dispute, the superior court's order confirming an arbitration award had to be vacated, and the case remanded, and if

the court found that the parties agreed to the version of their subcontractor's agreement which contained the choice of forum and arbitration clause, personal jurisdiction and venue were proper and the arbitrator's award was to be confirmed. Panhandle Fire Prot., Inc. v. Batson Cook Co., 288 Ga. App. 194, 653 S.E.2d 802, 2007 Ga. App. LEXIS 1163 (2007).

Role of arbitrator. — Court of Appeals erroneously held that the arbitrator, and not the court, should have decided whether arbitration was barred by res judicata, as: (1) no presumption existed that an arbitrator was in a better position than a court to apply a legal doctrine such as res judicata; (2) the parties did not expressly reserve the issue for arbitration; and (3) there was no presumption under Georgia law that the application of a procedural bar such as res judicata was a matter to be determined exclusively by an arbitrator. Bryan County v. Yates Paving & Grading Co., 281 Ga. 361, 638 S.E.2d 302, 2006 Ga. LEXIS 1033 (2006).

Arbitration under O.C.G.A. § 9-9-4(d) was properly compelled for debtors' claim for a setoff from amounts due under a note because the parties' agreement contained an arbitration provision, and the setoff claim sought affirmative relief, which arose from the parties' business relationship. Dunaway v. UAP/GA AG. Chem., Inc., 301 Ga. App. 282, 687 S.E.2d 211, 2009 Ga. App. LEXIS 1362 (2009), cert. denied, No. S10C0550, 2010 Ga. LEXIS 297 (Ga. Mar. 29, 2010).

Arbitrator did not overstep the arbitrator's authority under O.C.G.A. § 9-9-13(b)(3) in denying debtors' claim for a setoff from amounts due under a note because the award reflected the fact that the arbitrator considered the debtors' evidence and produced a definite award. Dunaway v. UAP/GA AG. Chem., Inc., 301 Ga. App. 282, 687 S.E.2d 211, 2009 Ga. App. LEXIS 1362 (2009), cert. denied, No. S10C0550, 2010 Ga. LEXIS 297 (Ga. Mar. 29, 2010).

Trial court properly granted a former employer's motion to compel arbitration because there was a causal connection between the former employee's claims for defamation, tortious interference with a business expectancy, and lost income and the former employee's employment and termination and the arbitration agreement clearly provided that the agreement applied to any employment-related claims. Wedemeyer v. Gulfstream Aero. Corp., 324 Ga. App. 47, 749 S.E.2d 241, 2013 Ga. App. LEXIS 793 (2013), cert. denied, No. S14C0198, 2014 Ga. LEXIS 146 (Ga. Feb. 24, 2014).

Claims not arbitrable. — Trial court did not err in failing to refer all claims to arbitration in a libel action because the libel and invasion of privacy (false light) claims were not immediate, foreseeable results of the performance of the bill of sale for the purchase of the trailer, which the defendants claimed was stolen, but arose solely and independently from the defendants subsequent advertisements for the return of the trailer and payment of a reward. Cate v. Patterson, 354 Ga. App. 108, 840 S.E.2d 489, 2020 Ga. App. LEXIS 135 (2020).

9-9-5. Limitation of time as bar to arbitration.

(a) If a claim sought to be arbitrated would be barred by limitation of time had the claim sought to be arbitrated been asserted in court, a party may apply to the court to stay arbitration or to vacate the award, as provided in this part. The court has discretion in deciding whether to apply the bar. A party waives the right to raise limitation of time as a bar to arbitration in an application to stay arbitration by that party's participation in the arbitration.

(b) Failure to make this application to the court shall not preclude a party from asserting before the arbitrators limitation of time as a bar to the arbitration. The arbitrators, in their sole discretion, shall decide

whether to apply the bar. This exercise of discretion shall not be subject to review of the court on an application to confirm, vacate, or modify the award except upon the grounds hereafter specified in this part for vacating or modifying an award.

History.
Code 1933, § 7-306, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-85; Code 1981, § 9-9-5, as redesignated by Ga. L. 1988, p. 903, § 1.

JUDICIAL DECISIONS

Role of arbitrator. — Court of Appeals erroneously held that the arbitrator, and not the court, should have decided whether arbitration was barred by res judicata, as: (1) no presumption existed that an arbitrator was in a better position than a court to apply a legal doctrine such as res judicata; (2) the parties did not expressly reserve the issue for arbitration; and (3) there was no presumption under Georgia law that the application of a procedural bar such as res judicata was a matter to be determined exclusively by an arbitrator. Bryan County v. Yates Paving & Grading Co., 281 Ga. 361, 638 S.E.2d 302, 2006 Ga. LEXIS 1033 (2006).

RESEARCH REFERENCES

ALR.
Which statute of limitations applies to efforts to compel arbitration of a dispute, 77 A.L.R.4th 1071.

What statute of limitations applies to action to compel arbitration pursuant to § 301 of Labor Management Relations Act (29 USCS § 185), 96 A.L.R. Fed. 378.

9-9-6. Application to compel or stay arbitration; demand for arbitration; consolidation of proceedings.

(a) A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. If the court determines there is no substantial issue concerning the validity of the agreement to submit to arbitration or compliance therewith and the claim sought to be arbitrated is not barred by limitation of time, the court shall order the parties to arbitrate. If a substantial issue is raised or the claim is barred by limitation of time, the court shall summarily hear and determine that issue and, accordingly, grant or deny the application for an order to arbitrate. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

(b) Subject to subsections (c) and (d) of this Code section, a party who has not participated in the arbitration and who has not made an application to compel arbitration may apply to stay arbitration on the grounds that:

(1) No valid agreement to submit to arbitration was made;

(2) The agreement to arbitrate was not complied with; or

(3) The arbitration is barred by limitation of time.

(c) A party may serve upon another party a demand for arbitration. This demand shall specify:

(1) The agreement pursuant to which arbitration is sought;

(2) The name and address of the party serving the demand;

(3) That the party served with the demand shall be precluded from denying the validity of the agreement or compliance therewith or from asserting limitation of time as a bar in court unless he makes application to the court within 30 days for an order to stay arbitration; and

(4) The nature of the dispute or controversy sought to be arbitrated; provided, however, that the demand for arbitration may be amended by either party to include disputes arising under the same agreement after the original demand is served.

(d) After service of the demand, or any amendment thereof, the party served must make application within 30 days to the court for a stay of arbitration or he will thereafter be precluded from denying the validity of the agreement or compliance therewith or from asserting limitation of time as a bar in court. Notice of this application shall be served on the other parties. The right to apply for a stay of arbitration may not be waived, except as provided in this Code section.

(e) Unless otherwise provided in the arbitration agreement, a party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate arbitration proceedings when:

(1) Separate arbitration agreements or proceedings exist between the same parties or one party is a party to a separate arbitration agreement or proceeding with a third party;

(2) The disputes arise from the same transactions or series of related transactions; and

(3) There is a common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

(f) If all the applicable arbitration agreements name the same arbitrator, arbitration panel, or arbitration tribunal, the court, if it orders consolidation under subsection (e) of this Code section, shall order all matters to be heard before the arbitrator, panel, or tribunal agreed to by the parties. If the applicable arbitration agreements name separate arbitrators, panels, or tribunals, the court, if it orders consoli-

dation under subsection (e) of this Code section, shall, in the absence of an agreed method of selection by all parties to the consolidated arbitration, appoint an arbitrator.

(g) In the event that the arbitration agreements in proceedings consolidated under subsection (e) of this Code section contain inconsistent provisions, the court shall resolve such conflicts and determine the rights and duties of various parties.

(h) If the court orders consolidation under subsection (e) of this Code section, the court may exercise its discretion to deny consolidation of separate arbitration proceedings only as to certain issues, leaving other issues to be resolved in separate proceedings.

History.

Code 1933, § 7-307, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-86; Code 1981, § 9-9-6, as redesignated by Ga. L. 1988, p. 903, § 1.

Law reviews.

For article, "Construction Law," see 63 Mercer L. Rev. 107 (2011).

For annual survey on trial practice and procedure, see 67 Mercer L. Rev. 257 (2015).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Code Section 9-9-86 are included in the annotations for this Code section.

Procedural requirements. — There was no statutory provision requiring clients of defendant company and owner to apply for an order compelling arbitration before seeking arbitration where such an order would have had no effect on the defendants' absence from the proceedings, and state law does not unequivocally reject ex parte arbitration. Deer Creek, Inc. v. Section 1031 Servs., Inc., 235 Ga. App. 891, 510 S.E.2d 853.

Because an agreement contained multiple promises based on multiple considerations, the agreement was not severable; consequently, pursuant to O.C.G.A. § 13-1-8(a), the trial court erred in granting a motion to compel arbitration and stay proceedings. Harris v. SAL Fin. Servs., 270 Ga. App. 230, 606 S.E.2d 293, 2004 Ga. App. LEXIS 1396 (2004).

Procedure when pending matter in another jurisdiction. — Trial court did not err in considering whether under the standards of O.C.G.A. § 9-9-6(a) the court could decide a party's petition to compel arbitration because Georgia courts generally apply Georgia law to procedural matters and, therefore, the trial court properly determined that the court lacked subject matter jurisdiction over the petition since an action was pending in Illinois and there was no showing that § 9-9-6(a) was preempted by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. BDO USA, LLP v. Coe, 329 Ga. App. 79, 763 S.E.2d 742, 2014 Ga. App. LEXIS 622 (2014).

Arbitrator decides failure to comply with condition precedent to arbitration. — Question of whether one party waived the party's right to compel arbitration by failing to comply with a purported condition precedent was a question for the arbitrator to resolve. Web IV, LLC v. Samples Constr., LLC, 349 Ga. App. 607, 824 S.E.2d 107, 2019 Ga. App. LEXIS 101 (2019).

Proper remedy when plaintiff refuses arbitration. — A motion for summary judgment is not a proper procedural vehicle by which to seek to enforce an arbitration provision in a limited warranty, because the remedy of a defendant who is aggrieved by the refusal of a plain-

tiff to arbitrate is to apply to the court for a stay of proceedings pending arbitration. Tillman Group, Inc. v. Keith, 201 Ga. App. 680, 411 S.E.2d 794, 1991 Ga. App. LEXIS 1545 (1991).

Plaintiff was not required to proceed under subsection (a) of O.C.G.A. § 9-9-6 simply because defendant declined to participate; instead, it was proper for plaintiff to proceed under subsection (c) of O.C.G.A. § 9-9-6. Yeremian v. Ellis, 239 Ga. App. 805, 521 S.E.2d 596.

Party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Pursuant to O.C.G.A. § 9-9-6(a), if a court determines there is no substantial issue concerning the validity of the agreement to submit to arbitration or compliance therewith and the claim sought to be arbitrated is not barred by limitation of time, the court shall order the parties to arbitrate. Yates Paving & Grading Co. v. Bryan County, 265 Ga. App. 578, 594 S.E.2d 756, 2004 Ga. App. LEXIS 197 (2004), cert. denied, No. S04C1088, 2004 Ga. LEXIS 513 (Ga. June 7, 2004).

Practical difficulties that a plaintiff faced in attempting to arbitrate the plaintiff's dispute with the defendant did not show that there was any defect in the formation of an arbitration provision or that the contract terms themselves were substantively unconscionable. Moreover, both the FAA and Georgia law provided that a party aggrieved by the failure of another to arbitrate under an agreement could apply for an order compelling arbitration, and the plaintiff did not avail oneself of this remedy. Kaspers v. Comcast Corp., 631 Fed. Appx. 779, 2015 U.S. App. LEXIS 19843 (11th Cir. 2015).

Defendant's refusal to participate in arbitration or to file any response thereto waived defendant's contentions regarding the validity of the arbitration clause of the contract or compliance therewith. Yeremian v. Ellis, 239 Ga. App. 805, 521 S.E.2d 596.

Compelled arbitration authorized. — Trial court correctly granted the construction company's motion to compel arbitration because the question of whether the contract's dispute resolution provisions imposed a condition precedent to arbitration was a threshold issue of procedural arbitrability that arose out of and related to the agreement itself; thus, the issue had to be resolved by an arbitrator rather than by the trial court. Web IV, LLC v. Samples Constr., LLC, 349 Ga. App. 607, 824 S.E.2d 107, 2019 Ga. App. LEXIS 101 (2019).

Motion to compel arbitration improperly denied. — Trial court erred in refusing to compel arbitration as to all counts of buyers' complaint against a seller to recover damages for construction defects in the buyers' new home because the parties intended to submit the types of claims in dispute to an arbitrator when the parties agreed to submit to arbitration not only construction defect claims but also "all other claims between the parties;" the arbitration clause in the agreement was not limited to claims sounding in contract but applied to "all other claims" without limitation. Order Homes, LLC v. Iverson, 300 Ga. App. 332, 685 S.E.2d 304, 2009 Ga. App. LEXIS 967 (2009).

In the homeowners' negligent misrepresentation claim, the trial court erred in denying the company's motion to compel arbitration based on the company's recommendation of a contractor who provided discounts to its members, such as the homeowners, because the homeowners' allegations against the company touched a matter — their membership with the company — covered by the arbitration agreement. DBGS, LLC v. Kormanik, 333 Ga. App. 33, 775 S.E.2d 283, 2015 Ga. App. LEXIS 432 (2015).

In a legal malpractice case, the trial court erred in refusing to enforce an arbitration clause in the parties' engagement agreement based on unconscionability because arbitration was favored under Georgia law and there was no evidence that the attorneys took advantage of the client. There was no blanket rule that the attorneys were required to explain the possible disadvantages of arbitration to the client. Summerville v. Innovative Images, LLC, 349 Ga. App. 592, 826 S.E.2d 391, 2019 Ga. App. LEXIS 203 (2019), aff'd in part, 309 Ga. 675, 848 S.E.2d 75, 2020 Ga. LEXIS 599 (2020), overruled in part, Bowen v. Savoy, 308 Ga. 204, 839 S.E.2d 546, 2020 Ga. LEXIS 133 (2020).

An arbitration clause in a contract between an attorney and a client was voidable at the client's option because of the attorney's conflict of interest; thus, it was error not to grant the client's motion to stay arbitration. Moreover, even if the clause were enforceable, the common-law indemnification and contribution claims the attorney sought to arbitrate arose independently of the contract and thus were not covered by the arbitration clause. Harris v. Albany Lime & Cement Co., 291 Ga. App. 474, 662 S.E.2d 160, 2008 Ga. App. LEXIS 470 (2008).

Magistrate court was "a court having jurisdiction to hear a motion to compel arbitration" within the contemplation of subsection (a) of O.C.G.A. § 9-9-6, for purposes of determining whether a house vendor had waived its right to arbitration by litigating the merits of a breach of warranty claim in the magistrate court without filing a motion to compel arbitration. Tillman Group, Inc. v. Keith, 201 Ga. App. 680, 411 S.E.2d 794, 1991 Ga. App. LEXIS 1545 (1991).

Stay of litigation to arbitrate. — City's unsuccessful action in petitioning the public service commission to stop a new electric service provider from providing electricity to the water utility was not an action inconsistent with the right to arbitrate, as that action was against a non-party in a regulatory proceeding that lacked jurisdiction to compel arbitration; the issue of whether the city and the water utility's electric service contract was terminated due to a flood was not involved in the proceedings before the public service commission, and if the water utility had been concerned about its right to arbitrate rather than defaulting on the contract, it could have, but did not, demand a stay of litigation in order to arbitrate. Macon Water Auth. v. City of Forsyth, 262 Ga. App. 224, 585 S.E.2d 131, 2003 Ga. App. LEXIS 810 (2003).

Trial court did not err in enforcing a 30-day limitations period in a contract between a general contractor and a subcontractor for the subcontractor to request arbitration of a dispute between the parties after notice by the contractor of default by the subcontractor and staying arbitration to the subcontractor, when the subcontractor waited more than 30 days to file for arbitration following the delivery of a decision letter by the contractor that the subcontractor had not complied with the agreement. Holt & Holt, Inc. v. Choate Constr. Co., 271 Ga. App. 292, 609 S.E.2d 103, 2004 Ga. App. LEXIS 1602 (2004), cert. denied, No. S05C0872, 2005 Ga. LEXIS 359 (Ga. May 9, 2005).

In a dispute over construction of a home in which homeowners sought rescission, the trial court was required to order arbitration, under O.C.G.A. § 9-9-6(a), because the arbitration clause in the parties' contract specifically provided that they intended to arbitrate even claims seeking rescission, and the homeowners did not challenge the validity of the arbitration clause itself, nor was their claim barred by the limitation of time. D. S. Ameri Constr. Corp. v. Simpson, 271 Ga. App. 825, 611 S.E.2d 103, 2005 Ga. App. LEXIS 186 (2005).

Waiver of right to stay arbitration. — Trial court did not err in denying a limited liability company's (LLC) motion under O.C.G.A. § 9-9-6(b) to stay an arbitration sought by a construction company because the LLC waived the LLC's right to stay the arbitration by participating in the process for 18 months, and the construction company's demands for arbitration put the LLC on notice that the LLC's claims arose out of an understanding between the parties; by participating in and failing to object to the arbitration process, the LLC waived any right the LLC had to stay the proceedings. Atl. Station, LLC v. Vratsinas Constr. Co., 307 Ga. App. 398, 705 S.E.2d 191, 2010 Ga. App. LEXIS 1025 (2010).

Waiver of right to compel arbitration. — House vendor, by litigating the merits of the purchasers' breach of warranty claim in the magistrate court without filing a motion to compel arbitration or otherwise seeking to initiate arbitration proceedings, waived its right to insist upon arbitration. Tillman Group, Inc. v. Keith, 201 Ga. App. 680, 411 S.E.2d 794, 1991 Ga. App. LEXIS 1545 (1991).

Judgment staying arbitration was affirmed as an assignee acquired only the rights held by the assignor and the assignor failed to raise an arbitration de-

fense, participated in discovery, and agreed to extend the discovery period in a related case with a limited liability company; the assignor waived its entitlement to arbitration, and the assignee's entitlement to arbitration was waived. M. Homes, LLC v. Southern Structural, Inc., 281 Ga. App. 380, 636 S.E.2d 99, 2006 Ga. App. LEXIS 1110 (2006).

Trial court properly denied the appellants' motion to compel arbitration of new claims asserted in an amended petition because the appellants waived the appellants' right to arbitration under a partnership agreement by failing to assert the right in a timely manner and, instead, participating in almost five years of very costly litigation, which was inconsistent with the right to arbitration. Schinazi v. Eden, 351 Ga. App. 151, 830 S.E.2d 531, 2019 Ga. App. LEXIS 410 (2019), cert. denied, No. S19C1526, 2020 Ga. LEXIS 108 (Ga. Feb. 10, 2020).

No right to compel arbitration. — Contractor sued a limited liability company (LLC) and the company's owner to recover payment. As the claims asserted by the contractor were "related to" the contractor's contract with the LLC, even if the claims did not "arise out of" the contract, and the owner was not a party to the contract, the owner's motion to compel arbitration under O.C.G.A. § 9-9-6(a) was properly denied. Tillman Park, LLC v. Dabbs-Williams Gen. Contrs., LLC, 298 Ga. App. 27, 679 S.E.2d 67, 2009 Ga. App. LEXIS 576 (2009).

Consolidation. — Consolidation of arbitration of a doctor's claims against the doctor's lawyer with the lawyer's fee claim against the doctor was not mandatory under O.C.G.A. § 9-9-6(h). Doman v. Stapleton, 256 Ga. App. 4, 567 S.E.2d 348, 2002 Ga. App. LEXIS 777 (2002).

RESEARCH REFERENCES

ALR.

Which statute of limitations applies to efforts to compel arbitration of a dispute, 77 A.L.R.4th 1071.

Consolidation by state court of arbitration proceedings brought under state law, 31 A.L.R.6th 433.

What statute of limitations applies to action to compel arbitration pursuant to § 301 of Labor Management Relations Act (29 USCS § 185), 96 A.L.R. Fed. 378.

Application of equitable estoppel by nonsignatory to compel arbitration — federal cases, 39 A.L.R. Fed. 2d 17.

Application of equitable estoppel against nonsignatory to compel arbitration under federal law, 43 A.L.R. Fed. 2d 275.

9-9-7. Appointment of arbitrators.

(a) If the arbitration agreement provides for a method of appointment of arbitrators, that method shall be followed. If there is only one arbitrator, the term "arbitrators" shall apply to him.

(b) The court shall appoint one or more arbitrators on application of a party if:

(1) The agreement does not provide for a method of appointment;

(2) The agreed method fails;

(3) The agreed method is not followed for any reason; or

(4) The arbitrators fail to act and no successors have been appointed.

(c) An arbitrator appointed pursuant to subsection (b) of this Code section shall have all the powers of one specifically named in the agreement.

History.
Code 1933, § 7-308, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-87; Code 1981, § 9-9-7, as redesignated by Ga. L. 1988, p. 903, § 1.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Code Section 9-9-87 are included in the annotations for this Code section.

Contractual arbitration agreement providing for disputes to be arbitrated by specific entity. — Superior court correctly dismissed homeowners' motion for the appointment of an arbitrator under O.C.G.A. § 9-9-7 because the homeowners had agreed with their builders to arbitrate any dispute with a specific entity under that entity's rules and procedures. Torres v. Piedmont Builders, Inc., 300 Ga. App. 872, 686 S.E.2d 464, 2009 Ga. App. LEXIS 1292 (2009).

RESEARCH REFERENCES

ALR.
Validity and effect under state law of arbitration agreement provision for alternative method of appointment of arbitrator where one party fails or refuses to follow appointment procedure specified in agreement, 75 A.L.R.5th 595.

Validity and effect under Federal Arbitration Act (9 USCA § 1 et seq.) of arbitration agreement provision for alternative method of appointment of arbitrator where one party fails or refuses to follow appointment procedure specified in agreement, 159 A.L.R. Fed. 1.

9-9-8. Time and place for hearing; notice; application for prompt hearing; conduct of hearing; right to counsel; record; waiver.

(a) The arbitrators, in their discretion, shall appoint a time and place for the hearing notwithstanding the fact that the arbitration agreement designates the county in which the arbitration hearing is to be held and shall notify the parties in writing, personally or by registered or certified mail or statutory overnight delivery, not less than ten days before the hearing. The arbitrators may adjourn or postpone the hearing. The court, upon application of any party, may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(b) The parties are entitled to be heard; to present pleadings, documents, testimony, and other matters; and to cross-examine witnesses. The arbitrators may hear and determine the controversy upon the pleadings, documents, testimony, and other matters produced notwithstanding the failure of a party duly notified to appear.

(c) A party has the right to be represented by an attorney and may claim such right at any time as to any part of the arbitration or hearings

which have not taken place. This right may not be waived. If a party is represented by an attorney, papers to be served on the party may be served on the attorney.

(d) The hearing shall be conducted by all the arbitrators unless the parties otherwise agree; but a majority may determine any question and render and change an award, as provided in this part. If during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

(e) The arbitrators shall maintain a record of all pleadings, documents, testimony, and other matters introduced at the hearing. The arbitrators or any party to the proceeding may have the proceedings transcribed by a court reporter.

(f) Except as provided in subsection (c) of this Code section, a requirement of this Code section may be waived by written consent of the parties or by continuing with the arbitration without objection.

History.

Code 1933, § 7-309, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-88; Code 1981, § 9-9-8, as redesignated by Ga. L. 1988, p. 903, § 1; Ga. L. 2000, p. 1589, § 3.

Editor's notes.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Law reviews.

For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004).

JUDICIAL DECISIONS

"Rehearing" after vacation of award by Court of Appeals. — Where the award was vacated and a "rehearing" was directed by the Court of Appeals, the trial court could properly restrict the arbitrator to the two issues found fatal to the earlier award by the Court of Appeals. Mid-American Elevator Co. v. Gemco Elevator Co., 189 Ga. App. 143, 375 S.E.2d 275, 1988 Ga. App. LEXIS 1306 (1988).

It was prejudicial error for the trial court, in response to a judgment of the Court of Appeals vacating the original award and directing a "rehearing," to authorize the arbitrator to recompute the arbitrator's former award on the basis of the evidence before the arbitrator, without permitting either party to submit additional evidence and/or a brief, if desired. Mid-American Elevator Co. v. Gemco Elevator Co., 189 Ga. App. 143, 375 S.E.2d 275, 1988 Ga. App. LEXIS 1306 (1988).

Record. — Arbitrators are required to maintain a record of all pleadings, documents, testimony, and other matters, and the failure to do so by the Bet Din, the tribunal consisting of three rabbis that heard artist's business dispute with the agents meant deciding whether the artist had waived that requirement. Ghertner v. Solaimani, 254 Ga. App. 821, 563 S.E.2d 878, 2002 Ga. App. LEXIS 395 (2002), cert. denied, No. S02C1322, 2002 Ga. LEXIS 833 (Ga. Sept. 16, 2002).

Trial court did not err in denying the clients' motion to vacate an arbitration award awarding monetary damages to their home remodeling decorator in an arbitration proceeding under the Georgia Arbitration Act, O.C.G.A. § 9-9-1 et seq., as the clients' claim that the arbitrator was required to maintain a record of the arbitration proceedings and did not do so had to be rejected; the clients waived that

requirement and also continued with the arbitration proceeding without further objection. Brown v. Premiere Designs, Inc., 266 Ga. App. 432, 597 S.E.2d 466, 2004 Ga. App. LEXIS 340 (2004), cert. denied, No. S04C1317, 2004 Ga. LEXIS 764 (Ga. Sept. 7, 2004), cert. denied, 543 U.S. 1152, 125 S. Ct. 1343, 161 L. Ed. 2d 116, 2005 U.S. LEXIS 1544 (2005).

Cross-examination. — In an arbitration arising out of a construction contract between a subcontractor and a construction manager and others, the arbitrator's award did not have to be vacated because of a claim by the construction manager and others that the arbitrator failed to follow the procedure set forth in O.C.G.A. § 9-9-8 in failing to allow them to cross-examine the subcontractor's counsel on the issue of attorney's fees; the record showed that the arbitrator questioned the subcontractor's counsel on the issue because the construction manager and others objected that no evidence was presented on the issue, and the record did not show that the construction manager and others objected to the testimony, made any effort to cross-examine the subcontractor's counsel, or were prevented from doing so or from responding to the testimony. Johnson Real Estate Invs., LLC v. Aqua Industrials, Inc., 282 Ga. App. 638, 639 S.E.2d 589, 2006 Ga. App. LEXIS 1501 (2006).

Denial of untimely request for court reporter. — Arbitrator did not violate O.C.G.A. § 9-9-8(e), which allows any party to have arbitration proceedings transcribed by a court reporter, because although the doctor agreed to submit the dispute to arbitration under the AAA, the doctor failed to comply with the rules requiring advance notice to the other parties of the desire for a stenographer; the arbitrator did not violate code procedure by denying the doctor's request. Doman v. Stapleton, 272 Ga. App. 114, 611 S.E.2d 673, 2005 Ga. App. LEXIS 147 (2005), cert. denied, No. S05C1144, 2005 Ga. LEXIS 624 (Ga. Sept. 19, 2005).

Waiver. — Requirement that arbitrators maintain a record of all pleadings, documents, testimony, and other matters could be waived pursuant to statute, and artist who arbitrated a business dispute with agents was not entitled to vacate the resulting arbitration award based on the absence of a record, since the artist waived that requirement by not requesting that such records be kept. Ghertner v. Solaimani, 254 Ga. App. 821, 563 S.E.2d 878, 2002 Ga. App. LEXIS 395 (2002), cert. denied, No. S02C1322, 2002 Ga. LEXIS 833 (Ga. Sept. 16, 2002).

9-9-9. Power of subpoena; enforcement; use of discovery; opportunity to examine documents; compensation of witnesses.

(a) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence. These subpoenas shall be served and, upon application to the court by a party or the arbitrators, enforced in the same manner provided by law for the service and enforcement of subpoenas in a civil action.

(b) Notices to produce books, writings, and other documents or tangible things; depositions; and other discovery may be used in the arbitration according to procedures established by the arbitrators.

(c) A party shall have the opportunity to obtain a list of witnesses and to examine and copy documents relevant to the arbitration.

(d) Witnesses shall be compensated in the same amount and manner as witnesses in the superior courts.

History.
Code 1933, § 7-310, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-89; Code 1981, § 9-9-9, as redesignated by Ga. L. 1988, p. 903, § 1.

Law reviews.
For article, "Methods for Discovery in Arbitration," see 13 Ga. St. B.J. 22 (2008).

JUDICIAL DECISIONS

Arbitrator not required to issue subpoenas at party's request. — O.C.G.A. § 9-9-9(a) did not require an arbitrator to issue subpoenas on behalf of a party, but only provided that an arbitrator "may" issue subpoenas. Further, the buyers of a home proceeded with the arbitration against their builder despite the lack of subpoenas or a witness list, thereby waiving any error. America's Home Place, Inc. v. Cassidy, 301 Ga. App. 233, 687 S.E.2d 254, 2009 Ga. App. LEXIS 1351 (2009).

RESEARCH REFERENCES

ALR.
Discovery in federal arbitration proceedings under discovery provision of Federal Arbitration Act (FAA), 9 USCS § 7, and Federal Rules of Civil Procedure, as permitted by Fed. R. Civ. P. 81(a)(6)(B), 45 A.L.R. Fed. 2d 51.

9-9-10. Award to be in writing; copies furnished; time of making award; waiver.

(a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy of the award to each party personally or by registered or certified mail or statutory overnight delivery, return receipt requested, or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within 30 days following the close of the hearing or within such time as the court orders. The parties may extend in writing the time either before or after its expiration. A party waives the objection that an award was not made within the time required unless he notifies in writing the arbitrators of his objection prior to the delivery of the award to him.

History.
Code 1933, § 7-311, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-90; Code 1981, § 9-9-10, as redesignated by Ga. L. 1988, p. 903, § 1; Ga. L. 2000, p. 1589, § 3.

Editor's notes.
Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Code Section 9-9-90 are included in the annotations for this Code section.

Construction with § 9-9-13. — In the absence of a transcript of an arbitration hearing, the superior court erred in vacating an arbitration award in favor of a plumbing company pursuant to O.C.G.A § 9-9-13(b)(5) because nothing in the record showed that the panel had the specific intent to disregard the appropriate law; further, the arguments provided by the company did not alter this result, as its supposition did not provide viable concrete evidence that the arbitration panel purposefully intended to disregard applicable law. ABCO Builders, Inc. v. Progressive Plumbing, Inc., 282 Ga. 308, 647 S.E.2d 574, 2007 Ga. LEXIS 533 (2007).

Objection to timeliness waived. — Where the record in a case contains no showing that petitioners seeking to vacate award objected to the timeliness of the award prior to its issuance and delivery to them, their contention that the trial court erred in confirming the award is without merit. Diversified Ass'y, Inc. v. Ra-Lin & Assocs., 186 Ga. App. 904, 368 S.E.2d 786, 1988 Ga. App. LEXIS 526 (1988) (decided under former § 9-9-90).

Arbitrator's failure to explicitly address issue. — Under O.C.G.A. § 9-9-10(a), an arbitrator in a home construction dispute was only required to issue an award in writing signed by the arbitrators joining in the award, and there was no mandate that the award include specific findings or reasons or that it expressly address each and every issue and collateral issue arising in the arbitration, so the arbitrator adequately considered the homeowners' counterclaim when, by awarding them no money, the arbitrator found the counterclaim invalid except for an amount credited against the builder's award. Marchelletta v. Seay Constr. Servs., 265 Ga. App. 23, 593 S.E.2d 64, 2004 Ga. App. LEXIS 4 (2004).

Failure to specify formula. — Vacatur of the arbitrator's award was upheld because while the lack of an amount was not fatal to the arbitrator's award, paragraph three of the arbitrator's injunctive relief in the final award failed to provide a specific formula for the general partner and the controlling stockholder's obligation to reimburse the company. Wells v. Wells-Wilson, 360 Ga. App. 646, 860 S.E.2d 185, 2021 Ga. App. LEXIS 368 (2021).

Delivery of award. — Trial court had no evidence on which to base the court's determination that the former employee had failed to file any timely motions at the time the court signed the order confirming the arbitration award because the former employer's petition, which was the only pleading before the trial court when the court rendered the court's decision, did not allege or present any evidence showing that the arbitrators delivered the award to the employee in the manner prescribed by the Georgia Arbitration Act, O.C.G.A. § 9-9-1 et seq., or when such delivery occurred. Mughni v. Beyond Management Group, Inc., 349 Ga. App. 398, 825 S.E.2d 829, 2019 Ga. App. LEXIS 168 (2019).

RESEARCH REFERENCES

ALR.

Referee's failure to file report within time specified by statute, court order, or stipulation as terminating reference, 71 A.L.R.4th 889.

9-9-11. When award changed; application for change; objection thereto; time for disposition of application.

(a) Pursuant to the procedure described in subsection (b) of this Code section, the arbitrators may change the award upon the following grounds:

(1) There was a miscalculation of figures or a mistake in the description of any person, thing, or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to

them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b)(1) An application to the arbitrators for a change in the award shall be made by a party within 20 days after delivery of the award to the applicant. Written notice of this application shall be served upon the other parties.

(2) Objection to a change in the award by the arbitrators must be made in writing to the arbitrators within ten days of service of the application to change. Written notice of this objection shall be served upon the other parties.

(3) The arbitrators shall dispose of any application made under this Code section in a written, signed order within 30 days after service upon them of objection to change or upon the expiration of the time for service of this objection. The parties may extend, in writing, the time for this disposition by the arbitrators either before or after its expiration.

(4) An award changed under this Code section shall be subject to the provisions of this part concerning the confirmation, vacation, and modification of awards by the court.

History.

Code 1933, § 7-312, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-91; Code 1981, § 9-9-11, as redesignated by Ga. L. 1988, p. 903, § 1.

Law reviews.

For article, "Construction Law," see 53 Mercer L. Rev. 173 (2001).

For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004).

JUDICIAL DECISIONS

Failure to specify formula. — Vacatur of the arbitrator's award was upheld because while the lack of an amount was not fatal to the arbitrator's award, paragraph three of the arbitrator's injunctive relief in the final award failed to provide a specific formula for the general partner and the controlling stockholder's obligation to reimburse the company. Wells v. Wells-Wilson, 360 Ga. App. 646, 860 S.E.2d 185, 2021 Ga. App. LEXIS 368 (2021).

Award modification vacated. — Trial court properly vacated the modification of an existing award under O.C.G.A. § 9-9-13 after finding that the arbitration panel had overstepped its authority by modifying the merits of its award, when none of the statutory grounds for modification under subsection (a) of O.C.G.A. § 9-9-11 had been met. Conmac Corp. v. Southern Diversified Dev., Inc., 245 Ga. App. 895, 539 S.E.2d 532, 2000 Ga. App. LEXIS 1143 (2000).

No ground existed for modification of arbitrator's award. — Arbitrator had broad authority to consider any disputes arising out of the contract consistent with the parties' agreement for the sale of the home; the seller specifically submitted to the arbitrator its claim for the damages arising from the change orders as did the purchaser and thus the issue was properly submitted to the arbitrator and no ground existed for modifying the award which found that the seller was not entitled to

keep the earnest money because it was in material breach but was entitled to actual damages for the approved changes. Henderson v. Millner Devs., LLC, 259 Ga. App. 709, 578 S.E.2d 289, 2003 Ga. App. LEXIS 246 (2003).

9-9-12. Confirmation of award by court.

The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified by the court as provided in this part.

History.

Code 1933, § 7-313, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-92; Code 1981, § 9-9-12, as redesignated by Ga. L. 1988, p. 903, § 1.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code Section 9-9-92 are included in the annotations for this Code section.

Personal jurisdiction in Georgia Lottery Corporation arbitrations. — Trial court properly vacated an arbitration award against a mart owner in the mart owner's personal capacity due to the arbitrator lacking personal jurisdiction over the mart owner as the mart owner was not a named party to the dispute, and the lessor failed to amend the demand or add the mart owner as a party. Ultra Group of Companies, Inc. v. Alli, 352 Ga. App. 71, 833 S.E.2d 751, 2019 Ga. App. LEXIS 529 (2019), cert. denied, No. S20C0336, 2020 Ga. LEXIS 421 (Ga. May 4, 2020).

Georgia Lottery Corporation arbitrator had subject matter jurisdiction over disputes between licensees, not personal jurisdiction over the licensees themselves, particularly when the licensee was not a party to the dispute. Ultra Group of Companies, Inc. v. Alli, 352 Ga. App. 71, 833 S.E.2d 751, 2019 Ga. App. LEXIS 529 (2019), cert. denied, No. S20C0336, 2020 Ga. LEXIS 421 (Ga. May 4, 2020).

Vacation of award limited to statutory grounds. — An arbitration award may be vacated only if one or more of the four statutory grounds set forth in O.C.G.A. § 9-9-13(b) is found to exist and, thus, an award could not be vacated based upon a determination that no evidence supported it; reversing Hundley v. Greene, 218 Ga. App. 193, 461 S.E.2d 250 (1995). Greene v. Hundley, 266 Ga. 592, 468 S.E.2d 350.

Issues resolved after application for confirmation. — Whether the applicable statute of limitation or other jurisdictional prerequisites have been met are issues necessarily resolved by the trial court after the party seeking confirmation files its application for confirmation. Hardin Constr. Group, Inc. v. Fuller Enters., Inc., 265 Ga. 770, 462 S.E.2d 130, 1995 Ga. LEXIS 719 (1995).

Confirmation of arbitration award proper. — Trial court did not err in confirming an arbitration award issued by the State Bar of Georgia arbitration committee because an attorney was not required to comply with the filing and service requirements imposed by Rule 6-501 of the Arbitration of Fee Disputes (AFD) program of the State Bar; because the attorney elected to file an application for confirmation of the award pursuant to Georgia Arbitration Code, O.C.G.A. § 9-9-12, the attorney complied with the filing and service requirements of the Code, and the filing, service, and notice requirements for summary proceedings under Rule 6-501 of the AFD rules did not apply. Prince v. Bailey Davis, LLC, 306 Ga. App. 59, 701 S.E.2d 492, 2010 Ga. App. LEXIS 785 (2010), cert. denied, No. S11C0206, 2011 Ga. LEXIS 140 (Ga. Feb. 7, 2011).

Judgment entered on arbitration award not in conformity therewith. — As a trial court's confirmation of an arbitration award in favor of law clerks

resulted in an award of back pay to the clerks that was to be implemented from the date of the confirmation order, it was not in conformity with the arbitration award, which required implementation from the date of the award. Fulton County v. Lord, 323 Ga. App. 384, 746 S.E.2d 188, 2013 Ga. App. LEXIS 598 (2013), cert. denied, No. S13C1802, 2014 Ga. LEXIS 31 (Ga. Jan. 6, 2014).

Denial of motion to confirm arbitration award error. — Trial court erred by denying the property owner's motion to confirm an arbitration award entered in the owner's favor and against the home builder because, even if the motion was filed prematurely, the motion ripened and was deemed to be filed when the trial court filed the court's remittitur on February 1, 2021, and because the one-year period for filing an application to confirm the arbitration award had been suspended the motion was timely filed. When the trial court ruled on the motion on February 2, the arbitration award had not been vacated or modified. Kamara v. Mark Anthony Homes, 362 Ga. App. 596, 869 S.E.2d 551, 2022 Ga. App. LEXIS 73 (2022).

Renewal application to confirm arbitration award. — Corporation's original state court application to confirm an arbitration award was incapable of being renewed pursuant to O.C.G.A. § 9-2-61(a) because O.C.G.A. § 9-9-4(a)(1) required any application to the court under the Georgia Arbitration Code to be made in the superior court of the county where venue lies, and thus, the state court lacked subject matter jurisdiction over the corporation's original application; O.C.G.A. § 9-2-61(c) provided the only avenue by which the corporation could have resurrected the corporations' original void action under the renewal statute. Warehouseboy Trading, Inc. v. Gew Fitness, LLC, 316 Ga. App. 242, 729 S.E.2d 449, 2012 Ga. App. LEXIS 528 (2012), rev'd, No. 10-1-12246-28, 2012 Ga. Super. LEXIS 729 (Ga. Super. Ct. Aug. 2, 2012).

Superior court erred in granting a motion to dismiss a corporation's renewal proceeding to confirm an arbitration award on the ground that the proceeding was barred by the one-year statute of limitation contained in O.C.G.A. § 9-9-12 because the application to confirm the award was a valid renewal action under O.C.G.A. § 9-2-61(c), thereby tolling the one-year statute of limitation; the corporation's original state court application to confirm the award was dismissed for lack of subject matter jurisdiction. Warehouseboy Trading, Inc. v. Gew Fitness, LLC, 316 Ga. App. 242, 729 S.E.2d 449, 2012 Ga. App. LEXIS 528 (2012), rev'd, No. 10-1-12246-28, 2012 Ga. Super. LEXIS 729 (Ga. Super. Ct. Aug. 2, 2012).

Construction with the arbitration of fee disputes program of the State Bar of Georgia. — Rules of the Arbitration of Fee Disputes (AFD) program of the State Bar of Georgia authorize a party seeking enforcement of the arbitration award to elect between the filing and service procedures provided by the general arbitration laws of the state, i.e., the Georgia Arbitration Code, and the filing and service procedures for the more summary and expedited proceeding authorized by Rule 6-501 of the AFD program; accordingly, a party seeking to enforce the results of the arbitration over attorney fees may elect to file an application for confirmation of the award in the superior court pursuant to the Georgia Arbitration Code, O.C.G.A. § 9-9-12, and the party must file and serve the application in the same manner as a complaint in a civil action, O.C.G.A. § 9-9-4 and the 30-day deadline for objections set forth in Rule 6-501 of the Arbitration of Fee Disputes (AFD) program of the State Bar of Georgia is not applicable. Prince v. Bailey Davis, LLC, 306 Ga. App. 59, 701 S.E.2d 492, 2010 Ga. App. LEXIS 785 (2010), cert. denied, No. S11C0206, 2011 Ga. LEXIS 140 (Ga. Feb. 7, 2011).

Arbitration award to a client regarding a fee dispute. — Arbitration award to a client regarding a fee dispute with the client's lawyer, since the lawyer did not agree to be bound by the award, could not be confirmed under O.C.G.A. § 9-9-12 because the award was not binding under the Rules of the State Bar of Georgia as the client initiated an arbitration proceeding before the State Bar of Georgia and the award was the product of the State Bar's nonbinding arbitration

rules and procedures. Farley v. Bothwell, 306 Ga. App. 801, 703 S.E.2d 397, 2010 Ga. App. LEXIS 1059 (2010), cert. denied, No. S11C0501, 2011 Ga. LEXIS 315 (Ga. Apr. 18, 2011).

Attorney's objections to an attorney fee arbitration award in favor of the attorney's client's mother's estate were filed too late; the client's application to confirm the award was filed timely under O.C.G.A. § 9-9-12, but the attorney's objection was filed well outside the three-month limitation in O.C.G.A. §§ 9-9-13(a) and 9-9-14(a). McFarland v. Roberts, 335 Ga. App. 40, 778 S.E.2d 349, 2015 Ga. App. LEXIS 575 (2015), cert. denied, No. S16C0522, 2016 Ga. LEXIS 229 (Ga. Mar. 7, 2016).

Approval of arbitration award not yet issued. — Court cannot accept and incorporate into a divorce decree an incomplete and unenforceable arbitration award; such an award simply does not exist, in the same manner that an incomplete agreement does not exist; an arbitration award that has not been filed with the trial court cannot be incorporated into a final judgment and decree of divorce, and it is error for the court to state that such a nonexistent award is incorporated. Ciraldo v. Ciraldo, 280 Ga. 602, 631 S.E.2d 640, 2006 Ga. LEXIS 400 (2006).

Confirmation of arbitration award improper. — Trial court had no evidence on which to base the court's determination that the former employee had failed to file any timely motions at the time the court signed the order confirming the arbitration award because the former employer's petition, which was the only pleading before the trial court when the court rendered the court's decision, did not allege or present any evidence showing that the arbitrators delivered the award to the employee in the manner prescribed by the Georgia Arbitration Act, O.C.G.A. § 9-9-1 et seq., or when such delivery occurred. Mughni v. Beyond Management Group, Inc., 349 Ga. App. 398, 825 S.E.2d 829, 2019 Ga. App. LEXIS 168 (2019).

Motion to vacate properly denied in child custody proceeding. — In a child custody dispute, the trial court did not err by confirming the arbitration award and denying the father's motion to vacate because the arbitrator's decision automatically changing visitation did not violate public policy and that the award lacked evidentiary support was not a basis for vacating the arbitrator's decision. Brazzel v. Brazzel, 337 Ga. App. 758, 789 S.E.2d 626, 2016 Ga. App. LEXIS 339 (2016), cert. denied, No. S16C1889, 2017 Ga. LEXIS 146 (Ga. Feb. 27, 2017).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

2A Am. Jur. Pleading and Practice Forms, Arbitration and Award, § 106.

9-9-13. Vacation of award by court; application; grounds; rehearing; appeal of order.

(a) An application to vacate an award shall be made to the court within three months after delivery of a copy of the award to the applicant.

(b) The award shall be vacated on the application of a party who either participated in the arbitration or was served with a demand for arbitration if the court finds that the rights of that party were prejudiced by:

(1) Corruption, fraud, or misconduct in procuring the award;

(2) Partiality of an arbitrator appointed as a neutral;

(3) An overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made;

(4) A failure to follow the procedure of this part, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection; or

(5) The arbitrator's manifest disregard of the law.

(c) The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a demand for arbitration or order to compel arbitration if the court finds that:

(1) The rights of the party were prejudiced by one of the grounds specified in subsection (b) of this Code section;

(2) A valid agreement to arbitrate was not made;

(3) The agreement to arbitrate has not been complied with; or

(4) The arbitrated claim was barred by limitation of time, as provided by this part.

(d) The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(e) Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrators or before new arbitrators appointed as provided by this part. In any provision of an agreement limiting the time for a hearing or award, time shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court. The court's ruling or order under this Code section shall constitute a final judgment and shall be subject to appeal in accordance with the appeal provisions of this part.

History.

Code 1933, § 7-314, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-93; Code 1981, § 9-9-13, as redesignated by Ga. L. 1988, p. 903, § 1; Ga. L. 2003, p. 820, § 2.

Editor's notes.

Ga. L. 2003, p. 820, § 9, not codified by the General Assembly, provides that this Act "shall apply to all civil actions filed on or after July 1, 2003."

Law reviews.

For article, "Recent Developments in Construction Law," see 5 Ga. St. B.J. 24 (1999).

For survey article on trial practice and procedure for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 439 (2003).

For note on the 2003 amendment to this Code section, see 20 Ga. St. U.L. Rev. 28 (2003).

For article, "Georgia General Assembly Adopts 'Manifest Disregard' as a Ground for Vacating Arbitration Awards: How Will

Georgia Courts Treat the New Standard?," see 9 Ga. St. B.J. 10 (2004).

For note, "The Addition of the 'Manifest Disregard of the Law' Defense to Georgia's Arbitration Code and Potential Conflicts with Federal Law," see 21 Ga. St. U.L. Rev. 501 (2004).

For note, "'A Manifest Disregard of Arbitration?' An Analysis of Recent Georgia Legislation Adding 'Manifest Disregard of the Law' to the Georgia Arbitration Code as a Statutory Ground for Vacatur," see 39 Ga. L. Rev. 259 (2004).

For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004).

For annual survey of trial practice and procedure, see 56 Mercer L. Rev. 433 (2004).

For article, "A Re-Evalution of Arbitration in Light of Class Actions and Appeal Rights — Is It Still Worth It?," see 11 Ga. St. B.J. 12 (2005).

For survey article on construction law, see 59 Mercer L. Rev. 55 (2007).

For article, "Comprehensive Arbitration of Domestic Relations Cases in Georgia," see 14 Ga. St. B.J. 20 (2008).

For survey article on local government law, see 60 Mercer L. Rev. 263 (2008).

For note, "Alive But Not Well: Manifest Disregard After Hall Street," see 44 Ga. L. Rev. 285 (2009).

For annual survey on construction law, see 61 Mercer L. Rev. 65 (2009).

For annual survey on construction law, see 68 Mercer L. Rev. 83 (2016).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code Section 9-9-93 are included in the annotations for this Code section.

Personal jurisdiction in Georgia Lottery Corporation arbitrations. — Trial court properly vacated an arbitration award against a mart owner in the mart owner's personal capacity due to the arbitrator lacking personal jurisdiction over the mart owner as the mart owner was not a named party to the dispute, and the lessor failed to amend the demand or add the mart owner as a party. Ultra Group of Companies, Inc. v. Alli, 352 Ga. App. 71, 833 S.E.2d 751, 2019 Ga. App. LEXIS 529 (2019), cert. denied, No. S20C0336, 2020 Ga. LEXIS 421 (Ga. May 4, 2020).

Procedural requirements. — There was no statutory provision requiring clients of defendant company and owner to apply for an order compelling arbitration before seeking arbitration where such an order would have had no effect on the defendants' absence from the proceedings, and state law does not unequivocally reject ex parte arbitration. Deer Creek, Inc. v. Section 1031 Servs., Inc., 235 Ga. App. 891, 510 S.E.2d 853.

Artist who did not request that records of an arbitration proceeding be kept waived the right to rely on the absence of records as a ground for arguing that the resulting arbitration award should be vacated; therefore, since no other ground existed for vacating the award, the award would be upheld. Ghertner v. Solaimani, 254 Ga. App. 821, 563 S.E.2d 878, 2002 Ga. App. LEXIS 395 (2002), cert. denied, No. S02C1322, 2002 Ga. LEXIS 833 (Ga. Sept. 16, 2002).

Trial court did not err in denying the clients' motion to vacate an arbitration award awarding monetary damages to their home remodeling decorator in an arbitration proceeding under the Georgia Arbitration Act, O.C.G.A. § 9-9-1 et seq., as the clients' claim that the arbitrator was required to maintain a record of the arbitration proceedings and did not do so had to be rejected; the clients waived that requirement and also continued with the arbitration proceeding without further ob-

General Consideration (Cont'd)

jection. Brown v. Premiere Designs, Inc., 266 Ga. App. 432, 597 S.E.2d 466, 2004 Ga. App. LEXIS 340 (2004), cert. denied, No. S04C1317, 2004 Ga. LEXIS 764 (Ga. Sept. 7, 2004), cert. denied, 543 U.S. 1152, 125 S. Ct. 1343, 161 L. Ed. 2d 116, 2005 U.S. LEXIS 1544 (2005).

Husband's application to vacate an arbitration award under O.C.G.A. § 9-9-13 should have been dismissed rather than denied since the trial court's divorce decree in which it approved the arbitration award was final on the date that it issued the decree even though the arbitration award had, in fact, not been issued on that date; thus, the husband should have filed an application for a discretionary appeal from the trial court's final judgment within 30 days of the entry of the judgment and decree under O.C.G.A. § 5-6-35(d) or filed a motion to set aside the judgment and decree under O.C.G.A. § 9-11-60; since, pursuant to O.C.G.A. § 9-9-15 the order confirming the arbitration award became the judgment of the trial court on the date that the trial court issued its divorce decree, all matters in litigation in the action were final on that date, including those submitted for arbitration, and the later purported arbitration award was of no effect. Ciraldo v. Ciraldo, 280 Ga. 602, 631 S.E.2d 640, 2006 Ga. LEXIS 400 (2006).

In the absence of a transcript of an arbitration hearing, the superior court erred in vacating an arbitration award in favor of a plumbing company pursuant to O.C.G.A § 9-9-13(b)(5) because nothing in the record showed that the panel had the specific intent to disregard the appropriate law; further, the arguments provided by the company did not alter this result, as its supposition did not provide viable concrete evidence that the arbitration panel purposefully intended to disregard applicable law. ABCO Builders, Inc. v. Progressive Plumbing, Inc., 282 Ga. 308, 647 S.E.2d 574, 2007 Ga. LEXIS 533 (2007).

Award need not specifically address every issue presented. — Although the trial court may vacate an arbitrators' award for, inter alia, "such imperfect execution of it that a final and definite award upon the subject matter submitted was not made," there is no mandate that the award include specific findings or reasons, or that it expressly address each and every issue and collateral issue arising in an arbitration. Cotton States Mut. Ins. Co. v. Nunnally Lumber Co., 176 Ga. App. 232, 335 S.E.2d 708, 1985 Ga. App. LEXIS 2199 (1985).

Award vacated when award did not specify formula for relief. — Vacatur of the arbitrator's award was upheld because while the lack of an amount was not fatal to the arbitrator's award, paragraph three of the arbitrator's injunctive relief in the Final Award failed to provide a specific formula for the general partner and the controlling stockholder's obligation to reimburse the company. Wells v. Wells-Wilson, 360 Ga. App. 646, 860 S.E.2d 185, 2021 Ga. App. LEXIS 368 (2021).

Standing to attack validity of award. — The term "party" refers to a party to the arbitration agreement or some other party whose rights the arbitration award purports to affect; a stranger to the arbitration, whose rights are not affected by the award, lacks standing to attack its validity. Wachovia Bank v. Miller, 232 Ga. App. 606, 502 S.E.2d 538.

"Corruption." — The context in which the word "corruption" was used by the legislature in promulgating subsection (b) of O.C.G.A. § 9-9-13 reveals that the word was intended to connote "corrupt or dishonest proceedings." The "corruption" required to vacate an award is an act of undue means rendering the proceedings tantamount to being dishonest. Haddon v. Shaheen & Co., 231 Ga. App. 596, 499 S.E.2d 693.

Grounds

Grounds for vacation of arbitration award. — Under O.C.G.A. § 9-9-13(b), a party seeking to set aside an award may do so under the five exclusive grounds stated in the statute; the fact that the relief was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm an award. Doman v. Stapleton, 272 Ga. App. 114, 611 S.E.2d 673, 2005 Ga. App. LEXIS 147 (2005), cert. denied,

No. S05C1144, 2005 Ga. LEXIS 624 (Ga. Sept. 19, 2005).

Country club and a lessee could not contractually expand the grounds for a court to vacate an arbitration award in their lease, as such grounds were statutorily mandated pursuant to O.C.G.A. § 9-9-13(b) and were not subject to the parties' modification. Brookfield Country Club, Inc. v. St. James-Brookfield, LLC, 287 Ga. 408, 696 S.E.2d 663, 2010 Ga. LEXIS 494 (2010).

Trial court properly denied the provider's motion to vacate the arbitration award because there was no transcript of the arbitration hearings provided or anything in the record to indicate the intent of the arbitrator in reaching the conclusion that the case was time-barred, therefore, there was an absence of evidence of a specific intent to disregard the appropriate law; thus, the final award was not subject to vacatur on the basis of manifest disregard of the law under O.C.G.A. § 9-9-13(b)(5). Odion v. Avesis, Inc., 355 Ga. App. 598, 845 S.E.2d 335, 2020 Ga. App. LEXIS 355 (2020).

Failure to show prejudice. — Employer asserting the failure of arbitrators to comply with statutory requirements as a basis for vacating award concerning contested value of company stock failed to make the requisite showing of prejudice under O.C.G.A. § 9-9-13, such that there was no basis for reversal at the trial court. Race, Inc. v. Shell, 212 Ga. App. 587, 442 S.E.2d 767, 1994 Ga. App. LEXIS 334 (1994), cert. denied, No. S94C1134, 1994 Ga. LEXIS 740 (Ga. May 27, 1994).

O.C.G.A. § 9-9-13(b)(2) did not provide a basis for vacating an arbitration award; while the comments made and questions asked by the arbitration panel's chairperson were aggressive, the record showed that the chairperson was merely trying to ferret out what happened between a subcontractor and the entities that had hired the subcontractor to work on a construction project. Airtab, Inc. v. Limbach Co., LLC, 295 Ga. App. 720, 673 S.E.2d 69, 2009 Ga. App. LEXIS 93 (2009).

Failure to state grounds for vacation of award. — Where, in a proceeding for confirmation of an arbitration award and on appeal from the judgment confirming the award, defendant made no arguments based on O.C.G.A. § 9-9-13, but limited the defendant's challenge only to a prearbitration ruling by the trial court on motions in limine that were pending when the case was referred for arbitration, defendant's claim did not state grounds for vacation of the award. Stringer v. Harkleroad & Hermance, 218 Ga. App. 701, 463 S.E.2d 152, 1995 Ga. App. LEXIS 858 (1995).

Vacation of award limited to statutory grounds. — An arbitration award may be vacated only if one or more of the four statutory grounds set forth in subsection (b) of O.C.G.A. § 9-9-13 is found to exist and, thus, an award could not be vacated based upon a determination that no evidence supported it; reversing Hundley v. Greene, 218 Ga. App. 193, 461 S.E.2d 250 (1995). Greene v. Hundley, 266 Ga. 592, 468 S.E.2d 350.

Because arbitration code is in derogation of common law, this provision must be strictly construed, and the four statutory bases for vacation of an arbitration award are therefore the exclusive grounds for such action. Ralston v. City of Dahlonega, 236 Ga. App. 386, 512 S.E.2d 300.

Courts cannot inquire into the merits of an arbitrable controversy, but must confine their review of an award to the statutory grounds. Ralston v. City of Dahlonega, 236 Ga. App. 386, 512 S.E.2d 300.

A showing of prejudice is required in addition to showing that the prejudice results from one of the reasons listed in O.C.G.A. § 9-9-13. Bennett v. Builders II, Inc., 237 Ga. App. 756, 516 S.E.2d 808.

Absent a finding of prejudice due to one of the four statutory grounds set forth in subsection (b) of O.C.G.A. § 9-9-13, it was not error for the trial court to confirm the arbitration award. Worsham v. Krause, 272 Ga. 528, 529 S.E.2d 373, 2000 Ga. LEXIS 336 (2000).

Arbitration award cannot be set aside for mistakes of fact made by the arbitrators, but an award may only be set aside for violation of one or more of the statutory grounds set forth in O.C.G.A. § 9-9-13(b); the statute provides the exclusive grounds to vacate all or part of an arbitration award, and, as the Georgia Arbitration Code, O.C.G.A. § 9-9-1 et seq., is in

Grounds (Cont'd)

derogation of the common law, it must be strictly construed. Scana Energy Mktg., Inc. v. Cobb Energy Mgmt. Corp., 259 Ga. App. 216, 576 S.E.2d 548, 2002 Ga. App. LEXIS 1459 (2002), cert. denied, No. S03C0750, 2003 Ga. LEXIS 454 (Ga. Apr. 29, 2003).

Courts must not decide the rightness or wrongness of an arbitrator's contract interpretation, only whether the decision "draws its essence" from the contract; a contract carrier's argument that an arbitrator did not correctly interpret a shipping contract did not establish one of the statutory grounds for vacating the award. U.S. Intermodal & Thunderbolt Express v. Ga. Pac. Corp., 267 Ga. App. 832, 600 S.E.2d 800, 2004 Ga. App. LEXIS 787 (2004).

Because the sole enumeration of error was that the arbitrators exhibited a manifest disregard of the law because there was not a valid and enforceable contract between the parties to be breached, but, there was a written document signed by both parties which was contained in the record and because no transcript of either the arbitration hearing or the hearing on the application to vacate the award was provided to the appellate court; the party failed to carry the party's burden of establishing by record evidence the statutory ground of manifest disregard of the law. Humar Props., LLLP v. Prior Tire Enters., Inc., 270 Ga. App. 306, 605 S.E.2d 926, 2004 Ga. App. LEXIS 1418 (2004).

Trial court properly refused to vacate an arbitration award for an attorney based on an allegation that the evidence did not support the award; the client challenging the award did not allege that the award was in manifest disregard of the law. Durden v. Suggs, 271 Ga. App. 688, 610 S.E.2d 640, 2005 Ga. App. LEXIS 131 (2005).

Because parties' lease added to the grounds for vacatur provided in O.C.G.A. § 9-9-13(b), and because the record exhibited no overstepping of the arbitrator's authority or manifest disregard of the law, the trial court properly denied the owner's motion to vacate the award. Brookfield Country Club, Inc. v. St. James-Brookfield, LLC, 299 Ga. App. 614, 683 S.E.2d 40, 2009 Ga. App. LEXIS 865 (2009), aff'd, 287 Ga. 408, 696 S.E.2d 663, 2010 Ga. LEXIS 494 (2010).

Application

Decision within arbitrators' authority. — Where a general contractor presented evidence that charges which increased the cost of building a convention center had been made by local government officials, and that the government had agreed to wait until the project was complete before resolving cost increase issues, contrary to contract provisions, the trial court did not err in finding that the arbitration panel acted within its authority in awarding judgment to the contractor. City of College Park v. Batson-Cook Co., 196 Ga. App. 138, 395 S.E.2d 385, 1990 Ga. App. LEXIS 842 (1990) (decided under former O.C.G.A. § 9-9-93).

An arbitrator's decision voiding a limitation of liability clause in a home inspection agreement on the basis of O.C.G.A. § 13-8-2 did not compel an inference that the arbitrator overstepped the arbitrator's authority. Amerispec Franchise v. Cross, 215 Ga. App. 669, 452 S.E.2d 188, 1994 Ga. App. LEXIS 1344 (1994), cert. denied, No. S95C0605, 1995 Ga. LEXIS 402 (Ga. Mar. 17, 1995).

Where the arbitration provision covered all disputes arising as to "the interpretation, meaning or intent" of an agreement for sale of a medical practice, finding that tortious interference claims were covered was within the arbitrators' authority. Banderas v. Doman, 224 Ga. App. 198, 480 S.E.2d 252.

Where the shareholders agreement plainly permitted arbitration in the event of an impasse in the management of the firm and did not require that a buy out offer be evaluated before the arbitrator could resolve the impasse, the court properly determined the shareholder failed to prove the arbitrator exceeded the arbitrator's authority or considered matters not properly before the arbitrator. Gilbert v. Montlick, 232 Ga. App. 91, 499 S.E.2d 731.

The agreement specifically authorized the umpire to utilize measures above and beyond traditional calculations of fair

market value and the umpire did not overstep the umpire's authority in awarding settlement amounts which encompassed notions of fair market value, intrinsic, denominational, and historic value, as well as replacement costs. Atlanta Gas Light Co. v. Trinity Christian Methodist Episcopal Church, 231 Ga. App. 617, 500 S.E.2d 374.

Where it was clear from the record that the plaintiff submitted all of plaintiff's claims against the city and the department of transportation to the arbitrator, the arbitrator did not overstep the arbitrator's authority in ruling upon such issues. Ralston v. City of Dahlonega, 236 Ga. App. 386, 512 S.E.2d 300.

Where clients of defendant company sought arbitration because they were unable to contact the owner to give the notifications required to initiate a tax-free exchange and were concerned that the statutory time would expire before the owner's could be contacted to accomplish this, the trial court did not err in implicitly finding that the clients sought arbitration regarding their instructions to defendant, and the arbitrator did not overstep the arbitrator's authority. Deer Creek, Inc. v. Section 1031 Servs., Inc., 235 Ga. App. 891, 510 S.E.2d 853.

"Overstepping" of the arbitrator's authority, like other grounds for vacation of an award, is very limited in scope and refers to the addressing of issues not properly before the arbitrator. Ralston v. City of Dahlonega, 236 Ga. App. 386, 512 S.E.2d 300.

The adding of a $20 million indemnity claim to a pending $400,000 arbitration proceeding arising out of the same indemnity agreement, which was added with the consent of the arbitration panel, did not require that a separate arbitration panel be appointed to hear the new claim because the rules stipulated by the agreement authorized the panel to consider all new claims. Barge v. St. Paul Fire & Marine Ins. Co., 245 Ga. App. 112, 535 S.E.2d 837, 2000 Ga. App. LEXIS 759 (2000), overruled in part, Green Tree Servicing, LLC v. Jones, 333 Ga. App. 184, 775 S.E.2d 714, 2015 Ga. App. LEXIS 475 (2015).

Arbitrator had broad authority to consider any disputes arising out of the contract, consistent with the parties' agreement of sale for the home; the seller specifically submitted to the arbitrator its claim for the damages arising from the change orders as did the purchaser and thus, the issue was properly submitted to the arbitrator, and no ground existed for modifying the award which found that the seller was not entitled to keep the earnest money because it was in material breach but was entitled to actual damages for the approved changes. Henderson v. Millner Devs., LLC, 259 Ga. App. 709, 578 S.E.2d 289, 2003 Ga. App. LEXIS 246 (2003).

In a home construction dispute in which an arbitrator awarded damages to a builder, none of the statutory grounds for vacating that award under O.C.G.A. § 9-9-13(b) were shown, and the award did not improperly award pre-award interest. Marchelletta v. Seay Constr. Servs., 265 Ga. App. 23, 593 S.E.2d 64, 2004 Ga. App. LEXIS 4 (2004).

Client's motion to vacate an arbitration award was properly rejected, as the arbitrator did not disregard the law of the case by allowing an attorney to recover attorney fees under a quantum meruit theory or by refusing to allow the client to present defenses to liability; the appellate court found that the attorney justifiably withdrew from representation, making a quantum meruit recovery appropriate, and the attorney had a right to recover a reasonable fee. Doman v. Stapleton, 272 Ga. App. 114, 611 S.E.2d 673, 2005 Ga. App. LEXIS 147 (2005), cert. denied, No. S05C1144, 2005 Ga. LEXIS 624 (Ga. Sept. 19, 2005).

Because there was no transcript of the arbitration hearing or detailed findings of fact, the appellate court could not find that the arbitrator's award of attorney fees was unlawful; arbitration awards were not subject to vacatur under O.C.G.A. § 9-9-13(d) where as an award would not have been granted by a court. Ordner Constr. Co. v. Parkside Crossing, 300, LLC, 276 Ga. App. 753, 624 S.E.2d 206, 2005 Ga. App. LEXIS 1292 (2005), cert. denied, No. S06C0818, 2006 Ga. LEXIS 295 (Ga. May 8, 2006).

In an arbitration arising out of a construction contract, an award of payment to a subcontractor under an invoice did

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not overstep the arbitrator's authority under O.C.G.A. § 9-9-13(b) of the Georgia Arbitration Code, even though there was evidence that the invoice had already been paid; overstepping consisted of addressing issues not properly before the arbitrator, the subcontractor's arbitration proceeding sought amounts due under the parties' contracts, and the arbitrator's award under the invoice was grounded in an interpretation of the contract language. Johnson Real Estate Invs., LLC v. Aqua Industrials, Inc., 282 Ga. App. 638, 639 S.E.2d 589, 2006 Ga. App. LEXIS 1501 (2006).

The trial court properly confirmed an arbitrator's award in a breach of contract action between a wastewater treatment company and a city as: (1) that part of the arbitrator's award which discussed the terms "maintenance" and "capital expenditures" was not inconsistent with the definitions contained in the contract; and (2) the award was based not only on the company's failure to make necessary repairs, but on the deterioration which resulted from that failure. Further, there was no requirement that the arbitrator's award include specific findings or reasons absent a request by the parties under O.C.G.A. § 9-9-39(a). Operations Mgmt. Int'l v. City of Forsyth, 288 Ga. App. 469, 654 S.E.2d 438, 2007 Ga. App. LEXIS 1228 (2007).

Court found that the arbitrator's award did not violate O.C.G.A. § 9-9-13(b)(3) as it was made pursuant to and within the scope of the arbitration agreement entered into by the parties specifically to resolve disputes about the vehicle service contracts. Adventure Motor Sports Reinsurance v. Interstate Nat'l Dealer Servs., 365 Ga. App. 636, 879 S.E.2d 817, 2022 Ga. App. LEXIS 483 (2022).

Arbitrator did not overstep authority by awarding alimony arrearage and scheduling payment because arbitrator's authority was not limited to mere calculation of alimony due and Georgia law was clear that arbitrator may grant relief that trial court would not be allowed to grant. Brooks v. Brooks, 366 Ga. App. 650, 883 S.E.2d 880, 2023 Ga. App. LEXIS 61 (2023).

Decision exceeded arbitrators' authority. — Trial court properly vacated the modification of an existing award under paragraph (b)(3) of O.C.G.A. § 9-9-13 after finding that the arbitration panel had overstepped its authority by modifying the merits of its award, when none of the statutory grounds for modification under O.C.G.A. § 9-9-11(a) had been met. Conmac Corp. v. Southern Diversified Dev., Inc., 245 Ga. App. 895, 539 S.E.2d 532, 2000 Ga. App. LEXIS 1143 (2000).

Partiality of arbitrator. — Merely pointing to adverse factual and legal findings cannot sustain an allegation of bias within the meaning of paragraph (b)(2) of O.C.G.A. § 9-9-13. Faiyaz v. Dicus, 245 Ga. App. 55, 537 S.E.2d 203, 2000 Ga. App. LEXIS 900 (2000).

Client's motion to vacate an arbitration award was properly denied, as the trial court's finding that the arbitrator did not solicit business from an attorney's counsel was not clearly erroneous. Doman v. Stapleton, 272 Ga. App. 114, 611 S.E.2d 673, 2005 Ga. App. LEXIS 147 (2005), cert. denied, No. S05C1144, 2005 Ga. LEXIS 624 (Ga. Sept. 19, 2005).

Law client failed to show competent evidence regarding an alleged basis for vacatur of an arbitration award under O.C.G.A. § 9-9-13(b) of the Georgia Arbitration Code, O.C.G.A. § 9-9-1 et seq., since the clients' claim that the arbitrator did not disclose prior associations that amounted to "potential conflicts" was not supported by the record; further, "The Hennings Rules" were not placed upon the record, although the rules were relied upon, and there was no evidence that the arbitrator fell within the ambit of the Ga. Code Jud. Conduct Canon 3(E)(1). Phan v. Andre & Blaustein, LLP, 309 Ga. App. 191, 709 S.E.2d 863, 2011 Ga. App. LEXIS 279 (2011), cert. denied, No. S11C1339, 2012 Ga. LEXIS 61 (Ga. Jan. 9, 2012).

Denial of motion to vacate was final judgment. — Trial court's order denying a company's motion to vacate a class determination arbitration award was a final one under O.C.G.A. § 5-6-34(a)(1). Once the trial court concluded that the com-

pany did not comply with the limitation period set forth in O.C.G.A. § 9-9-13(a), nothing remained for the trial court's consideration; therefore, an appeal could not be considered interlocutory, and the company was not required to file an application for discretionary appeal as a prerequisite to the appellate court obtaining jurisdiction. Cypress Communs., Inc. v. Zacharias, 291 Ga. App. 790, 662 S.E.2d 857, 2008 Ga. App. LEXIS 645 (2008).

Application of law in arbitrator's decision. Lower appellate court erred by reversing the order confirming the arbitration award on the basis that the arbitrator manifestly disregarded the law in rendering the award as however imperfect the lower appellate court may have judged the arbitrator's understanding or application of the law to have been, such a failure by the arbitrator did not amount to concrete evidence of a deliberate decision not to apply the applicable law in making the arbitration award. Adventure Motorsports Reinsurance v. Interstate Nat'l Dealer Servs., 313 Ga. 19, 867 S.E.2d 115, 2021 Ga. LEXIS 731 (2021).

Motion to vacate properly denied in child custody proceeding. — In a child custody dispute, the trial court did not err by confirming the arbitration award and denying the father's motion to vacate because the arbitrator's decision automatically changing visitation did not violate public policy and that the award lacked evidentiary support was not a basis for vacating the arbitrator's decision. Brazzel v. Brazzel, 337 Ga. App. 758, 789 S.E.2d 626, 2016 Ga. App. LEXIS 339 (2016), cert. denied, No. S16C1889, 2017 Ga. LEXIS 146 (Ga. Feb. 27, 2017).

Objection to timeliness waived. — Where the record in a case contains no showing that petitioners seeking to vacate award objected to the timeliness of the award prior to its issuance and delivery to them, their contention that the trial court erred in confirming the award is without merit. Diversified Ass'y, Inc. v. Ra-Lin & Assocs., 186 Ga. App. 904, 368 S.E.2d 786, 1988 Ga. App. LEXIS 526 (1988).

Facts did not support vacation of award to general contractors. See Raymer v. Foster & Cooper, Inc., 195 Ga. App. 200, 393 S.E.2d 49, 1990 Ga. App. LEXIS 429 (1990), cert. denied, No. S90C0968, 1990 Ga. LEXIS 650 (Ga. Sept. 4, 1990) (decided under former O.C.G.A. § 9-9-93).

Regardless of whether the arbitrator exceeded the arbitrator's authority by considering parol evidence in this case, the superior court correctly refused to vacate the decision of the arbitrator, because when the rules applicable to contract construction are applied in this case, the arbitrator's decision is correct. Martin v. RocCorp, Inc., 212 Ga. App. 177, 441 S.E.2d 671, 1994 Ga. App. LEXIS 177 (1994).

"Rehearing" after vacation of award by Court of Appeals. — Where the award was vacated and a "rehearing" was directed by the Court of Appeals, the trial court could properly restrict the arbitrator to the two issues found fatal to the earlier award by the Court of Appeals. Mid-American Elevator Co. v. Gemco Elevator Co., 189 Ga. App. 143, 375 S.E.2d 275, 1988 Ga. App. LEXIS 1306 (1988).

It was prejudicial error for the trial court, in response to a judgment of the Court of Appeals vacating the original award and directing a "rehearing," to authorize the arbitrator to recompute the arbitrator's former award on the basis of the evidence before the arbitrator, without permitting either party to submit additional evidence and/or a brief, if desired. Mid-American Elevator Co. v. Gemco Elevator Co., 189 Ga. App. 143, 375 S.E.2d 275, 1988 Ga. App. LEXIS 1306 (1988).

Arbitrator's "prevailing party" determination upheld on appeal. — In an arbitration action between a subcontractor and its general contractor, the trial court did not err in denying the subcontractor's motion to vacate the arbitration award on grounds that the arbitrator manifestly disregarded the law in finding that, for purposes of awarding attorney fees and costs, the general subcontractor was the prevailing party, as the arbitrator concluded that the award did not materially alter the legal relationship between the parties beyond that which was previously offered by the general contractor, which was the correct legal standard. Dan J. Sheehan Co. v. McCrory Constr. Co., 284 Ga. App. 159, 643 S.E.2d 546, 2007

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Ga. App. LEXIS 276 (2007), cert. denied, No. S07C1011, 2007 Ga. LEXIS 437 (Ga. June 4, 2007).

Failure of arbitrator to make specific findings. — In a construction contract dispute submitted to arbitration, there was no specific finding by the arbitrator as to whether the requisite bond under the contract was submitted. Thus, it could not be determined if the arbitrator overstepped the arbitrator's authority or imperfectly executed the arbitrator's authority in either awarding interest or in establishing a date to begin computing interest. Sayler Marine Corp. v. Dixie Metal Co., 194 Ga. App. 853, 392 S.E.2d 45, 1990 Ga. App. LEXIS 344 (1990).

Because the arbitration proceeding was not recorded and the arbitration award did not contain detailed findings of fact, the appellate court could not review the refusal to vacate the arbitration award under O.C.G.A. § 9-9-13(b)(5) in which the builder alleged that the arbitrator manifestly disregarded the law by failing to account for the contract balance stipulated by the parties. Ordner Constr. Co. v. Parkside Crossing, 300, LLC, 276 Ga. App. 753, 624 S.E.2d 206, 2005 Ga. App. LEXIS 1292 (2005), cert. denied, No. S06C0818, 2006 Ga. LEXIS 295 (Ga. May 8, 2006).

Fact that the arbitrators in a breach of contract action failed to provide any explanation for denying the subcontractor's request for attorney fees and interest was not a basis for vacating an arbitration award as the arbitrators were not required to enter written findings of fact or to explain the reasoning behind an award. Airtab, Inc. v. Limbach Co., LLC, 295 Ga. App. 720, 673 S.E.2d 69, 2009 Ga. App. LEXIS 93 (2009).

In a divorce action, the trial court did not err in vacating the arbitration award because the award did not contain findings of fact and conclusions of law as expressly required by the parties' arbitration agreement incorporated into the consent order and the husband was entitled to receive the benefit of his bargain. King v. King, 354 Ga. App. 19, 840 S.E.2d 108, 2020 Ga. App. LEXIS 110 (2020).

Failure of arbitrator to follow terms of contract. — The arbitrator overstepped the arbitrator's authority by awarding actual damages where the express terms of the contract permitted only the recovery of liquidated damages. Sweatt v. International Dev. Corp., 242 Ga. App. 753, 531 S.E.2d 192, 2000 Ga. App. LEXIS 337 (2000).

Failure of arbitrator to decide any and all disputes. — Final and definite arbitration award was not made because the arbitrator refused to consider the seller's counterclaim alleging that the buyer breached the buyer's obligations under certain promissory notes. The arbitration clauses in the parties' contracts required that "any and all disputes" between the parties be determined solely by arbitration; this included the dispute raised by the seller's counterclaim. Hansen & Hansen Enters. v. SCSJ Enters., 299 Ga. App. 469, 682 S.E.2d 652, 2009 Ga. App. LEXIS 814 (2009).

Language of contract did not govern Native American tribal corporation. — Trial court erred by confirming an arbitration award in favor of a supplier against a corporation owned by a Native American tribe because the corporation was an arm of the tribe entitled to tribal sovereign immunity, but was not authorized to waive tribal sovereign immunity by entering the contract containing the arbitration clause. The corporation did not waive the defense by failing to file an application to vacate the award. Churchill Fin. Mgmt. Corp. v. ClearNexus, Inc., 341 Ga. App. 798, 802 S.E.2d 85, 2017 Ga. App. LEXIS 285 (2017).

Language of contract must control. — The arbitrator may not ignore the plain language of the parties' contract, and courts must not decide the rightness or wrongness of the arbitrators' contract interpretation, only whether their decision draws its essence from the contract. Southwire Co. v. American Arbitration Ass'n, 248 Ga. App. 226, 545 S.E.2d 681, 2001 Ga. App. LEXIS 231 (2001).

Trial court could not alter arbitrators' award. — Trial court could not extend the time during which a natural

gas marketer was permitted to accept an alternative remedy under an arbitration award as a trial court lacked the statutory authority under O.C.G.A. § 9-9-13(b) to alter an arbitrators' award. Scana Energy Mktg., Inc. v. Cobb Energy Mgmt. Corp., 259 Ga. App. 216, 576 S.E.2d 548, 2002 Ga. App. LEXIS 1459 (2002), cert. denied, No. S03C0750, 2003 Ga. LEXIS 454 (Ga. Apr. 29, 2003).

As a construction company's motion to vacate an arbitration award with a store owner required a court to review whether the evidence supported particular findings of the arbitrator, such was not reviewable; factual findings of the arbitrator did not provide a ground for vacatur under O.C.G.A. § 9-9-13(b). Barron Reed Constr. v. 430, LLC, 275 Ga. App. 884, 622 S.E.2d 83, 2005 Ga. App. LEXIS 1131 (2005), cert. denied, No. S06C0441, 2006 Ga. LEXIS 232 (Ga. Mar. 27, 2006).

Trial court's order vacating an arbitrators' award for a subcontractor under O.C.G.A. § 9-9-13(b)(5) was reversed as there was no hearing transcript of the arbitration proceedings and the trial court could not determine from the face of the arbitration award what law the arbitrators applied or that the arbitrators deliberately ignored the applicable law. Progressive Plumbing, Inc. v. ABCO Builders, Inc., 281 Ga. App. 696, 637 S.E.2d 92, 2006 Ga. App. LEXIS 1209 (2006), aff'd, 282 Ga. 308, 647 S.E.2d 574, 2007 Ga. LEXIS 533 (2007).

Three month time limit. — Individual's motion for a protective order pursuant to Fed. R. Bankr. P. 7026(c) and a special master's motion to quash, pursuant to Fed. R. Civ. P. 45, a debtor's subpoena of the special master for a deposition and document production to question the special master on the basis for an arbitration decision, were granted because: (1) Georgia law provided that arbitrators could not have been required to testify as to their rationale or the reasoning behind their awards; (2) both the debtor and the individual agreed in a consent order in a state court action that the special master's decision was final and binding, and both parties waived their rights of appeal or reconsideration; and (3) the three-month period under O.C.G.A. § 9-9-13 to appeal the decision had passed, and, thus, deposing the special master would have been a useless act. Silver v. Protos (In re Protos), No. 02-74770-MHM, No. 03-6473, 2004 Bankr. LEXIS 1604 (Bankr. N.D. Ga. Sept. 10, 2004).

Attorney's objections to an attorney fee arbitration award in favor of the attorney's client's mother's estate were filed too late; the client's application to confirm the award was filed timely under O.C.G.A. § 9-9-12, but the attorney's objection was filed well outside the three-month limitation in O.C.G.A. §§ 9-9-13(a) and 9-9-14(a). McFarland v. Roberts, 335 Ga. App. 40, 778 S.E.2d 349, 2015 Ga. App. LEXIS 575 (2015), cert. denied, No. S16C0522, 2016 Ga. LEXIS 229 (Ga. Mar. 7, 2016).

Arbitration award that was not timely contested barred subsequent action. — Final arbitration award, which did not address the owners' breach of contract and fraud claims against a builder, barred a subsequent suit as the owners failed to timely renew their motion to vacate the award under O.C.G.A. § 9-2-61(a) after it was dismissed from a foreclosure action and the breach of contract and fraud claims had been submitted for arbitration. Witherington v. Adkins, 271 Ga. App. 837, 610 S.E.2d 561, 2005 Ga. App. LEXIS 98 (2005), cert. denied, No. S05C1105, 2005 Ga. LEXIS 488 (Ga. June 30, 2005).

Improper challenge to sufficiency of evidence. — Client's motion to vacate an arbitration award was properly denied as the client's claim that the arbitrator improperly awarded an attorney a fee based on distributions the client received without the attorney's assistance was a challenge to the sufficiency of the evidence. Doman v. Stapleton, 272 Ga. App. 114, 611 S.E.2d 673, 2005 Ga. App. LEXIS 147 (2005), cert. denied, No. S05C1144, 2005 Ga. LEXIS 624 (Ga. Sept. 19, 2005).

In a case seeking to vacate an arbitration award under O.C.G.A. § 9-9-13(b), it was evident that a seller's claims of "manifest disregard of the law" were nothing more than unreviewable factual issues; further, by failing to provide a transcript of the arbitration hearing to the appellate court, the seller was precluded from fulfilling its burden of showing by

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the record that the arbitrator manifestly disregarded the law. McGill Homes, Inc. v. Weaver, 278 Ga. App. 622, 629 S.E.2d 535, 2006 Ga. App. LEXIS 391 (2006).

Manifest disregard of the law not shown. — In an arbitration arising out of a construction contract, the arbitrator's award of payment to a subcontractor under an invoice did not manifestly disregard the law under O.C.G.A. § 9-9-13(b) of the Georgia Arbitration Code even though there was evidence that a construction manager and others had paid the invoice; the award did not equate with manifest disregard of the law or provide a ground to vacate the award because it was grounded in the parties' contract in that it was intended to compensate for bad faith which the arbitrator found that a corporation, a property owner, and a construction manager had shown by failing to keep the subcontractor apprised of the work schedule and thus preventing it from accepting other work. Johnson Real Estate Invs., LLC v. Aqua Industrials, Inc., 282 Ga. App. 638, 639 S.E.2d 589, 2006 Ga. App. LEXIS 1501 (2006).

A trial court properly denied a car dealership's motion to vacate an arbitration award in favor of a customer under O.C.G.A. § 9-9-13(b)(5). Whether or not the arbitrator correctly interpreted the Truth in Lending Act, the dealership did not show that the arbitrator manifestly disregarded the law to reach the result the arbitrator reached. Savannah Dodge, Inc. v. Bynes, 291 Ga. App. 281, 661 S.E.2d 660, 2008 Ga. App. LEXIS 472 (2008).

Subcontractor's assertion that the arbitrators in a breach of contract action ignored the law failed as the subcontractor failed to point to any evidence that the arbitrators ignored the subcontract or any controlling law. Airtab, Inc. v. Limbach Co., LLC, 295 Ga. App. 720, 673 S.E.2d 69, 2009 Ga. App. LEXIS 93 (2009).

Arbitrator's award was improperly vacated under O.C.G.A. § 9-9-13(b)(5) on grounds that the arbitrator manifestly disregarded the law of rescission as the arbitrator cited O.C.G.A. § 13-4-60 and applicable case law concerning rescission and applied that law to the circumstances of the case. Hansen & Hansen Enters. v. SCSJ Enters., 299 Ga. App. 469, 682 S.E.2d 652, 2009 Ga. App. LEXIS 814 (2009).

Arbitration award in favor of a home builder entitled the builder to summary judgment in the home buyers' action for breach of contract. The trial court erred in denying the builder's motion to confirm the award, because the buyers did not show that the arbitrator manifestly disregarded the applicable law or the parties' contract under O.C.G.A. § 9-9-13(b)(5). America's Home Place, Inc. v. Cassidy, 301 Ga. App. 233, 687 S.E.2d 254, 2009 Ga. App. LEXIS 1351 (2009).

Trial court properly denied a motion by a law client under O.C.G.A. § 9-9-13(b)(5) seeking to vacate an arbitration award on the basis that the arbitrator disregarded and violated Henning's Rules regarding disclosure of potential conflicts as it was not shown that the arbitrator manifestly disregarded the proper law applicable to the case, which involved a dispute over legal fees owed by the client. Phan v. Andre & Blaustein, LLP, 309 Ga. App. 191, 709 S.E.2d 863, 2011 Ga. App. LEXIS 279 (2011), cert. denied, No. S11C1339, 2012 Ga. LEXIS 61 (Ga. Jan. 9, 2012).

Arbitration award was affirmed because the arbitrator included with the arbitrator's award a detailed legal memorandum in which the arbitrator considered the cases cited by the franchisees but distinguished the cases on the facts. The fact that the arbitrator rejected the franchisees' legal argument did not mean the arbitrator ignored the arguments. SCSJ Enters. v. Hansen & Hansen Enters., 319 Ga. App. 210, 734 S.E.2d 214, 2012 Ga. App. LEXIS 934 (2012), cert. denied, No. S13C0603, 2013 Ga. LEXIS 460 (Ga. May 20, 2013).

Dismissal of law clerks' motion to confirm an arbitration award in the clerks' favor on the clerks' group-pay grievance against a county due to alleged pay disparity was not warranted as the back pay award was not barred by the doctrine of sovereign immunity; accordingly, there was no manifest disregard of the law by the arbitrator. Fulton County v. Lord, 323 Ga. App. 384, 746 S.E.2d 188, 2013 Ga. App. LEXIS 598 (2013), cert. denied, No.

S13C1802, 2014 Ga. LEXIS 31 (Ga. Jan. 6, 2014).

In a dispute between the licensor of a doll brand to a licensee, an arbitrator did not manifestly disregard Georgia's parol evidence rule, O.C.G.A. § 9-9-13(b)(5), when the arbitrator considered extrinsic evidence of the commercial context in which the license agreements were executed in determining that the licensor could engage in the negotiation of a new license agreement in the year before the agreement expired. Original Appalachian Artworks, Inc. v. Jakks Pac., Inc., 718 Fed. Appx. 776, 2017 U.S. App. LEXIS 23168 (11th Cir. 2017), transferred, No. 17-11513-CC, 2018 U.S. App. LEXIS 12477 (11th Cir. May 11, 2018).

Federal concept of manifest disregard of the law applicable. — In seeking to vacate an arbitration award to a subcontractor on the basis that the arbitrator allegedly showed manifest disregard of the law under O.C.G.A. § 9-9-13(b)(5), a construction manager and others failed to show any evidence that the Georgia legislature intended to adopt something other than the federally recognized concept of manifest disregard; thus, an error in interpreting the applicable law does not constitute manifest disregard, and instead, a showing must be made, other than the result obtained, that the arbitrator knew the law and expressly disregarded it. Johnson Real Estate Invs., LLC v. Aqua Industrials, Inc., 282 Ga. App. 638, 639 S.E.2d 589, 2006 Ga. App. LEXIS 1501 (2006).

Trial court properly denied plaintiffs' motion to vacate an arbitration award in a suit asserting breach of contract, breach of fiduciary duty, fraud, and other claims on the ground that the arbitrator manifestly disregarded the law, because that ground, pursuant to O.C.G.A. § 9-9-13(b)(5), only applied to claims filed after July 1, 2003, and the action was commenced in 2002. Ansley Marine Constr., Inc. v. Swanberg, 290 Ga. App. 388, 660 S.E.2d 6, 2008 Ga. App. LEXIS 170 (2008), cert. denied, No. S08C1260, 2008 Ga. LEXIS 673 (Ga. Sept. 8, 2008).

RESEARCH REFERENCES

ALR.

What constitutes corruption, fraud, or undue means in obtaining arbitration award justifying avoidance of award under state law, 22 A.L.R.4th 366.

Participation in arbitration proceedings as waiver to objections to arbitrability under state law, 56 A.L.R.5th 757.

Setting aside arbitration award on ground of interest or bias of arbitrators — insurance appraisals or arbitrations, 63 A.L.R.5th 675.

Setting aside arbitration award on ground of interest or bias of arbitrators — torts, 64 A.L.R.5th 475.

Setting aside arbitration award on ground of interest or bias of arbitrator — labor disputes, 66 A.L.R.5th 611.

Setting aside arbitration award on ground of interest or bias of arbitrators — commercial, business, or real estate transactions, 67 A.L.R.5th 179.

Construction and application of § 10(a)(4) of Federal Arbitration Act [9 USCS § 10(a)(4)] providing for vacating of arbitration awards where arbitrators exceed or imperfectly execute powers, 136 A.L.R. Fed 183.

Construction and application of § 10(a)(1)-(3) of Federal Arbitration Act [9 USCS § 10(a)(1)-(3)] providing for vacating of arbitration awards where award procured by fraud, corruption, or undue means, where arbitrators evidence partiality or corruption and where arbitrators engage in particular acts of misbehavior, 141 A.L.R. Fed 1.

Vacation on public policy grounds arbitration awards reinstating discharged employees, 142 A.L.R. Fed 387.

Refusal to enforce foreign arbitration awards on public policy grounds, 144 A.L.R. Fed. 481.

Vacating arbitration awards as contrary to National Labor Relations Act, 147 A.L.R. Fed. 77.

Application of Tribal Sovereign Immunity from Lawsuit — U.S. Supreme Court Cases, 28 A.L.R. Fed.3d 3 (2018).

9-9-14. Modification of award by court; application; grounds; subsequent confirmation of award.

(a) An application to modify the award shall be made to the court within three months after delivery of a copy of the award to the applicant.

(b) The court shall modify the award if:

(1) There was a miscalculation of figures or a mistake in the description of any person, thing, or property referred to in the award;

(2) The arbitrators awarded on a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a manner of form, not affecting the merits of the controversy.

(c) If the court modifies the award, it shall confirm the award as modified. If the court denies modification, it shall confirm the award made by the arbitrators.

History.
Code 1933, § 7-315, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-94; Code 1981, § 9-9-14, as redesignated by Ga. L. 1988, p. 903, § 1.

Law reviews.
For article, "Comprehensive Arbitration of Domestic Relations Cases in Georgia," see 14 Ga. St. B.J. 20 (2008).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code Section 9-9-94 are included in the annotations for this Code section.

Exclusivity of statutory grounds. — The statutory bases of O.C.G.A. § 9-9-14 provide the exclusive grounds for the modification of an arbitration award. Ralston v. City of Dahlonega, 236 Ga. App. 386, 512 S.E.2d 300.

Language of contract did not govern Native American tribal corporation. — Trial court erred by confirming an arbitration award in favor of a supplier against a corporation owned by a Native American tribe because the corporation was an arm of the tribe entitled to tribal sovereign immunity, but was not authorized to waive tribal sovereign immunity by entering the contract containing the arbitration clause. The corporation did not waive the defense by failing to file an application to vacate the award. Churchill Fin. Mgmt. Corp. v. ClearNexus, Inc., 341 Ga. App. 798, 802 S.E.2d 85, 2017 Ga. App. LEXIS 285 (2017).

Effect of failure to support enumerations of error. — Trial court's ruling confirming the arbitration award would be assumed to be correct, where the applicant presented no evidence in support of its enumerations other than arguments in its briefs and references to statements made in the opposing party's briefs. Trend-Pak of Atlanta, Inc. v. Arbor Commercial Div., Inc., 197 Ga. App. 137, 397 S.E.2d 592, 1990 Ga. App. LEXIS 1205 (1990).

Modification or striking of award not required. — Fact that arbitrators awarded an investor $190,000 in the investor's claim against a broker, which award did not correlate to the $694,448 that the investor sought in the investor's claim, did not render the award imperfect

and did not require that the award be modified or stricken. Tanaka v. Pecqueur, 268 Ga. App. 380, 601 S.E.2d 830, 2004 Ga. App. LEXIS 921 (2004).

The trial court properly confirmed an arbitrator's award in a breach of contract action between a wastewater treatment company and a city as: (1) that part of the arbitrator's award which discussed the terms "maintenance" and "capital expenditures" was not inconsistent with the definitions contained in the contract; and (2) the award was based not only on the company's failure to make necessary repairs, but on the deterioration which resulted from that failure. Further, there was no requirement that the arbitrator's award include specific findings or reasons absent a request by the parties under O.C.G.A. § 9-9-39(a). Operations Mgmt. Int'l v. City of Forsyth, 288 Ga. App. 469, 654 S.E.2d 438, 2007 Ga. App. LEXIS 1228 (2007).

Modification of award to comply with settlement agreement. — There was no reason to curtail enforcement of a pre-arbitration high/low agreement reached by the parties which addressed both the range of the amount of the award and the incremental payment of the award; a trial court's orders modifying an arbitration award to conform to the high/low agreement and confirming the modified award were affirmed. Universal Mgmt. Concepts, Inc. v. Noferi, 270 Ga. App. 212, 605 S.E.2d 899, 2004 Ga. App. LEXIS 1394 (2004).

Modification did not affect the merits of arbitrator's finding. — The trial court's modification of an arbitrator's award did not affect the merits of the arbitrators' finding as to a patient's liability to a medical provider for services rendered. Lowe v. Ctr. Neurology Assocs., P.C., 288 Ga. App. 166, 653 S.E.2d 318, 2007 Ga. App. LEXIS 1066 (2007), cert. denied, No. S08C0477, 2008 Ga. LEXIS 325 (Ga. Mar. 31, 2008).

Modification of an arbitration award was warranted under O.C.G.A. § 9-9-14(b)(2) since a bankruptcy court limited the purpose of the arbitration to determining the disputed amount of a bankruptcy debtor's underlying state law claim against sellers of a modular home and adjustment of the allowed claim of the sellers to include any amounts awarded by the arbitrator, and the arbitrator exceeded the scope of the court's instructions by providing a 90-day period for the debtor to pay the full amount so the debtor could obtain permanent financing. Clark v. Palm Harbor Homes, Inc., 411 B.R. 507, 2009 Bankr. LEXIS 2716 (Bankr. S.D. Ga. 2009).

Request for modification untimely. — As a county did not request modification of an arbitrator's award of back pay to county employees until eight months after the award was issued, and nearly one month after the award was confirmed, the county could not circumvent the statute of limitation governing arbitration awards by claiming on appeal that the award should have been modified. Fulton County v. Lord, 323 Ga. App. 384, 746 S.E.2d 188, 2013 Ga. App. LEXIS 598 (2013), cert. denied, No. S13C1802, 2014 Ga. LEXIS 31 (Ga. Jan. 6, 2014).

Attorney's objections to an attorney fee arbitration award in favor of the attorney's client's mother's estate were filed too late; the client's application to confirm the award was filed timely under O.C.G.A. § 9-9-12, but the attorney's objection was filed well outside the three-month limitation in O.C.G.A. §§ 9-9-13(a) and 9-9-14(a). McFarland v. Roberts, 335 Ga. App. 40, 778 S.E.2d 349, 2015 Ga. App. LEXIS 575 (2015), cert. denied, No. S16C0522, 2016 Ga. LEXIS 229 (Ga. Mar. 7, 2016).

9-9-15. Judgment on award.

(a) Upon confirmation of the award by the court, judgment shall be entered in the same manner as provided by Chapter 11 of this title and be enforced as any other judgment or decree.

(b) The judgment roll shall consist of the following:

(1) The agreement and each written extension of time within which to make the award;

(2) The award;

(3) A copy of the order confirming, modifying, or correcting the award; and

(4) A copy of the judgment.

History.
Code 1933, § 7-316, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-95; Code 1981, § 9-9-15, as redesignated by Ga. L. 1988, p. 903, § 1.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code Section 9-9-95 are included in the annotations for this Code section.

Separate order and judgment not required. — Although O.C.G.A. § 9-9-15 of the Georgia Arbitration Code contemplates entry of a judgment separate from the order confirming the award, the statute does not require that the order and the judgment be entered on separate documents. McFarland v. Roberts, 335 Ga. App. 40, 778 S.E.2d 349, 2015 Ga. App. LEXIS 575 (2015), cert. denied, No. S16C0522, 2016 Ga. LEXIS 229 (Ga. Mar. 7, 2016).

Approval of arbitration award not yet issued. — Husband's application to vacate an arbitration award under O.C.G.A. § 9-9-13 should have been dismissed rather than denied since the trial court's divorce decree in which it approved the arbitration award was final on the date that it issued the decree even though the arbitration award had, in fact, not been issued on that date. Since, pursuant to O.C.G.A. § 9-9-15 the order confirming the arbitration award became the judgment of the trial court on the date that the trial court issued its divorce decree, all matters in litigation in the action were final on that date, including those submitted for arbitration, and the later purported arbitration award was of no effect. Ciraldo v. Ciraldo, 280 Ga. 602, 631 S.E.2d 640, 2006 Ga. LEXIS 400 (2006).

Judgment entered on arbitration award not in conformity therewith. — As a trial court's confirmation of an arbitration award in favor of law clerks resulted in an award of back pay to the clerks that was to be implemented from the date of the confirmation order, the award was not in conformity with the arbitration award, which required implementation from the date of the award. Fulton County v. Lord, 323 Ga. App. 384, 746 S.E.2d 188, 2013 Ga. App. LEXIS 598 (2013), cert. denied, No. S13C1802, 2014 Ga. LEXIS 31 (Ga. Jan. 6, 2014).

Postjudgment interest awarded. — Trial court properly awarded postjudgment interest after the court confirmed an arbitration award; once confirmed, the arbitration was treated like all other judgments, and under O.C.G.A. § 7-4-12(a), all judgments bore annual interest on the principal amount recovered. Airtab, Inc. v. Limbach Co., LLC, 295 Ga. App. 720, 673 S.E.2d 69, 2009 Ga. App. LEXIS 93 (2009).

9-9-16. Appeals authorized.

Any judgment or any order considered a final judgment under this part may be appealed pursuant to Chapter 6 of Title 5.

History.
Code 1933, § 7-317, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-96; Code 1981, § 9-9-16, as redesignated by Ga. L. 1988, p. 903, § 1.

JUDICIAL DECISIONS

Jurisdiction. — Court of Appeals had jurisdiction over an attorney's appeal from a final order and judgment of a superior court confirming an arbitration award of the Georgia State Bar Committee on the Arbitration of Fee Disputes in favor of a client's mother's estate because the appeal was from a final judgment of a superior court affirming the award under O.C.G.A. § 9-9-16 and was directly appealable under O.C.G.A. § 5-6-34(a)(1). McFarland v. Roberts, 335 Ga. App. 40, 778 S.E.2d 349, 2015 Ga. App. LEXIS 575 (2015), cert. denied, No. S16C0522, 2016 Ga. LEXIS 229 (Ga. Mar. 7, 2016).

RESEARCH REFERENCES

ALR.
Uninsured and underinsured motorist coverage: enforceability of policy provision limiting appeals from arbitration, 23 A.L.R.5th 801.

Uninsured and underinsured motorist coverage: validity, construction, and effect of policy provision purporting to reduce coverage by amount paid or payable under workers' compensation law, 31 A.L.R.5th 116.

Participation in arbitration proceedings as waiver to objections to arbitrability under state law, 56 A.L.R.5th 757.

9-9-17. Arbitrators' fees and expenses.

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.

History.
Code 1933, § 7-318, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-97; Code 1981, § 9-9-17, as redesignated by Ga. L. 1988, p. 903, § 1.

JUDICIAL DECISIONS

Attorney's fees. — O.C.G.A. § 9-9-17 does not specifically prohibit the parties from contracting for the recovery of attorney's fees in arbitration proceedings; it merely addresses the allocation of the expenses of arbitration other than attorney's fees and provides that, as to the allocation of those expenses, the award will control insofar as it is not inconsistent with the parties' agreement. Hope & Assocs. v. Marvin M. Black Co., 205 Ga. App. 561, 422 S.E.2d 918, 1992 Ga. App. LEXIS 1252 (1992).

Vacation of award not warranted. — The appellate record did not reveal a manifest disregard for the law nor complete irrationality by the arbitrator sufficient to warrant vacation of the award. Haddon v. Shaheen & Co., 231 Ga. App. 596, 499 S.E.2d 693.

Federal Arbitration Act preempts this section. — Once it is found that an underlying contract involves interstate or foreign commerce or a maritime transaction, the federal Arbitration Act, 9 U.S.C. § 1 et seq., preempts the field and former O.C.G.A. § 9-9-97 (now this section) does not apply. Ceco Concrete Constr. v. J.T. Schrimsher Constr. Co., 792 F. Supp. 109, 1992 U.S. Dist. LEXIS 7941 (N.D. Ga. 1992).

RESEARCH REFERENCES

ALR.
Awarding attorneys' fees in connection with arbitration, 60 A.L.R.5th 669.

9-9-18. Commencement or continuation of proceedings upon death or incompetency of party.

Where a party dies or becomes incompetent after making a written agreement to arbitrate, the proceedings may be begun or continued upon the application of, or upon notice to, his executor or administrator or trustee or guardian or, where it relates to real property, his distributee or devisee who has succeeded to his interest in the real property. Upon the death or incompetency of a party, the court may extend the time within which an application to confirm, vacate, or modify the award or to stay arbitration must be made. Where a party has died since an award was delivered, the proceedings thereupon are the same as where a party dies after a verdict.

History.
Code 1981, § 9-9-18, enacted by Ga. L. 1988, p. 903, § 1.

Part 2

International Commercial Arbitration Code

Editor's notes.
Ga. L. 2012, p. 961, § 1/SB 383, effective July 1, 2012, repealed the Code sections formerly codified at this part and enacted the current part. The former part consisted of Code Sections 9-9-30 through 9-9-43, relating to international transactions, and was based on Code 1981, §§ 9-9-30 through 9-9-43, enacted by Ga. L. 1988, p. 903, § 2.

Ga. L. 2012, p. 961, § 2/SB 383, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to international arbitration agreements entered into on and after such date. This Act shall not apply to any international arbitration agreements entered into prior to July 1, 2012, to which the provisions of the former Part 2 of Article 1 of Chapter 9 of Title 9 shall apply."

Law reviews.
For article on the 2012 enactment of this part, see 29 Ga. St. U.L. Rev. 334 (2012).

9-9-20. Short title; statement of purpose.

(a) This part shall be known and may be cited as the "Georgia International Commercial Arbitration Code."

(b) The purpose of this part is to encourage international commercial arbitration in this state, to enforce arbitration agreements and arbitration awards, to facilitate prompt and efficient arbitration proceedings consistent with this part, and to provide a conducive environment for international business and trade.

History.
Code 1981, § 9-9-20, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.
2A Am. Jur. Pleading and Practice Forms, Arbitration and Award, § 81.
Am. Jur. 2d.
4 Am. Jur. 2d, Alternative Dispute Resolution, § 1.
ALR.
Refusal to enforce foreign arbitration awards on public policy grounds, 144 A.L.R. Fed. 481.

9-9-21. Applicability.

(a) This part shall apply to international commercial arbitration, subject to any agreement in force between the United States and any other country.

(b) The provisions of this part, except for Code Sections 9-9-29 and 9-9-30, subsections (f) through (h) of Code Section 9-9-38, and Code Sections 9-9-39, 9-9-57, and 9-9-58, shall apply only if the place of arbitration is in this state.

(c) An arbitration shall be considered international if:

(1) The parties to an arbitration agreement have their places of business in different countries at the time of the conclusion of such arbitration agreement;

(2) One of the following places is situated outside the country in which the parties have their places of business:

(A) The place of arbitration, if determined in or pursuant to the arbitration agreement; or

(B) Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(3) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(d) For the purposes of subsection (c) of this Code section:

(1) If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; and

(2) If a party does not have a place of business, reference is to be made to such party's habitual residence.

(e) This part shall not affect any other law of this state by virtue of which certain disputes shall not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this part.

History.
Code 1981, § 9-9-21, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-22. Definitions.

(a) As used in this part, the term:

(1) "Arbitration" means any arbitration, whether or not administered by a permanent arbitral institution.

(2) "Arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes that have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, and may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) "Arbitration award" means a decision of an arbitration tribunal on the substance of a dispute submitted to it and shall include an interim, interlocutory, or partial award.

(4) "Arbitration tribunal" means a sole arbitrator or a panel of arbitrators.

(b)(1) Where a provision of this part, except Code Section 9-9-50, leaves the parties free to determine a certain issue, such freedom shall include the right of the parties to authorize a third party, including an institution, to make that determination.

(2) Where a provision of this part refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement shall include any arbitration rule referred to in such agreement.

(3) Where a provision of this part, other than in paragraph (1) of Code Section 9-9-47 and paragraph (1) of subsection (b) of Code Section 9-9-54, refers to a claim, it shall also apply to a counterclaim, and where it refers to a defense, it shall also apply to a defense to such counterclaim.

History.
Code 1981, § 9-9-22, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-23. Interpretation.

(a) In the interpretation of this part, regard shall be given to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(b) Questions concerning matters governed by this part which are not expressly settled in it are to be settled in conformity with the general principles on which this part is based.

History.
Code 1981, § 9-9-23, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-24. Receipt of written communications.

(a) Unless otherwise agreed by the parties:

(1) Any written communication shall be deemed to have been received if it is delivered to the addressee personally or if it is delivered at his or her place of business, habitual residence, or mailing address; if none of these can be found after making a reasonable inquiry, a written communication shall be deemed to have been received if it is sent to the addressee's last known place of business, habitual residence, or mailing address by registered mail or any other means which provides a record of the attempt to deliver it; and

(2) Communications shall be deemed to have been received on the day it is delivered.

(b) The provisions of this Code section shall not apply to communications in court proceedings.

History.
Code 1981, § 9-9-24, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-25. Waiver of right to object to violations of arbitration agreement.

A party who knows that any provision of this part from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without objecting to such noncompliance without undue delay or, if a time limit is provided therefor, within such period of time, shall be deemed to have waived the right to object.

History.
Code 1981, § 9-9-25, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-26. Judicial intervention and enforcement.

In matters governed by this part, no court shall intervene except where provided in this part. If the controversy is within the scope of this part, the arbitration agreement shall be enforced by the courts of this state in accordance with this part without regard to the justiciable character of the controversy.

History.
Code 1981, § 9-9-26, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-27. County where agreement to be enforced.

The functions referred to in subsections (c) and (d) of Code Section 9-9-32, subsection (c) of Code Section 9-9-34, Code Section 9-9-35, paragraph (3) of Code Section 9-9-37, Code Section 9-9-49, and subsection (b) of Code Section 9-9-56 shall be performed by the superior court in the county agreed upon by the parties. Barring such agreement, these functions shall be performed by the superior court:

(1) In any county where any portion of the hearing has been conducted;

(2) If no portion of the hearing has been conducted in this state, in the county where any party resides or does business; or

(3) If there is no such county, in any county.

History.
Code 1981, § 9-9-27, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-28. Arbitration agreements to be in writing; definitions.

(a) All arbitration agreements shall be in writing.

(b) A written arbitration agreement means that its contents are recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(c)(1) As used in this subsection, the term:

(A) "Data message" means information generated, sent, received or stored by electronic, magnetic, optical, or similar means, including, but not limited to, electronic data interchange (EDI), email, telegram, telex, or telecopy.

(B) "Electronic communication" means any communication that the parties make by means of data messages.

(2) The requirement that an arbitration agreement be in writing may be met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

(d) An arbitration agreement shall be deemed to be in writing if it is contained in an exchange of statements of claim and defense in which the existence of an arbitration agreement is alleged by one party and not denied by the other.

(e) The reference in a contract to any document containing an arbitration clause shall constitute an arbitration agreement in writing, provided that the reference is such as to make that clause a part of the contract.

History.
Code 1981, § 9-9-28, enacted by Ga. L. 2012, p. 961, § 1/SB 383; Ga. L. 2023, p. 730, § 1(1)/HB 475, effective July 1, 2023.
The 2023 amendment, effective July 1, 2023, part of an Act to revise, modernize, and correct the Code, substituted "email" for "e-mail" in subparagraph (c)(1)(A).

9-9-29. Arbitration referrals.

(a) A court before which a civil action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative, or incapable of being performed.

(b) Where an action referred to in subsection (a) of this Code section has been brought, arbitral proceedings may nevertheless be commenced or continued, and an arbitration award may be made, while the action is pending before the court.

History.
Code 1981, § 9-9-29, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-30. Interim measures of protection.

Before or during arbitral proceedings, a party may request from a court an interim measure of protection, and a court may grant such measure, and such request shall not be deemed to be incompatible with an arbitration agreement.

History.
Code 1981, § 9-9-30, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

Law reviews.
For annual review of admiralty law, see 69 Mercer L. Rev. 1001 (2018).

JUDICIAL DECISIONS

Authority of court. — O.C.G.A. § 9-9-30 did not authorize the court to order a charterer and a guarantor to provide security to ship owners pending an arbitration in London as § 9-9-30 does not authorize the creation of interim measures of protection but instead guarantees that resort to a court for interim measures will not waive the right to arbitrate; the fact that O.C.G.A. § 9-9-38 uses "interim measures" in describing an arbitrator's authority does not mean that the same authority is granted to the courts. SCL Basilisk AG v. Agribusiness United Savannah Logistics LLC, 875 F.3d 609, 2017 U.S. App. LEXIS 22801 (11th Cir. 2017).

9-9-31. Number of arbitrators.

The parties shall be free to determine the number of arbitrators, and if no determination is stated, the number of arbitrators shall be one.

History.
Code 1981, § 9-9-31, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-32. Appointment of arbitrators; immunity from liability.

(a) No person shall be precluded by reason of nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(b) The parties shall be free to agree on a procedure to appoint the arbitrator or arbitrators, subject to the provisions of subsections (d) and (e) of this Code section.

(c) If the parties do not agree on the procedure to appoint the arbitrator or arbitrators:

(1) In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the court specified in Code Section 9-9-27; or

(2) In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator within 30 days, the arbitrator shall be appointed, upon request of a party, by the court specified in Code Section 9-9-27.

(d) Where, under an appointment procedure agreed upon by the parties:

(1) A party fails to act as required under such procedure;

(2) The parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure; or

(3) A third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court specified in Code Section 9-9-27 to take the necessary measure, unless the arbitration agreement on the appointment procedure provides other means for securing the appointment.

(e) A decision on a matter entrusted by subsection (c) or (d) of this Code section to the court specified in Code Section 9-9-27 shall not be subject to appeal. The court, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the arbitration agreement and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

(f) An arbitrator shall not be liable for:

(1) Anything done or omitted in the discharge or purported discharge of arbitral functions, unless the act or omission is shown to have been in bad faith; or

(2) Any mistake of law, fact, or procedure made in the course of arbitration proceedings or in the making of an arbitration award.

(g) Subsection (f) of this Code section shall apply to an employee or agent of an arbitrator and to an appointing authority, arbitral institution, or person designated or requested by the parties to appoint or nominate an arbitrator or provide other administrative services in support of the arbitration.

History. Code 1981, § 9-9-32, enacted by Ga. L. 2012, p. 961, § 1/SB 383; Ga. L. 2017, p. 774, § 9/HB 323.

9-9-33. Arbitrator disclosure requirements; challenge of arbitrator for doubts as to impartiality or independence.

(a) When a person is approached in connection with the possible appointment of such person as an arbitrator, such person shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by the arbitrator.

(b) An arbitrator may be challenged only if circumstances exist that

give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by the party, or in whose appointment the party has participated, only for reasons of which the party becomes aware after the appointment has been made.

History.
Code 1981, § 9-9-33, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-34. Procedure for challenging arbitrator.

(a) The parties shall be free to agree on a procedure for challenging an arbitrator, subject to the provisions of subsection (c) of this Code section.

(b) If the parties fail to agree on a procedure for challenging an arbitrator, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitration tribunal or after becoming aware of any circumstance referred to in subsection (b) of Code Section 9-9-33, send a written statement of the reasons for the challenge to the arbitration tribunal. Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitration tribunal shall decide on the challenge.

(c) If a challenge under the procedure set forth in subsection (b) of this Code section is not successful, within 30 days after having received notice of the decision rejecting the challenge, the challenging party may request that the court specified in Code Section 9-9-27 decide on the challenge, which decision shall not be subject to appeal; while such a request is pending, the arbitration tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an arbitration award.

History.
Code 1981, § 9-9-34, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-35. Inability of arbitrator to carry out or perform functions; termination of mandate.

(a) If an arbitrator becomes de jure or de facto unable to perform his or her functions or for other reasons fails to act without undue delay, the arbitrator's mandate terminates if he or she withdraws from office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request that the court specified in Code Section 9-9-27 decide on the termination of the mandate, which decision shall not be subject to appeal.

(b) If, under this Code section or subsection (b) of Code Section 9-9-34, an arbitrator withdraws from office or a party agrees to the termination of the mandate of an arbitrator, this shall not imply acceptance of the validity of any ground referred to in this Code section or subsection (b) of Code Section 9-9-33.

History.
Code 1981, § 9-9-35, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-36. Appointment of substitute arbitrator.

Where the mandate of an arbitrator terminates under Code Section 9-9-34 or 9-9-35 or because of withdrawal from office for any other reason or because of the revocation of the arbitrator's mandate by agreement of the parties or in any other case of termination of the arbitrator's mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

History.
Code 1981, § 9-9-36, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-37. Disputes as to jurisdiction.

Unless otherwise agreed by the parties:

(1) The arbitration tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitration tribunal that the contract is null and void shall not thereby invalidate the arbitration clause;

(2) A plea that the arbitration tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. A party shall not be precluded from raising such a plea by the fact that the party has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitration tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitration tribunal may, in either case, admit a later plea if it considers the delay justified; and

(3) The arbitration tribunal may rule on a plea referred to in paragraph (2) of this Code section either as a preliminary question or in an arbitration award on the merits. If the arbitration tribunal rules as a preliminary question that it has jurisdiction or only partial

jurisdiction, within 30 days after having received notice of such ruling and subject to the permission of the arbitration tribunal, any party may request that the court specified in Code Section 9-9-27 decide the matter, which decision shall not be subject to appeal; while such a request is pending, the arbitration tribunal may continue the arbitral proceedings and make an arbitration award.

History.
Code 1981, § 9-9-37, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-38. Interim measures.

(a) Unless otherwise agreed by the parties, the arbitration tribunal may, at the request of a party, grant interim measures as it deems appropriate.

(b) The arbitration tribunal may modify, suspend, or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitration tribunal's own initiative.

(c) The arbitration tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(d) The arbitration tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(e) If a measure ordered under subsection (a) of this Code section proves to have been unjustified from the outset, the party which obtained its enforcement may be obliged to compensate the other party for damage resulting from the enforcement of such measure or from its providing security in order to avoid enforcement. This claim may be put forward in the pending arbitral proceedings.

(f) An interim measure issued by an arbitration tribunal shall be recognized as binding and, unless otherwise provided by the arbitration tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of Code Section 9-9-39.

(g) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension, or modification of that interim measure.

(h) Where recognition or enforcement of an interim measure is sought in a court of this state, such court may order the requesting party to provide appropriate security if the arbitration tribunal has not

already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

History.
Code 1981, § 9-9-38, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

JUDICIAL DECISIONS

Use of "interim measures" in describing arbitrator's authority. — O.C.G.A. § 9-9-30 did not authorize the court to order a charterer and a guarantor to provide security to ship owners pending an arbitration in London as § 9-9-30 does not authorize the creation of interim measures of protection but instead guarantees that resort to a court for interim measures will not waive the right to arbitrate; the fact that O.C.G.A. § 9-9-38 uses "interim measures" in describing an arbitrator's authority does not mean that the same authority is granted to the courts. SCL Basilisk AG v. Agribusiness United Savannah Logistics LLC, 875 F.3d 609, 2017 U.S. App. LEXIS 22801 (11th Cir. 2017).

9-9-39. When recognition or enforcement of interim measure may be refused.

(a) Recognition or enforcement of an interim measure may be refused only:

(1) At the request of the party against whom it is invoked if the court is satisfied that:

(A) Such refusal is warranted on the grounds set forth in subparagraphs (a)(1)(A) through (a)(1)(D) of Code Section 9-9-58;

(B) The arbitration tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitration tribunal has not been complied with; or

(C) The interim measure has been terminated or suspended by the arbitration tribunal or, where so empowered, by the court of the state in which the arbitration takes place or under the law of which that interim measure was granted; or

(2) If the court finds that:

(A) The interim measure is incompatible with the powers conferred upon the court, unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(B) Any of the grounds set forth in subparagraph (a)(2)(A) or (a)(2)(B) of Code Section 9-9-58 shall apply to the recognition and enforcement of the interim measure.

(b) Any determination made by the court on any ground in subsec-

tion (a) of this Code section shall be effective only for the purposes of the application to recognize and enforce the interim measure. Where recognition or enforcement is sought, the court shall not undertake a review of the substance of the interim measure in determining any ground specified in subsection (a) of this Code section.

History.
Code 1981, § 9-9-39, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-40. Treatment of parties.

The parties shall be treated with equality, and each party shall be given a full opportunity of presenting its case.

History.
Code 1981, § 9-9-40, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-41. Procedure to be followed by arbitration tribunal.

(a) Subject to the provisions of this part, the parties shall be free to agree on the procedure to be followed by the arbitration tribunal in conducting the proceedings.

(b) If the parties fail to agree on the procedure to be followed by the arbitration tribunal in conducting proceedings, the arbitration tribunal may, subject to the provisions of this part, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitration tribunal includes the power to determine the admissibility, relevance, materiality, and weight of any evidence.

History.
Code 1981, § 9-9-41, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-42. Place of arbitration.

(a) The parties shall be free to agree on the place of arbitration; provided, however, that failing such agreement, the place of arbitration shall be determined by the arbitration tribunal having regard to the circumstances of the case, including the convenience of the parties.

(b) Notwithstanding the provisions of subsection (a) of this Code section, the arbitration tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts, or the parties, or for inspection of goods, other property, or documents.

History.
Code 1981, § 9-9-42, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-43. Date of commencement of arbitral proceedings.

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

History.
Code 1981, § 9-9-43, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-44. Languages to be used in arbitral proceedings; translation of documentary evidence.

(a) The parties shall be free to agree on the language or languages to be used in the arbitral proceedings; provided, however, that failing such agreement, the arbitration tribunal shall determine the language or languages to be used in the proceedings. Such agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing, and any arbitration award, decision, or other communication by the arbitration tribunal.

(b) The arbitration tribunal may order that any documentary evidence be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitration tribunal.

History.
Code 1981, § 9-9-44, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-45. Facts supporting claim; amendment or supplementing of claim.

(a) Within the period of time agreed by the parties or determined by the arbitration tribunal, the claimant shall state the facts supporting his or her claim, the points at issue, and the relief or remedy sought, and the respondent shall state his or her defense in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(b) Unless otherwise agreed by the parties, either party may amend or supplement his or her claim or defense during the course of the arbitral proceedings, unless the arbitration tribunal considers it inap-

propriate to allow such amendment having regard to the delay in making it.

History.
Code 1981, § 9-9-45, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-46. How proceedings to be conducted; oral hearings; notice; consolidation of proceedings or hearings.

(a) Subject to any contrary agreement by the parties, the arbitration tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials; provided, however, that unless the parties have agreed that no hearings shall be held, the arbitration tribunal shall hold hearings at an appropriate stage of the proceedings, if requested by a party.

(b) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitration tribunal for the purposes of inspection of goods, other property, or documents.

(c) All statements, documents, or other information supplied to the arbitration tribunal by one party shall be communicated to the other party. Any expert report or evidentiary document on which the arbitration tribunal may rely in making its decision shall be communicated to the parties.

(d) Unless the parties agree to confer such power on the tribunal, the tribunal shall not have the power to order consolidation of proceedings or concurrent hearings; provided, however, that the parties shall be free to agree:

(1) That the arbitral proceedings shall be consolidated with other arbitral proceedings; or

(2) That concurrent hearings shall be held, on such terms as may be agreed.

History.
Code 1981, § 9-9-46, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-47. Effects of failure to state facts supporting claim, failure to put forward statement of defense, or failure to appear at hearing or to produce documentary evidence.

Unless otherwise agreed by the parties, if, without showing sufficient cause:

(1) The claimant fails to communicate his or her statement of

claim in accordance with subsection (a) of Code Section 9-9-45, the arbitration tribunal shall terminate the proceedings;

(2) The respondent fails to communicate his or her statement of defense in accordance with subsection (a) of Code Section 9-9-45, the arbitration tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations; and

(3) Any party fails to appear at a hearing or to produce documentary evidence, the arbitration tribunal may continue the proceedings and make the arbitration award on the evidence before it.

History.
Code 1981, § 9-9-47, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-48. Appointment of experts.

(a) Unless otherwise agreed by the parties, the arbitration tribunal:

(1) May appoint one or more experts to report to it on specific issues to be determined by the arbitration tribunal; and

(2) May require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods, or other property for the expert's inspection.

(b) Unless otherwise agreed by the parties, if a party requests or if the arbitration tribunal considers it necessary, the expert shall, after delivery of the expert's written or oral report, participate in a hearing where the parties have the opportunity to put questions to the expert and to present expert witnesses in order to testify on the points at issue.

History.
Code 1981, § 9-9-48, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-49. Subpoenas for witnesses and other evidence; compensation of witnesses.

(a) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence. Subpoenas shall be served and, upon application to the court specified in Code Section 9-9-27 by a party or the arbitrators, enforced in the same manner provided by law for the service and enforcement of subpoenas in a civil action.

(b) Notices to produce books, writings, and other documents or tangible things, depositions, and other discovery may be used in the arbitration according to procedures established by the arbitrators.

(c) A party shall have the opportunity to obtain a list of witnesses and to examine and copy documents relevant to the arbitration.

(d) Witnesses shall be compensated in the same amount and manner set forth in Title 24.

History.
Code 1981, § 9-9-49, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-50. Rules applicable to disputes.

(a) The arbitration tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules.

(b) Failing any designation by the parties, the arbitration tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(c) The arbitration tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

(d) In all cases, the arbitration tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

History.
Code 1981, § 9-9-50, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-51. Decision-making when more than one arbitrator.

In arbitral proceedings with more than one arbitrator, any decision of the arbitration tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members; provided, however, that questions of procedure may be decided by a presiding arbitrator, if authorized by the parties or all members of the arbitration tribunal.

History.
Code 1981, § 9-9-51, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-52. Settlement; arbitration award on agreed terms.

(a) If, during arbitral proceedings, the parties settle the dispute, the arbitration tribunal shall terminate the proceedings and, if requested

by the parties and not objected to by the arbitration tribunal, record the settlement in the form of an arbitration award on agreed terms.

(b) An arbitration award on agreed terms shall be made in accordance with the provisions of Code Section 9-9-53 and shall state that it is an arbitration award. Such an arbitration award shall have the same status and effect as any other arbitration award on the merits of the case.

History.
Code 1981, § 9-9-52, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-53. Arbitration award.

(a) An arbitration award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitration tribunal shall suffice, provided that the reason for any omitted signature is stated.

(b) The arbitration award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the arbitration award is an arbitration award on agreed terms pursuant to Code Section 9-9-52.

(c) The arbitration award shall state its date and the place of arbitration as determined in accordance with subsection (a) of Code Section 9-9-42. The arbitration award shall be deemed to have been made at that place.

(d) After the arbitration award is made, a copy signed by the arbitrators in accordance with subsection (a) of this Code section shall be delivered to each party.

(e) The arbitrators may award reasonable fees and expenses actually incurred, including, without limitation, fees and expenses of legal counsel, to any party to the arbitration and shall allocate the costs of the arbitration among the parties as it determines appropriate.

History.
Code 1981, § 9-9-53, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 9-9-39 are included in the annotations for this Code section.

Degree of specificity required in written statement of award. — There is no requirement that the arbitrator's award include specific findings or reasons absent a request by the parties under subsection (a) of former O.C.G.A. § 9-9-39, or that the award expressly address each and every issue and collateral issue arising in an arbitration. Trend-Pak of Atlanta, Inc. v. Arbor Commercial Div., Inc., 197 Ga. App. 137, 397 S.E.2d 592, 1990 Ga. App. LEXIS 1205 (1990) (decided under former O.C.G.A. § 9-9-39).

Specific findings not required absent request. — Trial court properly confirmed an arbitrator's award in a breach of contract action between a wastewater treatment company and a city as: (1) that part of the arbitrator's award which discussed the terms "maintenance" and "capital expenditures" was not inconsistent with the definitions contained in the contract; and (2) the award was based not only on the company's failure to make necessary repairs, but on the deterioration which resulted from that failure. Further, there was no requirement that the arbitrator's award include specific findings or reasons absent a request by the parties under former O.C.G.A. § 9-9-39(a). Operations Mgmt. Int'l v. City of Forsyth, 288 Ga. App. 469, 654 S.E.2d 438, 2007 Ga. App. LEXIS 1228 (2007) (decided under former O.C.G.A. § 9-9-39).

9-9-54. Termination of arbitral proceedings.

(a) The arbitral proceedings shall be terminated by the final arbitration award or by an order of the arbitration tribunal in accordance with subsection (b) of this Code section.

(b) The arbitration tribunal shall issue an order for the termination of the arbitral proceedings when:

(1) The claimant withdraws his or her claim, unless the respondent objects thereto and the arbitration tribunal recognizes a legitimate interest by the respondent in obtaining a final settlement of the dispute;

(2) The parties agree on the termination of the proceedings; or

(3) The arbitration tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(c) The mandate of the arbitration tribunal shall terminate with the termination of the arbitral proceedings, subject to the provisions of Code Section 9-9-55 and subsection (d) of Code Section 9-9-56.

History.
Code 1981, § 9-9-54, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-55. Correction or interpretation of arbitration award; additional arbitration awards; extension of time for correction, interpretation, or additional award.

(a)(1) Within 30 days of receipt of the arbitration award, unless another period of time has been agreed upon by the parties:

(A) A party, with notice to the other party, may request the arbitration tribunal to correct in the arbitration award any errors in computation, any clerical or typographical errors, or any errors of similar nature; and

(B) If agreed by the parties, a party, with notice to the other party, may request the arbitration tribunal to give an interpretation of a specific point or part of the arbitration award.

(2) If the arbitration tribunal considers any request under paragraph (1) of this subsection to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request. The interpretation shall form part of the arbitration award.

(b) The arbitration tribunal may correct any error of the type referred to in subparagraph (a)(1)(A) of this Code section on its own initiative within 30 days of the date of the arbitration award.

(c) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the arbitration award, the arbitration tribunal to make an additional award as to claims presented in the arbitration proceedings but omitted from the arbitration award. If the arbitration tribunal considers such request to be justified, it shall make the additional award within 60 days of receipt of the request.

(d) The arbitration tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation, or an additional award under subsection (a) or (c) of this Code section.

(e) The provisions of Code Section 9-9-53 shall apply to a correction or interpretation of the arbitration award or to an additional award.

History.
Code 1981, § 9-9-55, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-56. Recourse against arbitration award; criteria for setting aside award; time for making application to set aside.

(a) Recourse to a court against an arbitration award may be made only by an application for setting aside in accordance with subsections (b) and (c) of this Code section.

(b) An arbitration award may be set aside by the court specified in Code Section 9-9-27 only if:

(1) The party making the application furnishes proof that:

(A) A party to the arbitration agreement referred to in Code Section 9-9-28 was under some incapacity; or that said arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this state;

(B) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case;

(C) The arbitration award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitration award which contains decisions on matters not submitted to arbitration may be set aside; or

(D) The composition of the arbitration tribunal or the arbitral procedure was not in accordance with the arbitration agreement of the parties, unless such arbitration agreement was in conflict with a provision of this part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this part; or

(2) The court finds that:

(A) The subject matter of the dispute is not capable of settlement by arbitration under the law of the United States; or

(B) The arbitration award is in conflict with the public policy of the United States.

(c) An application for setting aside an arbitration award may not be made after three months have elapsed from the date on which the party making that application had received the arbitration award or, if a request had been made under Code Section 9-9-55, from the date on which that request had been disposed of by the arbitration tribunal.

(d) The court, when asked to set aside an arbitration award, may, where appropriate and requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitration tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitration tribunal's opinion will eliminate the grounds for setting aside.

(e) Where none of the parties is domiciled or has its place of business in this state, they may, by written agreement referencing this subsection, limit any of the grounds for recourse against the arbitration award under this Code section, with the exception of paragraph (2) of subsection (b) of this Code section.

History.
Code 1981, § 9-9-56, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

9-9-57. Arbitration award recognized as binding; enforcement.

(a) An arbitration award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this Code section and of Code Section 9-9-58.

(b) The party relying on an arbitration award or applying for its enforcement shall supply the original arbitration award or a copy thereof. The court may request the party to supply a translation of the arbitration award.

History.
Code 1981, § 9-9-57, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.
2A Am. Jur. Pleading and Practice Forms, Arbitration and Award, § 81.

ALR.
Refusal to enforce foreign arbitration awards on public policy grounds, 144 A.L.R. Fed. 481.

9-9-58. Grounds for refusing recognition or enforcement of arbitration award.

(a) Recognition or enforcement of an arbitration award, irrespective of the country in which it was made, may be refused only:

(1) At the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(A) A party to the arbitration agreement referred to in Code Section 9-9-28 was under some incapacity; or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the arbitration award was made;

(B) The party against whom the arbitration award is invoked was not given proper notice of the appointment of an arbitrator or

of the arbitral proceedings or was otherwise unable to present his or her case;

(C) The arbitration award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the arbitration award which contains decisions on matters submitted to arbitration may be recognized and enforced;

(D) The composition of the arbitration tribunal or the arbitral procedure was not in accordance with the arbitration agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(E) The arbitration award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that arbitration award was made; or

(2) If the court finds that:

(A) The subject matter of the dispute is not capable of settlement by arbitration under the law of the United States; or

(B) The recognition or enforcement of the arbitration award would be contrary to the public policy of the United States.

(b) If an application for setting aside or suspension of an arbitration award has been made to a court referred to in subparagraph (a)(1)(E) of this Code section, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitration award, order the other party to provide appropriate security.

History.
Code 1981, § 9-9-58, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.
2A Am. Jur. Pleading and Practice Forms, Arbitration and Award, § 81.

ALR.
Refusal to enforce foreign arbitration awards on public policy grounds, 144 A.L.R. Fed. 481.

9-9-59. Appeal of final judgment.

Any judgment considered a final judgment under this part may be appealed pursuant to Chapter 6 of Title 5.

History.
Code 1981, § 9-9-59, enacted by Ga. L. 2012, p. 961, § 1/SB 383.

ARTICLE 2

MEDICAL MALPRACTICE

Editor's notes.
Ga. L. 1988, p. 903, effective July 1, 1988, repealed the Code sections formerly codified as Parts 1, 2, and 3 of Article 2 and redesignated former Code Sections 9-9-110 through 9-9-133 of Part 4 of Article 2 as this article. The provisions of former Part 3 of Article 2 (former Code Sections 9-9-80 through 9-9-97) now appear as Part 1 of Article 1 of this chapter, except that former Code Section 9-9-83, concerning the validity of agreements to arbitrate, was repealed.

Law reviews.
For article, "Proposed Changes in the Arbitration Law of Georgia," see 23 Ga. St. B.J. 152 (1987).

For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

RESEARCH REFERENCES

ALR.
What constitutes physician-patient relationship for malpractice purposes, 17 A.L.R.4th 132.

Medical malpractice in connection with breast augmentation, reduction, or reconstruction, 28 A.L.R.5th 497.

9-9-60. "Medical malpractice claim" defined.

For the purposes of this article, the term "medical malpractice claim" means any claim for damages resulting from the death of or injury to any person arising out of:

(1) Health, medical, dental, or surgical service, diagnosis, prescription, treatment, or care, rendered by a person authorized by law to perform such service or by any person acting under the supervision and control of a lawfully authorized person; or

(2) Care or service rendered by any public or private hospital, nursing home, clinic, hospital authority, facility, or institution, or by any officer, agent, or employee thereof acting within the scope of his employment.

History.
Code 1933, § 7-401, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-110; Code 1981, § 9-9-60, as redesignated by Ga. L. 1988, p. 903, § 3.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 1988, "article" was substituted for "part" in the introductory language of the Code section.

Law reviews.

For article, "Medical Malpractice: A Time for More Talk and Less Rhetoric," see 37 Mercer L. Rev. 725 (1986).

For article, "Physicians, Pharmacists, Pharmaceutical Manufacturers: Partners in Patient Care, Partners in Litigation?," see 37 Mercer L. Rev. 755 (1986).

For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

RESEARCH REFERENCES

ALR.

Medical malpractice in performance of legal abortion, 69 A.L.R.4th 875.

Medical malpractice: presumption or inference from failure of hospital or doctor to produce relevant medical records, 69 A.L.R.4th 906.

Arbitration of medical malpractice claims, 24 A.L.R.5th 1.

Hospital liability as to diagnosis and care of patients in emergency room, 58 A.L.R.5th 613.

9-9-61. Medical malpractice arbitration authorized.

In addition to any other legal procedure for the resolution of medical malpractice claims, the parties to a medical malpractice claim may submit the claim for arbitration in accordance with this article.

History.

Code 1933, § 7-402, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-111; Code 1981, § 9-9-61, as redesignated by Ga. L. 1988, p. 903, § 3.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1988, "article" was substituted for "part" at the end of the Code section.

9-9-62. Petition for arbitration; arbitration order and appointment of referee; conditions precedent to enforceability.

If the parties to a medical malpractice claim agree in writing to arbitrate the claim pursuant to this article, they shall file a petition in the superior court of the county where any party resides for an order authorizing the arbitration of the claim in accordance with this article and for the appointment of a referee for the arbitration. If the judge determines that the claim is a medical malpractice claim subject to this article, within 30 days of the filing of the petition for such order he shall issue an order authorizing the arbitration and appointing a referee. However, no agreement to arbitrate shall be enforceable unless the agreement was made subsequent to the alleged malpractice and after a dispute or controversy has occurred and unless the claimant is represented by an attorney at law at the time the agreement is entered into.

History.

Code 1933, § 7-403, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-112; Code 1981, § 9-9-62, as redesignated by Ga. L. 1988, p. 903, § 3.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1988, "article" was substituted for "part" twice in the first sentence and once in the second sentence of the Code section.

JUDICIAL DECISIONS

Preemption by federal Arbitration Act. — O.C.G.A. § 9-9-62 singles out a specific class of arbitration agreement and restricts the enforcement thereof counter to the liberal federal policy favoring arbitration agreements; further, a defense based on § 9-9-62 is not a generally applicable contract defense. It follows that § 9-9-62 is preempted by the federal Arbitration Act. Triad Health Mgmt. of Ga., III, LLC v. Johnson, 298 Ga. App. 204, 679 S.E.2d 785, 2009 Ga. App. LEXIS 641 (2009), cert. denied, No. S09C1680, 2009 Ga. LEXIS 779 (Ga. Nov. 9, 2009).

In a case in which a resident sued a care facility alleging negligence and the care facility moved to dismiss and compel arbitration of the resident's allegations pursuant to an arbitration clause contained in the Resident and Facility Agreement signed by the resident's son, the resident unsuccessfully argued that O.C.G.A. § 9-9-62 prohibited arbitration in medical malpractice cases where the arbitration agreements were signed before the claims arose or when a party was not represented by counsel, the Federal Arbitration Act (FAA) applied, and through the language in 9 U.S.C. § 2, the FAA preempted O.C.G.A. § 9-9-62. Holyfield v. GGNSC Atlanta, LLC, No. 1:08-CV-2669-RWS, 2009 U.S. Dist. LEXIS 29567 (N.D. Ga. Apr. 8, 2009).

Arbitration clause valid for long term care facility. — Appellate court reversed the trial court's decision that an Arbitration Agreement was unconscionable, and affirmed the trial court's decision to reject the aunt's claims that the Arbitration Agreement was not valid because it lacked consideration, that enforcement was precluded by federal Medicaid Act and implementing regulations, that FAA did not apply, and that the Arbitration Agreement was not enforceable because it precluded vindication of the nephew's rights under Georgia's Bill of Rights for Residents of Long-Term Care Facilities, O.C.G.A. § 31–8–100 et seq. CL SNF, LLC v. Fountain, 364 Ga. App. 371, 875 S.E.2d 370, 2022 Ga. App. LEXIS 314 (2022).

With respect to aunt's claim that aunt lacked authority under Guardianship Code to enter Arbitration Agreement on nephew's behalf, court adopted Supreme Court of Georgia's decision in CL SNF, LLC v. Fountain, 312 Ga. 416 (2022), as its own. CL SNF, LLC v. Fountain, 364 Ga. App. 371, 875 S.E.2d 370, 2022 Ga. App. LEXIS 314 (2022).

Motion to compel arbitration is not equitable in nature. — Approval by the superior courts contemplated by O.C.G.A. § 9-9-62 is not a requirement applicable to contracts generally or even arbitration agreements generally, nor has the legislature deemed that motions to compel arbitration be treated as equitable in nature. Thus, there was no merit to an argument that § 9-9-62 evidenced the legislature's intent that enforcement of a arbitration agreement fall within the superior court's equity jurisdiction and that an arbitration agreement could not be enforced through a motion in the state court to compel arbitration. Triad Health Mgmt. of Ga., III, LLC v. Johnson, 298 Ga. App. 204, 679 S.E.2d 785, 2009 Ga. App. LEXIS 641 (2009), cert. denied, No. S09C1680, 2009 Ga. LEXIS 779 (Ga. Nov. 9, 2009).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

21A Am. Jur. Pleading and Practice Forms, References, § 2.

9-9-63. Tolling of statute of limitations; when action permitted after filing of petition for arbitration.

(a) The filing of the petition for an order authorizing arbitration as

provided in Code Section 9-9-62 shall toll any applicable statute of limitations, and the statute of limitations shall remain tolled until the earliest of:

(1) Thirty days after the filing of the petition, when the judge has failed within the 30 days to issue an order authorizing arbitration as provided in Code Section 9-9-62;

(2) Sixty days after the issuance of the judge's order authorizing arbitration, when the parties or their representatives have failed by such time to sign the arbitration submission as provided in Code Section 9-9-65; or

(3) The date the arbitration submission is revoked as provided in Code Section 9-9-65.

(b) If any of the contingencies listed in subsection (a) of this Code section occur and if the statute of limitations has not yet run, the medical malpractice claim may be brought in any court of this state having jurisdiction.

History. Code 1933, § 7-404, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-113; Code 1981, § 9-9-63, as redesignated by Ga. L. 1988, p. 903, § 3.

9-9-64. Appointment of reporter; duties; compensation.

The judge of the superior court of the county in which was issued the order authorizing arbitration shall appoint a reporter to attend the proceedings of the medical malpractice arbitration panel and to record exactly and truly the testimony and proceedings in the case being arbitrated, except the arguments of counsel. All provisions relating to court reporter fees, compensation, contingent expenses, and travel allowance, as well as those relating to the furnishing of transcripts and the style and form of transcripts, shall be the same for reporters appointed to attend the arbitration panel proceedings as those applicable to reporters of the superior court of the county in which the arbitration was authorized.

History. Code 1933, § 7-405, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-114; Code 1981, § 9-9-64, as redesignated by Ga. L. 1988, p. 903, § 3.

9-9-65. Arbitration submission; irrevocability absent consent.

(a) The referee shall meet with the parties or their representatives, or both, prior to the arbitration. The referee shall assist the parties in preparing an arbitration submission which shall contain the following:

(1) A clear and accurate statement of the matters in controversy;

(2) An agreement as to the payment of the costs of the arbitration;

(3) The procedure to be followed in the arbitration;

(4) A list of the witnesses whose testimony the parties desire to present to the arbitrators;

(5) The names of the arbitrators chosen by each party;

(6) The time and place of meeting of the arbitrators; and

(7) Any other matters that may be pertinent to the arbitration.

(b) The submission shall be in writing and shall be signed by the parties or their representatives. When signed, the submission shall be irrevocable except by consent of all the parties.

History.
Code 1933, § 7-407, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-115; Code 1981, § 9-9-65, as redesignated by Ga. L. 1988, p. 903, § 3.

9-9-66. Qualifications and status of referee.

The referee shall be an attorney who is an active member of the State Bar of Georgia. The referee shall be a nonvoting member of the arbitration panel.

History.
Code 1933, § 7-406, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-116; Code 1981, § 9-9-66, as redesignated by Ga. L. 1988, p. 903, § 3.

9-9-67. Arbitrators — How chosen.

(a) Every arbitration pursuant to this article shall be conducted by three arbitrators, one of whom shall be chosen by each of the parties prior to the execution of the submission provided for in Code Section 9-9-65 and one of whom shall be chosen by the arbitrators named in the submission. The third arbitrator shall be chosen after the parties sign the submission provided in Code Section 9-9-65 and before arbitration begins.

(b) If the arbitrators chosen by the parties are unable to agree upon the third arbitrator as provided in subsection (a) of this Code section, the judge authorizing the arbitration and appointing the referee or the judge's successor shall appoint the third arbitrator.

(c) In cases involving a medical malpractice claim where there are multiple plaintiffs or defendants, there shall be only one arbitrator chosen by each side. The plaintiff parties shall have the right to choose one arbitrator and the defendant parties shall have the right to choose one arbitrator.

History.
Code 1933, § 7-408, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-117; Code 1981, § 9-9-67, as redesignated by Ga. L. 1988, p. 903, § 3.

Code Commission notes.
Pursuant to Code Section 28-9-5, in 1988, "article" was substituted for "part" near the beginning of subsection (a).

9-9-68. Arbitrators — How vacancy filled.

If an arbitrator selected by one of the parties should cease to serve for any reason, the party who chose the arbitrator shall then choose another in his place. If the arbitrator chosen by the other arbitrators shall cease to serve for any reason, the arbitrators chosen by the parties shall choose another in his place. If the arbitrators chosen by the parties are unable to agree upon the third arbitrator, the third arbitrator shall be appointed as provided in subsection (b) of Code Section 9-9-67. An arbitrator chosen pursuant to this Code section shall have all the powers of the original arbitrator.

History.
Code 1933, § 7-409, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-118; Code 1981, § 9-9-68, as redesignated by Ga. L. 1988, p. 903, § 3.

9-9-69. Arbitrators — Oath and affidavit.

(a) Before the arbitrators begin the arbitration, they shall be sworn by the referee to determine impartially the matters submitted to them according to law and the justice and equity of the case without favor or affection to either party.

(b) Each arbitrator selected under this article shall sign the following affidavit before the selection is effective and before acting as an arbitrator:

"State of Georgia
_____ County
I, _____, first being duly sworn, make this affidavit:
I, _____, agree to serve as arbitrator in the case of _____ v. _____ and will decide any issue put before me without favor or affection to any party and without prejudice for or against any party. I will follow and apply the law as given to me by the referee and will accept and abide by all decisions of the referee. I also agree not to discuss this case or any issue with any person except when all other arbitrators and the referee are present.

_____, L. S."

History.
Code 1933, § 7-410, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-119; Code 1981, § 9-9-69, as redesignated by Ga. L. 1988, p. 903, § 3; Ga. L. 2023, p. 730, § 1(2)/HB 475, effective July 1, 2023.

The 2023 amendment, effective July 1, 2023, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (b).

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1988, "article" was substituted for "part" near the beginning of subsection (b).

9-9-70. Postponement of arbitration.

When, upon the meeting of the arbitrators, either party is not ready for trial, the referee may postpone the hearing of the case to a future day, which day shall be as early as may be consistent with the ends of justice, considering all the circumstances of the case. If one party is not ready for trial at the time appointed for the hearing of the case and the party has previously required two or more postponements of the trial, the referee shall determine whether the arbitration panel shall nonetheless hear the case or whether another postponement shall be granted, the determination to be consistent with the ends of justice, considering all the circumstances of the case.

History.

Code 1933, § 7-411, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-120; Code 1981, § 9-9-70, as redesignated by Ga. L. 1988, p. 903, § 3.

9-9-71. Adjournments by arbitrators; no meeting outside group.

After the arbitrators have commenced their investigations, they may adjourn from day to day or for a longer time, if the ends of justice require it, until their investigations are completed and they have made up their award. The arbitrators shall not meet or discuss the case or any issue except as a group and with the referee present.

History.

Code 1933, § 7-412, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-121; Code 1981, § 9-9-71, as redesignated by Ga. L. 1988, p. 903, § 3.

9-9-72. Discovery.

The parties to the arbitration may obtain discovery in the same manner as provided by law for discovery in civil cases in the superior courts.

History.

Code 1933, § 7-413, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-122; Code 1981, § 9-9-72, as redesignated by Ga. L. 1988, p. 903, § 3.

9-9-73. Subpoena power of referee; compensation of witnesses.

The referee shall have all the powers of the superior courts to compel the attendance of witnesses before the arbitrators, to compel witnesses to testify, and to issue subpoenas requiring the attendance of witnesses at the time and place of the meeting of the arbitrators. Subpoenas shall be served in the manner provided by law for the service of subpoenas in

cases pending in the superior courts. Witnesses shall be entitled to the same compensation as witnesses in the superior courts, and the compensation may be collected in the same manner.

History.
Code 1933, § 7-414, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-123; Code 1981, § 9-9-73, as redesignated by Ga. L. 1988, p. 903, § 3.

9-9-74. Powers of referee to compel production of documentary evidence.

The referee shall have all the powers of the superior courts to compel parties to produce books and all other papers which may be deemed necessary and proper for the investigation of the matters submitted to arbitration, giving to the party, his agent, or his attorney, from whom the production is required, such notice as is required in the superior courts for the production of papers.

History.
Code 1933, § 7-415, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-124; Code 1981, § 9-9-74, as redesignated by Ga. L. 1988, p. 903, § 3.

9-9-75. Competency of witnesses.

All persons who are competent as witnesses in the superior courts shall be competent in all cases before the arbitrators.

History.
Code 1933, § 7-416, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-125; Code 1981, § 9-9-75, as redesignated by Ga. L. 1988, p. 903, § 3.

9-9-76. Rules governing examination of witnesses and admission of evidence.

The examination of witnesses and the admission of evidence shall be governed by the rules applicable to the superior courts.

History.
Code 1933, § 7-417, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-126; Code 1981, § 9-9-76, as redesignated by Ga. L. 1988, p. 903, § 3.

9-9-77. Administration of oaths by referee.

The referee shall have power to administer oaths to witnesses and to administer all other oaths that may be necessary for carrying this article into full effect.

History.
Code 1933, § 7-418, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-127;

Code 1981, § 9-9-77, as redesignated by Ga. L. 1988, p. 903, § 3.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1988, "article" was substituted for "part" near the end of the Code section.

9-9-78. Findings by arbitrators; concurrence of two sufficient.

The arbitrators shall make a written finding on each of the matters in controversy contained in the submission. If the arbitrators shall fail to agree on any finding, then any two of them may make the finding, which shall have the same force and effect as if made by all.

History.

Code 1933, § 7-419, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-128; Code 1981, § 9-9-78, as redesignated by Ga. L. 1988, p. 903, § 3.

9-9-79. Copy of findings furnished parties; entry of original on court's minutes; effect and enforcement; clerk's fees.

After the arbitrators have made their findings, the referee shall furnish each of the parties with a copy thereof. The original shall be entered on the minutes of the court authorizing the arbitration; it shall have all the force and effect of a judgment or decree of the court and may be enforced in the same manner at any time after the adjournment of the court. For the entering of the findings upon the minutes of the court, the clerk shall be entitled to the same fees allowed by law for the entering of judgments in other cases, to be paid by the parties as provided in the submission.

History.

Code 1933, § 7-420, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-129; Code 1981, § 9-9-79, as redesignated by Ga. L. 1988, p. 903, § 3.

9-9-80. Finality of findings absent appeal; appeals to superior courts; transmittal of record; when findings set aside; disposition of case; supersedeas.

(a) All findings of the arbitrators with respect to which no application for a review thereof is filed in due time shall be final and conclusive between the parties as to all matters submitted to the arbitrators; but either party to the dispute may, within 30 days from the date the findings are entered upon the minutes of the court authorizing the arbitration, appeal from the findings to the superior court of the county in which the arbitration was authorized. When an appeal is made, all findings shall be final and conclusive between the parties as to all matters submitted to the arbitrators only upon the final disposition of the appeal as provided by this article.

(b) The party conceiving himself to be aggrieved may file an application in writing to the referee of the arbitration panel asking for an

appeal from the findings, stating generally the grounds upon which the appeal is sought. In the event the appeal is filed as provided in this Code section, the referee shall, within 30 days from the filing of the same, cause a true copy of the submission, findings, and all other parts of the record, including a transcript of evidence and proceedings, to be transmitted to the clerk of the superior court to which the case is appealable. The case so appealed may thereupon be brought on for a hearing before the superior court upon such record by either party on ten days' written notice to the other; subject, however, to an assignment of the same for hearing by the court.

(c) The findings of fact made by the arbitrators shall, in the absence of fraud, be conclusive but, upon the hearing, the court shall set aside the findings if it is found that:

(1) The findings were procured by fraud;

(2) There is no evidence to support the findings of fact by the arbitrators; or

(3) The findings are contrary to law.

(d) No findings shall be set aside by the court upon any grounds other than one or more of the grounds above-stated. If not set aside upon one or more of the stated grounds, the court shall affirm the findings so appealed from. Upon the setting aside of any such findings, the court may recommit the controversy to the arbitration panel for further hearing or proceeding in conformity with the judgment and opinion of the court or the court may enter the proper judgment upon the findings, as the nature of the case may demand. The decree of the court shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though rendered in an action heard and determined by the court.

(e) An appeal from the decision of the arbitration panel shall operate as a supersedeas and no defendant shall be required to make payment of the amount involved in the submission in the case so appealed until the question at issue therein has been fully determined in accordance with this article. The defendant may voluntarily make payment, however, prior to final disposition of the appeal.

History.

Code 1933, § 7-421, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-130; Code 1981, § 9-9-80, as redesignated by Ga. L. 1988, p. 903, § 3.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1988, "article" was substituted for "part" at the end of subsection (a) and at the end of the first sentence of subsection (e); and "above-stated" was substituted for "above stated" at the end of the first sentence in subsection (d).

JUDICIAL DECISIONS

Waiver of right to challenge error. — In an arbitration matter between a patient and a medical provider, because the arbitrators failed to find that the provider could not recover from the patient, but instead could recover only against an insurer, and only to the extent that the patient's health benefits covered the services rendered, the patient waived any right to challenge any alleged error by the arbitrators. Lowe v. Ctr. Neurology Assocs., P.C., 288 Ga. App. 166, 653 S.E.2d 318, 2007 Ga. App. LEXIS 1066 (2007), cert. denied, No. S08C0477, 2008 Ga. LEXIS 325 (Ga. Mar. 31, 2008).

RESEARCH REFERENCES

ALR.

Participation in arbitration proceedings as waiver to objections to arbitrability under state law, 56 A.L.R.5th 757.

9-9-81. Costs; how taxed.

The arbitrators shall return in their award the costs of the case, which they shall tax against the parties in accordance with the submission.

History.

Code 1933, § 7-422, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-131; Code 1981, § 9-9-81, as redesignated by Ga. L. 1988, p. 903, § 3.

JUDICIAL DECISIONS

Federal preemption. — While the federal and state arbitration codes are very similar and embody their respective legislatures' intent to enforce commercial arbitration agreements, state law and policy must yield to the federal statute if interstate commerce is involved. Tampa Motel Mgt. Co. v. Stratton of Fla., Inc., 186 Ga. App. 135, 366 S.E.2d 804, 1988 Ga. App. LEXIS 276 (1988).

9-9-82. Compensation of arbitrators and referee.

The arbitrators and referee shall have such compensation for their services as may be agreed upon by the parties in the submission.

History.

Code 1933, § 7-423, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-132; Code 1981, § 9-9-82, as redesignated by Ga. L. 1988, p. 903, § 3.

9-9-83. Civil and criminal immunity of arbitrators.

An arbitrator shall not be civilly or criminally liable for libel, slander, or defamation of any of the parties to the arbitration for any statement or action taken within the official capacity of the arbitrator during the arbitration.

History.

Code 1933, § 7-424, enacted by Ga. L. 1978, p. 2270, § 2; Code 1981, § 9-9-133;

Code 1981, § 9-9-83, as redesignated by Ga. L. 1988, p. 903, § 3.

9-9-84. [Repealed] Governor's Commission on Obstetrics.

History.
Ga. L. 1990, p. 573, § 1; repealed by Ga. L. 1990, p. 573, § 1, effective December 1, 1990.

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9-10-204. Action for words.

Cross references.

Criminal penalties for unlawfully influencing jurors, influencing witnesses, tampering with evidence, § 16-10-90 et seq.

Law reviews.

For article comparing the Federal Rules of Civil Procedure to Georgia trial practice procedures prior to the adoption of the Civil Practice Act (Ch. 11 of this title), see 1 Ga. St. B.J. 315 (1965).

For annual survey on trial practice and procedure, see 36 Mercer L. Rev. 347 (1984).

For annual survey on trial practice and procedure, see 44 Mercer L. Rev. 421 (1992).

For annual survey article on trial practice and procedure, see 45 Mercer L. Rev. 459 (1993).

For survey of 1995 Eleventh Circuit cases on trial practice and procedure, see 47 Mercer L. Rev. 907 (1996).

For annual survey article on trial practice and procedure, see 49 Mercer L. Rev. 313 (1997).

For annual survey article on trial practice and procedure, see 50 Mercer L. Rev. 359 (1998).

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Am. Jur. Trials.

Opening Statements — Plaintiff's View, 5 Am .Jur. Trials 285.

Opening Statement — Defense View, 5 Am. Jur. Trials 305.

Mapping the Trial — Order of Proof, 5 Am. Jur. Trials 505.

Presenting Plaintiff's Case, 5 Am. Jur. Trials 611.

Summations for the Plaintiff, 6 Am. Jur. Trials 641.

Summations for the Defense, 6 Am. Jur. Trials 731.

Nonjury Summations, 6 Am. Jur. Trials 771.

Principles of Summation, 28 Am. Jur. Trials 599.

Use of Jury Consultant in Civil Cases, 49 Am. Jur. Trials 407.

Persuasive Cross-Examination, 59 Am. Jur. Trials 1.

The Trial Lawyer's Persuasive Speaking Voice, 81 Am. Jur. Trials 317.

ARTICLE 1

GENERAL PROVISIONS

9-10-1. Preference given to cases in which state is plaintiff.

Where civil cases are pending in the superior courts, the Court of Appeals, or the Supreme Court in which the state is a party plaintiff, preference shall be given to such cases over all other cases so pending; and the judges or Justices, as the case may be, shall use all the power vested in them by law to bring the cases to a speedy trial and, whenever required to do so by counsel for the state, shall take up the cases for trial and proceed to try the same, unless the defendant shows some good cause for continuance, when the case shall be continued to a future time in the same term, or to the next term, in the discretion of the court. Nothing in this Code section shall affect the right of the state to a continuance on a proper showing.

History.

Ga. L. 1876, p. 104, § 1; Code 1882, § 22a; Civil Code 1895, § 24; Civil Code 1910, § 24; Code 1933, § 81-1005; Ga. L. 1984, p. 22, § 9.

JUDICIAL DECISIONS

On facts, motion for continuance by intervenor properly denied. — All applications for a continuance are addressed to the sound legal discretion of the court, and in all cases the party making the application for a continuance must show that the party has exercised due diligence. Accordingly, in a civil action to which the state was a party, and which is accordingly entitled to priority of hearing, the court did not err in failing to grant a continuance on motion of the intervenor, based on the sole ground that the party had been absent from the state and had not heard of the case in time to make preparation for the hearing. Beazley v. De Kalb County, 87 Ga. App. 910, 75 S.E.2d 657, 1953 Ga. App. LEXIS 879, rev'd, 210 Ga. 41, 77 S.E.2d 740, 1953 Ga. LEXIS 479 (1953).

RESEARCH REFERENCES

Am. Jur. 2d.

75 Am. Jur. 2d, Trial, § 1 et seq.

C.J.S.

88 C.J.S., Trial, § 77 et seq.

9-10-2. Actions against state void absent notice or waiver.

Any verdict, decision, judgment, decree, order, ruling, or other judicial action by any court in this state in any matter in which this state or an official of this state in his official capacity is a party defendant, intervenor, respondent, appellee, or plaintiff in fi. fa. shall be void unless it affirmatively appears as a matter of record either:

(1) That the Attorney General was given five days' advance written notice by the adverse party or his attorney of the time set for the particular trial, hearing, or other proceeding as a result of which

the verdict, decision, judgment, decree, order, ruling, or other judicial action was entered;

(2) That the Attorney General or an assistant attorney general was present in person at the trial, hearing, or other proceeding; or

(3) That the Attorney General or an assistant attorney general has, in writing, waived the notice.

History.
Ga. L. 1956, p. 625, § 1; Ga. L. 2007, p. 47, § 9/SB 103.

JUDICIAL DECISIONS

Constitutionality. — The state notice provision, O.C.G.A. § 9-10-2, is rationally related to several legitimate governmental interests and does not violate due process. Georgia Dep't of Medical Assistance v. Columbia Convalescent Ctr., 265 Ga. 638, 458 S.E.2d 635, 1995 Ga. LEXIS 505 (1995), cert. denied, 516 U.S. 1046, 116 S. Ct. 706, 133 L. Ed. 2d 662, 1996 U.S. LEXIS 65 (1996).

Compliance with this section is an absolute condition precedent before valid judgment may be entered against the state or any of its officials acting in their official capacity. Otherwise, the judgment is void. Hawes v. Bigbie, 120 Ga. App. 294, 170 S.E.2d 302, 1969 Ga. App. LEXIS 746 (1969); Cofer v. Williams, 141 Ga. App. 72, 232 S.E.2d 610, 1977 Ga. App. LEXIS 1769 (1977) (see O.C.G.A. § 9-10-2).

Judgment void absent compliance with notice requirements. — Where the record does not show affirmatively that the Attorney General was extended the requisite notice of the proceeding upon which the trial court's judgment was based, that the Attorney General made an appearance, or that the Attorney General waived notice, the judgment is void. Caldwell v. Atlanta Bd. of Educ., 152 Ga. App. 291, 262 S.E.2d 573, 1979 Ga. App. LEXIS 2901 (1979).

A trial court's order which granted full relief to a company seeking certain e-mail records from the Georgia Department of Agriculture was void; the notice for the case management hearing from which the order emanated, did not satisfy the notice requirements in O.C.G.A. § 9-10-2(1) for a hearing on the full merits of the case as the notice stated only "small motions" and procedural matters would be considered, and the department was never afforded an opportunity to present its opposition to the request through an O.C.G.A. § 9-11-54(c)(1) hearing. Ga. Dep't of Agric. v. Griffin Indus., 284 Ga. App. 259, 644 S.E.2d 286, 2007 Ga. App. LEXIS 306 (2007).

Void and ineffective orders. — Where two orders of the superior court were entered following the filing of the plaintiffs' petition for judicial review, and in neither instance was there compliance with the notice provisions of O.C.G.A. § 9-10-2, the two orders are void and ineffective to prevent an automatic dismissal. Department of Medical Assistance v. Columbia Convalescent Ctr., Inc., 203 Ga. App. 535, 417 S.E.2d 195, 1992 Ga. App. LEXIS 520 (1992), cert. denied, No. S92C0850, 1992 Ga. LEXIS 669 (Ga. July 16, 1992).

"Ministerial act" defined. — A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. Miree v. United States, 490 F. Supp. 768, 1980 U.S. Dist. LEXIS 13210 (N.D. Ga. 1980).

"Discretionary act" defined. — A discretionary act calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed.

Miree v. United States, 490 F. Supp. 768, 1980 U.S. Dist. LEXIS 13210 (N.D. Ga. 1980).

Distinction between ministerial and discretionary acts dependent on specific character of act. — In Georgia, the distinction between a ministerial and a discretionary act, and therefore the scope of the immunity granted a public official in any given situation, turns upon the specific character of the act complained of, not the more general nature of the job. A discretionary act is generally characterized as one which is the result of personal discretion or judgment. A ministerial act, on the other hand, requires merely the execution of a specific duty arising from fixed or designated facts. A public official is protected from liability in the performance of the official's discretionary duties, whereas ministerial acts are committed at the official's own risk. Miree v. United States, 490 F. Supp. 768, 1980 U.S. Dist. LEXIS 13210 (N.D. Ga. 1980).

Failure to hold hearing. — Although the superior court is not required to conduct a hearing concerning the merits of the Department of Public Safety's decision to revoke a driver's license if the parties waive their right to be heard, the superior court cannot avoid the dictates of O.C.G.A. §§ 5-3-29 and 9-10-3 by simply failing to hold a hearing. Bowman v. Parrot, 200 Ga. App. 405, 408 S.E.2d 115, 1991 Ga. App. LEXIS 1009 (1991), cert. denied, No. S91C1383, 1991 Ga. LEXIS 546 (Ga. Sept. 6, 1991).

RESEARCH REFERENCES

Am. Jur. 2d.

47 Am. Jur. 2d, Judgments, §§ 722 et seq., 727 et seq. 72 Am. Jur. 2d, States, Territories, and Dependencies, §§ 96 et seq., 101 et seq., 147 et seq..

C.J.S.

49 C.J.S., Judgment, § 22. 82 C.J.S., Statutes, § 380.

ALR.

Consent to suit against state, 42 A.L.R. 1464; 50 A.L.R. 1408.

Waiver of, or estoppel to assert, failure to give required notice of claim of injury to municipality, county, or other governmental agency or body, 65 A.L.R.2d 1278.

Forum non conveniens in products liability cases, 76 A.L.R.4th 22.

Questions as to Convenience and Justice of Transfer Under Forum Non Conveniens Provision of Judicial Code (28 U.S.C.A. § 1404(a)) — Appellate Patent Cases, 32 A.L.R. Fed. 3d 3.

9-10-3. Closed trials authorized in certain cases.

During the trial in any court of any case in which the evidence is vulgar and obscene or relates to improper sexual acts and tends to debauch the morals of the young, the presiding judge shall have the right, in his discretion and on his own motion, or on motion of the plaintiff or the defendant or their attorneys, to hear and try the case after clearing the courtroom of all or any portion of the audience.

History.

Ga. L. 1890-91, p. 111, § 1; Civil Code 1895, § 5296; Ga. L. 1895, p. 49, § 1; Civil Code 1910, § 5885; Code 1933, § 81-1006; Ga. L. 1982, p. 3, § 9.

Cross references.

Corresponding provision relating to criminal procedure, § 17-8-53.

Exclusion of public from hearings or trials relating to determination of paternity, § 19-7-53.

RESEARCH REFERENCES

ALR.
Propriety of exclusion of press or other media representatives from civil trial, 39 A.L.R.5th 103.

9-10-4. Trial of collateral issues.

All collateral issues in the superior, state, or city courts, unless otherwise directed by law, shall be tried by jury.

History.
Orig. Code 1863, § 3532; Code 1868, § 3555; Code 1873, § 3612; Code 1882, § 3612; Civil Code 1895, § 4948; Civil Code 1910, § 5525; Code 1933, § 81-1010.

Cross references.
Right to trial by jury generally, Ga. Const. 1983, Art. I, Sec. I, Para. XI, and § 9-11-38.

JUDICIAL DECISIONS

Traverse of defendant's answer in garnishment action is not a collateral issue. Strickland v. Maddox, 4 Ga. 393, 1848 Ga. LEXIS 45 (1848).

Issue upon which the merits of the principal cause depends is not a collateral issue under this section. Mason & Dickinson v. Croom, 24 Ga. 211, 1858 Ga. LEXIS 186 (1858) (see O.C.G.A. § 9-10-4).

Motion to dismiss on ground that plaintiff was non compos mentis is collateral issue. — When a motion is made to dismiss based on the contention that the evidence showed the plaintiff to be absolutely non compos mentis when the action was filed and also at the time of the trial, the court may refer this collateral issue to the jury. Central of Ga. Ry. v. Harper, 124 Ga. 836, 53 S.E. 391, 1906 Ga. LEXIS 638 (1906).

RESEARCH REFERENCES

Am. Jur. 2d.
47 Am. Jur. 2d, Jury, § 25 et seq..
C.J.S.
50 C.J.S., Juries, §§ 7, 16, 28 et seq., 47, 50 et seq., 61, 68, 75, 77, 124 et seq.

9-10-5. Charges to be written out on request; exception; filing of written charges; copies.

(a) The judges of the superior, state, and city courts, when counsel for either party requests it before argument begins, shall write out their charges and read them to the jury; and it shall be error to give any other or additional charge than that so written and read; provided, however, that this Code section shall not apply when there is an official court reporter in attendance thereon who records the full charge of the trial judge in the case upon the direction of the court.

(b) In any civil action, upon motion by a party, upon request by the jury, or sua sponte, a judge of a superior, state, or city court is

authorized, but shall not be required, to reduce all of the charge to the jury to writing and send all of the charge so reduced to writing out with the jury during its deliberation.

(c) Any charge reduced to writing under subsection (a) or (b) of this Code section shall be filed with the clerk of the court in which it was given and shall be accessible to all persons interested in it. The clerk shall give certified copies of the charge to any person applying therefor, upon payment of the usual fee.

History.

Ga. L. 1860, p. 42, §§ 1, 2; Code 1863, §§ 240, 241; Code 1868, §§ 234, 235; Code 1873, §§ 244, 245; Ga. L. 1877, p. 13, § 1; Ga. L. 1878-79, p. 150, § 1; Code 1882, §§ 244, 245; Civil Code 1895, §§ 4318, 4319; Penal Code 1895, §§ 1030, 1031; Ga. L. 1897, p. 41, § 1; Civil Code 1910, §§ 4847, 4848; Penal Code 1910, §§ 1056, 1057; Code 1933, §§ 81-1102, 81-1103; Ga. L. 1943, p. 262, § 1; Ga. L. 1982, p. 3, § 9; Ga. L. 1983, p. 884, § 3-3; Ga. L. 1986, p. 320, § 1.

Cross references.

Corresponding provision relating to criminal procedure, § 17-8-56.

Editor's notes.

Ga. L. 1986, p. 320, § 2, not codified by the General Assembly, provided that that Act would apply to actions pending on July 1, 1986, as well as to actions initiated on or after that date.

Law reviews.

For article discussing importance of charge of the court, see 7 Ga. B.J. 34 (1944).

For annual survey of trial practice and procedure, see 38 Mercer L. Rev. 383 (1986).

JUDICIAL DECISIONS

Object of this section is to preserve a sure memorandum of what was actually charged. Wheatley & Co. v. West, 61 Ga. 401, 1878 Ga. LEXIS 139 (1878) (see O.C.G.A. § 9-10-5).

Object of this section is to prevent misunderstanding between the trial court and counsel as to what was the charge; and the only way to prevent such disputes from arising is to require the trial judge to conform strictly to this statute. McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535, 1935 Ga. App. LEXIS 299 (1935), rev'd, 182 Ga. 252, 185 S.E. 246, 1936 Ga. LEXIS 329 (1936) (see O.C.G.A. § 9-10-5).

This section is mandatory, and it is error for presiding judge to fail to comply therewith when properly requested so to do. Dixon v. Evans, 56 Ga. App. 583, 193 S.E. 470, 1937 Ga. App. LEXIS 170 (1937) (see O.C.G.A. § 9-10-5).

Requirement as to the giving of a charge in writing by the court, when properly requested by counsel for either side, is mandatory in its terms, and the court cannot refuse to do so when requested. McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535, 1935 Ga. App. LEXIS 299 (1935), rev'd, 182 Ga. 252, 185 S.E. 246, 1936 Ga. LEXIS 329 (1936).

Judge may direct a verdict, without complying with this section. Geer v. Dancer, 148 Ga. 465, 97 S.E. 406, 1918 Ga. LEXIS 371 (1918) (see O.C.G.A. § 9-10-5).

The request for a written charge must be made before the commencement of the argument to the jury. Gray v. Obear, 54 Ga. 231, 1875 Ga. LEXIS 134 (1875); Ashley-Price Lumber Co. v. Henry, 23 Ga. App. 93, 98 S.E. 185, 1918 Ga. App. LEXIS 58 (1918).

An oral request for a written charge will suffice. Citizens Bank v. Fort, 15 Ga. App. 427, 83 S.E. 678, 1914 Ga. App. LEXIS 135 (1914).

Required elements of request to charge jury. — A request to charge the jury, directed to the trial judge and submitted in writing before the retirement of

the jury, must be entirely correct and accurate; it must be adjusted to the pleadings, the law, and the evidence of the case; it must not be argumentative; and it must not seek an expression of opinion on the part of the trial judge. New York Life Ins. Co. v. Thompson, 50 Ga. App. 413, 178 S.E. 389, 1935 Ga. App. LEXIS 344 (1935).

All modifications in a charge, or request to charge, must be reduced to writing. City Bank v. Kent, 57 Ga. 283, 1876 Ga. LEXIS 104 (1876); Fields v. Carlton, 75 Ga. 554, 1885 Ga. LEXIS 178 (1885).

Oral explanation of ambiguity in charge no ground for new trial. — Although the court was requested to deliver a written charge, where counsel verbally called attention to an ambiguity, asked its correction, and assented to an oral explanation, that it was so given is no ground for a new trial. Continental Nat'l Bank v. Folsom, 67 Ga. 624, 1881 Ga. LEXIS 242 (1881).

Effect of oral request for additional charge on right to have general charge written out. — Where counsel for either party, who has duly requested the court for a written charge, orally requests the court to deliver a certain additional instruction, and the court thereupon orally instructs the jury along the line requested, such request does not constitute a waiver on the part of such party of the party's right to have the general charge of the court written out and read to the jury, but it does constitute a waiver on the part of such party of the party's right to have such oral request written out, and it is not error for the court to orally charge the jury along the line suggested by such oral request. McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535, 1935 Ga. App. LEXIS 299 (1935), rev'd, 182 Ga. 252, 185 S.E. 246, 1936 Ga. LEXIS 329 (1936).

It is error for trial judge to refuse timely and proper request to write out charge and read it to jury, and such error may be complained of in a direct bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50), without a motion for a new trial, where it is shown that the verdict was not demanded. Boykin v. McRae, 182 Ga. 252, 185 S.E. 246, 1936 Ga. LEXIS 329 (1936).

Request that trial judge write out charge and read it to jury may be subsequently waived, and in such case there would be no error in refusing it. Boykin v. McRae, 182 Ga. 252, 185 S.E. 246, 1936 Ga. LEXIS 329 (1936).

Judge should take a recess, if necessary, to secure time to write out the judge's charges. Homer v. State, 6 Ga. App. 667, 65 S.E. 701, 1909 Ga. App. LEXIS 418 (1909).

Judge not required to charge jury concerning provisions of law not at issue. — The trial judge is not required to include in charge provisions of law about which there is no issue. Knapp Bros. Mfg. Co. v. Cook, 171 Ga. 330, 155 S.E. 321, 1930 Ga. LEXIS 345 (1930).

What any juror of ordinary capacity would certainly know, need not be delivered as part of the charge of the court. Knapp Bros. Mfg. Co. v. Cook, 171 Ga. 330, 155 S.E. 321, 1930 Ga. LEXIS 345 (1930).

Error for court to refuse specific charge as requested although covered by other instructions. — A specific charge, which is adjusted to a distinct matter in issue involving the right of the plaintiff to recover, and which may materially aid the jury, should be given as requested, although in principle and in more general and abstract terms it may be covered by other instructions given by the court, and it is error for the court not to do so. City of Rome v. Stone, 46 Ga. App. 259, 167 S.E. 325, 1933 Ga. App. LEXIS 19 (1933).

Failure of the judge to comply with this section will require grant of a new trial, with the request that the judge reduce the judge's charges to writing conclusively presumed to have been met where the complaint is that this section was violated, unless affirmative proof to the contrary appears. Forrester v. Cocke, 6 Ga. App. 829, 65 S.E. 1063, 1909 Ga. App. LEXIS 490 (1909); Ashley-Price Lumber Co. v. Henry, 23 Ga. App. 93, 98 S.E. 185, 1918 Ga. App. LEXIS 58 (1918) (see O.C.G.A. § 9-10-5).

RESEARCH REFERENCES

Am. Jur. 2d.

75A Am. Jur. 2d, Trial, § 870 et seq., 873 et seq.

75 Am. Jur. 2d, Trial, §§ 117 et seq., 242 et seq., 398 et seq.

C.J.S.

89 C.J.S., Trial, §§ 484, 485, 608 et seq.

ALR.

Use of emphatic words, like "great care," "utmost care," or "highest care," in instructing jury as to duty of carrier to passengers, 32 A.L.R. 1190.

Instructions regarding measurement of damages for pain and suffering, 85 A.L.R. 1010.

Right or duty of court to instruct jury as to presumptions, 103 A.L.R. 126.

Instructions regarding good or bad character of witnesses as affecting their credibility, 120 A.L.R. 1442.

Propriety of instruction, or requested instruction, in civil case, as to caution in considering testimony of oral admissions, or as to weight of such admissions as evidence, 126 A.L.R. 66.

Propriety of instructions on matters of common knowledge, 144 A.L.R. 932.

Malpractice: propriety and effect of instruction or argument directing attention to injury to defendant's professional reputation or standing, 74 A.L.R.2d 662.

Necessity and propriety of instruction as to prima facie speed limit, 87 A.L.R.2d 539.

Propriety and prejudicial effect of instructions referring to the degree or percentage of contributory negligence necessary to bar recovery, 87 A.L.R.2d 1391.

Provision in Rule 51, Federal Rules of Civil Procedure, and similar state rules and statutes, requiring court to inform counsel, prior to argument to jury, of its proposed action upon requests for instructions, 91 A.L.R.2d 836.

Instruction as to possible effect of verdict on insurance rates as prejudicial error, 100 A.L.R.2d 345.

Propriety and effect, in eminent domain proceedings, of instructions to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Verdict urging instructions in civil case stressing desirability and importance of agreement, 38 A.L.R.3d 1281.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 101.

9-10-6. Juror's private knowledge.

A juror shall not act on his or her private knowledge respecting the facts, witnesses, or parties.

History.

Civil Code 1895, § 5337; Civil Code 1910, § 5932; Code 1933, § 110-108; Ga. L. 2011, p. 99, § 9/HB 24.

History of Section.

This Code section is derived from the decisions in Chattanooga, R. & C.R.R. v. Owen, 90 Ga. 265, 15 S.E. 853 (1892) and Pettyjohn v. Liebscher, 92 Ga. 149, 17 S.E. 1007 (1893).

Cross references.

Corresponding provision relating to criminal procedure, § 17-9-20.

Juror as witness, § 24-6-606.

Editor's notes.

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews.

For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

JUDICIAL DECISIONS

Jurors should not be instructed that the jurors can act upon their private and personal knowledge of the character of the witnesses who testify in the case on trial, and it is error for the court to instruct the jurors that the jury can consider such character if the jurors know it. Chattanooga, R. & C.R.R. v. Owen, 90 Ga. 265, 15 S.E. 853, 1892 Ga. LEXIS 165 (1892).

Error to refuse to charge section when counsel intimates rule contrary to section. — It is error to refuse to charge this section when counsel intimates to the jury that the jury may consider the jurors' personal knowledge of the plaintiff's character. Georgia Ry. & Elec. Co. v. Dougherty, 4 Ga. App. 614, 62 S.E. 158, 1908 Ga. App. LEXIS 489 (1908) (see O.C.G.A. § 9-10-6).

Jurors may apply to testimony knowledge obtained from viewing property or premises. — Purpose of a view is to aid the jury to better understand the evidence, and this necessarily implies that the jurors may apply to the testimony the knowledge obtained by the jurors in seeing the property or premises involved; the knowledge acquired by jurors in making a view is in one sense personal, but in another sense it becomes a part of the evidence in that it may be used by the jurors in construing the evidence and finding the truth of the case. Shahan v. AT & T, 72 Ga. App. 749, 35 S.E.2d 5, 1945 Ga. App. LEXIS 689 (1945).

Jury limited to consideration of facts as disclosed to the jury during trial. — Phrase "take into consideration all the facts and circumstances of the case as they have transpired here in your presence" does not limit the jury to a consideration only of the facts and circumstances of the case as they happened on the trial of the case, but does properly limit the jury to a consideration of the facts and circumstances of the case as those facts and circumstances were disclosed to the jury on the trial of the case. Sheridan v. Haggard, 95 Ga. App. 792, 99 S.E.2d 163, 1957 Ga. App. LEXIS 920 (1957).

Jury is not bound to render verdict in amount testified to by witnesses when there is sufficient data in the evidence upon which the jury may legitimately exercise the jury's own knowledge and ideas. Fulton County v. Bailey, 107 Ga. App. 512, 130 S.E.2d 800, 1963 Ga. App. LEXIS 894 (1963).

RESEARCH REFERENCES

Am. Jur. 2d.

47 Am. Jur. 2d, Jury, § 21 et seq.

C.J.S.

50A C.J.S., Juries, § 401. 89 C.J.S., Trial, § 790 et seq.

ALR.

Right of jury to act upon their own knowledge in determining property values, 104 A.L.R. 1017.

Expression of opinion by juror based upon or influenced by his own observation and experience in connection with his trade, business, or profession as ground for reversal or new trial, 156 A.L.R. 1033.

Evidentiary effect of view by jury in condemnation proceedings, 1 A.L.R.3d 1397.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

Taking of notes by jury, 14 A.L.R.3d 831.

Trial jurors as witnesses in same state court or related case, 86 A.L.R.3d 781.

Propriety of juror's tests or experiments in jury room, 31 A.L.R.4th 566.

Prejudicial effect of jury's procurement or use of book during deliberations in civil cases, 31 A.L.R.4th 623.

Taking and use of trial notes by jury, 36 A.L.R.5th 255.

9-10-7. Expression by judge of opinion in case reversible error.

It is error for any judge, during the progress of any case, or in his charge to the jury, to express or intimate his opinion as to what has or

has not been proved. Should any judge violate this Code section, the violation shall be held by the Supreme Court or Court of Appeals to be error, the decision in the case shall be reversed, and a new trial shall be granted in the court below with such directions as the Supreme Court or the Court of Appeals may lawfully give.

History.

Laws 1850, Cobb's 1851 Digest, p. 462.; Code 1863, § 3172; Code 1868, § 3183; Code 1873, § 3248; Code 1882, § 3248; Civil Code 1895, § 4334; Penal Code 1895, § 1032; Civil Code 1910, § 4863; Penal Code 1910, § 1058; Code 1933, § 81-1104.

Cross references.

Effect of prejudicial statements to jury by counsel, § 9-10-185.

Corresponding provision relating to criminal procedure, § 17-8-57.

JUDICIAL DECISIONS

Analysis

General Consideration
Objections
New Trial Required
Application

General Consideration

This section is not applicable in federal courts. Hathaway v. East Tenn. V. & G.R.R., 29 F. 489, 1886 U.S. App. LEXIS 2489 (C.C.D. Ga. 1886) (see O.C.G.A. § 9-10-7).

If a case is tried without a jury, this section is not applicable. Harris v. Massey, 241 Ga. 580, 247 S.E.2d 55, 1978 Ga. LEXIS 1052 (1978) (see O.C.G.A. § 9-10-7).

This section, known as the "dumb act," prevents the court from expressing an opinion on a fact in issue. Humphries v. Miller, 66 Ga. App. 871, 19 S.E.2d 321, 1942 Ga. App. LEXIS 319 (1942) (see O.C.G.A. § 9-10-7).

Private conversations with counsel. — O.C.G.A. § 9-10-7 has no application to trial judge's discretion in private conversation with counsel concerning conduct of case. Ray v. Marietta Marine, Inc., 163 Ga. App. 690, 294 S.E.2d 698, 1982 Ga. App. LEXIS 2621 (1982).

This section was not intended to prohibit the court from summing up the evidence. Shiels v. Stark, 14 Ga. 429, 1854 Ga. LEXIS 130 (1854) (see O.C.G.A. § 9-10-7).

Court may decline to exercise the privilege to sum up the evidence. Wright v. Central R.R. & Banking, 16 Ga. 38, 1854 Ga. LEXIS 168 (1854); City & Sub. Ry. v. Findley, 76 Ga. 311, 1886 Ga. LEXIS 26 (1886).

If the court attempts to do so, both sides must be treated fairly, although all material facts are not stated. Lazenby v. Citizens Bank, 20 Ga. App. 53, 92 S.E. 391, 1917 Ga. App. LEXIS 709 (1917).

It is error for court to select one piece of evidence and express a strong and decided opinion respecting it. Johnson v. Kinsey, 7 Ga. 428, 1849 Ga. LEXIS 157 (1849); City & Sub. Ry. v. Findley, 76 Ga. 311, 1886 Ga. LEXIS 26 (1886).

Court should not state the effect of the evidence in the case, although opinion is correct. Acme Brewing Co. v. Central R.R. & Banking Co., 115 Ga. 494, 42 S.E. 8, 1902 Ga. LEXIS 464 (1902).

Court should not state what a witness has testified. McVicker v. Conkle, 96 Ga. 584, 24 S.E. 23, 1895 Ga. LEXIS 140 (1895).

A synopsis of the contentions contained in the petition may be given. American Trust & Banking Co. v. Harris, 18 Ga. App. 610, 89 S.E. 1059 (1916); Hathaway v. Bishop, 214 Ga. App. 870, 449 S.E.2d 318, 1994 Ga. App. LEXIS 1083 (1994), cert. denied, No. S95C0283, 1995 Ga. LEXIS 293 (Ga. Feb. 17, 1995).

Use of the phrase, "it is contended" will not protect a charge detailing the evidence of a particular witness. Smith v. Hazlehurst, 122 Ga. 786, 50 S.E. 917, 1905 Ga. LEXIS 327 (1905).

It cannot be said that court may not express opinion as to sufficiency of pleadings in a case, or it may not adjudge sufficiency of the pleadings by declaring that pleadings are sufficient without amendment. Green v. Green, 176 Ga. 421, 168 S.E. 266, 1933 Ga. LEXIS 92 (1933).

Discussing admissibility of evidence without stating fact as proved. — In discussing the reasons for the admission or rejection of evidence, the judge may refer to the evidence but must not state that a relevant fact has or has not been proved. Florida, Cent. & P.R.R. v. Lucas, 110 Ga. 121, 35 S.E. 283, 1900 Ga. LEXIS 334 (1900); Brooks v. Griffin, 10 Ga. App. 497, 73 S.E. 752, 1912 Ga. App. LEXIS 590 (1912); Redwine Bros. v. Street, 18 Ga. App. 77, 89 S.E. 163, 1916 Ga. App. LEXIS 130 (1916).

The statute forbids a judge to express or intimate the judge's opinion as to what has been proved. But when an objection is made to evidence offered, the judge has a right if the judge deems proper to give the reasons for the judge's decision on the objections, and such reasons so given if pertinent to the objection made, do not constitute such an expression of opinion as to violate the statute. Central of Ga. Ry. v. Harper, 124 Ga. 836, 53 S.E. 391, 1906 Ga. LEXIS 638 (1906).

Section inapplicable to ruling on materiality of evidence. — This section refers to opinions of the court as to what has or has not been proved by the evidence and not to a ruling on the materiality of evidence. Norton v. Norton, 213 Ga. 384, 99 S.E.2d 139, 1957 Ga. LEXIS 391 (1957) (see O.C.G.A. § 9-10-7).

This section applies to cases of conflicting evidence. Hooks v. Frick & Co., 75 Ga. 715, 1885 Ga. LEXIS 214 (1885) (see O.C.G.A. § 9-10-7).

Section is not confined to the charge by the court, but includes improper remarks made during the progress of the trial. Florida, Cent. & P.R.R. v. Lucas, 110 Ga. 121, 35 S.E. 283, 1900 Ga. LEXIS 334 (1900).

Judge can refuse to give written request of charge containing an expression of opinion. Flanagan v. Scott, 102 Ga. 399, 31 S.E. 23, 1897 Ga. LEXIS 511 (1897); Georgia, Fla. & Ala. Ry. v. Lasseter, 122 Ga. 679, 51 S.E. 15, 1905 Ga. LEXIS 301 (1905).

Trial judge can state the judge's reasons for admitting or refusing to admit evidence, if such reasons are pertinent to the objections to evidence and the ruling made thereon. Jones v. Pope, 7 Ga. App. 538, 67 S.E. 280, 1910 Ga. App. LEXIS 373 (1910); Reserve Life Ins. Co. v. Peavy, 98 Ga. App. 268, 105 S.E.2d 465, 1958 Ga. App. LEXIS 565 (1958).

Pertinent remarks made by a trial court in discussing the admissibility of evidence or explaining the court's rulings do not constitute prohibited expressions of opinion. Morrison v. Morrison, 282 Ga. 866, 655 S.E.2d 571, 2008 Ga. LEXIS 16 (2008).

Inadequacy of written record to convey tone of judge's voice in giving charge. — Whether the language used amounts to an expression of opinion depends altogether upon the accentuation of the words at the time they were used, and the tone of voice in giving a charge cannot be transmitted in the written record which comes to the Supreme Court. Sikes v. Seckinger, 170 Ga. 1, 152 S.E. 65, 1930 Ga. LEXIS 384 (1930).

Error to express opinion as to conflicting evidence. — Where the evidence is in conflict as to what has been proved on the trial of a case, it is error for the trial court to express an opinion as to what has been proved. Rogers v. Swinks, 102 Ga. App. 444, 116 S.E.2d 638, 1960 Ga. App. LEXIS 646 (1960).

Excerpt to be considered together with entire charge. — In determining whether an excerpt from a charge is subject to the criticism that it contains an expression or intimation of opinion as to what has or has not been proved, the excerpt should be considered in the light of the entire charge. Camilla Cotton Oil Co. v. Cawley, 52 Ga. App. 268, 183 S.E. 134, 1935 Ga. App. LEXIS 136 (1935).

Excerpt from charge to be considered in context with disclaimer by court. — Where it is contended as a special ground of a motion for new trial

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that an excerpt from the charge of the court is error as containing an expression of opinion on what has been proved, the excerpt will be considered in its context and with the charge as a whole, including a statement of the court that nothing the court has said should be construed as an expression of opinion on the court's part. Imperial Inv. Co. v. Modernization Constr. Co., 96 Ga. App. 385, 100 S.E.2d 107, 1957 Ga. App. LEXIS 588 (1957).

If fact is established by undisputed evidence, charge may intimate that the fact is proved. Marshall v. Morris, 16 Ga. 368, 1854 Ga. LEXIS 194 (1854); Georgia Fla. & Ala. Ry. v. Jernigan, 128 Ga. 501, 57 S.E. 791, 1907 Ga. LEXIS 151 (1907); Dexter Banking Co. v. McCook, 7 Ga. App. 436, 67 S.E. 113, 1910 Ga. App. LEXIS 332 (1910); Jones v. Wall, 22 Ga. App. 513, 96 S.E. 344, 1918 Ga. App. LEXIS 583 (1918); Watkins v. Stulb & Vorhauer, 23 Ga. App. 181, 98 S.E. 94, 1919 Ga. App. LEXIS 26 (1919); Hall v. Wingate, 159 Ga. 630, 126 S.E. 796, 1924 Ga. LEXIS 6 (1924).

If no evidence of any kind is introduced in support of a given plea, the court may state to the jury that such is the fact. Underwood v. American Mtg. Co., 97 Ga. 238, 24 S.E. 847, 1895 Ga. LEXIS 345 (1895).

Judge may properly refuse to charge that an undisputed issuable fact is true. New Ware Furn. Co. v. Reynolds, 16 Ga. App. 19, 84 S.E. 491, 1915 Ga. App. LEXIS 484 (1915).

Inclusion in charge of indication that undisputed fact is proved not violative of section. — Where in a civil case the undisputed evidence clearly establishes a particular fact, the judge may in the jury charge assume or indicate that the fact has been proved, and to do so is not a violation of this section. McLendon v. City of La Grange, 47 Ga. App. 690, 171 S.E. 307, 1933 Ga. App. LEXIS 601 (1933) (see O.C.G.A. § 9-10-7).

It is no violation of section for court to state fact which is uncontested and undisputed under the evidence in the case. Imperial Inv. Co. v. Modernization Constr. Co., 96 Ga. App. 385, 100 S.E.2d 107, 1957 Ga. App. LEXIS 588 (1957) (see O.C.G.A. § 9-10-7).

Charge instructing jury that disputed facts are proved required for new trial. — Assuming that the excerpt of the charge complained of did express an opinion by the trial court as to what had been proved, yet, unless it instructed the jury that such fact or facts were proven when actually such fact or facts were disputed, no error is shown. That the court intimates an opinion upon an uncontested and undisputed fact is not cause for a new trial. Valdosta Coca Cola Bottling Works, Inc. v. Montgomery, 102 Ga. App. 440, 116 S.E.2d 675, 1960 Ga. App. LEXIS 645 (1960).

It is not cause for new trial when trial court expresses opinion as to uncontested and undisputed fact. Columbus Transp. Co. v. Curry, 104 Ga. App. 700, 122 S.E.2d 584, 1961 Ga. App. LEXIS 776 (1961).

Reference in charge to facts which are in evidence and undisputed does not constitute expression of an opinion under the proscription of this section. Miller v. Dean, 113 Ga. App. 869, 150 S.E.2d 191, 1966 Ga. App. LEXIS 1238 (1966) (see O.C.G.A. § 9-10-7).

No reversal where evidence demands finding as to opinion expressed. — While this section prohibits a trial judge from intimating or expressing any opinion as to what has or has not been proved, yet where the evidence demands a finding as to the opinion expressed, there is no cause for reversal. Georgia Power Co. v. Mozingo, 132 Ga. App. 666, 209 S.E.2d 66, 1974 Ga. App. LEXIS 1783 (1974); Cadden v. State, 176 Ga. App. 377, 336 S.E.2d 266, 1985 Ga. App. LEXIS 2875 (1985); Pierce County Sch. Dist. v. Greene, 185 Ga. App. 269, 363 S.E.2d 825, 1987 Ga. App. LEXIS 2495 (1987) (see O.C.G.A. § 9-10-7).

Error as to opinion of weight of evidence not necessarily violative of section. — Expression of opinion as to the weight of evidence may or may not be error, according to the circumstances under which the opinion is expressed; but even where error, it need not be a violation of this section. Reserve Life Ins. Co. v. Peavy, 98 Ga. App. 268, 105 S.E.2d 465,

1958 Ga. App. LEXIS 565 (1958) (see O.C.G.A. § 9-10-7).

To declare law applicable to given state of facts is not violation of this section. Gilstrap v. Leith, 24 Ga. App. 720, 102 S.E. 169, 1919 Ga. App. LEXIS 987 (1919) (see O.C.G.A. § 9-10-7).

Intimation of an opinion in a jury charge, or its expression on an immaterial fact, will not require a new trial. Elder v. Cozart, 59 Ga. 199, 1877 Ga. LEXIS 233 (1877); Seaboard Air-Line Ry. v. Hunt, 10 Ga. App. 273, 73 S.E. 588, 1912 Ga. App. LEXIS 456 (1912).

Wording of decision may, when given out of context in instructions to jury, be misleading even though it represents a correct statement of the law. Gulf Life Ins. Co. v. Moore, 90 Ga. App. 791, 84 S.E.2d 696, 1954 Ga. App. LEXIS 816 (1954).

It is not error to give charges delivered at former trial, as corrected by appellate court. Tanner v. Hinson, 155 Ga. 838, 118 S.E. 680, 1923 Ga. LEXIS 173 (1923).

It is not error to state the contentions of the parties. Brewer v. Barnett Nat'l Bank, 16 Ga. App. 593, 85 S.E. 928, 1915 Ga. App. LEXIS 142 (1915); John Deere Plow Co. v. Anderson, 29 Ga. App. 497, 116 S.E. 38, 1923 Ga. App. LEXIS 91 (1923).

It is not error to state what the positions of plaintiff are as to the defenses made. Chambers & Co. v. Walker, 80 Ga. 642, 6 S.E. 165, 1888 Ga. LEXIS 211 (1888).

Amount to be recovered cannot be commented upon. Jarrett v. Arnold, 30 Ga. 323, 1860 Ga. LEXIS 93 (1860); Savannah, Fla. & W. Ry. v. Hardin, 110 Ga. 433, 35 S.E. 681, 1900 Ga. LEXIS 456 (1900).

Instructing jury as to what court understands to be contentions of the parties is not an expression of opinion. McArthur v. Ryals, 162 Ga. 413, 134 S.E. 76, 1926 Ga. LEXIS 206 (1926).

For court to state to jury allegations of petition and claims of parties is not violative of this section. Napier v. Du Bose, 45 Ga. App. 661, 165 S.E. 773, 1932 Ga. App. LEXIS 644 (1932) (see O.C.G.A. § 9-10-7).

This section does not prohibit court from directing attention of jury to any particular portion of the evidence and instructing them on the contentions of the parties in regard to it. Continental Cas. Co. v. Rucker, 50 Ga. App. 694, 179 S.E. 269, 1935 Ga. App. LEXIS 268 (1935) (see O.C.G.A. § 9-10-7).

Court may state contentions of parties, and may summarize evidence in regard thereto, without violating the inhibition of this section, providing it does not intimate an opinion as to what has or has not been proved. General Whsle. Co. v. Hertz Corp., 120 Ga. App. 319, 170 S.E.2d 310, 1969 Ga. App. LEXIS 763 (1969) (see O.C.G.A. § 9-10-7).

Trial court's synopsis of the landowners' contentions, in the context of a contested jury charge, did not constitute an improper opinion by the trial court upon the evidence, and thus, did not constitute reversible error pursuant to O.C.G.A. § 9-10-7. City of Columbus v. Barngrover, 250 Ga. App. 589, 552 S.E.2d 536, 2001 Ga. App. LEXIS 826 (2001).

Any preliminary instructions given by trial judge must avoid misstating contentions of parties and issues in the case. Akin v. Patton, 235 Ga. 51, 218 S.E.2d 802, 1975 Ga. LEXIS 776 (1975).

An instruction is erroneous which includes an inference from given facts to other facts. Standard Cotton Mills v. Cheatham, 125 Ga. 649, 54 S.E. 650, 1906 Ga. LEXIS 237 (1906).

An instruction is erroneous if it assumes the existence of a disputed fact. Central of Ga. Ry. v. Woodall, 13 Ga. App. 50, 78 S.E. 781, 1913 Ga. App. LEXIS 28 (1913).

A violation on the part of the trial court of this section makes reversal mandatory. Imperial Inv. Co. v. Modernization Constr. Co., 96 Ga. App. 385, 100 S.E.2d 107, 1957 Ga. App. LEXIS 588 (1957) (see O.C.G.A. § 9-10-7).

An intimation of opinion in jury instructions on a matter conceded, or even the statement of facts admitted to be such, is not improper. Western Union Tel. Co. v. Harris, 6 Ga. App. 260, 64 S.E. 1123, 1909 Ga. App. LEXIS 257 (1909).

Application of law by jury to facts as found by jury. — A jury's principal function is to ascertain facts, and where

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facts are in dispute the court must of necessity leave the application of the law to the jury to be based on the facts found; this is not intended to be prohibited by this section. Gulf Life Ins. Co. v. Belch, 108 Ga. App. 480, 133 S.E.2d 622, 1963 Ga. App. LEXIS 680 (1963), rev'd, 219 Ga. 823, 136 S.E.2d 351, 1964 Ga. LEXIS 418 (1964) (see O.C.G.A. § 9-10-7).

Paraphrasing statute in response to juror's question not error. — In an action arising out of an automobile accident, the trial court did not express an opinion to the jury, but carefully avoided, by paraphrasing the right-of-way statute, answering the question posed by a juror which called on the judge to express an opinion as to who had the right-of-way in the center turn lane where the accident occurred. Latargia v. Toole, 196 Ga. App. 692, 396 S.E.2d 607, 1990 Ga. App. LEXIS 1025 (1990).

Questions propounded to witnesses by the court must not violate this section. Guggenheimer & Co. v. Gilmore, 29 Ga. App. 540, 116 S.E. 67, 1923 Ga. App. LEXIS 110 (1923) (see O.C.G.A. § 9-10-7).

Judge may refer to evidence in discussing admissibility of testimony with counsel. — The judge, in discussing with counsel the admissibility of testimony or similar matters in the progress of the trial, or in explaining rulings thereon, may refer to the evidence or to statements of the witnesses. Realty Co. v. Ellis, 4 Ga. App. 402, 61 S.E. 832, 1908 Ga. App. LEXIS 314 (1908); Moore v. McAfee, 151 Ga. 270, 106 S.E. 274, 1921 Ga. LEXIS 219 (1921).

It is error for the judge to go beyond the limits of legitimate discussions and unnecessarily deal with the actual questions of fact involved in the case. Florida, Cent. & P.R.R. v. Lucas, 110 Ga. 121, 35 S.E. 283, 1900 Ga. LEXIS 334 (1900); Ficken v. City of Atlanta, 114 Ga. 970, 41 S.E. 58, 1902 Ga. LEXIS 852 (1902); Morrison v. Dickey, 119 Ga. 698, 46 S.E. 863, 1904 Ga. LEXIS 340 (1904); Georgia Ry. & Elec. Co. v. Baker, 1 Ga. App. 832, 58 S.E. 88, 1907 Ga. App. LEXIS 123 (1907).

Error to make remarks fortifying position of one party over another. — A judge may give counsel the benefit of the judge's views on the law, but it is error prejudicial to the opposite party for the court to make suggestions or remarks tending to fortify the positions of one party rather than the other. Franklin Life Ins. Co. v. Hill, 136 Ga. App. 128, 220 S.E.2d 707, 1975 Ga. App. LEXIS 1272 (1975).

Section 53-2-25 is exception to this section. — Former Code 1933, § 113-205 (see O.C.G.A. § 53-2-25, Pre-1998 Probate Code), which stated a rule of evidence relating to the sufficiency of the mental state of a testator, constituted an exception to former Code 1933, § 81-1104 (see O.C.G.A. § 9-10-7). Holland v. Bell, 148 Ga. 277, 96 S.E. 419, 1918 Ga. LEXIS 297 (1918).

Remark that counsel was "fishing" not violative of section. — The use by the court of the sentence "well go ahead and use him (the witness); you seem to be fishing anyhow," was, under the circumstances of the case, held not to be an intimation of opinion by the judge. Richardson v. State, 161 Ga. 640, 131 S.E. 682, 1926 Ga. LEXIS 317 (1926).

Statement that testimony was immaterial not reversible error. — Statement of the trial court in the presence of the jury that the testimony of a certain witness was immaterial, such statement having been made pursuant to an objection to the evidence and while the evidence was under discussion, was not reversible error, the court having immediately thereafter instructed the jury that a part of the testimony was relevant and material, and that its previous statement to the contrary was inadvertently made, and where most of the testimony of such witness in reality was either immaterial or constituted conclusions of the witness, which also formed a basis of the objection. Banks v. Kilday, 88 Ga. App. 307, 76 S.E.2d 642, 1953 Ga. App. LEXIS 1071 (1953).

Pertinent statements regarding admissibility of evidence not violative of section. — A trial judge can state the

judge's reasons for admitting or refusing to admit evidence, if such reasons are pertinent to the objections to the evidence and the ruling made thereon; and such statement does not constitute such an expression of opinion as is violative of this section. Parker v. Wellons, 43 Ga. App. 721, 160 S.E. 109, 1931 Ga. App. LEXIS 531 (1931); Sloan v. Glaze, 72 Ga. App. 415, 33 S.E.2d 846, 1945 Ga. App. LEXIS 594 (1945) (see O.C.G.A. § 9-10-7).

Statement clarifying testimony proper where counsel's argument goes outside testimony. — Where counsel, in arguing to the jury, goes outside the testimony, it is the duty of the court, on objection made by opposing counsel, to settle the fact of what was said or sworn by the witness; and the statement by the court that the witness said a certain thing is proper, and is not, in a legal sense, the expression of an opinion as to the evidence. Royal Crown Bottling Co. v. Stiles, 82 Ga. App. 254, 60 S.E.2d 815, 1950 Ga. App. LEXIS 1093 (1950).

Any error harmless where directed verdict only one renderable. — The only harm that can accrue to a party by the expression of an opinion on the evidence by the trial judge is that such expression might influence the jury in their verdict; the jury in the present case could have found no other verdict than that rendered, under the direction of the judge to find for the petitioner, and any error which might have been committed by the judge in expressing an opinion on the evidence, during the progress of the trial, was harmless error. Kinney v. Youngblood, 216 Ga. 354, 116 S.E.2d 608, 1960 Ga. LEXIS 471 (1960).

It is not harmful error for trial judge to express opinion in accordance with what is demanded by the evidence and about which there is no controversy. Rauch v. Shanahan, 125 Ga. App. 782, 189 S.E.2d 111, 1972 Ga. App. LEXIS 1471 (1972); International Indem. Co. v. Coachman, 181 Ga. App. 82, 351 S.E.2d 224, 1986 Ga. App. LEXIS 2804 (1986).

No new trial where context removes probability of erroneous impression. — Where the context removes all probability of an erroneous impression which might be created by an excerpt from a judge's statement as an isolated fragment, a new trial will not be granted. Bennett v. Haley, 132 Ga. App. 512, 208 S.E.2d 302, 1974 Ga. App. LEXIS 1733 (1974).

Assumption that crime had been committed not violative of section. — There being nothing in the evidence or in the defendant's statement to dispute the fact that the alleged crime was committed, and the defendant's defense resting solely upon the contention that the defendant did not participate in the offense, the court, in charging the jury, did not violate this section in assuming that a crime had been committed. Pruitt v. State, 36 Ga. App. 736, 138 S.E. 251, 1927 Ga. App. LEXIS 271 (1927); Victorine v. State, 264 Ga. 580, 449 S.E.2d 91, 1994 Ga. LEXIS 859 (1994) (see O.C.G.A. § 9-10-7).

Not error for judge to express opinion as to conceded fact not at issue. — Where a fact is conceded to be true, and the parties are not at issue with reference thereto, it is not reversible error for the judge, while instructing the jury, to intimate or express an opinion that such fact has been proved. Richards v. Smith, 173 Ga. 424, 160 S.E. 608, 1931 Ga. LEXIS 331 (1931).

Statement of fact as proved by uncontradicted testimony not error. — It is not a violation of this section where a fact stated by the trial judge as having been proved is established by uncontradicted testimony. Rentz v. Collins, 51 Ga. App. 782, 181 S.E. 678, 1935 Ga. App. LEXIS 472 (1935) (see O.C.G.A. § 9-10-7).

Statement of existence of ordinances as fact not error where established by undisputed evidence. — Where ordinances of the city are established by evidence which is uncontradicted and undisputed, it is not error as being an expression of an opinion on the facts and in violation of this section for the trial judge to state in the charge to the jury the existence of the ordinances as a fact. Rentz v. Collins, 51 Ga. App. 782, 181 S.E. 678, 1935 Ga. App. LEXIS 472 (1935) (see O.C.G.A. § 9-10-7).

No error where fact stated as proved is undisputed. — A statement by the court in the charge that a certain

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fact has been proved is not harmful error, and is not cause for a new trial, under this section, where the fact stated as having been proved is not in controversy, but is established by uncontradicted and undisputed evidence. Pate v. Carrollton Clinic, 52 Ga. App. 774, 184 S.E. 780, 1936 Ga. App. LEXIS 247 (1936) (see O.C.G.A. § 9-10-7).

Court's opinion permissible. — Where there was an absence of objection or motion for mistrial and defendant had expressly stipulated to the fact at trial, the court's opinion as to what had been proved at trial when it instructed the jury that "defendant has admitted to signing the contract" was permissible. Dover v. Master Lease Corp., 203 Ga. App. 526, 417 S.E.2d 368, 1992 Ga. App. LEXIS 524 (1992).

Charge leaving to jury determination of disputed facts not reversible error. — A charge of a correct principle of law applicable to the case on trial does not constitute error requiring the reversal of the case as an expression of an opinion of what has been proved, where the whole charge construed together shows that the matters assumed to be proved in the charge complained of were left to the jury on the question of whether or not such facts had been established by the evidence. Gulf Life Ins. Co. v. Moore, 90 Ga. App. 791, 84 S.E.2d 696, 1954 Ga. App. LEXIS 816 (1954); First Fed. Sav. & Loan Ass'n. v. Commercial Union Ins. Co., 115 Ga. App. 756, 156 S.E.2d 101, 1967 Ga. App. LEXIS 1242 (1967).

Charge not reversible error absent reference to pertinent portion of record or transcript. — Where a trial court charges that the evidence shows a particular fact, and complaint is made that that charge is an expression of opinion by the trial judge prohibited by this section, but does not refer to any portion of the record or transcript from which it can be determined there is an issue as to this in the case, the charge is not reversible error. Robinson v. McClain, 123 Ga. App. 664, 182 S.E.2d 157, 1971 Ga. App. LEXIS 1337 (1971) (see O.C.G.A. § 9-10-7).

Expression by court favoring plaintiff's case requires new trial. — An expression by the court, although no doubt unintentional, that the plaintiff's case was a meritorious one, would require the grant of a new trial. Humphries v. Miller, 66 Ga. App. 871, 19 S.E.2d 321, 1942 Ga. App. LEXIS 319 (1942).

Error for court to express opinion on conflicting evidence. — It is error for the court to express or intimate an opinion upon a material question of fact as to which the evidence is conflicting. City of Decatur v. Robertson, 85 Ga. App. 747, 70 S.E.2d 135, 1952 Ga. App. LEXIS 825 (1952).

Error to express opinion as to consideration of contract not appearing on its face. — It is error for the judge to express an opinion as to what has been proved to be the consideration of a contract, when such consideration does not appear upon the face of the contract itself. Hudson v. Best, 104 Ga. 131, 30 S.E. 688, 1898 Ga. LEXIS 292 (1898).

Error to charge that given acts constitute negligence absent statute to that effect. — On the trial of an action for damages alleged to have been occasioned by the negligence of the defendant, it is always error, requiring the grant of a new trial, for the court to charge the jury that given acts constitute negligence when such acts are not declared by statute to be negligent. Alabama Great S.R.R. v. McBryar, 67 Ga. App. 509, 21 S.E.2d 173, 1942 Ga. App. LEXIS 458 (1942).

Charge did not comment on evidence. — In an action for breach of realty contract, plaintiff's contention that charge commented on the evidence was without merit, as the charge was phrased in terms of what the jury would be authorized to conclude if it found certain facts. Separk v. Caswell Bldrs., Inc., 209 Ga. App. 713, 434 S.E.2d 502, 1993 Ga. App. LEXIS 987 (1993), cert. denied, No. S93C1775, 1993 Ga. LEXIS 1017 (Ga. Oct. 22, 1993).

Objections

Objection to court's remarks prior to and unconnected to charge must be timely. — Where the court expresses an opinion in ascertaining the position or opinion of counsel as to what has or has not been proved, or the effect of certain evidence, and does so before beginning the

charge to the jury, and where the remarks made are entirely disconnected from the charge, a party will not be permitted to allow the remarks to pass unchallenged until after the case has been submitted to the jury and a verdict adverse to the party returned, and then seek to utilize them in a reviewing court. Royal Crown Bottling Co. v. Stiles, 82 Ga. App. 254, 60 S.E.2d 815, 1950 Ga. App. LEXIS 1093 (1950).

Exceptions to remarks not made by court during charge must be timely. — Statements by the court not made during the charge to the jury must be the subject of timely exception in order to be reviewable, as the complaining party cannot remain silent and take chances on a verdict in the complaining party's favor without waiving the complaining party's right to complain in the event the verdict is adverse. Head v. Pollard Lumber Sales, Inc., 88 Ga. App. 757, 77 S.E.2d 827, 1953 Ga. App. LEXIS 1183 (1953).

Prejudicial statements to counsel no ground for new trial absent timely motion. — Statements made by the court in colloquy with counsel, which are prejudicial or intimate an opinion which would not be permissible in a charge to the jury, are not good ground for a new trial unless a motion for mistrial was made. Chandler v. Alabama Power Co., 104 Ga. App. 521, 122 S.E.2d 317, 1961 Ga. App. LEXIS 731 (1961).

Motion for mistrial must be made at time of objectionable remarks. — Where during the trial of an action the court comments on evidence in a manner which counsel feels contains or intimates an expression of opinion as to what has been proved, it is incumbent upon counsel to object or move for a mistrial at that time. Freedman v. Housing Auth., 108 Ga. App. 418, 136 S.E.2d 544, 1963 Ga. App. LEXIS 663 (1963).

Because a landlord did not waive a tenant's obligation to obtain casualty insurance, the tenant did not move for a mistrial based on the trial court's alleged objectionable remarks under O.C.G.A. §§ 9-10-7 and 15-6-6, and the trial court's jury instructions were proper; the trial court did not err in denying the tenant's motions for a JNOV or a new trial. Mahsa, Inc. v. Al-Madinah Petroleum, Inc., 276 Ga. App. 890, 625 S.E.2d 37, 2005 Ga. App. LEXIS 1294 (2005), cert. denied, No. S06C0777, 2006 Ga. LEXIS 325 (Ga. Apr. 25, 2006).

Objectionable remarks not assignable as error for first time in motion for new trial. — Where the remark which allegedly expresses or intimates the court's opinion occurs in the course of trial elsewhere than in the charge to the jury a proper objection or a motion for mistrial should be made at the occurrence as it cannot be assigned as error for the first time in a motion for a new trial. Mitchell v. Gay, 111 Ga. App. 867, 143 S.E.2d 568, 1965 Ga. App. LEXIS 1123 (1965).

Absent objection or motion for mistrial, appellant cannot complain of any alleged expression of opinion by the trial court. Myrick v. State, 155 Ga. App. 496, 271 S.E.2d 637, 1980 Ga. App. LEXIS 2634 (1980).

In the absence of an objection or motion for mistrial, an appellant cannot complain on appeal that the appellant was prejudiced by the trial court expressing or intimating opinions concerning the evidence adduced at trial. Walker v. Bishop, 169 Ga. App. 236, 312 S.E.2d 349, 1983 Ga. App. LEXIS 3037 (1983); Southeastern Ambulance Corp. v. Freeman, 185 Ga. App. 119, 363 S.E.2d 571, 1987 Ga. App. LEXIS 2467 (1987).

Where defendant argued error in the trial court's asking questions of witnesses and making statements to the jury concerning the damages computation, but no objection or motion for mistrial was made with regard to any of these instances, the absence of an objection or motion for mistrial prevented defendant from complaining on appeal that the defendant was prejudiced by such conduct. Wehunt v. ITT Bus. Communications Corp., 183 Ga. App. 560, 359 S.E.2d 383, 1987 Ga. App. LEXIS 2019 (1987).

The question of whether O.C.G.A. § 9-10-7 has been violated is not reached unless an objection or motion for mistrial is made. Provost v. Gwinnett County, 199 Ga. App. 713, 405 S.E.2d 754, 1991 Ga. App. LEXIS 625 (1991).

Explanation of decision on objections to evidence. — The court has the right to explain its decision on objections

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to evidence and, if pertinent, such reasons do not constitute prohibited expressions of opinion. Starks v. Robinson, 189 Ga. App. 168, 375 S.E.2d 86, 1988 Ga. App. LEXIS 1323 (1988), cert. denied, 258 Ga. 828, 377 S.E.2d 503, 1989 Ga. LEXIS 209 (1989).

Objection to alleged error at time of occurrence not necessary. — Where during the progress of a trial the judge by interrogation of a witness for the state violates this section by expressing or intimating an opinion as to what has been proved or as to the guilt of the accused, and the defendant passively sits by and takes the defendant's chances of acquittal without having made a motion for a mistrial or any other motion at the time of the commission of the error, the defendant may as a matter of procedure nevertheless complain of the error for the first time in a motion for a new trial. Allen v. State, 194 Ga. 178, 21 S.E.2d 73, 1942 Ga. LEXIS 545 (1942), overruled in part as stated in Wright v. State, 113 Ga. App. 436, 148 S.E.2d 333, 1966 Ga. App. LEXIS 1087 (1966). But see Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139, 1943 Ga. LEXIS 449 (1943); Lumbermen's Underwriting Alliance v. Jessup, 100 Ga. App. 518, 112 S.E.2d 337, 1959 Ga. App. LEXIS 660 (1959).

Assignment of judge's error for first time in motion for new trial permitted. — Where a judge, in a civil or criminal case, during the progress of the trial or in the charge to the jury, expresses or intimates the judge's opinion as to what has or has not been proved or as to the guilt of the accused in violation of this section, such error may be taken advantage of for the first time in a motion for new trial. Allen v. State, 67 Ga. App. 607, 21 S.E.2d 280, 1942 Ga. App. LEXIS 482 (1942). But see Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139, 1943 Ga. LEXIS 449 (1943); Lumbermen's Underwriting Alliance v. Jessup, 100 Ga. App. 518, 112 S.E.2d 337, 1959 Ga. App. LEXIS 660 (1959) (see O.C.G.A. § 9-10-7).

Motion for new trial need not allege any motion was made at time of error. — It is not necessary for the aggrieved party to allege in the motion for new trial that any sort of motion was made at the time of the alleged error, or to allege injury resulting from a violation of this section, since the law conclusively presumes injury on account of the error, and the mandatory provisions of this section require reversal of the judgment of the trial court on proper assignment of error. Allen v. State, 67 Ga. App. 607, 21 S.E.2d 280, 1942 Ga. App. LEXIS 482 (1942). But see Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139, 1943 Ga. LEXIS 449 (1943); Lumbermen's Underwriting Alliance v. Jessup, 100 Ga. App. 518, 112 S.E.2d 337, 1959 Ga. App. LEXIS 660 (1959) (see O.C.G.A. § 9-10-7).

Motion for new trial based on error in charge permitted without prior motion. — If the expression or intimation of the court's opinion occurs during the charge to the jury, counsel may utilize the remarks made in the course of the charge in counsel's motion for a new trial by making it one of the grounds thereof, although no motion for a mistrial was made. Royal Crown Bottling Co. v. Stiles, 82 Ga. App. 254, 60 S.E.2d 815, 1950 Ga. App. LEXIS 1093 (1950).

Motion for new trial not permitted absent timely objection or motion for mistrial. — Where the court, in colloquy with counsel, makes remarks which are prejudicial or intimate an opinion upon the merits of the case, proper objection, or a motion for a mistrial, should be made at the time of the occurrence; in the absence of such objection, error cannot be assigned thereon for the first time in a motion for new trial. Lumbermen's Underwriting Alliance v. Jessup, 100 Ga. App. 518, 112 S.E.2d 337, 1959 Ga. App. LEXIS 660 (1959). But see Allen v. State, 194 Ga. 178, 21 S.E.2d 73, 1942 Ga. LEXIS 545 (1942), overruled in part as stated in Wright v. State, 113 Ga. App. 436, 148 S.E.2d 333, 1966 Ga. App. LEXIS 1087 (1966).

New Trial Required

New trial mandatory after expression of opinion by court as to unproved evidence. — Under the mandatory provisions of this section, the expression or intimation of an opinion by court as to evidence or proof requires a new trial, unless statement relates to a

point as to which there is no dispute or to a point which is absolutely uncontradicted. Green v. Green, 176 Ga. 421, 168 S.E. 266, 1933 Ga. LEXIS 92 (1933) (see O.C.G.A. § 9-10-7).

New trial required even where verdict correct. — A new trial must be awarded when there is an intimation of opinion in the instructions of the trial judge even though the verdict is right. Phillips v. Williams, 39 Ga. 597, 1869 Ga. LEXIS 250 (1869); Lellyett v. Markham, 57 Ga. 13, 1876 Ga. LEXIS 3 (1876); Sanders v. Nicolson, 101 Ga. 739, 28 S.E. 976, 1897 Ga. LEXIS 312 (1897); Georgia Ry. & Elec. Co. v. Cole, 1 Ga. App. 33, 57 S.E. 1026, 1907 Ga. App. LEXIS 139 (1907); Everett v. Jennings, 137 Ga. 253, 73 S.E. 375, 1911 Ga. LEXIS 371 (1911); Central of Ga. Ry. v. Woodall, 13 Ga. App. 50, 78 S.E. 781, 1913 Ga. App. LEXIS 28 (1913); Frost v. Smith, 148 Ga. 840, 98 S.E. 471, 1919 Ga. LEXIS 79 (1919).

Granting new trial mandatory upon violation of section. — When the judge in the jury charge expresses the judge's opinion as to what has or has not been proved the judge violates this section, and it is mandatory for the Court of Appeals, in either a civil or a criminal case, to grant a new trial. Alabama Great S.R.R. v. McBryar, 67 Ga. App. 509, 21 S.E.2d 173, 1942 Ga. App. LEXIS 458 (1942) (see O.C.G.A. § 9-10-7).

Court's undertaking to decide question of fact is invasion of province of jury, and such error requires a new trial. Hilburn v. O'Barr, 19 Ga. 591, 1856 Ga. LEXIS 234 (1856); Garbutt Lumber Co. v. Prescott, 131 Ga. 326, 62 S.E. 228, 1908 Ga. LEXIS 78 (1908).

Trial judge's favorable comments about witness required new trial. — Judgment in a divorce case was reversed and a new trial was ordered where the trial court, in comments made to the jury following the testimony of a witness, stated its high opinion of the witness and bolstered the witness's credibility, influencing an issue that was solely for the jury to determine. Hubbard v. Hubbard, 277 Ga. 729, 594 S.E.2d 653, 2004 Ga. LEXIS 278 (2004).

Application

Judge's questioning on merely tangential issue. — In an action to probate a will, a judge did not ask improper questions, express an opinion, or conduct an argumentative examination after the judge questioned a witness on an issue that was, at best, tangentially related to the disputed fact issue of testamentary capacity and undue influence. Coggin v. Fitts, 268 Ga. 112, 485 S.E.2d 495.

Judge's rulings on objections or sua sponte efforts by trial court to control trial. — In a trial for undue influence and revocation of a will brought by one sibling against another, the trial judge's remarks in stopping the plaintiff's counsel from questioning a witness about a provision in a previous will of the testator's, which was not carried over into the will at issue in the case, were not directed to the evidence or to the credibility of witnesses, but to the conduct of the cross-examination by the plaintiff's counsel; they were merely rulings on objections or sua sponte efforts by the trial court to control the trial. Morrison v. Morrison, 282 Ga. 866, 655 S.E.2d 571, 2008 Ga. LEXIS 16 (2008).

Statement that witness not qualified to answer question. — In a condemnation action, the trial court did not improperly comment on the evidence by stating that a witness was not qualified to answer a legal question. Pertinent remarks made by a trial court in discussing the admissibility of evidence or explaining the court's rulings did not constitute prohibited expressions of opinion. Bulgin v. Ga. DOT, 292 Ga. App. 1, 663 S.E.2d 730, 2008 Ga. App. LEXIS 624 (2008), cert. denied, No. S08C1797, 2008 Ga. LEXIS 908 (Ga. Oct. 6, 2008).

Reference to fact in issue admitted by defendant not violative of section. — Where the defendant testified: "I left this deed with Mr. John Camp Davis, my lawyer, for the purpose of borrowing money on it;" and further: "I executed this deed . . . and delivered it to Mr. Davis for him to deliver when he borrowed the money on it," this evidence is such an admission upon the fact in issue as autho-

Application (Cont'd)

rized the judge to refer to the fact without violating this section. Richards v. Smith, 173 Ga. 424, 160 S.E. 608, 1931 Ga. LEXIS 331 (1931) (see O.C.G.A. § 9-10-7).

Charging jury with determining damages not error. — In personal injury action, where the court properly charged the jury as to the items of damage consisting of medical and drug expenses and room and board furnished the plaintiff during convalescence, there was no expression of opinion by the court where the charge contained the instruction "you can arrive at the amount you believe right and proper, that being a question for your determination." Southeastern Greyhound Lines v. Fisher, 72 Ga. App. 717, 34 S.E.2d 906, 1945 Ga. App. LEXIS 683 (1945).

Response to jury question as to damage. — Where the jury, during deliberations, posed a question as to the amount of damages and the court, in responding, stated, inter alia, ". . . before you get to the question of damages you must decide the issue of liability. There would be no damages if there is no liability,"; such a statement did not give undue prominence to the contentions of either party, and was not violative of O.C.G.A. § 9-10-7. Cox v. GMC, 187 Ga. App. 176, 369 S.E.2d 525, 1988 Ga. App. LEXIS 545 (1988).

Response to jury question as to elements. — Trial court's statements to the jury did not give undue prominence to contentions of either party where the judge, in response to a question from the jury, told the jury that they had properly listed all the elements of fraud, as there was no evidence that the judge expressed an opinion as to whether those elements had been proved; further, there was no contention that either the original jury charge or the re-charge misstated the law, and the trial court made it clear that the re-charge was not intended to place added emphasis on the fraud claim. Cline v. Lee, 260 Ga. App. 164, 581 S.E.2d 558, 2003 Ga. App. LEXIS 360 (2003).

Instruction was not expression of opinion that plaintiff's injuries were permanent. — The instruction that if the plaintiff had proved the plaintiff's case as laid (such case being in part founded on permanent pain and suffering) the jury would bring in such sum as their enlightened conscience determines as to the pain and suffering the plaintiff had endured and will probably endure is not an expression of opinion that the plaintiff's injuries are permanent. Redd v. Peters, 100 Ga. App. 316, 111 S.E.2d 132, 1959 Ga. App. LEXIS 608 (1959).

Use of words "if you should believe" not expression of opinion. — The use, by the trial judge in charging the jury, of the words "if you should believe," instead of "if the jury should find from the evidence," is not an expression of an opinion by the trial judge. Steffner v. Cohen, 104 Ga. App. 634, 122 S.E.2d 530, 1961 Ga. App. LEXIS 757 (1961).

"Not to exceed the sum sued for" not expression of opinion. — Where the court instructed the jury that in the event they found for the plaintiffs the form of their verdict would be, "We, the jury, find for the plaintiffs in the sum of so many dollars, not to exceed the sum sued for," the latter portion of the charge is not an expression of opinion by the court as to the value of the life of the deceased in violation of this section. City of Macon v. Smith, 117 Ga. App. 363, 160 S.E.2d 622, 1968 Ga. App. LEXIS 1090 (1968) (see O.C.G.A. § 9-10-7).

For court correctly to denominate case as action in tort is not equivalent to expression of opinion that the defendant had committed a tort, but, properly construed, only informed the jury that the plaintiff so contended. Pollard v. Phelps, 56 Ga. App. 408, 193 S.E. 102, 1937 Ga. App. LEXIS 385 (1937).

Telling counsel not to make statements not violation of statute. — In telling defense counsel that counsel could not make statements when cross-examining a state's witness, the trial court did not violate O.C.G.A. § 9-10-7. The remarks did not pertain to guilt or innocence and were not an expression of opinion as to what had been proven. Green v. State, 298 Ga. App. 17, 679 S.E.2d 348, 2009 Ga. App. LEXIS 566 (2009).

No error to state hypothesis where jury to establish it from evidence. — Where the evidence warrants, it is not error as an expression of opinion for the

court to state a particular hypothesis where the jury is left to establish the hypothesis from the evidence. Atlanta Laundries, Inc. v. Goldberg, 71 Ga. App. 130, 30 S.E.2d 349, 1944 Ga. App. LEXIS 296 (1944).

Instruction requiring recognition of validity of contract option not opinion as to weight of evidence. — Instruction to the effect that the jury must recognize the validity of an option in a contract as a valid and binding obligation, which was obviously the purpose for introduction of the option in evidence, was not an expression or intimation of an opinion as to the weight of such evidence. Arrington v. Thompson, 211 Ga. 734, 88 S.E.2d 402, 1955 Ga. LEXIS 443 (1955).

Instructions concerning verdict in former trial of same action not expression of opinion. — Whether the remarks of the court went further than was necessary to inform the jury that the verdict returned on a former trial should not be considered by them and to eradicate the effects of its introduction, they did not amount to an expression of an opinion as to which of the parties should prevail in the case then in progress; the jury could not have failed to know from the very explicit instructions given them by the court that neither the judge's ruling in granting a new trial following the former trial, nor any thing connected therewith, carried with it any implication that the judge entertained an opinion as to who should prevail in the trial then in progress. Reserve Life Ins. Co. v. Peavy, 98 Ga. App. 268, 105 S.E.2d 465, 1958 Ga. App. LEXIS 565 (1958).

Charge in wrongful death action placing fault on defendant reversible error. — In action for wrongful death of a person killed at a place where a railroad sidetrack was crossed by a city street, by reason of being crushed between train which was backing over the crossing and an automobile which was proceeding along the street, charge that "if the engineer saw it, then of course he would be required to stop his train and save the life of the deceased, although the deceased had not signaled him to stop," was error in that it contained an expression of opinion by the court, as a matter of law, that under the circumstances the duty was on the engineer to stop the train, whereas under the evidence it was a question of fact whether in this respect the engineer failed to exercise ordinary care by failing to stop the train. Southern Ry. v. Blanton, 59 Ga. App. 252, 200 S.E. 471, 1938 Ga. App. LEXIS 483 (1938).

No expression of opinion made by trial judge. — In a customer's slip and fall case against a dry cleaner establishment, the trial court did not err by denying the customer's motion for a new trial and did not improperly express or intimate an opinion as to what had or had not been proved by making an inquiry concerning the relevancy of certain evidence nor by making two comments during the customer's closing argument that were limited in scope and did not concern the merits of the case and were aimed at preventing misstatements and improper arguments from being made before the jury. Further, the trial judge charged the jury after the close of evidence that anything the court had said or done during the course of the trial was not intended to imply or suggest which of the parties should prevail in the case. Muskett v. Sketchley Cleaners, Inc., 297 Ga. App. 561, 677 S.E.2d 731, 2009 Ga. App. LEXIS 479 (2009), cert. denied, No. S09C1422, 2009 Ga. LEXIS 412 (Ga. June 29, 2009).

In a medical malpractice case arising out of gastric bypass surgery, a trial judge's comments regarding a medical study involving blood thinners while the judge ruled on whether the defending doctor could look at the study to refresh the doctor's memory did not violate O.C.G.A. § 9-10-7 because they did not imply approval of any witness's testimony. Sellers v. Burrowes, 302 Ga. App. 667, 691 S.E.2d 607, 2010 Ga. App. LEXIS 211 (2010).

Trial court's use of the phrase "a very simple document" when referring to a will did not express an opinion as to what had been proved or endorse the propounders' view of the case, but rather was directed to instructing the jury regarding the formalities of a valid will. Ayers v. Cook, 298 Ga. 501, 783 S.E.2d 99, 2016 Ga. LEXIS 158 (2016).

RESEARCH REFERENCES

Am. Jur. 2d.
75 Am. Jur. 2d, Trial, § 203 et seq.
C.J.S.
89 C.J.S., Trial, § 520 et seq.
ALR.
Propriety and correctness of instructions regarding maxim "falsus in uno, falsus in omnibus," 90 A.L.R. 74.

Propriety and effect of instruction or requested instruction which either affirms or denies jury's right to draw unfavorable inference against a party because he invokes privilege against testimony of person offered as witness by the other party or because he fails to call such person as a witness, 131 A.L.R. 693.

Comments in judge's charge to jury disparaging expert testimony, 156 A.L.R. 530.

Instruction mentioning or suggesting specific sum as damages in action for personal injury or death, 2 A.L.R.2d 454.

Coercive effect of verdict — urging by judge in civil case, 19 A.L.R.2d 1257.

Prejudicial effect of judge's disclosure to jury of motions or proceedings in chambers in civil case, 77 A.L.R.2d 1253.

Propriety and prejudicial effect of instructions referring to the degree or percentage of contributory negligence necessary to bar recovery, 87 A.L.R.2d 1391.

Instructions in a personal injury action which, in effect, tell jurors that in assessing damages they should put themselves in injured person's place, 96 A.L.R.2d 760.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Propriety and prejudicial effect of comment or instruction by court with respect to party's refusal to permit introduction of privileged testimony, 34 A.L.R.3d 775.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury, 77 A.L.R.3d 769.

Pendency of criminal prosecution as ground for continuance or postponement of civil action involving facts or transactions upon which prosecution is predicated — state cases, 37 A.L.R.6th 511.

9-10-8. Approval or disapproval of verdict by judge forbidden; discharge or commendation of jury for verdict not permitted; judge expressing approval or disapproval disqualified from presiding at new trial.

(a) No judge of any court shall either directly or indirectly express in open court his approval or disapproval of the verdict of any jury in any case tried before him, except as provided in this Code section; nor may the judge discharge any jury upon the ground that the verdict rendered in any case does not meet with his approval.

(b) No judge of any court may commend or compliment a jury during the term of any court for discharging its duty if the commendation or compliment has the effect of approving a verdict.

(c) If any judge of any court either directly or indirectly expresses in open court his approval or disapproval of the verdict of the jury in any case tried before him, he shall be disqualified from presiding in the case in the event a new trial is granted.

(d) Nothing in this Code section shall have the effect of prohibiting a judge of any court from approving or disapproving the verdict of a jury in any case tried before him in hearing a motion for a new trial that

comes on before him; however, the approval or disapproval on the hearing of a motion for new trial shall be expressed in the formal order of the judge in granting or overruling the motion and not otherwise.

History.
Ga. L. 1918, p. 168, §§ 1-3; Code 1933, §§ 110-201, 110-202, 110-203.

Cross references.
Corresponding provisions relating to criminal procedure, §§ 17-9-22, 17-9-23.

JUDICIAL DECISIONS

Judge's options when unsatisfied with verdict. — If judge is not satisfied that the verdict as returned is proper, before receiving the verdict the judge may require the jury to return to the room and correct its verdict, under proper instructions from the court, or, after the verdict is received and recorded and the jury is dispersed, the judge may grant a new trial; but the judge is without power to change and modify the verdict after it is received and recorded, and the jury has dispersed. Ballard v. Turner, 147 Ga. App. 584, 249 S.E.2d 637, 1978 Ga. App. LEXIS 2859 (1978).

Where a verdict is erroneous on its face, the trial judge may determine from the jury, before its dispersal, what its true intent had been, give correct instructions on how various verdicts might be framed under the evidence, and to return jury to the jury room to correct the error. Ballard v. Turner, 147 Ga. App. 584, 249 S.E.2d 637, 1978 Ga. App. LEXIS 2859 (1978).

Trial judge may poll the jury as to intendment of its verdict in a proper case. Ballard v. Turner, 147 Ga. App. 584, 249 S.E.2d 637, 1978 Ga. App. LEXIS 2859 (1978).

Poll need not continue after one juror indicates lack of unanimity. — If, on being polled, a juror's response demonstrates that no unanimous verdict has been reached, the proper remedy is for the trial court to direct the jury to retire for further deliberations. There is no requirement that the poll be continued after one juror's response has demonstrated a lack of unanimity. Hunter v. State, 202 Ga. App. 195, 413 S.E.2d 526, 1991 Ga. App. LEXIS 1730 (1991).

Modification of verdict by jury before dispersing. — Where a jury makes a mistake in writing a verdict, and the verdict as returned into court does not express or contain its true finding, the jury, before dispersing, may change or modify its verdict in matter of substance so as to express the true intention and finding of the jury. Ballard v. Turner, 147 Ga. App. 584, 249 S.E.2d 637, 1978 Ga. App. LEXIS 2859 (1978).

After jury disperses and verdict is received and recorded, it may not be amended in a matter of substance, even where the jury has found punitive but no general damages. Ballard v. Turner, 147 Ga. App. 584, 249 S.E.2d 637, 1978 Ga. App. LEXIS 2859 (1978).

Only disqualification which attaches to a trial judge who violates this section is that the trial judge shall be disqualified from presiding in a subsequent trial of the case, in the event a new trial is granted. Ingram v. Grimes, 213 Ga. 652, 100 S.E.2d 914, 1957 Ga. LEXIS 476 (1957) (see O.C.G.A. § 9-10-8).

"New trial" of fact issue. — Trial of an issue of fact cannot be termed "new trial" under this section unless it is another or second trial for judicial determination of the same fact. Felker v. Still, 41 Ga. App. 462, 153 S.E. 781, 1930 Ga. App. LEXIS 931 (1930), transferred, 176 Ga. 735, 169 S.E. 15, 1933 Ga. LEXIS 271 (1933) (see O.C.G.A. § 9-10-8).

RESEARCH REFERENCES

Am. Jur. 2d.
75 Am. Jur. 2d, Trial, § 203.

C.J.S.
89 C.J.S., Trial, § 520 et seq.

ALR.

Necessity of repeating definition of legal or technical term in different parts of instructions in which it is employed, 7 A.L.R. 135.

Threat to dismiss jury in criminal case for term, unless they could agree on verdict, as coercion, 10 A.L.R. 421.

Disqualification of judge who presided at trial or of juror as ground of habeas corpus, 124 A.L.R. 1079.

Statute providing for change of judge or venue on ground of bias or prejudice as applicable to proceeding for modification of decree of divorce, 143 A.L.R. 411.

Disqualification of judge in pending case as subject to revocation or removal, 162 A.L.R. 641.

Reviewability of action of judge in disqualifying himself, 162 A.L.R. 654.

What constitutes accused's consent to court's discharge of jury or to grant of state's motion for mistrial which will constitute waiver of former jeopardy plea, 63 A.L.R.2d 782.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 A.L.R.3d 845.

Disqualification of original trial judge to sit on retrial after reversal or mistrial, 60 A.L.R.3d 176.

Disqualification or recusal of judge due to comments at Continuing Legal Education (CLE) seminar or other educational meetings, 49 A.L.R.6th 93.

9-10-9. [Reserved] Jurors' affidavits permitted to uphold but not impeach verdict.

History.

Civil Code 1895, § 5338; Civil Code 1910, § 5933; Code 1933, § 110-109; repealed by Ga. L. 2011, p. 99, § 10/HB 24, effective January 1, 2013.

Editor's notes.

Ga. L. 2011, p. 99, § 10/HB 24 repealed and reserved this Code section, effective January 1, 2013. For present comparable provisions, see O.C.G.A. § 24-6-606.

Law reviews.

For article on the 2011 repeal of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

9-10-10. Cash bonds permitted; docketing.

(a) Any party, litigant, or other person required or permitted by law to give or post bond or bail as surety or security for the happening of any event or act in all civil matters may discharge the requirement by depositing cash in the amount of the bond so required with the appropriate person, official, or other depository.

(b) Any official or other person receiving any such bond shall give a receipt therefor and shall cause the fact of the receipt to be entered and recorded on the docket of the case in which it was given. If bond is given in a matter not appearing as a separate court case on a docket, a docket shall be prepared, maintained, and kept of all such transactions. The name and address of the person giving or making the bond, the date of the receipt of the bond, the name of the person receiving the bond, the amount of the bond, and a description of the cause for giving the bond, together with any and all other desirable information concerning the bond, shall be a part of the record in that separate docket.

History.

Ga. L. 1969, p. 41, §§ 1, 2; Ga. L. 1982, p. 3, § 9.

Cross references.

Corresponding provision relating to criminal procedure, § 17-6-4.

OPINIONS OF THE ATTORNEY GENERAL

Section provides alternative of depositing cash to giving bond. — This section does not vary the previous law or procedure for recording bonds; it only provides that as an alternative to giving a bond, the person may satisfy the requirement by depositing cash. 1969 Op. Att'y Gen. No. 69-265 (see O.C.G.A. § 9-10-10).

Official who receives cash bond under this section is proper person to give the receipt and cause the fact to be entered and recorded on the docket of the case in which it was given. 1969 Op. Att'y Gen. No. 69-265 (see O.C.G.A. § 9-10-10).

RESEARCH REFERENCES

Am. Jur. 2d.
12 Am. Jur. 2d, Bonds, §§ 4 et seq., 20 et seq., 28 et seq.
C.J.S.
11 C.J.S., Bonds, § 16 et seq.
ALR.
Check or money as meeting requirement of appeal bond, 65 A.L.R.2d 1134.
Propriety of applying cash bail to payment of fine, 42 A.L.R.5th 547.

9-10-11. When appearance bond not forfeited by failure to attend; setting aside forfeiture of appearance bond.

(a) No judgment decreeing the forfeiture of any appearance bond shall be rendered:

(1) If it is shown to the satisfaction of the court by the sworn statement of a reputable physician that the principal in the bond was prevented from attending by some physical disability; or

(2) If it is shown to the satisfaction of the court that the principal in the bond was prevented from attending because he was detained in a penal institution in another jurisdiction. A sworn affidavit of the warden or other responsible officer of the penal institution in which the principal is being detained shall be considered adequate proof of the principal's detention.

(b) If adequate proof is furnished within 60 days of the forfeiture of an appearance bond that the principal failed to appear on the date of forfeiture for one of the reasons set forth in subsection (a) of this Code section, the forfeiture shall be set aside.

History.
Ga. L. 1965, p. 266, §§ 1-3.
Cross references.
Corresponding provision relating to criminal procedure, § 17-6-72.

OPINIONS OF THE ATTORNEY GENERAL

Date of forfeiture of appearance bond depends entirely upon the wording of each particular bond; in the event the bond indicates an appearance at a term of court, forfeiture would not occur until the end of that particular

term of court; if, however, the bond is returnable on a specific date, then the 60-day provision would commence to run from that date. 1965-66 Op. Att'y Gen. No. 66-30.

RESEARCH REFERENCES

Am. Jur. 2d.

8A Am. Jur. 2d, Bail and Recognizance, §§ 127 et seq., 130 et seq.

C.J.S.

8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 28 et seq., 144 et seq.

ALR.

Induction of principal into military or naval service as exonerating his bail for his nonappearance, 8 A.L.R. 371; 147 A.L.R. 1428; 148 A.L.R. 1400; 150 A.L.R. 1447; 151 A.L.R. 1462; 152 A.L.R. 1459; 153 A.L.R. 1431; 154 A.L.R. 1456; 156 A.L.R. 1457; 157 A.L.R. 1456.

Right to recover back cash bail or securities taken without authority, 48 A.L.R. 1430.

Bail: effect on surety's liability under bail bond of principal's incarceration in other jurisdiction, 33 A.L.R.4th 663.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction, 35 A.L.R.4th 1192.

9-10-12. Certified mail equivalent to registered mail; sufficient compliance for notice by statutory overnight delivery.

(a) Whenever any law, statute, Code section, ordinance, rule, or regulation of this state or any officer, department, agency, municipality, or governmental subdivision thereof provides that a notice shall be given by "registered mail," the notice may be given by "certified mail."

(b) Whenever any law, statute, Code section, ordinance, rule, or regulation of this state or any officer, department, agency, municipality, or governmental subdivision thereof provides that a notice may be given by "statutory overnight delivery," it shall be sufficient compliance if:

(1) Such notice is delivered through the United States Postal Service or through a commercial firm which is regularly engaged in the business of document delivery or document and package delivery;

(2) The terms of the sender's engagement of the services of the United States Postal Service or commercial firm call for the document to be delivered not later than the next business day following the day on which it is received for delivery by the United States Postal Service or the commercial firm; and

(3) The sender receives from the United States Postal Service or the commercial firm a receipt acknowledging receipt of the document which receipt is signed by the addressee or an agent of the addressee.

History.

Ga. L. 1967, p. 560, § 1; Ga. L. 2000, p. 1589, § 2.

Editor's notes.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that

the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

JUDICIAL DECISIONS

Default entered in error against foreign corporation. — Judgment denying the defendant's motion to set aside the default judgment against the defendant was reversed because there was no evidence that the defendant, a foreign corporation, failed to answer or otherwise respond within 45 days after service of the summons and complaint was perfected upon the defendant via a commercial mailing service; thus, the case never went into default and the trial court was not authorized to enter a default judgment. Turfstore.Com, Inc. v. Hall, 348 Ga. App. 398, 823 S.E.2d 81, 2019 Ga. App. LEXIS 16 (2019).

RESEARCH REFERENCES

Am. Jur. 2d.
62 Am. Jur. 2d, Postal Service, § 35 et seq.

C.J.S.
72 C.J.S., Postal Service and Offenses Against Postal Laws, § 8.

9-10-13. Effect of judgment on party vouched into court.

Where a defendant may have a remedy over against another person and vouches him into court by giving notice of the pendency of the action, the judgment rendered therein shall be conclusive upon the person vouched, as to the amount and right of the plaintiff to recover.

History.
Civil Code 1895, § 5234; Civil Code 1910, § 5821; Code 1933, § 38-624.

History of Section.
This Code section is derived from the decisions in Western & A.R.R. v. City of Atlanta, 74 Ga. 774 (1885), and Faith v. City of Atlanta, 78 Ga. 779, 4 S.E. 3 (1887).

Law reviews.
For article comparing the Federal Rules of Civil Procedure to Georgia trial practice procedures prior to the adoption of the Georgia Civil Practice Act (Ch. 11 of this title), see 1 Ga. St. B.J. 315 (1965).

For article comparing sections of the Georgia Civil Practice Act (Ch. 11 of this title) with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967).

For article discussing aspects of third party practice (impleader) under the Georgia Civil Practice Act (Ch. 11 of this title), see 4 Ga. St. B.J. 355 (1968).

JUDICIAL DECISIONS

Analysis

General Consideration
Procedure
Application

General Consideration

This section is not of statutory origin, but is simply an adaptation of language employed by the Supreme Court in the cases of Western & Atl. R.R. v. City of Atlanta, 74 Ga. 774 (1885); Faith v. City of Atlanta, 78 Ga. 779, 4 S.E. 3, 1887 Ga. LEXIS 75 (1887); Usry v. Hines-Yelton

General Consideration (Cont'd)

Lumber Co., 176 Ga. 660, 168 S.E. 249, 1933 Ga. LEXIS 247 (1933); Loeb v. May, 186 Ga. 742, 198 S.E. 785, 1938 Ga. LEXIS 682 (1938).

This section is merely statement of well-known common-law principle, and it was not intention of codifiers to hedge it about with any unusual limitations or give to it any additional scope. Usry v. Hines-Yelton Lumber Co., 176 Ga. 660, 168 S.E. 249, 1933 Ga. LEXIS 247 (1933); Loeb v. May, 186 Ga. 742, 198 S.E. 785, 1938 Ga. LEXIS 682 (1938) (see O.C.G.A. § 9-10-13).

Section not superseded by third-party practice rule. — The vouchment procedure authorized by O.C.G.A. § 9-10-13 has not been superseded by the third-party practice rule of the Civil Practice Act. Hardee v. Allied Steel Bldgs., Inc., 182 Ga. App. 587, 356 S.E.2d 682, 1987 Ga. App. LEXIS 1732 (1987).

Purpose of vouching is to enable vouchee to come in and present any defense which would tend to relieve either the vouchee or the voucher from liability in the pending action. Acme Fast Freight, Inc. v. Southern Ry., 65 Ga. App. 647, 16 S.E.2d 62, 1941 Ga. App. LEXIS 364 (1941), rev'd, 193 Ga. 598, 19 S.E.2d 286, 1942 Ga. LEXIS 437 (1942).

The object to be gained by vouching is an end of litigation, and if the act of the vouchee is the real thing complained of, so that, if there is a recovery by the injured party against the voucher, the injured party can turn right around and claim indemnity from the vouchee, then it is to the interest of the state that a multiplicity of actions should be avoided by requiring the vouchee to appear in the original action and set up any defense which the vouchee has. Acme Fast Freight, Inc. v. Southern Ry., 65 Ga. App. 647, 16 S.E.2d 62, 1941 Ga. App. LEXIS 364 (1941), rev'd, 193 Ga. 598, 19 S.E.2d 286, 1942 Ga. LEXIS 437 (1942).

Underlying purpose of this section is to conclude vouchee upon question of the voucher's liability to the original plaintiff and the amount of such liability, thus leaving for future determination only the one other question as to whether the vouchee is in fact liable over to the vouching defendant. Southern Ry. v. Acme Fast Freight, Inc., 193 Ga. 598, 19 S.E.2d 286, 1942 Ga. LEXIS 437 (1942) (see O.C.G.A. § 9-10-13).

The term "vouch" as used in this section means to call into court to warrant and defend, or to make good a warranty of title, as in a fine and recovery. Loeb v. May, 186 Ga. 742, 198 S.E. 785, 1938 Ga. LEXIS 682 (1938) (see O.C.G.A. § 9-10-13).

Under this section it must appear that liability of vouchee arises from identical cause of action upon which the voucher is in danger of being held liable, or that the ground of the liability arises from the same subject-matter. Raleigh & G.R.R. v. Western & Atl. R.R., 6 Ga. App. 616, 65 S.E. 586, 1909 Ga. App. LEXIS 406 (1909) (see O.C.G.A. § 9-10-13).

Defendant may vouch another to defend act not of defendant's doing. — If a party is obliged to defend against the act of another against whom the party has a remedy over, and defends solely and exclusively the act of such other party and is compelled to defend no misfeasance of the party's own, the party may notify such party of pendency of the action and may call upon the party to defend it; but this principle does not apply where one is defending one's own wrong, or one's own contract, although another party may be responsible to that person. Usry v. Hines-Yelton Lumber Co., 176 Ga. 660, 168 S.E. 249, 1933 Ga. LEXIS 247 (1933).

Generally speaking, one of two or more joint wrongdoers has no right of action over against those connected with the wrongdoer in the tort for either contribution or indemnity where the wrongdoer alone has been compelled to satisfy the damages resulting from the tort. Central of Ga. Ry. v. Macon Ry. & Light Co., 9 Ga. App. 628, 71 S.E. 1076, 1911 Ga. App. LEXIS 266 (1911), superseded by statute as stated in City of College Park v. Fortenberry, 271 Ga. App. 446, 609 S.E.2d 763, 2005 Ga. App. LEXIS 69 (2005).

Procedure

A vouchee is not a party defendant. Clary Appliance & Furn. Ctr., Inc. v. But-

ler, 139 Ga. App. 233, 228 S.E.2d 211, 1976 Ga. App. LEXIS 1752 (1976).

Burden on voucher to show necessary relationship between voucher and vouchee. — The relationship between the voucher and the vouchee may arise by contract, express or implied, or by operation of law; the voucher, notwithstanding the judgment in a first action, still has the burden of showing that the vouchee bears that necessary relationship to the voucher and to the cause of action, as asserted in the original action, essential to give an action over, and the vouchee may defend by showing anything which will negative the right of an action over. Phelps v. House, 67 Ga. App. 872, 21 S.E.2d 522, 1942 Ga. App. LEXIS 530 (1942).

Plaintiff must establish liability against voucher before relief allowed against vouchee. — In action in which plaintiff proceeds only against a county, but alleges facts under which the county may vouch the State Highway Department (now Department of Transportation) into court in order that it shall defend the suit and be responsible for any damages awarded against the county, the plaintiff is bound to establish liability against the county under existing laws before the plaintiff is entitled to any recovery or relief against the State Highway Department. Felton v. Macon County, 43 Ga. App. 651, 159 S.E. 730, 1931 Ga. App. LEXIS 500 (1931).

Prerequisite for a vouchment. — Before a person can be properly vouched, the action between the injured party and the voucher must be of such a kind that the vouchee could set up therein any defense which the vouchee could set up if the action were proceeding against the vouchee directly. Acme Fast Freight, Inc. v. Southern Ry., 65 Ga. App. 647, 16 S.E.2d 62, 1941 Ga. App. LEXIS 364 (1941), rev'd, 193 Ga. 598, 19 S.E.2d 286, 1942 Ga. LEXIS 437 (1942).

Required aspects of remedy over before a vouchment is authorized. — To authorize the voucher to give the vouchee notice of pendency of the action and require the vouchee to defend it so that the judgment obtained therein will be conclusive upon vouchee as to the amount and the right of the original plaintiff to recover, there must be such a remedy over against vouchee as that issues in the two actions would be practically identical, both on the question of liability and on the question of amount of damages, and there must at least be such a relation between parties that defenses which vouchee could set up in the original action would be the same defenses that the vouchee could set up if the vouchee were sued by the voucher. Usry v. Hines-Yelton Lumber Co., 176 Ga. 660, 168 S.E. 249, 1933 Ga. LEXIS 247 (1933); Southern Ry. v. Acme Fast Freight, Inc., 193 Ga. 598, 19 S.E.2d 286, 1942 Ga. LEXIS 437 (1942).

Prior judgment conclusive on vouchee only as to correctness of judgment. — Under this section, judgment in a prior action is conclusive on the person vouched as to the correctness of the judgment, but is not conclusive of the fact that there is such a relationship between the person vouched and the person vouching as that a right of action over exists. Central of Ga. Ry. v. Macon Ry. & Light Co., 9 Ga. App. 628, 71 S.E. 1076, 1911 Ga. App. LEXIS 266 (1911), superseded by statute as stated in City of College Park v. Fortenberry, 271 Ga. App. 446, 609 S.E.2d 763, 2005 Ga. App. LEXIS 69 (2005) (see O.C.G.A. § 9-10-13).

Plaintiff in second action estopped from showing causes alleged in prior action untrue. — Where a right of action over against a third person is asserted by the defendant in a prior tort action who has been compelled by the judgment thereon to pay damages, the plaintiff in the second action is estopped from showing that the causes alleged in the prior action were not the true causes of the damage. Central of Ga. Ry. v. Macon Ry. & Light Co., 9 Ga. App. 628, 71 S.E. 1076, 1911 Ga. App. LEXIS 266 (1911), superseded by statute as stated in City of College Park v. Fortenberry, 271 Ga. App. 446, 609 S.E.2d 763, 2005 Ga. App. LEXIS 69 (2005); United States Printing & Lithographing Co. v. Stovall-Jones Co., 23 Ga. App. 472, 98 S.E. 407, 1919 Ga. App. LEXIS 162 (1919).

Judgment in first action is not adjudication of question whether primary defendant is entitled to recover

Procedure (Cont'd)

against a vouchee upon an action brought by the primary defendant against the latter after a recovery has been had in the first action. Charleston & W.C. Ry. v. Union Whse. & Compress Co., 139 Ga. 20, 76 S.E. 360, 1912 Ga. LEXIS 509 (1912); Southern Ry. v. Acme Fast Freight, Inc., 193 Ga. 598, 19 S.E.2d 286, 1942 Ga. LEXIS 437 (1942); Smith v. Transamerica Ins. Co., 218 Ga. App. 839, 463 S.E.2d 711, 1995 Ga. App. LEXIS 894 (1995), cert. denied, No. S96C0295, 1996 Ga. LEXIS 279 (Ga. Jan. 26, 1996).

Burden on voucher of showing responsibility of vouchee by extrinsic proof. — By its terms this section has no application so as to bind the vouchee unless the defendant in the former action was entitled to a remedy over against the vouchee, and whether the defendant was so entitled is a question not settled by the former judgment; the voucher still has the burden of showing that the vouchee is responsible over to the voucher, and to do this will require allegation and proof of extrinsic matter, unless the record in the former action may suffice to establish such responsibility. Bryant v. Guaranty Life Ins. Co., 40 Ga. App. 573, 150 S.E. 596, 1929 Ga. App. LEXIS 659 (1929) (see O.C.G.A. § 9-10-13).

Only a person against whom defendant has remedy over is, as vouchee, bound by judgment which may be rendered against the defendant. May v. Loeb, 57 Ga. App. 788, 196 S.E. 268, 1938 Ga. App. LEXIS 388, aff'd, 186 Ga. 742, 198 S.E. 785, 1938 Ga. LEXIS 682 (1938).

Under vouchment, the vouchee is bound by the judgment if a right over is established. Dodge Trucks, Inc. v. Wilson, 140 Ga. App. 743, 231 S.E.2d 818, 1976 Ga. App. LEXIS 1618 (1976), aff'd, 238 Ga. 636, 235 S.E.2d 142, 1977 Ga. LEXIS 1144 (1977).

Vouchee bound by prior judgment with respect to any defense proffered or possible. — By the terms of this section, when a person against whom a defendant has a remedy over has been vouched, and such remedy over has been established by aliunde proof, the vouchee is bound by the previous judgment establishing the liability of the original defendant and the amount thereof; and this is true with respect to any and all defenses which the voucher or vouchee either made or could have made to prevent a recovery by the plaintiff in the former action. Southern Ry. v. Acme Fast Freight, Inc., 193 Ga. 598, 19 S.E.2d 286, 1942 Ga. LEXIS 437 (1942) (see O.C.G.A. § 9-10-13).

Properly notified vouchee bound by judgment regardless of whether vouchee defends or not. — When the vouchee has been properly notified, the vouchee may come in and defend, or the vouchee may refrain — but in either event, the vouchee is bound by the result as to the right of the plaintiff to recover and as to the amount. Register v. Stone's Indep. Oil Distribs., 122 Ga. App. 335, 177 S.E.2d 92, 1970 Ga. App. LEXIS 868 (1970), rev'd, 227 Ga. 123, 179 S.E.2d 68, 1971 Ga. LEXIS 609 (1971).

Prior judgment not determinative of validity of voucher's claim against vouchee. — The mere avouchment of a third person by a defendant under the claim of a remedy over against the vouchee, and the failure of the vouchee to respond, does not adjudicate the validity of such claim of the voucher against the vouchee; the previous judgment does not determine whether the voucher's claim over against the vouchee was in fact good or bad. Southern Ry. v. Acme Fast Freight, Inc., 193 Ga. 598, 19 S.E.2d 286, 1942 Ga. LEXIS 437 (1942).

Person not having right to defend is not vouchee. — A vouchee is not a stranger to the pending action, and, for the principles of this section to become applicable, it must appear that the vouchee has the same means of defeating recovery as if the vouchee were the real party of record; consequently, if the vouchee does not have the right to defend, the vouchee does not, in fact, become a vouchee. Blankenship v. Smart, 102 Ga. App. 666, 117 S.E.2d 257, 1960 Ga. App. LEXIS 713 (1960).

Passive vouchee not permitted to question judgment in original action. — The vouchee acts at the vouchee's peril in failing to come in and defend to the extent that if, after being vouched, the

vouchee fails to respond or refuses to protect the vouchee's interest and should thereafter be held liable over to the voucher, the vouchee will not thereafter be permitted to question the amount and right of the plaintiff to recover in the original action, but while, under the language of this section, the vouchee is thus precluded from contesting these questions, the burden is still on the voucher to establish by aliunde proof the voucher's remedy over against the vouchee in order to utilize the vouchee's inability to deny that the voucher was liable as adjudged in the original action. Southern Ry. v. Acme Fast Freight, Inc., 193 Ga. 598, 19 S.E.2d 286, 1942 Ga. LEXIS 437 (1942) (see O.C.G.A. § 9-10-13).

Vouchee bound by prior judgment as to the vouchee's liability over to voucher. — The vouchee, under the particular facts of a case, may be concluded by the original action as to the additional question of the vouchee's own liability over to the voucher, as where, upon being vouched into court, the vouchee's response as made by the vouchee's own pleading or the vouchee's actual procedure in the vouchee's conduct of the case necessarily establishes the vouchee's own liability over to the original defendant for any recovery which might be had against that defendant. Southern Ry. v. Acme Fast Freight, Inc., 193 Ga. 598, 19 S.E.2d 286, 1942 Ga. LEXIS 437 (1942).

Only questions resolved against properly vouched vouchee are right of plaintiff to recover and amount recoverable; a judgment either for or against the vouchee cannot be entered in the case. Masters v. Pardue, 91 Ga. App. 684, 86 S.E.2d 704, 1955 Ga. App. LEXIS 844, aff'd, 211 Ga. 772, 88 S.E.2d 385, 1955 Ga. LEXIS 457 (1955).

Vouchment proceedings require bringing of second action to determine liability over of vouchee to voucher, since there is no procedural device available whereby the vouchee's liability over can be determined in the plaintiff's action against the voucher. Register v. Stone's Indep. Oil Distribs., 122 Ga. App. 335, 177 S.E.2d 92, 1970 Ga. App. LEXIS 868 (1970), rev'd, 227 Ga. 123, 179 S.E.2d 68, 1971 Ga. LEXIS 609 (1971).

Nature of notice to vouchee. — When it is sought to bind a third party by a judgment in action to which the third party is not a party, the third party should be given a formal notice with a demand that the third party appear and defend, and this should involve the right of the party vouched not only to appear, but also to take charge of and direct the litigation; a mere notice, unless it involves the right to direct the defense, is little more than an empty gesture, since the voucher and the vouchee and their counsel may differ as to the proper method of defense. Loeb v. May, 186 Ga. 742, 198 S.E. 785, 1938 Ga. LEXIS 682 (1938).

Error to deny plaintiff's showing prior judgment in action in which plaintiff was vouchee. — Where the plaintiff has introduced the record of a former action by defendant against a third party and relies thereon as a former adjudication, it is error to refuse to allow the plaintiff to show that, under notice from the third party, who had a remedy over against the plaintiff, the plaintiff had been vouched into court in the former action and had participated therein in person and by attorney; this evidence was relevant to show that the judgment, though rendered in an action to which the plaintiff was not originally a party, was nevertheless conclusive as between the plaintiff and defendant. Monroe v. Fourakers, 117 Ga. 901, 45 S.E. 240, 1903 Ga. LEXIS 388 (1903).

Showing of action over against vouchee required before invoking prior judgment as estoppel. — Where one of the parties to an action vouches a third person to participate in the action on the ground that he is a party at interest, before the voucher can invoke the judgment in that case as an estoppel against the vouchee in a subsequent action instituted between these two, it must aliunde appear that as to the cause of action upon which, by legal necessity, the original judgment was based, the voucher in fact had an action over against the vouchee, except in those cases where the prior judgment necessarily, under the particu-

Procedure (Cont'd)

lar facts, also establishes this relationship. McArthor v. Ogletree, 4 Ga. App. 429, 61 S.E. 859, 1908 Ga. App. LEXIS 322 (1908).

Right of voucher does not include the right of volunteering to become a defendant, when no notice has been given by the defendant and when the plaintiff has not asked such a one to be made a party defendant. Armour Car Lines v. Summerour, 5 Ga. App. 619, 63 S.E. 667, 1909 Ga. App. LEXIS 90 (1909).

This section is not authority for making vouchee a party defendant to action against wishes of the plaintiff. Masters v. Pardue, 91 Ga. App. 684, 86 S.E.2d 704, 1955 Ga. App. LEXIS 844, aff'd, 211 Ga. 772, 88 S.E.2d 385, 1955 Ga. LEXIS 457 (1955) (see O.C.G.A. § 9-10-13).

Vouchee not permitted to be made defendant of record over objection of plaintiff. — A vouchee may set up any defense which would tend to relieve the vouchee from liability in the pending action, but the vouchee may not be made a party defendant of record over the objection of the plaintiff. Blankenship v. Smart, 102 Ga. App. 666, 117 S.E.2d 257, 1960 Ga. App. LEXIS 713 (1960).

Determination of liability in advance of original action not permitted. — No provision of law exists by which the vouchee can, by petition to the presiding judge, have the question of its liability ever determined in advance of the original action. Charleston & W.C. Ry. v. Union Whse. & Compress Co., 139 Ga. 20, 76 S.E. 360, 1912 Ga. LEXIS 509 (1912).

Right to recover and amount. — Notice alone, not independent venue or jurisdictional grounds, is required to conclude vouchee as to the right of the plaintiff to recover and as to the amount. Register v. Stone's Indep. Oil Distribs., 122 Ga. App. 335, 177 S.E.2d 92, 1970 Ga. App. LEXIS 868 (1970), rev'd, 227 Ga. 123, 179 S.E.2d 68, 1971 Ga. LEXIS 609 (1971).

Application

Right of voucher has been particularly applied to tort cases where liability of party vouching arises merely from some negative act of omission, and the proximate cause of the injury, as between the voucher and the vouchee, is some positive act or primary duty and responsibility of the vouchee. Cook v. Pollard, 50 Ga. App. 752, 179 S.E. 264, 1935 Ga. App. LEXIS 278 (1935).

Right over is established by separate action against vouchee for contribution or indemnity whether the relationship is contractual or noncontractual. Dodge Trucks, Inc. v. Wilson, 140 Ga. App. 743, 231 S.E.2d 818, 1976 Ga. App. LEXIS 1618 (1976), aff'd, 238 Ga. 636, 235 S.E.2d 142, 1977 Ga. LEXIS 1144 (1977).

Conduct of defendant not constituting collusion insufficient to relieve vouchee of judgment's effect. — Mere acts or conduct of the defendant which do not constitute collusion or negligence causing the judgment to be rendered against the defendant, but which are mere acts or conduct on the part of the defendant which, when appearing in evidence on the trial, are sufficient to influence the jury in rendering judgment against the defendant, do not relieve the vouchee of the binding force and effect of the judgment as against the vouchee. May v. Loeb, 57 Ga. App. 788, 196 S.E. 268, 1938 Ga. App. LEXIS 388, aff'd, 186 Ga. 742, 198 S.E. 785, 1938 Ga. LEXIS 682 (1938).

No error in introducing prior judgment against vendee of stolen car in action against vendor. — There is no error in introducing a judgment against a vendee of a stolen car and taking the car away from the vendee in an action by the vendee against the vendor for the purchase money, where the vendee gave the vendor notice of the former action and the vendor failed to defend. Barrett v. Miller, 36 Ga. App. 48, 135 S.E. 111, 1926 Ga. App. LEXIS 751 (1926).

Right of vouchee will extend to vendee of personal property who is sued in trover by plaintiff claiming paramount title antedating the sale to the vendee. Cook v. Pollard, 50 Ga. App. 752, 179 S.E. 264, 1935 Ga. App. LEXIS 278 (1935).

Adverse prior judgment conclusive against vouched vendor on question of title. — Where the vendee has vouched the vendor into court by timely notice,

giving the vendor an opportunity to defend the action, a judgment rendered in favor of the claimant of the title will conclusively bind the vendor on the question of title in a subsequent action by the vendee against the vendor upon the implied warranty of title. Cook v. Pollard, 50 Ga. App. 752, 179 S.E. 264, 1935 Ga. App. LEXIS 278 (1935).

County commissioners not authorized to vouch third party in mandamus proceeding. — There is no provision of law which authorizes defendant county commissioners, in mandamus proceeding to compel payment to sheriff for services rendered, to vouch into court a third party. Lewis v. Gay, 215 Ga. 90, 109 S.E.2d 268, 1959 Ga. LEXIS 399 (1959).

City as joint tort-feasor has right of contribution over against property owner. — Status of joint tort-feasor is not such as would prevent a city from having the right of contribution over against a property owner. Schneider v. City Council, 118 Ga. 610, 45 S.E. 459, 1903 Ga. LEXIS 632 (1903); Scearce v. Mayor of Gainesville, 33 Ga. App. 411, 126 S.E. 883, 1925 Ga. App. LEXIS 796 (1925), overruled in part, Gilson v. Mitchell, 131 Ga. App. 321, 205 S.E.2d 421, 1974 Ga. App. LEXIS 1413 (1974).

Defendant in action ex contractu four years after injury cannot vouch another liable in tort. — When more than four years have elapsed before the bringing of an action, it is too late for one who is sued for liability arising out of a contract to vouch another who is liable to that person in tort. Raleigh & G.R.R. v. Western & Atl. R.R., 6 Ga. App. 616, 65 S.E. 586, 1909 Ga. App. LEXIS 406 (1909).

Voucher permitted to cross-examine vouchee whose interest is adverse to voucher. — Where the vouchee was subpoenaed by the plaintiff and sworn as the plaintiff's witness, the vouchee's interest was adverse to that of defendant, and the vouchee's testimony was material and relevant to defendant's defense, there is no abuse of discretion of the trial court in permitting the voucher to cross-examine the vouchee. Clary Appliance & Furn. Ctr., Inc. v. Butler, 139 Ga. App. 233, 228 S.E.2d 211, 1976 Ga. App. LEXIS 1752 (1976).

RESEARCH REFERENCES

ALR.

Necessity of offering in evidence of record in the prior case in support of plea or claim that former judgment is bar or res judicata, 96 A.L.R. 944.

"Vouching in" of one who is not liable over to defendant but is liable over to one whom the defendant has vouched in, 123 A.L.R. 1153.

Extent to which vouchee is bound by judgment against voucher, 140 A.L.R. 1121.

Judgment in action against codefendants for injury or death of person, or for damage to property, as res judicata in subsequent action between codefendants as to their liability inter se, 24 A.L.R.3d 318.

9-10-14. Promulgation of form for use by inmates in actions against government.

(a) The Administrative Office of the Courts shall, with the approval of the Supreme Court, promulgate and from time to time amend as necessary a form or forms for use by inmates of state and local penal and correctional institutions in actions against the state and local governments and government agencies and officers. In addition to any other appropriate provisions, such form or forms shall clearly identify the nature of the action, the subject matter and disposition of all previous actions filed against any unit or officer of government by the inmate during his incarceration, the law and facts on which the action

is based, the parties to be served, the parties against whom relief is requested, and the specific relief requested against each party. If an affidavit of indigency accompanies the pleading, it shall include a sworn financial statement which shall include but not be limited to any custodial account of the inmate with the institution wherein he is incarcerated.

(b) No clerk of any court shall accept for filing any action by an inmate of a state or local penal or correctional institution against the state or a local government or against any agency or officer of state or local government unless the complaint or other initial pleading is on a form or forms promulgated by the Administrative Office of the Courts and such form or forms are appropriately and legibly completed. Any inmate filing such an action may submit with the complaint or other initial pleading any additional matter in any form if the pleading includes the form or forms required by this Code section. If the pleading is accompanied by an affidavit of indigency, the clerk shall not accept the pleading for filing unless the pleading is also accompanied by a certification from the institution wherein the inmate is incarcerated that the financial statement correctly states the amount of funds in any and all custodial accounts of the inmate with the institution.

(c) Upon request of an inmate or the order of a court wherein an inmate has filed an action subject to this Code section, the officials in charge of a state or local institution may remit to the court amounts from an inmate's custodial account for payment of court costs, deposits, or filing fees. Such officials shall upon request of an inmate provide the certification required by subsection (b) of this Code section.

(d) The Administrative Office of the Courts shall cause to be printed such number of the forms provided for in this Code section as is necessary to furnish such forms to attorneys and to the Department of Corrections and local penal and correctional institutions for use by their inmates. Such forms shall be distributed to such institutions by the Administrative Office of the Courts without cost, and such forms shall be provided in reasonable numbers to inmates without cost. The cost of printing and distributing such forms shall be paid from funds appropriated to the judicial branch of government.

History.

Code 1981, § 9-10-14, enacted by Ga. L. 1985, p. 883, § 1.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1985, "Department of Corrections" was substituted for "Department of Offender Rehabilitation" in the first sentence of subsection (d).

Editor's notes.

Ga. L. 1985, p. 883, § 2, not codified by the General Assembly, provided that that Act would apply to actions presented for filing on or after July 1, 1985.

Law reviews.

For article, "The Writ of Habeas Corpus in Georgia," see 12 Ga. St. B.J. 20 (2007).

JUDICIAL DECISIONS

Verification of habeas corpus petition. — Where a prisoner completed a form provided by the Administrative Office of the Courts in filing the prisoner's habeas corpus petition, dismissal of the application was improper even though the verification statement did not comply with the traditional form. Heaton v. Lemacks, 266 Ga. 189, 466 S.E.2d 7, 1996 Ga. LEXIS 43 (1996).

No application to federal lawsuits. — In a case in which a federal district court found that a state inmate's claims under 42 U.S.C. § 1983 and Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, were time-barred, the inmate was not entitled to an equitable tolling. The inmate's contention that prison officials refused to provide the inmate the appropriate form to file a state court action did not warrant equitable tolling because O.C.G.A. § 9-10-14 did not apply to federal lawsuits. Price v. Owens, 634 F. Supp. 2d 1349, 2009 U.S. Dist. LEXIS 58844 (N.D. Ga. 2009).

Construction of terms. — Georgia General Assembly's use of that phrase "the Department of Corrections and local penal and correctional institutions for use by their inmates" in O.C.G.A. § 9-10-14(d) supports the conclusion that the phrase "state or local penal or correctional institution" used in subsection (b) refers only to those institutions located in Georgia. Gay v. Owens, 292 Ga. 480, 738 S.E.2d 614, 2013 Ga. LEXIS 156 (2013).

No application to inmate not incarcerated in Georgia. — Georgia Supreme Court dismissed an inmate's petition for a writ of mandamus because the inmate was not incarcerated in Georgia; thus, the filing requirements of O.C.G.A. § 9-10-14(b) were not applicable to the inmate, and the inmate should have filed the petition initially with a Georgia superior court. Gay v. Owens, 292 Ga. 480, 738 S.E.2d 614, 2013 Ga. LEXIS 156 (2013).

Use of required form mandatory. — An inmate's complaint for mandamus relief against a state prison warden and the commissioner of the department of corrections should not have been permitted to proceed as the inmate failed to use the form required by O.C.G.A. § 9-10-14(b); the language of the statute was unambiguous and did not provide for any exceptions. Donald v. Price, 283 Ga. 311, 658 S.E.2d 569, 2008 Ga. LEXIS 255 (2008).

Statute does not provide exceptions to form requirement. — Clerk of court acts contrary to the requirements of O.C.G.A. § 9-10-14(b) when the clerk accepts for filing a complaint or initial pleading against a Georgia agency or official that is not in accord with the statute's requirements; the statutory language is unambiguous and does not provide for any exceptions: the clerk of a Georgia court is not to docket a mandamus petition without the statutorily required form. Gay v. Owens, 292 Ga. 480, 738 S.E.2d 614, 2013 Ga. LEXIS 156 (2013).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

19A Am. Jur. Pleading and Practice Forms, Penal and Correctional Institutions, § 3.

ARTICLE 2

VENUE

Cross references.

Venue generally, Ga. Const. 1983, Art. VI, Sec. II.

Venue for actions against corporations, § 14-2-510.

Law reviews.

For note, "Getting Personal With Our Neighbors-A Survey of Southern States' Exercise of General Jurisdiction and A Proposal for Extending Georgia's Long-Arm Statute," see 25 Ga. St. U.L. Rev. 1177 (2009).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Nonestablishment of Domicil in Foreign Jurisdiction, 4 POF2d 595.

Establishment of Person's Domicil, 39 POF2d 587.

ALR.

Power to withdraw or modify order granting change of venue, 59 A.L.R. 362.

Venue of action for damage to growing crops, 103 A.L.R. 374.

When action deemed to be for recovery of personal property within venue statute, 126 A.L.R. 1190.

What amounts to a personal injury within venue statute, 134 A.L.R. 751.

Different or same venue or place of trial of proceeding or issue, and effect thereof, in respect of main action and ancillary garnishment or attachment, 139 A.L.R. 1478.

Right of defendant, upon motion made or renewed after plaintiff has closed his case without proving liability on part of codefendant, to change of venue to the county or district which would have been the proper venue but for the joinder of the codefendant, 140 A.L.R. 1287.

Lien as estate or interest in land within venue statute, 2 A.L.R.2d 1261.

Relationship between "residence" and "domicil" under venue statutes, 12 A.L.R.2d 757.

Venue of action for partnership dissolution, settlement, or accounting, 33 A.L.R.2d 914.

Venue of wrongful death action, 36 A.L.R.2d 1146.

Retroactive operation and effect of venue statute, 41 A.L.R.2d 798.

Validity of contractual provision authorizing venue of action in particular place, court, or county, 69 A.L.R.2d 1324.

Construction and effect of statutory provision for change of venue for the promotion of the convenience of witnesses and the ends of justice, 74 A.L.R.2d 16.

Prohibition or mandamus as appropriate remedy to review ruling on change of venue in civil case, 93 A.L.R.2d 802.

Prohibition as appropriate remedy to restrain civil action for lack of venue, 93 A.L.R.2d 882.

Sufficiency of contractual designation of place of performance to fix venue at that place, under statute authorizing or requiring such venue, 97 A.L.R.2d 934.

Venue of damage action for breach of real-estate sales contract, 8 A.L.R.3d 489.

Choice of venue to which transfer is to be had, where change is sought because of local prejudice, 50 A.L.R.3d 760.

Forum non conveniens in products liability cases, 59 A.L.R.3d 138.

Validity of contractual provision limiting place or court in which action may be brought, 31 A.L.R.4th 404.

Place where claim or cause of action "arose" under state venue statute, 53 A.L.R.4th 1104.

Forum non conveniens in products liability cases, 76 A.L.R.4th 22.

PART 1

GENERAL PROVISIONS

9-10-30. Proceedings in equity generally; injunctions to stay pending litigation; divorce cases.

All actions seeking equitable relief shall be filed in the county of the residence of one of the defendants against whom substantial relief is prayed, except in cases of injunctions to stay pending proceedings, when the action may be filed in the county where the proceedings are pending, provided no relief is prayed as to matters not included in such litigation, and except in divorce cases, venue in which is governed by Article VI, Section II, Paragraph I of the Constitution of this state.

History.

Orig. Code 1863, § 4095; Code 1868, § 4124; Code 1873, § 4183; Code 1882, § 4183; Civil Code 1895, § 4950; Civil Code 1910, § 5527; Code 1933, § 3-202; Ga. L. 1962, p. 659, § 1; Ga. L. 1983, p. 3, § 48.

Code Commission notes.

Ga. L. 1962, p. 659, § 1, purporting to amend this Code section to provide that foreclosures and sales under power should be considered pending litigation, was held unconstitutional in Modern Homes Constr. Co. v. Burke, 219 Ga. 710, 135 S.E.2d 383 (1964), as a violation of the separation of powers doctrine of Ga. Const. 1976, Art. I, Sec. II, Para. IV, and the section has therefore been set out without said provision. In addition, reference to Ga. Const. 1976, Art. VI, Sec. XIV, Para. I (now Ga. Const. 1983, Art VI, Sec. II, Para. I) with regard to divorce cases was added for clarification.

Law reviews.

For comment on Bennett v. Bagwell & Stewart, 214 Ga. 115, 103 S.E.2d 561 (1958), holding that as a nuisance is a continuing trespass, a court in equity will enjoin it in the county of the resident defendant even though he is only an agent or employee of the nonresident defendant, see 21 Ga. B.J. 564 (1959).

For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

For note, "Venue in Multidefendant Civil Practice in Georgia," see 6 Ga. State U.L. Rev. 427 (1990).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PROCEDURAL ISSUES
APPLICATION

General Consideration

Applicability of O.C.G.A. § 15-1-2 where third parties involved. — Since former Code 1933, § 3-202 (see O.C.G.A. § 9-10-30) could be reconciled with Ga. Const. 1976, Art. VI, Sec. XIV, Para. III (see Ga. Const. 1983, Art. VI, Sec. II, Para. III), as to venue of equity cases only on the ground of waiver, then former Code 1933, § 24-112 (see O.C.G.A. § 15-1-2), and particularly the latter portion thereof, was directly on point in a case where third parties were involved. Terhune v. Pettit, 195 Ga. 793, 25 S.E.2d 660, 1943 Ga. LEXIS 291 (1943).

Filing of petition for injunction in county where proceedings pending not violative of Constitution. — The

General Consideration (Cont'd)

constitutional requirement that equity cases shall be tried in the county where a defendant resides against whom substantial relief is prayed is not violated in cases of injunctions to stay pending proceedings, where, jurisdiction having been acquired, it is provided by this section that the petition for injunction may be filed in the county where the proceedings are pending, provided no relief is prayed as to matters not included in such litigation. State Hwy. Dep't v. H.G. Hastings Co., 187 Ga. 204, 199 S.E. 793, 1938 Ga. LEXIS 743 (1938) (see O.C.G.A. § 9-10-30).

Section must be strictly construed. — Since this section is an exception to the constitutional requirement of Ga. Const. 1976, Art. VI, Sec. XIV, Para. III (see Ga. Const. 1983, Art. VI, Sec. II, Para. III), it must be strictly construed. Bailey v. Williams, 214 Ga. 702, 107 S.E.2d 209, 1959 Ga. LEXIS 315 (1959) (see O.C.G.A. § 9-10-30).

This section prevents a multiplicity of suits growing out of the same factual transaction. Bragg v. Gavin, 234 Ga. 70, 214 S.E.2d 532, 1975 Ga. LEXIS 1045 (1975) (see O.C.G.A. § 9-10-30).

Proper construction of "substantial relief". — Properly construed, the words "substantial relief" mentioned in Ga. Const. 1976, Art. VI, Sec. XIV, Para. III (see Ga. Const. 1983, Art. VI, Sec. II, Para. III), and in this section refer to substantial equitable relief. Wright v. Trammell, 176 Ga. 84, 166 S.E. 866, 1932 Ga. LEXIS 391 (1932); First Nat'l Bank v. Holderness, 189 Ga. 819, 7 S.E.2d 682, 1940 Ga. LEXIS 381 (1940); Reynolds v. Solomon, 191 Ga. 1, 11 S.E.2d 201, 1940 Ga. LEXIS 603 (1940) (see O.C.G.A. § 9-10-30).

Section includes nonresidents. Gordy v. Levison & Co., 157 Ga. 670, 122 S.E. 234, 1924 Ga. LEXIS 227 (1924) (see O.C.G.A. § 9-10-30).

Each case involving this section must be determined on its particular allegations, and must be decided on the nature, extent, and kind of equitable relief sought and the relationship between the parties to the action. First Nat'l Bank v. Holderness, 189 Ga. 819, 7 S.E.2d 682, 1940 Ga. LEXIS 381 (1940) (see O.C.G.A. § 9-10-30).

Levy of execution to foreclose lien on personalty does not create pending proceeding within the meaning of this section. Mays v. Taylor, 7 Ga. 238, 1849 Ga. LEXIS 132 (1849); Rounsaville v. McGinnis, 93 Ga. 579, 21 S.E. 123, 1894 Ga. LEXIS 363 (1894); Dade Coal Co. v. Anderson, 103 Ga. 809, 30 S.E. 640, 1898 Ga. LEXIS 258 (1898); Macon Nav. Co. v. Stallings, 110 Ga. 352, 35 S.E. 647, 1900 Ga. LEXIS 442 (1900); Railroad Comm'n v. Palmer Hdwe. Co., 124 Ga. 633, 53 S.E. 193, 1906 Ga. LEXIS 567 (1906); Malsby & Co. v. Studstill, 127 Ga. 726, 56 S.E. 988, 1907 Ga. LEXIS 468 (1907) (see O.C.G.A. § 9-10-30).

Issuance and levy of distress warrant does not create pending proceeding within meaning of this section. Wooley v. Georgia Loan & Trust Co., 102 Ga. 591, 29 S.E. 119, 1897 Ga. LEXIS 644 (1897); Townsend v. Brinson, 117 Ga. 375, 43 S.E. 748, 1903 Ga. LEXIS 236 (1903) (see O.C.G.A. § 9-10-30).

Advertising and preparing for sale under power conferred in security deed does not create pending proceeding within meaning of this section. Meeks v. Roan, 117 Ga. 865, 45 S.E. 252, 1903 Ga. LEXIS 370 (1903); John Hancock Mut. Life Ins. Co. v. Baskin, 179 Ga. 86, 175 S.E. 251, 1934 Ga. LEXIS 225 (1934); Millen Hotel Co. v. Chastaine, 183 Ga. 172, 188 S.E. 4, 1936 Ga. LEXIS 190 (1936); Modern Homes Constr. Co. v. Burke, 219 Ga. 710, 135 S.E.2d 383, 1964 Ga. LEXIS 384 (1964) (see O.C.G.A. § 9-10-30).

Some of prayers for substantial equitable relief must be common to both nonresident and resident defendant in order to obtain jurisdiction of the nonresident defendant. I. Perlis & Sons v. National Sur. Corp., 218 Ga. 667, 129 S.E.2d 915, 1963 Ga. LEXIS 293 (1963).

Action to enjoin sale by nonresident properly brought in county of nonresident's agent. — When a nonresident is proceeding to foreclose a mortgage under a power of sale through the instrumentality of an agent resident in this state, an equitable petition filed to enjoin the sale, upon the ground that the power is being improperly exercised, is properly filed in the county of the residence of the

resident agent. Smith v. Allen, 222 Ga. 607, 151 S.E.2d 138, 1966 Ga. LEXIS 575 (1966).

Procedural Issues

Waiver of personal jurisdiction by institution of action. — The only way in which this section can be reconciled with Ga. Const. 1976, Art. VI, Sec. XIV, Para. III (see Ga. Const. 1983, Art. VI, Sec. II, Para. III), is on theory of waiver, in that a plaintiff by voluntarily instituting the plaintiff's action gives to the court of the county where it is so instituted jurisdiction of the plaintiff's person, sufficient to answer all the ends of justice respecting the action originally instituted. Terhune v. Pettit, 195 Ga. 793, 25 S.E.2d 660, 1943 Ga. LEXIS 291 (1943) (see O.C.G.A. § 9-10-30).

Improper venue. — Bibb County was not the proper venue for an equitable action against the Department of Public Safety by a Macon attorney given a traffic citation in Tift County for speeding. Higgins v. Department of Pub. Safety, 256 Ga. 288, 347 S.E.2d 562, 1986 Ga. LEXIS 807 (1986).

The doctrine of forum non conveniens has never been expressly sanctioned in the Georgia courts. Smith v. Board of Regents, 165 Ga. App. 565, 302 S.E.2d 124, 1983 Ga. App. LEXIS 3171 (1983).

Dismissal based on forum non conveniens improper. — Because the relevant constitutional and statutory authority places venue, absent certain specified circumstances, squarely and solely in the county of the defendant's residence, and because Georgia's courts have not seen fit generally to invoke the doctrine of forum non conveniens, the trial court erred in granting defendant's motion to dismiss based on forum non conveniens. Smith v. Board of Regents, 165 Ga. App. 565, 302 S.E.2d 124, 1983 Ga. App. LEXIS 3171 (1983).

Equitable relief prayed must be common to both resident and nonresident defendants. — This section has been uniformly construed to mean that in order to join a nonresident in equitable action, substantial equitable relief must be common to the nonresident and the resident defendant; in other words, regardless of substantial relief sought against resident defendant and other substantial equitable relief sought against nonresident, the nonresident cannot be joined. I. Perlis & Sons v. National Sur. Corp., 218 Ga. 667, 129 S.E.2d 915, 1963 Ga. LEXIS 293 (1963) (see O.C.G.A. § 9-10-30).

Proper grounds to dismiss for lack of jurisdiction. — A motion to dismiss for lack of jurisdiction is properly granted by the trial court where an equitable action is brought: (1) in which in personam relief is prayed against a nonresident of Georgia; and (2) in which no substantial relief is prayed against a resident of the county where the action is brought. Roberts v. Markin, 225 Ga. 352, 168 S.E.2d 576, 1969 Ga. LEXIS 496 (1969).

Intention of pleader determines whether action based on equity or title to land. — A rule, perhaps the cardinal rule, by which to determine whether an action is based on equity or title to land is to ascertain the intention of the pleader; where the pleader's intention is not clearly manifest as to what form of action is relied on in the petition, the courts will prima facie presume that the pleader's purpose is to serve the pleader's best interest, and will construe the pleadings so as to uphold and not to defeat the action. Cook v. Grimsley, 175 Ga. 138, 165 S.E. 30, 1932 Ga. LEXIS 207 (1932).

Allegations determinative of equitable nature of action. — If the allegations in a petition are sufficient to show that the plaintiff can recover on the plaintiff's title alone without the aid of a court of equity, the case is one of ejectment or complaint for land; but if this is not the case, and equitable aid is necessary, the petition is equitable in character. Cook v. Grimsley, 175 Ga. 138, 165 S.E. 30, 1932 Ga. LEXIS 207 (1932).

Equitable petition to subject land to judgments properly brought in county of defendants' residence. — An equitable petition against a man and his wife for the purpose of subjecting to judgments against the former, held by the plaintiffs, land to which the wife, as alleged, fraudulently and in collusion with the husband claimed title in order to de-

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feat the collection of the plaintiff's claims, was properly brought in the county of the residence of the husband and wife, although the land was situated in another county; such an equitable petition was not a suit "respecting title to land," within the meaning of Ga. Const. 1976, Art. VI, Sec. II, Para. IV (see Ga. Const. 1983, Art. VI, Sec. VI, Paras. II, III, and V). Builders' Supply Co. v. Hobbs, 169 Ga. 777, 151 S.E. 485, 1930 Ga. LEXIS 30 (1930).

Substantial relief prayed determinative of jurisdiction. — The essential fact necessary to confer jurisdiction is not that a defendant residing in the county has a substantial interest in the litigation, but whether or not substantial relief is prayed against such defendant. First Nat'l Bank v. Holderness, 189 Ga. 819, 7 S.E.2d 682, 1940 Ga. LEXIS 381 (1940); Planters Cotton Oil Co. v. McCurley, 199 Ga. 104, 33 S.E.2d 270, 1945 Ga. LEXIS 256 (1945).

If substantial relief is prayed against all defendants, action may be brought in county of any of the defendants. Reynolds v. Solomon, 191 Ga. 1, 11 S.E.2d 201, 1940 Ga. LEXIS 603 (1940).

Site of action praying relief against defendants residing in different counties. — If substantial relief prayed is against two or more defendants residing in different counties, action may be brought in the county of the residence of either. O'Hara v. Jacobs, 191 Ga. 5, 11 S.E.2d 199, 1940 Ga. LEXIS 602 (1940).

Venue was proper in Echols County, even though the complaint sought additional relief against the DeKalb County Tax Commissioner, who resided in DeKalb County, as the complaint sought substantial relief against the Echols County Tax Commissioner, who, resided in Echols County; the complaint sough declaratory and injunctive relief seeking to prevent the duplicate collection of ad valorem taxes by the two Tax Commissioners. Scott v. Prime Sales & Leasing, Inc., 276 Ga. App. 283, 623 S.E.2d 167, 2005 Ga. App. LEXIS 1229 (2005), cert. denied, No. S06C0525, 2006 Ga. LEXIS 279 (Ga. Apr. 25, 2006).

No jurisdiction where action brought in county where no "substantial relief" defendant resides. — Where a petition seeking equitable relief is brought in a county where no defendant resides against whom substantial relief is sought, and in a county other than the residence of the only defendant against whom substantial relief is sought, the court is without jurisdiction, and the petition should be dismissed on demurrer (now motion to dismiss), raising that question. First Nat'l Bank v. Holderness, 189 Ga. 819, 7 S.E.2d 682, 1940 Ga. LEXIS 381 (1940).

Action for injunction against several defendants properly brought in county of any defendant. — Where a petition for injunction brought in the county where one defendant resides, seeks to restrain a continuing trespass which all of the defendants are committing, the court is not without jurisdiction to grant such relief, even though all except the one defendant are residents of other counties in the state. Bennett v. Bagwell & Stewart, Inc., 214 Ga. 115, 103 S.E.2d 561, 1958 Ga. LEXIS 344 (1958).

Only waiver or voluntary submission permits trial in county other than defendant's residence. — Only through waiver or voluntary submission to the courts of another county may a trial take place in a county other than that of the defendant's residence. Terhune v. Pettit, 195 Ga. 793, 25 S.E.2d 660, 1943 Ga. LEXIS 291 (1943).

Original proceedings must be filed in superior court, and not a court of limited jurisdiction. Moore, Marsh & Co. v. Medlock, 100 Ga. 94, 101 Ga. 94, 28 S.E. 836, 1897 Ga. LEXIS 165 (1897).

Petition for injunction must show that original plaintiff has consented to jurisdiction of court. Crawley v. Barge, 132 Ga. 96, 63 S.E. 819, 1909 Ga. LEXIS 47 (1909); Stone v. King-Hodgson Co., 140 Ga. 487, 79 S.E. 122, 1913 Ga. LEXIS 165 (1913).

Mere fact of praying injunction against defendant does not, in all

events, confer the right to file the equitable petition in the county of the defendant's residence, and to draw to that county residents of other counties. First Nat'l Bank v. Holderness, 189 Ga. 819, 7 S.E.2d 682, 1940 Ga. LEXIS 381 (1940).

To be pending proceeding within meaning of this section, there must be an action of some nature. Modern Homes Constr. Co. v. Burke, 219 Ga. 710, 135 S.E.2d 383, 1964 Ga. LEXIS 384 (1964) (see O.C.G.A. § 9-10-30).

Interposition of claim by third person does not inure to defendant in fi. fa. Ray v. Home & Foreign Inv. & Agency Co., 106 Ga. 492, 32 S.E. 603, 1899 Ga. LEXIS 711 (1899); Thomason v. Thompson, 129 Ga. 440, 59 S.E. 236, 1907 Ga. LEXIS 400 (1907); Keith v. Hughey, 138 Ga. 769, 76 S.E. 91, 1912 Ga. LEXIS 703 (1912).

Submission by plaintiff to equitable jurisdiction of court where action brought. — Where a party institutes a proceeding in a county other than that of the party's residence, against a person residing in such county, the person submits oneself, to the extent of such action, to the equitable jurisdiction of the superior court of the county in which the action is brought. Caswell v. Bunch, 77 Ga. 504, 1886 Ga. LEXIS 358 (1886); Townsend v. Brinson, 117 Ga. 375, 43 S.E. 748, 1903 Ga. LEXIS 236 (1903); Keith v. Hughey, 138 Ga. 769, 76 S.E. 91, 1912 Ga. LEXIS 703 (1912); Bailey v. Williams, 214 Ga. 702, 107 S.E.2d 209, 1959 Ga. LEXIS 315 (1959).

Plaintiffs estopped from denying equitable jurisdiction once invoked. — Where the plaintiffs themselves brought the petition, invoked the aid of a court of equity to enjoin certain acts by the bank, and filed the action in the county of residence of the bank against which substantial relief was prayed, and the petition alleged that the title to the land in controversy was in the plaintiffs, and the court was asked to decree that the title was legally in them and was not subject to the payment of the indebtedness of another to the bank, the plaintiffs, having invoked the jurisdiction in equity of the court in such county, were estopped from denying that that court had jurisdiction to entertain the case; and if the title to land in another county is involved in the litigation, it is only incidentally so and on account of the fact that the plaintiffs themselves brought the question into the case. Manry v. Farmers' Bank, 177 Ga. 37, 177 Ga. 371, 170 S.E. 30, 1933 Ga. LEXIS 105 (1933).

Plaintiff's submission to jurisdiction of transferee court as to matters in original action. — Where a lessor, a resident of one county, sued out dispossessory and distress warrants against the lessee in a municipal court for a city in a different county, and the lessee filed counter-affidavits and bonds, and by operation of law the cases were transferred to the other county's superior court, the municipal court having no jurisdiction to try the issues made by the counter-affidavits, the lessor consequently submitted itself to the jurisdiction of the superior court as to all matters included in the litigation which it instituted. West View Corp. v. Thunderbolt Yacht Basin, Inc., 208 Ga. 93, 65 S.E.2d 167, 1951 Ga. LEXIS 287 (1951).

Waiver of jurisdiction extends only to matters in pending litigation. — A party bringing an action in a county other than that of the party's residence submits oneself, to the extent of such action, to the equity jurisdiction of the county wherein the action is brought; but this waiver of jurisdiction extends only to matters included in the pending litigation, and ordinarily a person not a party to that action cannot take advantage of such waiver. Chamblee Constr. Co. v. Pickett, 227 Ga. 421, 181 S.E.2d 32, 1971 Ga. LEXIS 719 (1971).

Defendant may transfer action from court of limited jurisdiction to superior court of same county. — Plaintiff who institutes action in a county other than the one in which the plaintiff resides, for purposes of the defense of that action, submits oneself to the jurisdiction of the courts of the county in which the action is pending; and if such action is pending in a court of limited jurisdiction, which for want of power cannot afford full relief, the defendant, by proper proceeding in the superior court of the county where the action was instituted, may set up and have adjudicated as to the nonresident

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plaintiff all matters necessary for a complete defense. Europa Hair, Inc. v. Browning, 133 Ga. App. 753, 212 S.E.2d 862, 1975 Ga. App. LEXIS 2272 (1975).

Nonresident of state, suing at law, submits to jurisdiction for equitable relief in same county. Wachovia Bank & Trust Co. v. Jones, 166 Ga. 747, 144 S.E. 256, 1928 Ga. LEXIS 394 (1928).

Petition for recovery ex delicto against nonresidents properly dismissed since not related to pending litigation. — Where the sole equitable relief sought in petition is a recovery ex delicto against nonresident defendants, to be set off against amounts constituting the basis of several actions in the city court, and the alleged acts of the several nonresidents for which a recovery is sought are matters not included in the subject matter of city court actions, the court did not err in sustaining a demurrer (now motion to dismiss) thereto. Askew v. Bassett Furn. Co., 172 Ga. 700, 158 S.E. 577, 1931 Ga. LEXIS 184 (1931).

Application

This section applies to bills ancillary to actions at law, as for discovery, injunction, and other procedures. Home Mixture Guano Co. v. Woolfolk, 148 Ga. 567, 97 S.E. 637, 1918 Ga. LEXIS 445 (1918) (see O.C.G.A. § 9-10-30).

This section applies to actions to recover possession of land and damages for cutting timber, and for equitable relief relating to land and timber. Brindle v. Goswick, 162 Ga. 432, 132 S.E. 83 (1926) (see O.C.G.A. § 9-10-30).

Equitable action jointly against vendee, in invalid reservation contract, and the vendee's transferee, brought in county of transferee's residence to recover as in trover the article sold and to reform the contract so as to make it include a description of that article, does not lie for lack of jurisdiction. Flemming v. Drake, 163 Ga. 872, 137 S.E. 268, 1927 Ga. LEXIS 86 (1927).

Court without authority to grant relief as to nonresident defendant in action on title to lands. — In action strictly respecting title to lands, and which therefore is brought in the county in which the land is situated, the court has no jurisdiction to grant equitable relief as to a defendant who is a resident of another county in this state. Cook v. Grimsley, 175 Ga. 138, 165 S.E. 30, 1932 Ga. LEXIS 207 (1932).

Equitable action to remove cloud from title improperly brought in county where no defendant resided. — Action to remove from the record a certain year's support proceeding as a cloud upon the title of described land in plaintiff's possession was one in equity and not one respecting title to land, and should have been brought in the county of a defendant against whom substantial relief was sought; since the action was brought in a county where neither defendant resided, the court was without jurisdiction of the subject matter and such jurisdiction could not be conferred by consent or waived by the parties. Sweatman v. Roberts, 213 Ga. 112, 97 S.E.2d 320, 1957 Ga. LEXIS 316 (1957).

Constitutionally required county site of equity cases. — Under Ga. Const., Art. VI, Sec. XIV, Para. III (see Ga. Const. 1983, Art. VI, Sec. II, Para. III), and former Code 1933, § 3-202 (see O.C.G.A. § 9-10-30), equity cases must be tried in the county where a defendant resided against whom substantial equitable relief was prayed. Harper v. Gunby, 215 Ga. 466, 111 S.E.2d 85, 1959 Ga. LEXIS 514 (1959).

Court of county where either of two coexecutors resides has jurisdiction to decree accounting. — The superior court of a county in which resides either of the two coexecutors against whom substantial relief is prayed, is clothed with jurisdiction to decree an accounting, and under such circumstances and in the exercise of such jurisdiction it may set aside a judgment obtained by fraud which might be interposed as a bar to the equitable proceeding, which invokes an accounting between the guardians and their ward and the consequent abrogation of the alleged settlement which was obtained by fraud. Jordan v. Harber, 172 Ga. 139, 157 S.E. 652, 1931 Ga. LEXIS 39 (1931).

Venue of action brought by administrator against heirs and their attorney in county of latter. — Where action

instituted by an administrator against heirs at law and their attorney alleged a contingent interest of the attorney in the subject matter of action; and, though contingent upon recovery for the attorney's clients, it was a substantial interest in the property alleged to be in the hands of the administrator for distribution among the heirs, and afforded grounds for equitable relief against the attorney as such action was in equity, venue was properly laid in the county of the residence of the attorney at law. Reynolds v. Ingraham, 179 Ga. 398, 175 S.E. 918, 1934 Ga. LEXIS 297 (1934).

Venue for injunction action properly in county of one of joint defendants in trespass. — Where a petition for injunction, brought in the county where one defendant resides, seeks relief against joint trespasses by all of the defendants, the court is not without jurisdiction, even though all except the one defendant are residents of other counties, and even though the resident defendant, as an employee or agent of other defendants, may have been acting only under their command or authority in the commission of the trespasses. Hoch v. Candler, 190 Ga. 390, 9 S.E.2d 622, 1940 Ga. LEXIS 479 (1940); Baggett v. Linder, 208 Ga. 590, 68 S.E.2d 469, 1952 Ga. LEXIS 270 (1952).

Petition for cancellation of deeds and other equitable relief properly brought in county of grantee or grantor. — A petition for injunction, cancellation of deeds, and other equitable relief, in which it is sought to have a conveyance of land delivered up and cancelled, may be brought in the county of the residence of the grantee or in that of the grantor. Planters Cotton Oil Co. v. McCurley, 199 Ga. 104, 33 S.E.2d 270, 1945 Ga. LEXIS 256 (1945).

Action to decree title to land properly brought in county where "substantial relief" defendant resides. — An equitable action against three defendants, two resident and one nonresident, seeking to have equity decree title in the plaintiffs to land lying in the county of the action, not being one respecting title to land, must be brought in the county where one of the defendants against whom substantial relief is prayed resides. Empire Land Co. v. Stokes, 212 Ga. 707, 95 S.E.2d 283, 1956 Ga. LEXIS 504 (1956).

Administratrix's action against several defendants properly in county of any "substantial relief" defendant. — Where the plaintiff administratrix alleged that the defendants entered into a conspiracy to fraudulently procure a transfer to them by the decedent of all of the decedent's real and personal estate, that the confederates had made a division of the fruits of their conspiracy and accordingly prayed for appropriate substantial equitable relief against each for the benefit of the estate, the defendants were properly joined in the equitable action and venue was laid in a county where any one of the defendants resided against whom substantial equitable relief was prayed. Hayes v. Hayes, 214 Ga. 624, 106 S.E.2d 790, 1959 Ga. LEXIS 289 (1959).

Court without jurisdiction where no substantial relief prayed against only defendant of county. — Where no substantial equitable relief was prayed against the only defendant who was a resident of Murray County, and the only defendants against whom substantial equitable relief was prayed were nonresidents of Murray County, the Superior Court of Murray County was without jurisdiction to entertain the equitable petition and should have sustained the general demurrer (now motion to dismiss). Harper v. Gunby, 215 Ga. 466, 111 S.E.2d 85, 1959 Ga. LEXIS 514 (1959).

Pending action was created by proceeding instituted under former Civil Code 1895, §§ 4813, 4814, and 4815 (see O.C.G.A. §§ 44-7-50, 44-7-51, and 44-7-53), to evict one from the possession of land, wherein a counter-affidavit had been filed and the issue raised. Townsend v. Brinson, 117 Ga. 375, 43 S.E. 748, 1903 Ga. LEXIS 236 (1903); Ellis v. Stewart, 123 Ga. 242, 51 S.E. 321, 1905 Ga. LEXIS 425 (1905); Bedgood v. Carlton, 145 Ga. 54, 88 S.E. 568, 1916 Ga. LEXIS 173 (1916); Vickers v. Robinson, 157 Ga. 731, 122 S.E. 405, 1924 Ga. LEXIS 236 (1924).

Bail trover proceeding is a pending action within meaning of this section. Bernstein v. Higgenbotham, 148 Ga. 110, 96 S.E. 1, 1918 Ga. LEXIS 210 (1918) (see O.C.G.A. § 9-10-30).

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Pending proceeding is created by claim interposed to sale of land. Merchants' Bank v. Davis, 3 Ga. 112, 1847 Ga. LEXIS 81 (1847); Thomason v. Thompson, 129 Ga. 440, 59 S.E. 236, 1907 Ga. LEXIS 400 (1907).

Venue to enjoin levy and sale absent allegation of misconduct lies in county of plaintiff in fi. fa. — Venue of an equitable petition to enjoin the levy of an execution and the sale of the land levied upon, where no misconduct on the part of the levying officer is alleged, is in the county of the residence of the plaintiff in fi. fa., if a resident of this state, the levying officer not being a necessary party; and this applies also to a prayer for cancellation of a transfer of the execution by the levying officer, the marshall and the clerk of the superior court being mere nominal parties. Interstate Bond Co. v. Lee, 182 Ga. 238, 184 S.E. 866, 1936 Ga. LEXIS 322 (1936).

Action to dispossess one of land brought in county of defendant's residence is pending proceeding. — Proceeding to dispossess one from the possession of land, wherein a counter-affidavit and bond have been filed and the papers returned to the superior court of the county of the defendant's residence for trial of the issues raised, is, until disposed of, a pending proceeding within the exception provided in this section. West View Corp. v. Thunderbolt Yacht Basin, Inc., 208 Ga. 93, 65 S.E.2d 167, 1951 Ga. LEXIS 287 (1951) (see O.C.G.A. § 9-10-30).

Fieri facias on property and interposition and return of claim not operative as waiver of jurisdiction. — Where a fi. fa. is levied on property and a claim is interposed and returned to the proper court for trial, this does not operate as a waiver of jurisdiction by the claimant as to all the world, so as to authorize the original defendant in fi. fa. to file an equitable petition in the county where the claim is pending, asserting title in the claimant, and seeking to obtain equitable relief against the claimant, and, as a part thereof, to enjoin the execution and claim action, regardless of the residence of any person against whom substantial relief is sought. Bailey v. Williams, 214 Ga. 702, 107 S.E.2d 209, 1959 Ga. LEXIS 315 (1959).

Plaintiff in ejectment must allege defendant is resident of county or nonresident of state. — Plaintiff in ejectment cannot engraft upon the original petition an amendment in the nature of a petition in equity, praying for a judgment declaring a deed from plaintiff to the defendant, absolute in form, to be a security for debt only, and for an equitable accounting between the parties without alleging that the defendant is a resident of the county in which the action is pending or a nonresident of the state. Hutchings v. Merritt, 165 Ga. 650, 141 S.E. 652, 1928 Ga. LEXIS 38 (1928).

Action against resident and nonresident of state to be brought in county of resident. — All petitions for equitable relief shall be filed in the county of the residence of one of the defendants against whom substantial relief is prayed, and when substantial relief is prayed against two defendants, one alleged to be a resident of this state and the other alleged to be a nonresident, the petition should be brought in the superior court of the county in which the resident defendant resides. Builders' Supply Co. v. Hobbs, 169 Ga. 777, 151 S.E. 485, 1930 Ga. LEXIS 30 (1930).

Relief prayed against resident insurer not enough to confer jurisdiction over nonresident assignee. — Petition filed in Fulton County by named beneficiary in an insurance policy against the insurer, a company having an office and agent in Fulton County, and against an assignee of the policy, a resident of Bibb County, seeking to have the assignment declared void and cancelled, and praying that the insurer be enjoined from paying the proceeds of the policy to the assignee, and for a judgment and accounting against the insurer for the proceeds of the policy, did not pray for such equitable relief against the resident defendant as would draw to the jurisdiction the nonresident defendant for the equitable relief prayed against the nonresident. Reynolds

v. Solomon, 191 Ga. 1, 11 S.E.2d 201, 1940 Ga. LEXIS 603 (1940).

Exception as to injunctions not applicable to action seeking independent relief against nonresident. — The exception contained in this section to the effect that injunction actions to stay pending proceedings may be filed in the county where the proceedings are pending, provided no relief is prayed as to matters not included in such litigation, does not affect the venue of an action in which independent relief is sought against one who is a nonresident of the county in which the action is brought, and who is not a party to the action there pending. Terhune v. Pettit, 195 Ga. 793, 25 S.E.2d 660, 1943 Ga. LEXIS 291 (1943) (see O.C.G.A. § 9-10-30).

Defendant may transfer action at law by nonresident plaintiff to court of equity. — Where a nonresident plaintiff brings an action ex contractu in a court of law, which has no authority to entertain an equitable defense, to make another a party to the action, or to allow a setoff arising ex delicto, a court of equity, in the county where the action is pending, may, on petition of the defendant in the pending action, enjoin the action at law in order to allow such defendant to set up and have adjudicated in the equity case, as to the nonresident plaintiff, all matters incidental to such litigation. Commercial Credit Corp. v. Davis, 207 Ga. 562, 63 S.E.2d 353, 1951 Ga. LEXIS 452 (1951).

Action at law by nonresident corporation in city court properly enjoined by superior court. — Where action ex contractu was filed by nonresident corporation against defendant in a city court of the defendant's residence, and such defendant filed an equitable petition in the superior court of the same county against the plaintiff in the pending action, alleging a cause of action ex delicto and the necessity of making another corporation a party to the case, and praying that the action in the city court be enjoined and that the defendant be granted legal and equitable relief, and where the petition was served on the attorneys of record of the plaintiff in the pending action, the court did not err in overruling the general demurrer (now motion to dismiss) of the plaintiff in the pending action. Commercial Credit Corp. v. Davis, 207 Ga. 562, 63 S.E.2d 353, 1951 Ga. LEXIS 452 (1951).

Action not brought in county of defendant's residence on matters not included in pending litigation properly dismissed. — Where the only defendant was a resident of one county, when the plaintiff instituted action against the defendant for equitable relief in the superior court of another county, and the petition prayed for relief as to matters not included in the defendant's pending application to probate a will in solemn form, the court did not err in sustaining the defendant's plea to the jurisdiction of the court and in dismissing the plaintiff's action. Spiller v. Chapman, 216 Ga. 456, 117 S.E.2d 536, 1960 Ga. LEXIS 503 (1960).

Right of defendant to have superior court enjoin action at law for equitable setoff. — If the plaintiff's action is pending in a city court, the defendant, in order to utilize right of equitable setoff may apply to the superior court, as a court of equity, to enjoin the common-law proceeding in the city court and take jurisdiction of the entire controversy between the parties and make a decree doing complete justice between them. Europa Hair, Inc. v. Browning, 133 Ga. App. 753, 212 S.E.2d 862, 1975 Ga. App. LEXIS 2272 (1975).

Court of pending action has jurisdiction of cross claim for recovery of legacy. — If a cross bill (now cross claim) to an action for the recovery of a legacy should be necessary, under this section, the court of the county in which the original action is pending has jurisdiction of it. Bowman v. Long, 27 Ga. 178, 1859 Ga. LEXIS 28 (1859) (see O.C.G.A. § 9-10-30).

Court without jurisdiction to make third person party to cross action. — Where, to an action at law brought by a resident of Polk County against a defendant residing in Fulton County, an answer in the nature of a cross action was filed, in which substantial equitable relief was prayed against the plaintiff and a third party who was also a resident of Polk County, it was erroneous to make the latter, over the third party's objection, a party, and to refuse the third party's motion to dismiss the cross action as to the third party, the ground of such objection

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and motion being that the court had no jurisdiction to grant as to the third party the relief sought. Terhune v. Pettit, 195 Ga. 793, 25 S.E.2d 660, 1943 Ga. LEXIS 291 (1943).

RESEARCH REFERENCES

Am. Jur. 2d.

77 Am. Jur. 2d, Venue, §§ 17.

C.J.S.

92A C.J.S., Venue, §§ 5, 36, 88, 131 et seq.

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National bank as subject to suit outside county of its residence, 86 A.L.R. 47.

Right to lay venue of action against municipality in county other than that in which it is situated, 93 A.L.R. 500.

Right to maintain single suit to foreclose separate mortgages, securing same debt or portions thereof, upon real property in different counties, 110 A.L.R. 1477.

Injunction on ground of inconvenience against prosecuting action in particular state or district, 115 A.L.R. 237.

Right of defendant, upon motion made or renewed after plaintiff has closed his case without proving liability on part of codefendant, to change of venue to the county or district which would have been the proper venue but for the joinder of the codefendant, 140 A.L.R. 1287.

Venue of suit to enjoin nuisance, 7 A.L.R.2d 481.

Proper county for bringing replevin, or similar possessory action, 60 A.L.R.2d 487.

Venue of action for specific performance of contract pertaining to real property, 63 A.L.R.2d 456.

Independent venue requirements as to cross complaint or similar action by defendant seeking relief against a codefendant or third party, 100 A.L.R.2d 693.

Venue of wrongful death action, 58 A.L.R.5th 535.

9-10-31. Actions against certain codefendants residing in different counties; pleading requirements; application.

(a) The General Assembly finds that Paragraph IV of Section II of Article VI of the Georgia Constitution permits a trial and entry of judgment against a resident of Georgia in a county other than the county of the defendant's residence only if the Georgia resident defendant is a joint obligor, joint tort-feasor, joint promisor, copartner, or joint trespasser.

(b) Subject to the provisions of Code Section 9-10-31.1, joint tort-feasors, obligors, or promisors, or joint contractors or copartners, residing in different counties, may be subject to an action as such in the same action in any county in which one or more of the defendants reside.

(c) In any action involving a medical malpractice claim as defined in Code Section 9-9-60, a nonresident defendant may require that the case be transferred to the county of that defendant's residence if the tortious act upon which the medical malpractice claim is based occurred in the county of that defendant's residence.

(d) If all defendants who reside in the county in which an action is pending are discharged from liability before or upon the return of a

verdict by the jury or the court hearing the case without a jury, a nonresident defendant may require that the case be transferred to a county and court in which venue would otherwise be proper. If venue would be proper in more than one county, the plaintiff may elect from among the counties in which venue is proper the county and the court in which the action shall proceed.

(e) Nothing in this Code section shall be deemed to alter or amend the pleading requirements of Chapter 11 of this title relating to the filing of complaints or answers.

History.

Orig. Code 1863, § 3315; Code 1868, § 3327; Code 1873, § 3404; Code 1882, § 3404; Civil Code 1895, § 4952; Civil Code 1910, § 5529; Code 1933, § 3-204; Ga. L. 1999, p. 734, § 1; Ga. L. 2001, p. 4, § 9; Ga. L. 2005, p. 1, § 2/SB 3.

Cross references.

Suits against joint obligors, copartners, or joint trespassers, Ga. Const. 1983, Art. VI, Sec. II, Para. IV.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1999, "tort-feasors" was substituted for "tortfeasors" in the first sentence of subsection (a) (now subsection (b)).

Editor's notes.

Ga. L. 1999, p. 734, § 2, not codified by the General Assembly, provides: "It is the intent of the General Assembly through this Act to provide for a fairer and more predictable rule of venue in actions involving joint or joint and several tort-feasors, obligors or promisors, or joint contractors, or copartners, residing in different counties; to establish venue in such actions prior to the commencement of trial in a manner that is fair and constitutionally sound; to eliminate the waste of time and resources to courts and parties under the vanishing venue doctrine; and to bring the law of venue into conformity with the language of Article IV, Section II, Paragraph IV of the Georgia Constitution of 1983."

Ga. L. 2005, p. 1, § 1, not codified by the General Assembly, provides: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Law reviews.

For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

For note, "Venue in Multidefendant Civil Practice in Georgia," see 6 Ga. State U.L. Rev. 427 (1990).

For note on 1999 amendment to this section, see 16 Ga. St. U.L. Rev. 7 (1999).

For annual survey article discussing trial practice and procedure, see 51 Mercer L. Rev. 487 (1999).

For annual survey of trial practice and procedure, see 56 Mercer L. Rev. 433 (2004).

For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005).

For annual survey of trial practice and

procedure, see 57 Mercer L. Rev. 381 (2005).

For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007).

For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008).

JUDICIAL DECISIONS

Action against joint defendants to be brought in county of residence of either. — Ga. L. 1949, §§ 4-6 (see O.C.G.A. § 15-21-56) did not overrule Ga. Const. 1976, Art. VI, Sec. II, Para. IV (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI), providing that civil actions generally shall be brought in the county of the defendant's residence; where there are joint defendants, however, such an action may be brought in the county of residence of either. Banks County v. Stark, 88 Ga. App. 368, 77 S.E.2d 33, 1953 Ga. App. LEXIS 1091 (1953).

Insurer and contractor held not to be joint obligors. — Where a county board of education contracted with a construction company to renovate a portion of an elementary school, but, during renovation, a fire (allegedly caused by the contractor's negligence) partially destroyed not only the section being renovated, but other portions of the school building as well, and a "builder's risk" insurance policy covering the renovation named as insureds both the construction company and the county board of education, although the construction company was a resident of Stephens County, the board of education sued both the insurance company and the construction company in Rabun County, the locale of the insured property, as "joint obligors," it was held that the defendants were not joint obligors. The school district's actions were not only for different injuries but one was ex contractu (against the insurance company) and the other was ex delicto (against the construction company). Currahee Constr. Co. v. Rabun County Sch. Dist., 180 Ga. App. 471, 349 S.E.2d 487, 1986 Ga. App. LEXIS 2195 (1986).

Service by sheriff outside of the sheriff's county allowed. — Service in another county by the sheriff of the county where suit was brought and where a joint obligor resided was permitted. Re/Max 100 of Sandy Springs, Inc. v. Tri-Continental Leasing Corp., 177 Ga. App. 111, 338 S.E.2d 542, 1985 Ga. App. LEXIS 2473 (1985).

Venue against nonresident governed by long-arm statute. — An individual defendant who lives outside the state does not "reside" in Georgia so as to be subject to the joint obligor venue provisions, and venue against the nonresident individual is proper only where authorized by the long-arm statute. Goodman v. Vilston, Inc., 197 Ga. App. 718, 399 S.E.2d 241, 1990 Ga. App. LEXIS 1448 (1990), cert. denied, No. S91C0418, 1991 Ga. LEXIS 480 (Ga. Jan. 31, 1991).

Action jointly against residents and nonresidents to be brought where jurisdiction over nonresident is obtainable. — Where residents and nonresidents are joint obligors or joint tortfeasors, action against them may be brought in any county in the state in which jurisdiction can be obtained over the nonresident defendant. Nelson Assocs. v. Grubbs, 135 Ga. App. 947, 219 S.E.2d 607, 1975 Ga. App. LEXIS 1882 (1975).

Transfer of jurisdiction improper. — Consent judgment entered against the sole resident defendant/joint tortfeasor did not amount to a discharge from liability entitling the nonresident defendants/joint tortfeasors to transfer the action. Nalley v. Baldwin, 261 Ga. App. 713, 583 S.E.2d 544, 2003 Ga. App. LEXIS 752 (2003).

Trial court erred in granting transfer motion. — In a wrongful death medical malpractice suit, the trial court erred in granting the plaintiff's motion to transfer venue of the case because the remaining defendant had waived the defendant's venue defenses and, therefore, the plaintiff had no standing to require the trial court to transfer the case to the county where the defendant resided when the suit was filed. Richardson v. Gilbert, 319

Ga. App. 72, 733 S.E.2d 783, 2012 Ga. App. LEXIS 894 (2012).

Venue proper as to nonresident, resident, and joint obligor defendants. — Where a nonresident admits jurisdiction, the defendant against whom substantial relief is prayed is a resident, and a second defendant is a joint obligor of the first, venue is proper as to all parties. Cheek v. Savannah Valley Prod. Credit Ass'n, 244 Ga. 768, 262 S.E.2d 90, 1979 Ga. LEXIS 1403 (1979).

Venue proper in county where co-defendant's office located. — Trial court's order that venue was proper in Twiggs County was proper in a declaratory judgment action between an owner and a corporation arising from leases between the parties for facilities because one of the facilities at issue was located in Twiggs County and the corporation's subsidiary, a co-defendant, had an office and transacted business in Twiggs County. Mariner Healthcare, Inc. v. Foster, 280 Ga. App. 406, 634 S.E.2d 162, 2006 Ga. App. LEXIS 867 (2006), cert. denied, No. S06C2005, 2006 Ga. LEXIS 798 (Ga. Oct. 2, 2006).

Proof of cause of action against resident required to maintain action against nonresident. — In order to maintain action against a nonresident joint tortfeasor, it is essential that a cause of action be alleged and proven against the resident defendant. Chitty v. Jones, 210 Ga. 439, 80 S.E.2d 694, 1954 Ga. LEXIS 339 (1954).

Court without jurisdiction to enter judgment against nonresident where resident discharged. — Where joint tortfeasors residing in different counties are sued in the county of one, and on the trial of the case the resident defendant is discharged and a verdict returned solely against the nonresident defendant, the court is without jurisdiction to enter a judgment against the nonresident defendant. O'Neill v. Western Mtg. Corp., 153 Ga. App. 151, 264 S.E.2d 691, 1980 Ga. App. LEXIS 1716 (1980).

Effect of judgment against resident. — Where a single suit is brought against several joint tortfeasors in a county where one of them is a resident, and the others reside outside the county, a consent judgment and an agreement not to enforce the judgment constitute a finding that the resident is liable and do not deprive the trial court of jurisdiction over the nonresident defendants in the county where suit was brought. Motor Convoy, Inc. v. Brannen, 194 Ga. App. 795, 391 S.E.2d 671, 1990 Ga. App. LEXIS 326, aff'd, 260 Ga. 340, 393 S.E.2d 262, 1990 Ga. LEXIS 275 (1990).

Corporation resident of same county as other tortfeasors and also resident of different county. — A corporation which is sued as a joint tortfeasor and is deemed to be a resident of the same county as other joint tortfeasors with which it is joined and is also considered to be a resident of another county in which neither of the other joint tortfeasors resides is a resident of a "different" county within the meaning of this section. Richards v. Johnson, 219 Ga. 771, 135 S.E.2d 881, 1964 Ga. LEXIS 401 (1964) (see O.C.G.A. § 9-10-31).

Action against nonresident corporation and resident noncorporate defendant proper in county of latter. — Even where a defendant corporation has no office, agent, or place of business in the county where action is brought, and regardless of whether the other defendant was an independent contractor or an employee of the corporation, venue is proper if the petition alleges facts which state a claim against the defendants as joint tortfeasors and the noncorporate defendant is a resident of the county in which the action is brought. Del-Cook Timber Co. v. Brown, 124 Ga. App. 67, 183 S.E.2d 81, 1971 Ga. App. LEXIS 814 (1971).

Action against corporation and noncorporate defendant proper in county where former has office. — A nonresident corporation is, for purposes of action, a resident of the county of this state in which it has an office, agent, and place of business, and an action will lie against such corporation and a resident joint defendant tortfeasor in such county, even though the resident joint tortfeasor resides in a different county. Nelson Assocs. v. Grubbs, 135 Ga. App. 947, 219 S.E.2d 607, 1975 Ga. App. LEXIS 1882 (1975).

Fact that partnership has place of business in state does not establish

venue as to the partners. Reading Assocs., Ltd. v. Reading Assocs. of Ga., Inc., 236 Ga. 906, 225 S.E.2d 899, 1976 Ga. LEXIS 1065 (1976).

Constitutional and statutory provisions as to venue of actions against partners apply to limited partnership. Farmers Hdwe. of Athens, Inc. v. L.A. Properties, Ltd., 136 Ga. App. 180, 220 S.E.2d 465, 1975 Ga. App. LEXIS 1287 (1975).

Action against partnership to be brought only in county where at least one partner resides. — A partnership may be sued in any county in which one partner resides but it cannot be sued in a county where none of the partners reside even if the partnership may be doing business in the latter county. Farmers Hdwe. of Athens, Inc. v. L.A. Properties, Ltd., 136 Ga. App. 180, 220 S.E.2d 465, 1975 Ga. App. LEXIS 1287 (1975).

There is no basis for distinction as to partners who may be sued in county of either. Nelson Assocs. v. Grubbs, 135 Ga. App. 947, 219 S.E.2d 607, 1975 Ga. App. LEXIS 1882 (1975).

Court of county of partner's residence has jurisdiction regardless of citizenship. — Partnership may be sued in any county in which one of the partners has such a residence as will confer upon the courts of that county jurisdiction over the partner's person, regardless of the place of the partner's citizenship. Nelson Assocs. v. Grubbs, 135 Ga. App. 947, 219 S.E.2d 607, 1975 Ga. App. LEXIS 1882 (1975).

Venue in an action against the guarantor of unpaid promissory notes was not lost merely because no final judgment for money damages was entered against resident joint obligors, where summary judgment was granted against all joint obligors and final judgment for money damages was entered against only the guarantor, who resided in another county, and the others could not satisfy the liability of their debt. Hodge Residential, Inc. v. Bankers First Fed. Savs. & Loan Ass'n, 199 Ga. App. 474, 405 S.E.2d 302, 1991 Ga. App. LEXIS 536 (1991).

Retention of jurisdiction after venue vanishes. — After venue vanishes, the trial court still retains jurisdiction to order the case transferred to a court where venue is appropriate and the court also retains jurisdiction to consider and grant a defendant's motion to dismiss on a matter of abatement, such as insufficiency of service of process, rendering the need to transfer moot. Exum v. Melton, 244 Ga. App. 775, 536 S.E.2d 786, 2000 Ga. App. LEXIS 855 (2000), cert. denied, No. S00C1801, 2000 Ga. LEXIS 925 (Ga. Nov. 30, 2000).

Improper venue. — In a personal injury action by the passenger against the estate of the driver of the vehicle in which the passenger was riding and the owner of the truck, venue over the nonresident truck owner vanished when the passenger dismissed the owner from the main action, notwithstanding a pending cross-claim for wrongful death against the owner by the estate, a joint tortfeasor which had consented to judgment against it. Airgrowers, Inc. v. Tomlinson, 230 Ga. App. 415, 496 S.E.2d 528.

Not proper exercise of legislature's authority. — O.C.G.A. § 9-10-31(c) was not a proper exercise of the legislature's authority to enact laws which allowed the superior and state courts to change venue; furthermore, because O.C.G.A. § 9-10-31.1(a) vested power to change venue in the court, and not in a defendant, as did O.C.G.A. § 9-10-31(c), O.C.G.A. § 9-10-31.1(a) was proper under Ga. Const. 1983, Art. VI, Sec. II, Para. VIII, and did not violate Ga. Const. 1983, Art. VI, Sec. II, Para. IV. EHCA Cartersville, LLC v. Turner, 280 Ga. 333, 626 S.E.2d 482, 2006 Ga. LEXIS 114 (2006).

Medical malpractice action. — Gwinnett County trial court properly granted an emergency motion by a husband and wife, in their medical malpractice action, to transfer the case back to Fulton County, based on the Supreme Court of Georgia finding that O.C.G.A. § 9-10-31(c) was unconstitutional, as: (1) the husband and wife's participation in the litigation did not waive any issue of transfer; (2) the husband and wife did not acquiesce in the transfer, and the hospital failed to show how the husband and wife waived the issue when they failed to pursue an interlocutory appeal; and (3) the husband and wife were not to be denied a

remedy merely because there was no specific procedural mechanism to address their grievance; moreover, the Gwinnett County trial court's transfer order was not erroneous despite the fact that the statute that the court relied upon was later found to be unconstitutional, but rather, the result was that the case was to be tried in the original forum, which the hospital did not show was substantively prejudicial to its defense. Hosp. Auth. of Gwinnett County v. Rapson, 283 Ga. App. 297, 641 S.E.2d 286, 2007 Ga. App. LEXIS 44 (2007).

RESEARCH REFERENCES

Am. Jur. 2d.

77 Am. Jur. 2d, Venue, §§ 6, 33.

C.J.S.

92A C.J.S., Venue, § 116 et seq.

ALR.

Plaintiff's bona fide belief in cause of action against defendant whose presence in action is necessary to justify venue as against another defendant as sustaining venue against latter notwithstanding failure to establish cause of action, or dismissal of action, against former, 93 A.L.R. 949.

Venue of action for partnership dissolution, settlement, or accounting, 33 A.L.R.2d 914.

Independent venue requirements as to cross complaint or similar action by defendant seeking relief against a codefendant or third party, 100 A.L.R.2d 693.

9-10-31.1. Forums outside this state; waiver of statute of limitations defense.

(a) If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties and witnesses a claim or action would be more properly heard in a forum outside this state or in a different county of proper venue within this state, the court shall decline to adjudicate the matter under the doctrine of forum non conveniens. As to a claim or action that would be more properly heard in a forum outside this state, the court shall dismiss the claim or action. As to a claim or action that would be more properly heard in a different county of proper venue within this state, the venue shall be transferred to the appropriate county. In determining whether to grant a motion to dismiss an action or to transfer venue under the doctrine of forum non conveniens, the court shall give consideration to the following factors:

(1) Relative ease of access to sources of proof;

(2) Availability and cost of compulsory process for attendance of unwilling witnesses;

(3) Possibility of viewing of the premises, if viewing would be appropriate to the action;

(4) Unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his or her remedy;

(5) Administrative difficulties for the forum courts;

(6) Existence of local interests in deciding the case locally; and

(7) The traditional deference given to a plaintiff's choice of forum.

(b) A court may not dismiss a claim under this Code section until the defendant files with the court or with the clerk of the court a written stipulation that, with respect to a new action on the claim commenced by the plaintiff, all the defendants waive the right to assert a statute of limitations defense in all other states of the United States in which the claim was not barred by limitations at the time the claim was filed in this state as necessary to effect a tolling of the limitations periods in those states beginning on the date the claim was filed in this state and ending on the date the claim is dismissed.

History.

Code 1981, § 9-10-31.1, enacted by Ga. L. 2005, p. 1, § 2/SB 3.

Editor's notes.

Ga. L. 2005, p. 1, § 1, not codified by the General Assembly, provides: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Law reviews.

For article on 2005 enactment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005).

For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005).

For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007).

For article, "Ten Insights Into Georgia's Doctrine of Forum Non Conveniens," see 14 Ga. St. B.J. 26 (2008).

For annual survey on trial practice and procedure, see 65 Mercer L. Rev. 277 (2013).

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Constitutionality. — O.C.G.A. § 9-10-31(c) was not a proper exercise of the legislature's authority to enact laws which allowed the superior and state courts to change venue; furthermore, because O.C.G.A. § 9-10-31.1(a) vested power to change venue in the court, and not in a defendant, as did O.C.G.A. § 9-10-31(c), O.C.G.A. § 9-10-31.1(a) was proper under Ga. Const. 1983, Art. VI, Sec. II, Para. VIII, and did not violate Ga. Const. 1983, Art. VI, Sec. II, Para. IV. EHCA Cartersville, LLC v. Turner, 280 Ga. 333, 626 S.E.2d 482, 2006 Ga. LEXIS 114 (2006).

O.C.G.A. § 9-10-31.1(a) does not automatically divest a superior court of its jurisdiction; to the contrary, a transfer of venue under the statute occurs only after the trial court exercises initial jurisdiction over the case to determine whether, in the interest of justice and for the convenience of the parties and witnesses a claim or action would be more properly heard in a forum outside the state. Accordingly, § 9-

10-31.1(a) remains constitutional under Ga. Const. 1983, Art. VI, Sec. IV, Para. I. Hawthorn Suites Golf Resorts, LLC v. Feneck, 282 Ga. 554, 651 S.E.2d 664, 2007 Ga. LEXIS 590 (2007).

Georgia's forum non conveniens statute does not distinguish between motions to dismiss and motions to transfer, but rather states that in determining whether to grant a motion to dismiss an action or to transfer venue under the doctrine of forum non conveniens, the court shall give consideration to the seven factors. Therefore, trial courts must consider the factors in ruling on either kind of motion. Kennestone Hosp., Inc. v. Lamb, 288 Ga. App. 289, 653 S.E.2d 858, 2007 Ga. App. LEXIS 1188 (2007), overruled in part, Wang v. Liu, 292 Ga. 568, 740 S.E.2d 136, 2013 Ga. LEXIS 254 (2013).

Forum non conveniens in writing. — Strictly construing O.C.G.A. § 9-10-31.1, the Georgia Court of Appeals holds that the statute does not authorize a trial court to dismiss a case on the ground of forum non conveniens without a written motion from a party and the required stipulation. Nothing in the statute indicates that a trial court is authorized to raise the issue of forum non conveniens on its own or to dismiss a case on that ground without the required stipulation. Wegman v. Wegman, 338 Ga. App. 648, 791 S.E.2d 431, 2016 Ga. App. LEXIS 519 (2016).

Trial court abused the court's discretion by dismissing the complaint on the ground of forum non conveniens because O.C.G.A. § 9-10-31.1 does not authorize a trial court to dismiss a case on the ground of forum non conveniens without a written motion from a party and the required stipulation. Wegman v. Wegman, 338 Ga. App. 648, 791 S.E.2d 431, 2016 Ga. App. LEXIS 519 (2016).

Seven factors must be considered. — It is an abuse of discretion for a trial court not to address each of the seven factors listed in O.C.G.A. § 9-10-31.1(a), and in order to ensure that the trial court's decision-making process was guided by the statutory requirements, the trial court must make specific findings either in writing or orally on the record demonstrating that the court has considered all seven of the factors. The same rules apply to a court considering whether the court should decline jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, O.C.G.A. Art. 3, Ch. 9, T. 19, as an inconvenient forum in accordance with O.C.G.A. § 19-9-67. Murillo v. Murillo, 300 Ga. App. 61, 684 S.E.2d 126, 2009 Ga. App. LEXIS 1082 (2009).

No authority to dismiss to another country. — O.C.G.A. § 9-10-31.1 was inapplicable because it only allowed dismissal of actions to other states and not to other countries and, thus, did not authorize the dismissal of the instant action to another country based on forum non conveniens. La Fontaine v. Signature Research, Inc., 305 Ga. 107, 823 S.E.2d 791, 2019 Ga. LEXIS 58 (2019).

Forum non conveniens finding proper. — In a suit by a Delaware company against a consultant with regard to property the consultant had managed in Louisiana, the trial court properly held that Louisiana was a more convenient forum than Georgia; the relative ease of access to sources of proof favored Louisiana, the witnesses could more easily be compelled to testify there, any premises to be viewed were in Louisiana, the company would not be inconvenienced by traveling to Louisiana while the consultant would be inconvenienced by traveling to Georgia, a Georgia court would have difficulty in administering the case, and Georgia's interest in the matter was insignificant. Hawthorn Suites Golf Resorts, LLC v. Feneck, 282 Ga. 554, 651 S.E.2d 664, 2007 Ga. LEXIS 590 (2007).

Fulton County Superior Court did not err in transferring patients' medical malpractice case to Cobb County because the court made written findings of fact reflecting an analysis of the procedural framework of the forum non conveniens statute, O.C.G.A. § 9-10-31.1(a), specifically considering and weighing each of the seven factors enumerated, and the court further expressly included additional specifics with regards to those of the seven factors the court deemed relevant in the court's consideration and determination that transfer was warranted; the Cobb County Superior Court had subject-matter jurisdiction over medical malpractice cases,

and venue was also proper in that county, and because the patients made no showing of harm by the adjudication of their case in Cobb County Superior Court, the patients demonstrated no basis to disturb the judgment entered against the patients upon the Cobb County jury's verdict. Lamb v. Javed, 303 Ga. App. 278, 692 S.E.2d 861, 2010 Ga. App. LEXIS 333 (2010), cert. denied, No. S10C1260, 2010 Ga. LEXIS 702 (Ga. Sept. 7, 2010).

Trial court did not abuse the court's discretion in granting dismissal of the breach of contract action based on forum non conveniens, because the written finding of fact, supported by the evidence including lack of a showing that the computer equipment in Georgia would be necessary in the case and that the hirer had already filed a related suit in California, reflected an analysis of all seven factors. Woodard Events, LLC v. Coffee House Indus., LLC, 341 Ga. App. 526, 801 S.E.2d 322, 2017 Ga. App. LEXIS 237 (2017).

Appellants' complaint was properly dismissed as to the appellees based on forum non conveniens because most of the evidence relevant to the appellants' breach of fiduciary duty claim arose out of the trust agreements that were executed in Florida and pertained to real and personal property, including money deposits and expenditures, in Florida; all of the appellees and two of the appellants resided in Florida; there was minimal local interest in adjudicating the matter in Georgia; and Florida had an interest as it had determined the limited guardianship of the appellant father. Waldon v. Alger, 352 Ga. App. 496, 835 S.E.2d 312, 2019 Ga. App. LEXIS 589 (2019).

Specific findings required. — Before dismissing a case on the ground of forum non conveniens, a trial court must make specific findings either in writing or orally on the record demonstrating that the court has considered all seven of the factors set forth in O.C.G.A. § 9-10-31.1(a); a summary order is not sufficient.

When a trial court denied a motion to transfer venue without making findings of fact considering the factors in O.C.G.A. § 9-10-31.1, remand was required. The statute did not require findings only with regard to motions to dismiss, and it did not require findings only when a motion was granted. Kennestone Hosp., Inc. v. Lamb, 288 Ga. App. 289, 653 S.E.2d 858, 2007 Ga. App. LEXIS 1188 (2007), overruled in part, Wang v. Liu, 292 Ga. 568, 740 S.E.2d 136, 2013 Ga. LEXIS 254 (2013).

Because a superior court dismissed an action between two insurers on forum non conveniens grounds without finding on the record that: (1) an adequate alternative forum existed; (2) dismissal served the interest of justice and the convenience of the parties and witnesses, as guided by a consideration of the seven enumerated factors in O.C.G.A. § 9-10-31.1(a); and, therefore, (3) the claim or action was more properly heard in a forum outside the state, said dismissal amounted to an abuse of discretion warranting vacation of the dismissal, reinstatement of the case, and an order remanding the case for further hearing. Fed. Ins. Co. v. Chicago Ins. Co., 281 Ga. App. 152, 635 S.E.2d 411, 2006 Ga. App. LEXIS 1020 (2006), overruled in part, Wang v. Liu, 292 Ga. 568, 740 S.E.2d 136, 2013 Ga. LEXIS 254 (2013).

In a declaratory judgment action filed by an insurer seeking an order that the insurer had no duty to provide a defense or coverage under the insurance policy with the insured, because the trial court failed to comply with all the factors under O.C.G.A. § 9-10-31.1(a), and the vanishing venue doctrine did not apply, the venue transfer order was vacated, and the case was remanded for further hearing. Ga. Cas. & Sur. Co. v. Valley Wood, Inc., 290 Ga. App. 177, 659 S.E.2d 410, 2008 Ga. App. LEXIS 266 (2008), overruled in part, Wang v. Liu, 292 Ga. 568, 740 S.E.2d 136, 2013 Ga. LEXIS 254 (2013).

A trial court erred in denying Florida defendants' motion to dismiss a Georgia suit for forum non conveniens because the court failed to make specific findings, either in writing or orally, on the record, demonstrating that it had considered all of the factors in O.C.G.A. § 9-10-31.1(a) as required. GrayRobinson, P.A. v. Smith, 302 Ga. App. 375, 690 S.E.2d 656, 2010 Ga. App. LEXIS 53 (2010), cert. denied, No. S10C1021, 2010 Ga. LEXIS 752 (Ga. Sept. 7, 2010), overruled in part, Wang v.

Liu, 292 Ga. 568, 740 S.E.2d 136, 2013 Ga. LEXIS 254 (2013).

Although a trial court was authorized to dismiss the child custody portion of a husband's case on the basis of forum non conveniens under O.C.G.A. § 19-9-67(a), the court erred in dismissing the husband's divorce case as well because he had a right to litigate his divorce in his county of residence. Although the trial court could arguably decline to exercise jurisdiction over the divorce case under O.C.G.A. § 9-10-31.1, the trial court did not invoke § 9-10-31.1 or consider the factors that the statute enumerated. Spies v. Carpenter, 296 Ga. 131, 765 S.E.2d 340, 2014 Ga. LEXIS 887 (2014).

Requiring a finding on each statutory factor. — With regard to a motion to dismiss under the doctrine of forum non conveniens, the Georgia Supreme Court supposes that some case might require a finding on each factor under O.C.G.A. § 9-10-31.1(a) to adequately explain the decision but cannot say that such findings always or even usually are required; however, to the extent that the Georgia Court of Appeals has held otherwise in Park Ave. Bank v. Steamboat City Dev. Co., 317 Ga. App. 289 (2012); GrayRobinson, P.A. v. Smith, 302 Ga. App. 375 (2010); Ga. Cas. & Sur. Co. v. Valley Wood, Inc., 290 Ga. App. 177 (2008); Kennestone Hosp. v. Lamb, 288 Ga. App. 289 (2007); Federal Ins. Co. v. Chicago Ins. Co., 281 Ga. App. 152 (2006); Hewett v. Raytheon Aircraft Co., 273 Ga. App. 242 (2005), the Georgia Supreme Court overrules those decisions. By the statute's express terms, the trial court is required to consider each of the statutory factors enumerated in O.C.G.A. § 9-10-31.1(a), but the statute does not expressly require specific findings of fact on each factor. Wang v. Liu, 292 Ga. 568, 740 S.E.2d 136, 2013 Ga. LEXIS 254 (2013).

Denial of motion to transfer not improper. — Hospital failed to meet its burden of showing an abuse of the trial court's discretion in the denial of its motion to transfer venue of a medical malpractice case; among other things, there was no showing that litigating the matter in Bibb County, where several of the defendants resided, posed difficulties with regard to interviewing or securing witnesses and evidence or that relocating the case to Pulaski County would allow easier access; further, since Bibb and Pulaski Counties were not at great distance from one another, it was difficult to accept the assertions that what was at issue affected the receipt of medical care solely in Pulaski County or that there was no local interest in deciding the case in Bibb County. R.J. Taylor Mem. Hosp., Inc. v. Beck, 280 Ga. 660, 631 S.E.2d 684, 2006 Ga. LEXIS 451 (2006).

In a medical malpractice case, the trial court properly denied a hospital owner's motion to transfer the case from Fulton County to Spalding County, where the hospital was located, as the physician resided in Fulton County, the plaintiff's expert witnesses would be flying into an airport there, the attorneys were located there, and the record did not show a need for compulsory process or a need to view the premises or that litigation there would inconvenience the owner; furthermore, O.C.G.A. § 9-10-31.1(a) did not single out medical malpractice actions for different consideration or treatment as to venue. Blackmon v. Tenet Healthsystem Spalding, Inc., 288 Ga. App. 137, 653 S.E.2d 333, 2007 Ga. App. LEXIS 1083 (2007), rev'd, 284 Ga. 369, 667 S.E.2d 348, 2008 Ga. LEXIS 756 (2008), vacated in part, 294 Ga. App. 423, 669 S.E.2d 237, 2008 Ga. App. LEXIS 1216 (2008).

In an auto negligence suit, a trial court did not abuse the court's discretion by denying the defendant's motion to dismiss for forum non conveniens under O.C.G.A. § 9-10-31.1(a) because the court held a hearing and evaluated the defendant's claim as to the non conveniens factors and denied the motion based on the location of the collision, the close proximity of the two venues at issue, the comparative inconveniences to the parties, the location of the witnesses, and the difficulties of compulsory process in either venue. Gowdy v. Schley, 317 Ga. App. 693, 732 S.E.2d 774, 2012 Ga. App. LEXIS 799 (2012).

Trial court was not shown to have erred by denying the defendant's motion to dismiss under the doctrine of forum non conveniens because the defendant's counsel approved the form of the order on the

motion to dismiss; therefore, the defendant could not complain that the record had no explanation of the decision of the trial court so as to permit meaningful appellate review and because the record had no explanation of that decision, the defendant could not carry the burden to show that the trial court abused the court's discretion when the court denied the motion. Wang v. Liu, 292 Ga. 568, 740 S.E.2d 136, 2013 Ga. LEXIS 254 (2013).

Granting of motion to transfer improper. — Trial court erred in granting a debtor's motion to transfer a bank's action alleging breach of a loan agreement and promissory note because the trial court's focus solely on the note and the note's venue clause was in contradiction of O.C.G.A. § 13-2-2(4); the promissory note was a loan document subject to the document protocols that were attached to the loan agreement, and no showing was contained in the record that the forum selection clause in the document protocols was unenforceable. Park Ave. Bank v. Steamboat City Dev. Co., 317 Ga. App. 289, 728 S.E.2d 925, 2012 Ga. App. LEXIS 668 (2012), cert. denied, No. S12C2037, 2013 Ga. LEXIS 103 (Ga. Jan. 22, 2013), overruled in part, Wang v. Liu, 292 Ga. 568, 740 S.E.2d 136, 2013 Ga. LEXIS 254 (2013).

Dismissal on forum non conveniens grounds proper. — An appellant's suit to collect under a contract was properly dismissed on the ground of forum non conveniens under O.C.G.A. § 9-10-31.1(a) where: seven of the nine appellees were Puerto Rican corporations; the hotel project involved was in Puerto Rico; evidence and witnesses pertaining to the appellees' defense were primarily in Puerto Rico; any site visit would have to take place in Puerto Rico; over 60,000 documents relating to the project were being maintained there; other cases arising from the project were pending there; a Puerto Rican court had appointed a special master; and there was a question as to whether the appellees had sufficient minimum contacts with Georgia. John Hardy Group, Inc. v. Cayo Largo Hotel Assocs., 286 Ga. App. 588, 649 S.E.2d 826, 2007 Ga. App. LEXIS 830 (2007).

Alleged wife's suit for a declaration that she was the common law wife of a decedent was properly dismissed for forum non conveniens under O.C.G.A. § 9-10-31.1(a) because the issue was already pending in a Florida probate court, where the wife had filed for letters of administration, and involved mainly Florida residents and a Florida estate. Collier v. Wehmeier, 313 Ga. App. 421, 721 S.E.2d 919, 2011 Ga. App. LEXIS 1116 (2011).

Trial court did not err by ruling on the motion to dismiss without allowing the appellants to obtain discovery related to the issue of forum non conveniens because the appellants did not articulate any evidence which the appellants hoped such discovery would uncover that would be relevant to that issue. Hawkins v. Blair, 334 Ga. App. 898, 780 S.E.2d 515, 2015 Ga. App. LEXIS 738 (2015).

Trial court did not err in dismissing the appellants' complaint on the ground of forum non conveniens because the relative ease of access to sources of proof favored dismissal as every party to the suit was a resident of South Carolina and the law offices were located in South Carolina; the appellants' right to pursue the appellants remedy would not be adversely affected if the case was dismissed from the Georgia court as both parties were South Carolina residents and the alleged injury occurred in South Carolina where the money taken from the accounts was received by the law firm; and the alleged injury would have been suffered in South Carolina, and the appellees' last acts to make the appellees liable also would have occurred in South Carolina. Hawkins v. Blair, 334 Ga. App. 898, 780 S.E.2d 515, 2015 Ga. App. LEXIS 738 (2015).

Appeal dismissed as moot. — Patients' appeal of a judgment entered against them in a medical malpractice action on the ground that it was error to grant a motion to transfer filed by a hospital and corporation pursuant to the forum non conveniens statute, O.C.G.A. § 9-10-31.1, was dismissed as moot because the patients admitted in their appellate brief that their case had already been adjudicated, and it was too late for the patients to obtain an adjudication of their case in the Fulton County Superior Court; therefore, any determination by the court of appeals regarding whether

the Fulton County Superior Court was authorized under the forum non conveniens statute to transfer their case to Cobb County Superior Court for adjudication would be an abstract exercise unrelated to any existing facts or rights. Lamb v. Javed, No. A09A2234, 2010 Ga. App. LEXIS 44 (Ga. Ct. App. Jan. 19, 2010).

Waiver of claim. — Patients waived their claim that the Fulton Superior Court failed to make oral or written findings of fact reflecting an analysis of the seven factors enumerated in O.C.G.A. § 9-10-31.1(a) because they acquiesced to the transfer order; the patients chose not to challenge the propriety of the transfer ruling on the grounds they asserted on appeal, despite having options and the opportunity to do so, and there was no dispute that the Cobb County Superior Count had subject-matter jurisdiction over medical malpractice cases and that venue was also proper in that county. Lamb v. Javed, No. A09A2234, 2010 Ga. App. LEXIS 44 (Ga. Ct. App. Jan. 19, 2010).

In a payee's action alleging that the makers breached promissory notes, the trial court erred in granting the makers' motion to dismiss under the forum non conveniens statute, O.C.G.A. § 9-10-31.1, because the language of the forum selection clauses in the notes precluded the makers from seeking to dismiss the cases based on the doctrine of forum non conveniens and since the makers agreed in the makers' promissory notes to waive any claims contrary to the provisions of the forum selection clauses, the makers waived the ability to seek such a determination under the statute; O.C.G.A. § 9-10-31.1(a) provides for the forum non conveniens determination to occur on written motion of a party, and the statute does not prohibit contracting parties from waiving the parties' option of moving for transfer or dismissal under the statute. Int'l Greetings USA, Inc. v. Cammack, 306 Ga. App. 786, 703 S.E.2d 386, 2010 Ga. App. LEXIS 1061 (2010).

Appellate review. — When an appeal properly is taken from the grant or denial of a motion to dismiss under the doctrine of forum non conveniens, the appellant is entitled to meaningful appellate review, even if that review is only for an abuse of discretion. Wegman v. Wegman, 338 Ga. App. 648, 791 S.E.2d 431, 2016 Ga. App. LEXIS 519 (2016).

Transfer of divorce case. — Georgia Supreme Court held that a superior court can transfer a divorce case to another proper venue under the doctrine of forum non conveniens pursuant to O.C.G.A. § 9-10-31.1(a) without offending Ga. Const. 1983, Art. VI, Sec. II, Para. I. McInerney v. McInerney, 313 Ga. 462, 870 S.E.2d 721, 2022 Ga. LEXIS 66 (2022).

9-10-32. Action against maker and endorser residing in different counties.

Where the maker and endorser of a promissory note who reside in different counties are subjected to an action in the county where the maker resides, as provided by Article VI, Section II, Paragraph V of the Constitution of this state, service of a copy of the original pleading and process on the endorser, as provided in the case of joint obligors and promisors, shall be deemed sufficient.

History.

Orig. Code 1863, § 3266; Code 1868, § 3277; Code 1873, § 3353; Code 1882, § 3353; Civil Code 1895, § 5012; Civil Code 1910, § 5594; Code 1933, § 3-303; Ga. L. 1983, p. 3, § 48.

Cross references.

Form of complaint on promissory note, § 9-11-103.

RESEARCH REFERENCES

Am. Jur. 2d.
62B Am. Jur. 2d, Process, § 43. 77 Am. Jur. 2d, Venue, §§ 29, 34.

C.J.S.
72 C.J.S., Process, §§ 8, 124, 133 et seq.

9-10-33. Action against nonresident found in state.

A person who is not a citizen of this state, passing through or sojourning temporarily in the state, may be subject to an action in any county thereof in which he may be found at the time when the action is brought.

History.
Orig. Code 1863, § 3318; Code 1868, § 3339; Code 1873, § 3416; Code 1882, § 3416; Civil Code 1895, § 4954; Civil Code 1910, § 5531; Code 1933, § 3-206.

Cross references.
Personal jurisdiction over nonresident generally, § 9-10-90.

Law reviews.
For article discussing aspects of third party practice (impleader) under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 355 (1968).

For comment on White v. Henry, 232 Ga. 64, 205 S.E.2d 206 (1974), see 26 Mercer L. Rev. 317 (1974).

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This section applies to actions by creditors against foreign executors. Johnson v. Jackson, 56 Ga. 326, 1876 Ga. LEXIS 283 (1876) (see O.C.G.A. § 9-10-33).

Section applicable to nonresident voluntarily attending city court to answer to accusation for misdemeanor against the nonresident. Rogers v. Rogers, 138 Ga. 803, 76 S.E. 48, 1912 Ga. LEXIS 718 (1912) (see O.C.G.A. § 9-10-33).

If nonresident abandons his wife in this state, bill by her for alimony will lie against him if he is found and served in any county of this state. Campbell v. Campbell, 67 Ga. 423, 1881 Ga. LEXIS 196 (1881).

This section is applicable to foreign corporations. Williams v. East Tenn., V. & Ga. Ry., 90 Ga. 519, 16 S.E. 303, 1892 Ga. LEXIS 212 (1892) (see O.C.G.A. § 9-10-33).

This section applies where contract of insurance was made in state, but company maintained no agency here. Equity Life Ass'n v. Gammon, 119 Ga. 271, 46 S.E. 100, 1903 Ga. LEXIS 784 (1903) (see O.C.G.A. § 9-10-33).

This section relates to venue rather than jurisdiction over the person. McPherson v. McPherson, 238 Ga. 271, 232 S.E.2d 552, 1977 Ga. LEXIS 988 (1977) (see O.C.G.A. § 9-10-33).

Section inapplicable where nonresident defendants out of state at time of filing petition. — This section has no application where the petition shows upon its face that the mother and child were residents of the state of Ohio and were located in Ohio at the time the petition for modification of custody decree was filed. Gates v. Shaner, 208 Ga. 454, 67 S.E.2d 569, 1951 Ga. LEXIS 408 (1951) (see O.C.G.A. § 9-10-33).

Personal service on citizen of another state constitutes institution of action against him. — The legal perfection of service by personal service of action upon a citizen of another state constitutes the institution of action against him, and the court has jurisdiction over him. Minsk v. Cook, 48 Ga. App. 567, 173 S.E. 446, 1934 Ga. App. LEXIS 131 (1934).

Jurisdiction of state extends to nonresidents temporarily sojourning in state. — A person not a citizen, and temporarily sojourning in this state, may be sued in any county in which he may be found at the time he is sued, for the jurisdiction of this state extends to "citi-

zens, denizens, or temporary sojourners." Cheeley v. Fujino, 131 Ga. App. 41, 205 S.E.2d 83, 1974 Ga. App. LEXIS 1318 (1974).

Temporary presence of nonresident tortfeasor insufficient to join other tortfeasors residing in other county. — The temporary presence of a nonresident tortfeasor in state is not such residence within the meaning of state Constitution as will authorize joining, in action against him in the county where he is found and served, other joint tortfeasors who reside in a different county or counties of this state. Benton Rapid Express v. Johnson, 202 Ga. 597, 43 S.E.2d 667, 1947 Ga. LEXIS 474 (1947).

Court acquired jurisdiction over nonresident sojourning in county and personally served. — Even though the allegations showed that the defendant was a resident of a foreign jurisdiction, yet where he was personally served with process while sojourning within county in which the court was located, where the petitioner resided, the court acquired jurisdiction under this section, O.C.G.A. § 50-2-21, and Ga. Const. 1983, Art. VI, Sec. II, Para. I. Miller v. Miller, 216 Ga. 535, 118 S.E.2d 85, 1961 Ga. LEXIS 269 (1961).

Where defendant voluntarily appears to defend criminal charge against the defendant, the defendant is liable to action as others are, and must answer thereto in like manner, but it would seem that one who did not voluntarily appear, but was forced into the state, would not be liable to action. Lomax v. Lomax, 176 Ga. 605, 168 S.E. 863, 1933 Ga. LEXIS 231 (1933).

Nonresident witness or suitor in attendance upon trial of any case in court is exempt from service of any writ or summons while so attending, and in going to or returning from the court. Ewing v. Elliott, 51 Ga. App. 565, 181 S.E. 123, 1935 Ga. App. LEXIS 407 (1935).

Exemption extends to any tribunal affecting judicial proceedings. — The privilege of exemption from service is not only assured while a nonresident is attending upon strictly judicial proceedings, but upon any tribunal whose business has reference to or is intended to affect judicial proceedings. Ewing v. Elliott, 51 Ga. App. 565, 181 S.E. 123, 1935 Ga. App. LEXIS 407 (1935).

Exemption extends to every person who in good faith attends as witness any proceeding where testimony is to be taken, according to the practice of the courts, to be used in establishing the rights of a party in any judicial proceeding. Ewing v. Elliott, 51 Ga. App. 565, 181 S.E. 123, 1935 Ga. App. LEXIS 407 (1935).

Exemption applicable to hearings before various quasi-judicial bodies. — Hearings before arbitrators, legislative committees, registers and commissioners in bankruptcy, and examiners and commissions to take depositions, are all embraced within the scope of application of the rule of nonresident immunity from service. Ewing v. Elliott, 51 Ga. App. 565, 181 S.E. 123, 1935 Ga. App. LEXIS 407 (1935).

Service on nonresident temporarily in county for taking depositions should be quashed. — If a person is present in a county other than that of the person's residence for the sole purpose of attending the taking of depositions in a case to which the person is a party, and advantage is taken of the person's presence to serve process on the person in another action and to compel the person to defend it in a jurisdiction other than that of the person's residence, the service of such process should be quashed. Ewing v. Elliott, 51 Ga. App. 565, 181 S.E. 123, 1935 Ga. App. LEXIS 407 (1935).

Nonresident's main purpose in coming into state must have been for taking depositions. — In order for a nonresident to be immune from process under the rule of exemption, the nonresident's main and controlling purpose in coming into this state must have been for the purpose of taking the depositions; this is the meaning of the term "good faith" when used in connection with this rule of exemption. Ewing v. Elliott, 51 Ga. App. 565, 181 S.E. 123, 1935 Ga. App. LEXIS 407 (1935).

Nonresident in state solely for taking depositions exempt from service regardless of purpose of depositions. — Where there is pending in the state of Florida an action of A against B, and, by

stipulation of counsel for both parties, B comes into this state solely for the purpose of taking depositions, B is exempt from service of civil process while taking such depositions and during a reasonable time going and coming, even though the attorney for B testified that the purpose of taking the depositions was to make opposing counsel believe that B would not be present at the trial of action in Florida and there was no intention to use the depositions. Ewing v. Elliott, 51 Ga. App. 565, 181 S.E. 123, 1935 Ga. App. LEXIS 407 (1935).

Corporation subject to jurisdiction as any other citizen of another state. — A corporation is for some purposes a citizen, and, if present, is no less subject to jurisdiction than any other citizen of another state; in addition, a corporation, though a citizen of but one state, may also be a resident of other states. Louisville & N.R.R. v. Meredith, 66 Ga. App. 488, 18 S.E.2d 51, 1941 Ga. App. LEXIS 535 (1941), aff'd, 194 Ga. 106, 21 S.E.2d 101, 1942 Ga. LEXIS 549 (1942).

Corporation subject to action brought in any jurisdiction where it does business through agent. — The true test of jurisdiction is not residence or nonresidence of the plaintiff, or the place where the cause of action originated, but whether the defendant can be found and served in the jurisdiction where the cause of action is asserted; and a corporation can be found in any jurisdiction where it transacts business through agents located in that jurisdiction. Aiken Asphalt Paving Co. v. Winn, 133 Ga. App. 3, 209 S.E.2d 700, 1974 Ga. App. LEXIS 947 (1974).

Nonresident agent served while physically present in the state. — Court had personal jurisdiction over the company and the agent since when a nonresident was found within the State of Georgia, O.C.G.A. § 9-10-33 provided the courts with a basis for personal jurisdiction independent from the long-arm statute. Because the agent was served with process while physically present within the state, the exercise of personal jurisdiction would comport with due process. Carrier v. Jordaan, 714 F. Supp. 2d 1204, 2008 U.S. Dist. LEXIS 114596 (S.D. Ga. 2008).

Registered office of corporations not invalidated by absence of registered agent. — In an action against a trucking company, venue was proper in the county in which the company had its registered office; even though the company's registered agent had moved out of state, documents filed with the Secretary of State reflected that the registered office remained in that county, and service could be made in the absence of the registered agent by mail addressed to the registered office. Rock v. Ready Trucking, Inc., 218 Ga. App. 774, 463 S.E.2d 355, 1995 Ga. App. LEXIS 879 (1995), cert. denied, No. S96C0254, 1996 Ga. LEXIS 271 (Ga. Jan. 26, 1996).

Soliciting of freight in county sufficient to permit service on railroad corporation. — Legal service may be perfected on a defendant railroad corporation which does business in this state, (i.e., has tracks in the state) by serving its soliciting freight agent who has an office in the county in which action is filed and service perfected, although the defendant does no business in the county other than that of the soliciting of freight. Louisville & N.R.R. v. Meredith, 66 Ga. App. 488, 18 S.E.2d 51, 1941 Ga. App. LEXIS 535 (1941), aff'd, 194 Ga. 106, 21 S.E.2d 101, 1942 Ga. LEXIS 549 (1942).

RESEARCH REFERENCES

C.J.S.

92A C.J.S., Venue, § 91.

ALR.

Power of court, in exercise of discretion, to refuse to entertain action for nonstatutory tort occurring in another state or country, 32 A.L.R. 6; 48 A.L.R.2d 800.

Suits and remedies against alien enemies, 137 A.L.R. 1361; 147 A.L.R. 1309; 148 A.L.R. 1386; 149 A.L.R. 1454; 152 A.L.R. 1451; 153 A.L.R. 1418; 153 A.L.R. 1419; 155 A.L.R. 1451; 156 A.L.R. 1448; 157 A.L.R. 1449.

Independent venue requirements as to cross complaint or similar action by defendant seeking relief against a codefendant or third party, 100 A.L.R.2d 693.

Forum non conveniens doctrine in state court as affected by availability of alternative forum, 57 A.L.R.4th 973.

9-10-34. Action against third-party defendant.

(a) As used in this Code section, the term:

(1) "Defending party" means a party to a civil action who is:

(A) A defendant who contends that a person or entity not a party to the action is or may be liable to the defendant for all or part of a plaintiff's claim against the defendant;

(B) A plaintiff who contends that a person or entity not a party to the action is or may be liable to the plaintiff for all or part of another party's claim against the plaintiff; or

(C) A third-party defendant who contends that a person or entity not a party to the action is or may be liable to the third-party defendant for all or part of a claim made in the action against the third-party defendant.

(2) "Third-party defendant" means any person or entity whom a defending party contends may be liable to the defending party for all or part of the claim made against the defending party in the action.

(b) The claim of a defending party against a third-party defendant may be tried in the county where the action in which the claim for which the third-party defendant may be wholly or partially liable to the defending party is pending; and such claim may be tried in such county even though the third-party defendant is not a resident of such county.

(c) The venue established under this Code section against a third-party defendant is dependent upon the venue over the defending party who brought the third-party defendant into the action, and if venue is lost over said defending party, whether through dismissal or otherwise, venue shall likewise be lost as to the third-party defendant.

History.

Code 1981, § 9-10-34, enacted by Ga. L. 1984, p. 1149, § 1; Ga. L. 1985, p. 149, § 9.

Cross references.

Constitutional authority for third-party venue provisions, Ga. Const. 1983, Art. VI, Sec. II, Para. VII.

Third-party practice generally, § 9-11-14.

Law reviews.

For article, "Defending the Lawsuit: A First-Round Checklist," see 22 Ga. St. B.J. 24 (1985).

For note, "Venue in Multidefendant Civil Practice in Georgia," see 6 Ga. State U.L. Rev. 427 (1990).

JUDICIAL DECISIONS

O.C.G.A. § 9-10-34 applied where the collision which underlay plaintiff's complaint and the third-party complaint occurred prior to the effective date of the section but the lawsuit was filed after the effective date. Davis v. Betsill, 178 Ga. App. 730, 344 S.E.2d 525, 1986 Ga. App. LEXIS 1723 (1986).

PART 2

CHANGE OF VENUE

Cross references.
Change of venue generally, Ga. Const. 1983, Art. VI, Sec. II, Para. VIII.
Transfer and change of venue, Uniform Rules for the Probate Courts, Rule 5.8.

9-10-50. When venue may be changed; how county for transfer to be selected; subsequent change of venue.

(a) Whenever, by an examination voir dire of the persons whose names are on the jury list and who are compellable to serve on the jury, the presiding judge is satisfied that an impartial jury cannot be obtained in the county where any civil case is pending, the civil case may be transferred to any county that may be agreed upon by the parties or their counsel.

(b) In the event the parties or their counsel fail or refuse to agree upon any county in which to try the case pending, the judge may select the county in which the same shall be tried and have the case transferred accordingly.

(c) When any civil case has been once transferred, the judge may again change the venue from the county to which the transfer was first made to any other county, in the same manner as the venue was first changed from the county in which the civil case was originally commenced.

History.
Ga. L. 1884-85, p. 35, § 1; Civil Code 1895, §§ 4955, 4956; Civil Code 1910, §§ 5532, 5533; Code 1933, §§ 3-207, 3-208.

Law reviews.
For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

For article surveying developments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981).

JUDICIAL DECISIONS

Legislative intent. — The language of this section manifests the legislative intent that a trial judge may transfer a civil case only when the trial judge is satisfied that an impartial jury cannot be obtained in the county where pending and that this determination shall be made by an examination voir dire of the persons whose names are on the jury list. Claxton Poultry Co. v. City of Claxton, 155 Ga. App. 308, 271 S.E.2d 227, 1980 Ga. App. LEXIS 2566 (1980) (see O.C.G.A. § 9-10-50).

Motion for change of venue properly denied absent sufficient proof of allegations. — The court has wide discretion as to the granting of a change of venue, and where there are no facts submitted to prove the allegations of the motion for change of venue, the motion is properly denied. Veal v. Paulk, 121 Ga.

App. 575, 174 S.E.2d 465, 1970 Ga. App. LEXIS 1285 (1970).

Pertinent inquiry regarding request for change of venue due to pretrial publicity. — Where a defendant has requested a change of venue due to pretrial publicity, the pertinent inquiry is the percentage of potential jurors who were so influenced by pre-trial publicity that they were excused for prejudice. Lumpkin v. State, 255 Ga. 363, 338 S.E.2d 431, 1986 Ga. LEXIS 503 (1986), overruled, Woodard v. State, 269 Ga. 317, 496 S.E.2d 896, 1998 Ga. LEXIS 289 (1998).

Decision to order change in venue in civil case is committed to the sound discretion of the trial court. Thompson v. Sawnee Elec. Membership Corp., 157 Ga. App. 561, 278 S.E.2d 143, 1981 Ga. App. LEXIS 1912 (1981).

Discretion of trial court not to be disturbed absent abuse of discretion. — The matter of whether a change of venue is appropriate lies within the sound discretion of the trial court, and this discretion will not be disturbed unless an abuse of this discretion is shown. Claxton Poultry Co. v. City of Claxton, 155 Ga. App. 308, 271 S.E.2d 227, 1980 Ga. App. LEXIS 2566 (1980).

Only purpose of voir dire questions is to ascertain whether or not a juror is impartial, and does not bear upon other qualifications of a juror, such as relationship. Alley v. Gormley, 181 Ga. 650, 183 S.E. 787, 1935 Ga. LEXIS 171 (1935).

Matters to be considered by judge in deciding question of change of venue. — In determining question of change of venue, the trial judge may examine by voir dire those persons named on the jury list, although such an undertaking is not required; the judge is also authorized to consider other evidence, such as the testimony of public witnesses, in order to throw light on the condition of the public mind. Claxton Poultry Co. v. City of Claxton, 155 Ga. App. 308, 271 S.E.2d 227, 1980 Ga. App. LEXIS 2566 (1980).

Judge had jurisdiction to vacate change of venue orders. — Judge did not lack jurisdiction to vacate the change of venue orders as nothing in the orders indicated that jurisdiction was being transferred or that the case would not be heard by that judge; it was apparent that the judge intended for the county to retain power over the case while changing the place where the trial would be conducted. Head v. Brown, 259 Ga. App. 855, 578 S.E.2d 555, 2003 Ga. App. LEXIS 285 (2003), cert. denied, No. S03C0951, 2003 Ga. LEXIS 579 (Ga. June 2, 2003).

Influence, which citizens of county who are parties to action possess, is no reason for a change of venue and is insufficient to show that an impartial jury cannot be obtained. Colonial Pipeline Co. v. Westlake Club, Inc., 112 Ga. App. 412, 145 S.E.2d 669, 1965 Ga. App. LEXIS 721 (1965).

Difficulty finding jurors unrelated to party. — The trial court did not abuse its discretion in granting a change of venue where, after personally examining 80 or 90 venire persons as to any relationship with an insurance company, the court qualified only 12 jurors for the panel. Holt v. Scott, 226 Ga. App. 812, 487 S.E.2d 657.

Proper test to ascertain whether pretrial publicity has sufficiently prejudiced a case. — The test as to whether pretrial publicity has so prejudiced a case that an accused cannot receive a fair trial is whether the jurors summoned to try the case have formed fixed opinions as to guilt or innocence of the accused from reading such publicity. Dampier v. State, 245 Ga. 427, 265 S.E.2d 565, 1980 Ga. LEXIS 812 (1980).

In order to establish that they did not receive a fair trial, plaintiffs must show: (1) that the setting of the trial was inherently prejudicial; or (2) that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible. Claxton Poultry Co. v. City of Claxton, 155 Ga. App. 308, 271 S.E.2d 227, 1980 Ga. App. LEXIS 2566 (1980).

Unnecessary to put forth voir dire questions where juror disqualified by relationship to party. — Although O.C.G.A. § 9-10-50 calls for the court to exercise its discretion with regard to a request for change of venue, upon examination by voir dire of the persons whose names are on the jury list and who are compellable to serve on the jury, if a juror

were disqualified by reason of relationship or for other cause, it would be unnecessary to proceed further by putting to the juror the voir dire questions. Thompson v. Sawnee Elec. Membership Corp., 157 Ga. App. 561, 278 S.E.2d 143, 1981 Ga. App. LEXIS 1912 (1981).

Change of venue not warranted. — There was no abuse of discretion in the finding that a fair trial could be had in the county; the latter judge found that, contrary to the earlier ruling, a change of venue was not warranted as the judge was satisfied that an impartial jury could be found in the county. Head v. Brown, 259 Ga. App. 855, 578 S.E.2d 555, 2003 Ga. App. LEXIS 285 (2003), cert. denied, No. S03C0951, 2003 Ga. LEXIS 579 (Ga. June 2, 2003).

RESEARCH REFERENCES

Am. Jur. 2d.

77 Am. Jur. 2d, Venue, § 48 et seq.

C.J.S.

92A C.J.S., Venue, §§ 184 et seq., 212, 229, 230, 299.

ALR.

What is "civil action" or "civil proceeding" within statute relating to disqualification of judge or change of venue, 102 A.L.R. 397.

Right of defendant, upon motion made or renewed after plaintiff has closed his case without proving liability on part of codefendant, to change of venue to the county or district which would have been the proper venue but for the joinder of the codefendant, 140 A.L.R. 1287.

Right of defendant in civil action to change of venue upon motion made after time specified by statute or rule in that regard, as affected by fact that codefendant had made such a motion within the prescribed period, 141 A.L.R. 1177.

Statute providing for change of judge or venue on ground of bias or prejudice as applicable to proceeding for modification of decree of divorce, 143 A.L.R. 411.

Venue of action for the cutting, destruction, or damage of standing timber or trees, 65 A.L.R.2d 1268.

Binding effect of order on motion for change of venue, where action is terminated otherwise than on merits and reinstituted, 85 A.L.R.2d 993.

Venue of civil libel action against newspaper or periodical, 15 A.L.R.3d 1249.

Right of accused in misdemeanor prosecution to change of venue on grounds of inability to secure fair trial and the like, 34 A.L.R.3d 804.

Change of venue as justified by fact that large number of inhabitants of local jurisdiction have interest adverse to party to state civil action, 10 A.L.R.4th 1046.

Questions as to Convenience and Justice of Transfer Under 28 U.S.C.A. § 1404(a) — Federal Appellate Personal Injury and Wrongful Death Cases, 37 A.L.R. Fed. 3d Art. 6.

Doctrine of "Intergovernmental Tax Immunity" as Codified in 4 U.S.C.A. § 411, 37 A.L.R. Fed. 3d Art. 10.

Effect of Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) upon Compensation of Chapter 7 Bankruptcy Trustees Under 11 U.S.C.A. §§ 326, 330, 37 A.L.R. Fed. 3d Art. 13.

9-10-51. Change of venue in action by county against county.

In all actions brought by one county against another county in the defending county, the judge shall change the venue to a county adjoining the one in which the action is brought, on the motion of the plaintiff, supported by the oath of the chairman or presiding official of the county governing authority of the county bringing the action, that in his opinion a fair and impartial trial cannot be had in the county in which the action is brought.

History.
Ga. L. 1898, p. 88, § 1; Civil Code 1910, § 5537; Code 1933, § 3-212.
Law reviews.
For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

RESEARCH REFERENCES

Am. Jur. 2d.
77 Am. Jur. 2d, Venue, § 48 et seq.
C.J.S.
92A C.J.S., Venue, §§ 184 et seq., 193, 209.

9-10-52. Transmittal of transcript of order and record to court of transfer.

The clerk of the court from which a case has been transferred shall send a true transcript of the order for the change of venue, together with the original record in the case, including depositions and orders and all pleadings, to the court of the county to which the case has been transferred.

History.
Ga. L. 1884-85, p. 35, § 2; Civil Code 1895, § 4957; Civil Code 1910, § 5534; Code 1933, § 3-209.

RESEARCH REFERENCES

Am. Jur. 2d.
77 Am. Jur. 2d, Venue, § 71 et seq.
C.J.S.
92A C.J.S., Venue, §§ 290 et seq., 300.

9-10-53. Conduct of proceedings following transfer.

After a case has been transferred, all further proceedings shall be conducted as if the case had been originally commenced in the court to which the same was transferred.

History.
Ga. L. 1884-85, p. 35, § 3; Civil Code 1895, § 4958; Civil Code 1910, § 5535; Code 1933, § 3-210.
Law reviews.
For article, "Appellate Practice and Procedure," see 63 Mercer L. Rev. 67 (2011).

JUDICIAL DECISIONS

Construction with O.C.G.A. § 5-3-34. — Although O.C.G.A. § 9-10-53 addresses the general conduct of further proceedings following a case transfer, O.C.G.A. § 5-3-34(b) sets forth the more specific rule governing the issuance of a certificate of immediate review for interlocutory appeals; thus, the general provisions of O.C.G.A. § 9-10-53 cannot override the clear and specific provisions of O.C.G.A. § 5-6-34(b) mandating that the certificate of immediate review be issued by the trial judge who entered the order in question. Mauer v. Parker Fibernet, LLC, 306 Ga. App. 160, 701 S.E.2d 599, 2010 Ga. App. LEXIS 882 (2010), cert. denied, No. S11C0234, 2011 Ga. LEXIS 199 (Ga. Feb. 28, 2011).

RESEARCH REFERENCES

Am. Jur. 2d.
77 Am. Jur. 2d, Venue, § 71 et seq.
Am. Jur. Proof of Facts.
Entitlement to a Stay or Default Judgment Relief Under the Soldiers' and Sailors' Civil Relief Act, 35 POF3d 323.
C.J.S.
92A C.J.S., Venue, § 284 et seq.
ALR.
Power to withdraw or modify order granting change of venue, 59 A.L.R. 362.
Binding effect of order on motion for change of venue, where action is terminated otherwise than on merits and reinstituted, 85 A.L.R.2d 993.

9-10-54. Payment of costs accrued at time of transfer.

All costs which have accrued at the time of the transfer of a case shall, at the termination of the case, be paid by the party or parties against whom the same are assessed to the proper officers of the county from which the case was transferred.

History.
Ga. L. 1884-85, p. 35, § 4; Civil Code 1895, § 4959; Civil Code 1910, § 5536; Code 1933, § 3-211.

RESEARCH REFERENCES

C.J.S.
92A C.J.S., Venue, §§ 286, 300.

ARTICLE 3

SERVICE

9-10-70. Service on resident minor over 14 temporarily outside state; return or refusal of receipt; time for filing defensive pleadings; appointment of guardian ad litem; effect of service on guardian or trustee.

(a) Anything to the contrary notwithstanding, in all instances where a minor, 14 years of age or older, is a legal resident of the county wherein the legal proceeding concerning such service is sought to be made but is temporarily residing or sojourning outside this state or outside the United States, service may be perfected upon the minor by registered or certified United States mail with return receipt attached or by statutory overnight delivery.

(b) When service is to be perfected by registered or certified mail or statutory overnight delivery, as provided for in subsection (a) of this Code section, the clerk or the judge of the court in which the matter is proceeding shall enclose a copy of the petition, order, or other document sought to be served on the minor in an envelope addressed to the minor at his or her last known address and shall mail the same forthwith with postage prepaid, noting on the records of the court the date and hour of

mailing, or shall send the same by statutory overnight delivery as provided in Code Section 9-10-12. When a receipt therefor is returned or if the sealed envelope in which the notice was mailed to the minor is returned to the sender by the appropriate postal authorities or commercial delivery company marked "Refused," giving the date of refusal, and the notation of refusal is signed or initialed by a postal employee or mail carrier or commercial delivery company employee to whom the refusal was made, then the clerk or judge shall attach the same to the original papers in the case or shall otherwise file it as a part of the records in the case and it shall be prima-facie evidence of service on the minor.

(c) When service upon a minor is perfected as set forth in subsections (a) and (b) of this Code section, the minor shall have 60 days from the date of receipt of the registered letter or statutory overnight delivery or the refusal thereof as shown on the receipt of refusal in which to file such defensive pleadings as may be necessary. No judgment or decree shall be rendered in the proceeding which shall adversely affect the interest of the minor until the 60 day period has elapsed unless the judgment or decree is expressly agreed or consented to by the duly appointed guardian ad litem of the minor as being in the best interest of the minor and unless the 60 day period provided for in this subsection has been expressly waived by the guardian ad litem. Each process issued in such cases shall be conformed to the 60 day provision set forth in this subsection.

(d) When the return of service provided for in this Code section is made to the proper court and an order is taken to appoint for the minor a guardian ad litem, and the guardian ad litem agrees to serve in writing, all of which shall be shown in the proceedings of the court, the minor shall be considered a party to the proceedings.

(e) In cases concerning minors 14 years of age or older who are temporarily sojourning or living outside this state or the United States, where the minor has a statutory or testamentary guardian or trustee representing the interest of the minor to be affected by a legal proceeding, service as usual on the guardian or trustee shall be sufficient to bind the minor's interest in his control to be affected by the proceedings.

History.

Code 1933, § 81-212.1, enacted by Ga. L. 1964, p. 301, § 1; Ga. L. 2000, p. 1589, § 5.

Editor's notes.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Law reviews.

For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969).

RESEARCH REFERENCES

C.J.S.
72 C.J.S., Process, §§ 37, 133 et seq.
ALR.
Construction and effect of provision for service of process against minor on a parent, guardian, or other designated person, 92 A.L.R.2d 1336.

9-10-71. Service by publication on nonresidents or unknown persons with interest in property in state.

(a) Where any nonresident or person unknown claims or owns title to or an interest, present or contingent, in any real or personal property in this state, service on the nonresident or unknown owner or claimant may be made by publication in cases affecting such property in proceedings brought:

(1) To remove a cloud therefrom or quiet title thereto;

(2) To cancel or set aside deeds, mortgages, liens, or encumbrances thereon;

(3) To establish, enforce, or foreclose liens thereon;

(4) To enforce, by decree for specific performance, any contract in reference thereto;

(5) To order the partition thereof by division or sale;

(6) To make any decree or order in which the subject of the action is real or personal property in this state in which a nonresident or unknown person has or may have or claims an interest, actual or contingent, and in which the relief demanded consists wholly or in part in excluding him from an interest therein;

(7) Where a nonresident or person unknown has or may have or may claim a present, future, or contingent interest in any property in this state; or

(8) Where a nonresident or person unknown may have or claim any interest in any trust estate in this state and it becomes necessary or proper or advantageous to order a sale of the whole or any part of the property.

(b) This Code section shall be supplemental to the other provisions in this Code providing for service by publication.

History.
Ga. L. 1895, p. 42, § 1; Civil Code 1895, §§ 4976, 4977; Civil Code 1910, §§ 5554, 5555; Code 1933, § 81-205.
Cross references.
Service of process by publication generally, § 9-11-4.
Law reviews.
For comment on Calhoun Nat'l Bank v. Bentley, 189 Ga. 355, 6 S.E.2d 288 (1939), see 2 Ga. B.J. 68 (1940).
For article, "The 1967 Amendments to the Georgia Civil Practice Act and the

Appellate Procedure Act," see 3 Ga. St. B.J. 383 (1967).

For article summarizing law relating to jurisdiction and venue over domestic and foreign corporations in Georgia, and service therein, see 21 Mercer L. Rev. 457 (1970).

JUDICIAL DECISIONS

This section applies exclusively to actions in rem; to hold otherwise would result in a collision with the due process clause of the federal Constitution. Caldwell v. Hill, 179 Ga. 417, 176 S.E. 381, 1934 Ga. LEXIS 299 (1934) (see O.C.G.A. § 9-10-71).

This section has no application where sole object is to deprive defendant of the defendant's right to act as trustee, and by express statement of petitioners does not seek to change the property rights, claims, or interests of anyone. Caldwell v. Hill, 179 Ga. 417, 176 S.E. 381, 1934 Ga. LEXIS 299 (1934) (see O.C.G.A. § 9-10-71).

This section does not purport to create any new ground of equity jurisdiction; it merely provides a method of service on nonresidents in cases where recognized equitable principles are involved. Grimmett v. Barnwell, 184 Ga. 461, 192 S.E. 191, 1937 Ga. LEXIS 584 (1937) (see O.C.G.A. § 9-10-71).

Personal jurisdiction necessary to permanently enjoin defendant. — The trial court was correct in concluding that personal jurisdiction over defendant was necessary to permanently enjoin defendant from enforcement of the wage assignment order against plaintiff, where defendant levied plaintiff's military wages due to arrearages in alimony and child support payments. Millard v. Millard, 204 Ga. App. 399, 419 S.E.2d 718, 1992 Ga. App. LEXIS 880 (1992).

In equitable actions brought against nonresident, service by publication can be had under this section; if there be in such cases a resident defendant against whom substantial relief is prayed, the action must be brought in the county where such defendant resides. Borden v. I.B.C. Corp., 220 Ga. 688, 141 S.E.2d 449, 1965 Ga. LEXIS 607 (1965) (see O.C.G.A. § 9-10-71).

Section applicable only to actions in rem. — A state statute authorizing service of process by publication or otherwise upon absent and nonresident defendants has no application to actions in personam; but it is sufficient authority for the institution of actions in rem, where, under recognized principles of law, such actions may be instituted against nonresident defendants. Irons v. American Nat'l Bank, 178 Ga. 160, 172 S.E. 629, 1933 Ga. LEXIS 34 (1933).

Service by publication on nonresident ineffectual for any in personam purpose. — Substituted service by publication, or in any other authorized form, is sufficient to inform a nonresident of the object of proceedings where property is once brought under the control of the court by seizure or some equivalent act; but where the action is brought to determine the nonresident's personal rights and obligations, that is, where it is merely in personam, such service upon the nonresident is ineffectual for any purpose. Irons v. American Nat'l Bank, 178 Ga. 160, 172 S.E. 629, 1933 Ga. LEXIS 34 (1933).

Service by publication on nonresident in action in rem authorized. — While the courts of this state have no extraterritorial jurisdiction and cannot make citizens of other states amenable to their process, or conclude them by a judgment in personam without their consent, or unless such a defendant has expressly or implicitly waived jurisdiction, yet where the subject of the action relates to an actionable interest or claim by the plaintiff in real or personal property located in this state, a court of equity of this state will have jurisdiction to render a decree in rem with respect to the particular property involved, so as to exclude the adverse interest of a nonresident who has been made a party to the proceeding, and who has been served by publication as provided by statute. Blount v. Metropoli-

tan Life Ins. Co., 190 Ga. 301, 9 S.E.2d 65, 1940 Ga. LEXIS 440 (1940).

Court without in personam jurisdiction over nonresident absent personal service or waiver of service. — In a proceeding where the nonresident is not served personally, and does not waive service, if the relief sought is only such as operates against the person, the court is without jurisdiction to render a decree granting such relief. Toomer v. Hopkins, 204 Ga. 34, 48 S.E.2d 733, 1948 Ga. LEXIS 531 (1948).

Georgia law does not provide for service by publication or otherwise upon nonresidents in actions in personam. James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 1971 U.S. App. LEXIS 10368 (5th Cir.), cert. denied, 404 U.S. 940, 92 S. Ct. 280, 30 L. Ed. 2d 253, 1971 U.S. LEXIS 555 (1971).

Judgments in personam cannot validly be rendered against nonresident defendants where service is had only by publication. James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 1971 U.S. App. LEXIS 10368 (5th Cir.), cert. denied, 404 U.S. 940, 92 S. Ct. 280, 30 L. Ed. 2d 253, 1971 U.S. LEXIS 555 (1971).

Nonresident corporation claiming transfer of stock from a domestic corporation may be served by publication. People's Nat'l Bank v. Cleveland, 117 Ga. 908, 44 S.E. 20, 1903 Ga. LEXIS 390 (1903).

Nonresident executor or testator who agreed to sell stock may be served by publication. Hamil v. Flowers, 133 Ga. 216, 65 S.E. 961, 1909 Ga. LEXIS 193 (1909).

Foreign stockholder against whom a minority stockholder seeks a receivership of stock may not be served by publication. Tennessee Fertilizer Co. v. Hand, 147 Ga. 588, 95 S.E. 81, 1917 Ga. LEXIS 297 (1917). See Forrester v. Forrester, 155 Ga. 722, 118 S.E. 373, 1923 Ga. LEXIS 158 (1923).

This section authorizes service on a nonresident grantee in an action to cancel a deed. Berry v. Williams, 141 Ga. 642, 81 S.E. 881, 1914 Ga. LEXIS 88 (1914) (see O.C.G.A. § 9-10-71).

Service by publication insufficient to foreclose law lien by attachment against nonresident. — No contract or law lien held by the plaintiff can be foreclosed by attachment without making the nonresident a party; publication under this section will not suffice. Owens v. Atlanta Trust & Banking Co., 119 Ga. 924, 47 S.E. 215, 1904 Ga. LEXIS 407 (1904) (see O.C.G.A. § 9-10-71).

Court without jurisdiction over nonresident in in personam action seeking settlement of partnership affairs. — A petition in equity seeking an accounting and settlement of partnership affairs and a decree of title to a one-half interest in land alleged to be the property of the partnership, the allegations of which show that legal title to the land is in the defendant, who paid the purchase price, held a deed to the property, and was in possession, is an action in personam; since the defendant, a nonresident, was not served and did not waive service, the superior court was without jurisdiction of the in personam action. Sternbergh v. McClure, 217 Ga. 278, 122 S.E.2d 217, 1961 Ga. LEXIS 424 (1961).

Service by publication sufficient in action by creditor seeking money judgment against tenant in common. — In an equitable action by a creditor against a nonresident tenant in common, seeking a money judgment and a special lien on the tenant's interest in the land, service may be perfected by publication as provided by this section. Calhoun Nat'l Bank v. Bentley, 189 Ga. 355, 6 S.E.2d 288, 1939 Ga. LEXIS 722 (1939).

Situs of insurance policy is state where it is actually held and possessed by insured. — The fact that an insurance policy was issued in another state where the insured and the beneficiary then resided, or that it was payable at the home office of the insurance company in a foreign state, does not operate to fix the status of the policy, as personal property, in a state other than the one where it is actually held and possessed by the insured, a resident of the county where the action is brought. Blount v. Metropolitan Life Ins. Co., 190 Ga. 301, 9 S.E.2d 65, 1940 Ga. LEXIS 440 (1940).

Service may be made by publication on nonresident claiming interest in real estate in state in a case where it is sought to enforce, by decree for specific performance, any contract in reference

thereto. Toomer v. Hopkins, 204 Ga. 34, 48 S.E.2d 733, 1948 Ga. LEXIS 531 (1948).

Service by publication sufficient in action for specific performance regarding title to lands. — Under proper allegations and prayers, in a proceeding seeking specific performance, the courts of this state can determine the title to lands within the state in the county where the land lies, although service is had on the nonresident defendant by publication only. Toomer v. Hopkins, 204 Ga. 34, 48 S.E.2d 733, 1948 Ga. LEXIS 531 (1948).

RESEARCH REFERENCES

Am. Jur. 2d.

62B Am. Jur. 2d, Process, § 206 et seq.

C.J.S.

72 C.J.S., Process, § 76 et seq.

ALR.

Jurisdiction of suit to remove cloud or quiet title upon constructive service of process against nonresident, 51 A.L.R. 754.

May suit for injunction against a nonresident rest upon constructive service or service out of state, 69 A.L.R. 1038.

Constructive service of process against nonresident in suit for specific performance of contract relating to real property within state, 93 A.L.R. 621; 173 A.L.R. 985.

Statute providing for service by publication on "unknown persons" in action relating to real property as permitting such service on persons in possession or occupation of the land, 146 A.L.R. 713.

Exemption of member of armed forces from service of civil process, 147 A.L.R. 1311; 148 A.L.R. 1388; 149 A.L.R. 1457; 150 A.L.R. 1420; 151 A.L.R. 1456; 152 A.L.R. 1452; 153 A.L.R. 1422; 154 A.L.R. 1448; 155 A.L.R. 1452; 156 A.L.R. 1450; 157 A.L.R. 1450; 158 A.L.R. 1450.

Suits and remedies against alien enemies, 155 A.L.R. 1451; 156 A.L.R. 1448; 157 A.L.R. 1449.

Constructive service of process in action against nonresident to set aside judgment, 163 A.L.R. 504.

Validity and effect of constructive service upon nonresident in action, otherwise in personam, seeking lien or title in respect to property in state described in pleadings, but not attached, 174 A.L.R. 417.

Difference between date of affidavit for service by publication and date of filing or of order for publication as affecting validity of service, 46 A.L.R.2d 1364.

9-10-72. Issuance of second original where defendants reside out of county.

If the defendant or any of the defendants reside outside the county where the action is filed, the clerk shall issue a second original and copy for such other county or counties and forward the same to the sheriff, who shall serve the copy and return the second original, with his entry thereon, to the clerk of the court from which the same issued.

History.

Orig. Code 1863, § 3254; Code 1868, § 3265; Code 1873, § 3341; Code 1882, § 3341; Civil Code 1895, § 4989; Civil Code 1910, § 5567; Code 1933, § 81-215; Ga. L. 1984, p. 966, § 1.

Law reviews.

For note, "How to Fill a Procedural Loophole: Re-evaluating the Ragan and Walker Analysis in Light of Federal Rule of Civil Procedure 4(M)," see 52 Ga. L. Rev. 581 (2018).

JUDICIAL DECISIONS

Second original to be directed to sheriff of county where defendant resides. — This section provides for the issuance of a second original of process directed to the sheriff of the county where the defendant resides. Callaway v. Harrold, Johnson & Co., 61 Ga. 111, 1878 Ga. LEXIS 39 (1878); Powell v. Perry, 63 Ga. 417, 1879 Ga. LEXIS 235 (1879); Strauss Bros. v. Owens, 6 Ga. App. 415, 65 S.E. 161, 1909 Ga. App. LEXIS 324 (1909); Estroff v. Kaplin, 33 Ga. App. 374, 126 S.E. 159, 1925 Ga. App. LEXIS 781 (1925) (see O.C.G.A. § 9-10-72).

Second original service of process may issue, by way of amendment, after the appearance term. White v. Hart, 35 Ga. 269, 1866 Ga. LEXIS 218 (1866); Cox v. Strickland, 120 Ga. 104, 47 S.E. 912, 1904 Ga. LEXIS 456 (1904).

Absent a defect on record, service of second original will be presumed to be valid. Williams v. Atlanta Nat'l Bank, 31 Ga. App. 212, 120 S.E. 658, 1923 Ga. App. LEXIS 856 (1923).

Service by the sheriff where action is pending may be set aside. Beasley v. Smith, 144 Ga. 377, 87 S.E. 293, 1915 Ga. LEXIS 208 (1915).

Nonresident landlord serviceable under section in joint action against landlord and resident tenant. — Where both the landlord and the tenant are charged with being negligent by one who alleges that one has been injured by reason of their joint acts, a joint action will lie against both defendants, and where the landlord does not reside in the county where the injury occurred and where the tenant resides, the action may be brought in the county of the residence of the tenant, and the landlord may be served with a second original of the action. Peake v. Stovall, 50 Ga. App. 595, 179 S.E. 287, 1935 Ga. App. LEXIS 231 (1935).

Service could be by original or second original. — Although appellant was incarcerated in the county jail in one county, the Superior Court of a different county correctly held that it had personal jurisdiction over appellant for purposes of resolving a dispute over title to property located in that county, and it was immaterial which county sheriff personally served appellant or whether that service was accomplished by delivery of the original or second original. Elrod v. Elrod, 272 Ga. 188, 526 S.E.2d 339, 2000 Ga. LEXIS 87 (2000).

RESEARCH REFERENCES

Am. Jur. 2d.
62B Am. Jur. 2d, Process, § 170.

C.J.S.
72 C.J.S., Process, §§ 100, 101.

9-10-73. Acknowledgment of service or waiver of process.

The defendant may acknowledge service or waive process by a writing signed by the defendant or someone authorized by him.

History.
Laws 1840, Cobb's 1851 Digest, p. 363.; Code 1863, § 3250; Code 1868, § 3261; Code 1873, § 3337; Code 1882, § 3337; Civil Code 1895, § 4983; Civil Code 1910, § 5561; Code 1933, § 81-211.

Law reviews.
For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005).

JUDICIAL DECISIONS

Mere acknowledgment of service or waiver of process in accordance with this section admits nothing, but puts the party in precisely the same situation as though process were annexed and service effected by the proper officer. Jackson v. Hitchcock, 48 Ga. 491, 1873 Ga. LEXIS 99 (1873). See also Humphries v. McWhorter & Brightwell, 25 Ga. 37, 1858 Ga. LEXIS 6 (1858); McBride v. Bryan, 67 Ga. 584, 1881 Ga. LEXIS 233 (1881) (see O.C.G.A. § 9-10-73).

In personam jurisdiction waivable in connection with acknowledgment of service. — Jurisdiction of the person may be waived as between the parties, and may be done in connection with an acknowledgment of service. Georgia Creosoting Co. v. Moody, 41 Ga. App. 701, 154 S.E. 294, 1930 Ga. App. LEXIS 1060 (1930).

Acknowledgment of service binding on defendant unaware of nature of papers absent fraud. — When plaintiff or someone for the plaintiff serves defendant with a copy of the petition with process attached and obtains the defendant's written acknowledgment of service, the fact that the defendant was not aware of the nature and character of the paper delivered to the defendant and did not know the contents of the writing which the defendant executed, or that it was an acknowledgment of service on the action in question, does not, standing alone, affect the jurisdiction of the court, as a person is generally committed to the contents of an instrument which the person signs, even though the person did not have actual knowledge thereof, in the absence of fraud or some other circumstance relieving the person of the imputation of inexcusable indifference or neglect. Ketchem v. Ketchem, 191 Ga. 140, 11 S.E.2d 788, 1940 Ga. LEXIS 622 (1940).

Acknowledgment sufficient even though defendant unaware of its import. — The acceptance by a defendant of a copy of a petition for divorce handed to her by counsel for the plaintiff husband, and an acknowledgment of service by her at the time on the original petition, was sufficient to give the court jurisdiction of her person (she being a resident of the county), even though she was not in fact aware of the nature of the paper delivered to her and did not know that she was acknowledging service of an action by her husband for divorce, where it affirmatively appeared that her failure to read the contents or otherwise ascertain the nature of the paper served on her and the writing to which she affixed her signature was attributable, if not to her own inexcusable indifference and inattention, to the conduct and representations of her own counsel, of which counsel for plaintiff had no knowledge or reasonable grounds for suspicion. Ketchem v. Ketchem, 191 Ga. 140, 11 S.E.2d 788, 1940 Ga. LEXIS 622 (1940).

Judgment rendered after acknowledgment obtained by fraud invalid. — When, in an action requiring personal service on the defendant, there is no official service of the petition but the case proceeds on an acknowledgment of service, by the defendant under this section, a verdict rendered in favor of the plaintiff is invalid, if the acknowledgment was, in fact, a forgery or was obtained by fraud, and a motion to set aside such verdict made at the same term at which it was rendered would be available, even though the defect does not appear on the face of the record. Ketchem v. Ketchem, 191 Ga. 140, 11 S.E.2d 788, 1940 Ga. LEXIS 622 (1940) (see O.C.G.A. § 9-10-73).

Acknowledgment by attorney for defendant prima facie authorized but rebuttable. — No warrant of attorney is required in Georgia, and an acknowledgment of service signed by one as attorney for the defendant is prima facie authorized until the contrary appears; this presumption may be rebutted by the party for whom the attorney purports to act if the party proceeds in due time, the burden being upon the party to show the want of authority in the attorney. Jackson v. Jackson, 199 Ga. 716, 35 S.E.2d 258, 1945 Ga. LEXIS 364 (1945).

An acknowledgment estops the attorney from later contending that the attorney acted without authority; thus, where no counter-showing is made

on behalf of the defendant by someone not estopped that the attorney did not in fact represent the defendant, the court did not err in ruling that the acknowledgment was authorized and binding upon the defendant. Jackson v. Jackson, 199 Ga. 716, 35 S.E.2d 258, 1945 Ga. LEXIS 364 (1945).

Attack on judgment for lack of personal service meritless after proper acknowledgment. — Where, after action for divorce was filed and process issued, a written acknowledgment of service was made by attorney for defendant in the defendant's presence and at the defendant's direction, an attack on the validity of the judgment rendered in such action, on the ground that the defendant was not personally served, is without merit. Nash v. Nash, 198 Ga. 527, 32 S.E.2d 379, 1944 Ga. LEXIS 446 (1944).

Time to file answer. — After a realty group acknowledged a waiver of service under O.C.G.A. § 9-10-73, the group had 30 days to file an answer, and upon failing to do so in that time period, a default judgment under O.C.G.A. § 9-11-55 was validly entered in favor of a flooring company despite the fact that the company failed to provide the group with notice pursuant to O.C.G.A. § 9-11-5(a); the group failed to assert a timely defense, and the default certificate filed by the company satisfied the requirements of Ga. Unif. Super. Ct. R. 15. SRM Realty Servs. Group, LLC v. Capital Flooring Enters., 274 Ga. App. 595, 617 S.E.2d 581, 2005 Ga. App. LEXIS 724 (2005), cert. denied, No. S05C2035, 2006 Ga. LEXIS 60 (Ga. Jan. 17, 2006).

Trial court did not err in granting a creditor's motion for default judgment on the ground that a debtor failed to answer the complaint within thirty days pursuant to O.C.G.A. § 9-11-12(a) because the trial court was authorized to conclude that the debtor's counsel executed an acknowledgment and waiver pursuant to O.C.G.A. § 9-10-73, that the debtor's answer was due within thirty days after the acknowledgment and waiver, and that because it failed to serve an answer within that thirty-day period, its answer was untimely; O.C.G.A. § 9-11-4 did not apply because the acknowledgment of service the creditor drafted and submitted to the debtor did not make reference to § 9-11-4, and the creditor also did not inform the debtor by means of the text prescribed in § 9-11-4(1). Satnam Waheguru Corp. v. Buckhead Cmty. Bank, 304 Ga. App. 438, 696 S.E.2d 430, 2010 Ga. App. LEXIS 553 (2010).

In a legal malpractice case in which the attorneys filed the attorney's answer late, believing that the attorney's acknowledgement of service gave the attorneys 60 days to respond under O.C.G.A. § 9-11-4(d)(3), but O.C.G.A. § 9-10-73 applied, which did not extend the response time, the trial court properly opened default upon their setting up the meritorious defense of an arbitration clause, and properly found that it was a "proper case" based on the attorney's reason and the lack of prejudice to the client. Summerville v. Innovative Images, LLC, 349 Ga. App. 592, 826 S.E.2d 391, 2019 Ga. App. LEXIS 203 (2019), aff'd in part, 309 Ga. 675, 848 S.E.2d 75, 2020 Ga. LEXIS 599 (2020), overruled in part, Bowen v. Savoy, 308 Ga. 204, 839 S.E.2d 546, 2020 Ga. LEXIS 133 (2020).

Stipulation conferring consensual powers on trustee not tantamount to waiver of service. — A stipulation in the deed of trust to the effect that the trustee "may enter consent to a decree, or a judgment, or a verdict, or both, following and enforcing this instrument and the debt hereby secured," does not dispense with the necessity of service or the equivalent thereof as a prerequisite to a valid action, and the case is not altered by the fact that one of the parties named as defendant in the action originally filed by the bank made a voluntary answer to such petition several terms after the appearance term, such defendant being the mere owner of the equity of redemption and having no authority to represent or bind the bondholders. City Bank & Trust Co. v. Graf, 177 Ga. 236, 170 S.E. 74, 1933 Ga. LEXIS 154 (1933).

The sole purpose of waiver of service is to avoid formal service, and courts should unhesitatingly hold that when a defendant executes such waiver of service the defendant is thereby precluded from thereafter complaining because of

the absence of service. Jones v. Jones, 209 Ga. 861, 76 S.E.2d 801, 1953 Ga. LEXIS 449 (1953).

Service intended for benefit and protection of defendant. — The law requires service not for form or as a snare to trap litigants or to prevent an adjudication of a legal controversy, but rather to put the defendant on notice that the defendant is being sued and to afford the defendant ample opportunity to be heard on any defense that the defendant may wish to make thereto; it is a right conferred upon a defendant for the defendant's own benefit and protection and the defendant is free to waive it if the defendant so chooses. Jones v. Jones, 209 Ga. 861, 76 S.E.2d 801, 1953 Ga. LEXIS 449 (1953).

Waiver may be executed before commencement of action. — A party may waive process, service of process, and the time of filing with respect to an action against the party; and such waiver, being a different matter from a confession of judgment, may be executed before the commencement of the action. Henry & Co. v. Johnson, 178 Ga. 541, 173 S.E. 659, 1933 Ga. LEXIS 42 (1933).

Waiver or acknowledgment void absent reference to particular action. — Unless the waiver or acknowledgment has reference to some particular action intended to be instituted in some particular court, it is void for uncertainty. Henry & Co. v. Johnson, 178 Ga. 541, 173 S.E. 659, 1933 Ga. LEXIS 42 (1933).

Defendant may waive service before petition is filed provided only that such waiver clearly identifies action to which it refers. Jones v. Jones, 209 Ga. 861, 76 S.E.2d 801, 1953 Ga. LEXIS 449 (1953).

Entry of waiver on bare petition constitutes waiver of process when issued. — Every defendant when signing a waiver of service is charged with knowledge that a bare petition, with no process or rule nisi, when process is not waived, is not an action and that there is no provision of law for filing or serving it in the absence of waiver and, hence, no reason whatever for a defendant to enter thereon a waiver of service; but, since the petition prays for process and the defendant knows that the law makes it mandatory that the clerk attach thereto a process, a signed entry of waiver of service thereon is a plain expression of intent to waive service of the process when issued. Jones v. Jones, 209 Ga. 861, 76 S.E.2d 801, 1953 Ga. LEXIS 449 (1953).

Because a notice and waiver of service did not satisfy the requirements of O.C.G.A. § 9-11-4(d)(3), it was deemed to be a waiver of service under O.C.G.A. § 9-10-73, and the 60-day time within which to answer under O.C.G.A. § 9-11-4(d)(3) did not apply; the waiver of service under O.C.G.A. § 9-10-73 did not require any particular form, and was merely an effort to dispense with the formality and expense of actual service. SRM Realty Servs. Group, LLC v. Capital Flooring Enters., 274 Ga. App. 595, 617 S.E.2d 581, 2005 Ga. App. LEXIS 724 (2005), cert. denied, No. S05C2035, 2006 Ga. LEXIS 60 (Ga. Jan. 17, 2006).

In executing waiver of service, defendant expects and intends that it shall be thereafter filed and that process issue as therein prayed and be attached thereto, for it is only when this had been done that service or waiver of service is required by law or would have any purpose whatever, and the waiver is intended for no purpose except as the legal substitute for service when, under the law, service would be required in the absence of such waiver. Jones v. Jones, 209 Ga. 861, 76 S.E.2d 801, 1953 Ga. LEXIS 449 (1953).

Written agreement and consent by defendant constitute waiver of process preventing attack of judgment. — Where, after waiving service, the defendant executes a written agreement relating to alimony and custody of children, and also enters a consent that the case be tried at the appearance term, these actions are equivalent to appearance and pleading, under former Code 1933, § 81-209, and would waive process; such conduct would also estop the defendant from attacking the judgment rendered in the case. Jones v. Jones, 209 Ga. 861, 76 S.E.2d 801, 1953 Ga. LEXIS 449 (1953).

Waiver of service entered on petition constitutes waiver of process. — Where an acknowledgment that a copy of the petition was received and a waiver of

all other and further service are entered upon the petition, signed by the defendant before it is filed, and two days thereafter the petition is filed and the clerk issues process as therein prayed, attaching same to the petition, the waiver of service constitutes a legal waiver of the service of the process, and the judgment rendered therein is not void because process was not served upon the defendant. Jones v. Jones, 209 Ga. 861, 76 S.E.2d 801, 1953 Ga. LEXIS 449 (1953).

Letter purporting to enter appearance of attorney not waiver of process. — Letter written by attorney to clerk of superior court, enclosing a card entitled "Request for Entry of Appearance," on which, over the attorney's name, appeared the words, "In the action of Oscar H. Baker v. Beatrice Johnston Baker, please enter my appearance for Beatrice Johnston Baker, libellee," did not constitute such appearance as would waive jurisdiction, service, or absence of process under this section. Baker v. Baker, 215 Ga. 688, 113 S.E.2d 113, 1960 Ga. LEXIS 307 (1960) (see O.C.G.A. § 9-10-73).

Only strongest of evidence can set aside acknowledgment. — While an acknowledgment of service executed by an attorney on behalf of an alleged client can be traversed and impeached by showing want of authority in the attorney, the acknowledgment of service is of itself evidence of a higher order, and can only be set aside upon evidence which is not only clear and convincing, but the strongest of which the nature of the case will admit. Newell v. Brown, 187 Ga. App. 9, 369 S.E.2d 499, 1988 Ga. App. LEXIS 566 (1988).

Acknowledgement sufficient to confer jurisdiction. — O.C.G.A. § 9-11-4(d) sets out a procedure for waiver of service, but it did not eliminate O.C.G.A. § 9-10-73 as an alternative method of obtaining service, which prescribed no particular form, and an acknowledgement signed by a motorist was sufficient to confer jurisdiction; while the injured person's counsel violated Ga. St. Bar R. 4-102(d):4.2(a) when counsel set the acknowledgment directly to the motorist, the motorist offered no evidence concerning the motorist's execution of the acknowledgment and thus the motorist failed to sustain the burden of proof required to challenge the sufficiency of service. Askins v. Colon, 270 Ga. App. 737, 608 S.E.2d 6, 2004 Ga. App. LEXIS 1383 (2004), cert. denied, No. S05C0637, 2005 Ga. LEXIS 307 (Ga. Apr. 26, 2005).

Agreement to waiver of service yet still filed answer late. — Trial court did not err in denying the motion for an extension of time to answer the complaint because the defendants agreed to a waiver of service yet still filed the answer late, the motion for an extension was made after the time for filing an answer had expired, and a judicial extension of the statutory time for filing the answer, in essence, would have allowed a circumvention of the default status of the action. Mecca Constr., Inc. v. Maestro Invs., LLC, 320 Ga. App. 34, 739 S.E.2d 51, 2013 Ga. App. LEXIS 113 (2013).

RESEARCH REFERENCES

Am. Jur. 2d.

62B Am. Jur. 2d, Process, §§ 260 et seq., 283 et seq.

C.J.S.

72 C.J.S., Process, §§ 30, 53, 155.

ALR.

Waiver of immunity from service of summons by failure to attack service, or to follow up an attack, before judgment entered thereon, 68 A.L.R. 1469.

Power of infant to acknowledge service of process or to bind himself by waiver or estoppel in that regard, 121 A.L.R. 957.

Stipulation extending time to answer or otherwise proceed as waiver of objection to jurisdiction for lack of personal service — state cases, 77 A.L.R.3d 841.

ARTICLE 4
PERSONAL JURISDICTION OVER NONRESIDENTS

JUDICIAL DECISIONS

In order for courts to bind nonresidents by judgments in personam, there must be personal service or waiver of personal service upon such nonresidents; this requirement has not been changed by the enactment of this article. Tapley v. Proctor, 150 Ga. App. 337, 258 S.E.2d 25, 1979 Ga. App. LEXIS 2301 (1979) (see O.C.G.A. Art. 4, Ch. 10, T. 9).

RESEARCH REFERENCES

Am. Jur. Proof of Facts.

Nonestablishment of Domicil in Foreign Jurisdiction, 4 POF2d 595.

Establishment of Person's Domicil, 39 POF2d 587.

ALR.

Construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations on the commission of a tort within the state, 24 A.L.R.3d 532.

Forum state's jurisdiction over nonresident defendant in action based on obscene or threatening telephone call from out of state, 37 A.L.R.4th 852.

Products liability: personal jurisdiction over nonresident manufacturer of component incorporated in another product, 69 A.L.R.4th 14.

9-10-90. "Nonresident" defined.

As used in this article, the term "nonresident" includes an individual, or a partnership, association, or other legal or commercial entity (other than a corporation) not residing, domiciled, organized, or existing in this state at the time a claim or cause of action under Code Section 9-10-91 arises, or 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 at the time a claim or cause of action under Code Section 9-10-91 arises. The term "nonresident" shall also include an individual, or a partnership, association, or other legal or commercial entity (other than a corporation) who, at the time a claim or cause of action arises under Code Section 9-10-91, was residing, domiciled, organized, or existing in this state and subsequently becomes a resident, domiciled, organized, or existing outside of this state as of the date of perfection of service of process as provided by Code Section 9-10-94.

History.

Ga. L. 1968, p. 1419, § 2; Ga. L. 1977, p. 586, § 1.

Law reviews.

For article summarizing law relating to jurisdiction and venue over domestic and foreign corporations in Georgia, and service therein, see 21 Mercer L. Rev. 457 (1970).

For comment on Griffin v. Air S., Inc., 324 F. Supp. 1284 (N.D. Ga. 1971), see 8 Ga. St. B. J. 414 (1972).

For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

For article, "Foreign Corporations in Georgia," see 10 Ga. St. B.J. 243 (1973).

For comment on Coe & Payne Co. v. Wood-Mosaic Corp., 230 Ga. 58, 195 S.E.2d 399 (1973), see 10 Ga. St. B.J. 164 (1973).

For note advocating the adoption of a statute incorporating the doctrine of forum non conveniens, see 7 Ga. L. Rev. 744 (1973).

For note analyzing the long arm statute and suggesting some reforms, see 11 Ga. L. Rev. 149 (1976).

For article discussing 1976 to 1977 developments in Georgia's long arm statute, see 29 Mercer L. Rev. 265 (1977).

For article examining waiver of objections to venue and lack of personal jurisdiction by default, see 12 Ga. L. Rev. 181 (1978).

For article surveying Georgia cases in the area of trial practice and procedure from June 1977 through May 1978, see 30 Mercer L. Rev. 239 (1978).

For article surveying Georgia cases in the area of trial practice and procedure from June 1979 through May 1980, see 32 Mercer L. Rev. 225 (1980).

For comment on World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980), and Rush v. Savchuk, 444 U.S. 320, 100 S. Ct. 591, 62 L. Ed. 2d 516 (1980), regarding minimum contacts and state jurisdiction, see 15 Ga. L. Rev. 19 (1980).

For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982).

For comment, "Jurisdiction over Nonresidents in Georgia: Crowder v. Ginn," see 17 Ga. L. Rev. 201 (1982).

For note, "Getting Personal With Our Neighbors — A Survey of Southern States' Exercise of General Jurisdiction and A Proposal for Extending Georgia's Long-Arm Statute," see 25 Ga. St. U.L. Rev. 1177 (2009).

For article, "Georgia's Unconstitutional Business Venue Provision: A Kingdom with Impermissible Borders," see 69 Mercer L. Rev. 433 (2018).

For article, "Personal Jurisdiction and the Fairness Factor(s)," see 72 Emory L.J. 781 (2023).

JUDICIAL DECISIONS

This section is remedial in nature and does not affect the substantive rights of a defendant; therefore, it is not subject to constitutional attack as a retroactive law as to causes of action pending at the time of enactment. Ballew v. Riggs, 244 Ga. 232, 259 S.E.2d 482, 1979 Ga. LEXIS 1201 (1979) (see O.C.G.A. § 9-10-90).

O.C.G.A. § 9-10-90 does not deny due process by defining the term "nonresident" as used in the long arm statute, O.C.G.A. Art. 4, Ch. 10, T. 9, so as to include a person who was a Georgia resident at the time a claim arose against the person out of a motor vehicle collision occurring in Georgia, but who subsequently became a resident of another state before personal service was perfected upon the person in the other state in accordance with the long arm statute. Crowder v. Ginn, 248 Ga. 824, 286 S.E.2d 706, 1982 Ga. LEXIS 1094 (1982).

Service of process under long-arm statute. — The two-year statute of limitations on actions for personal injury was not tolled throughout the period of defendants' alleged absence from the state, where there was no showing that the defendants could not have been served with process pursuant to the long-arm statute, O.C.G.A. Art. 4, Ch. 10, T. 9. Towns v. Brown, 177 Ga. App. 504, 339 S.E.2d 926, 1986 Ga. App. LEXIS 1464 (1986).

O.C.G.A. § 9-11-4(e)(1) did not govern service of process in a manufacturer's breach of contract action against a distributor because the distributor was not "authorized to transact business in the State" as that phrase was used in O.C.G.A. § 9-11-4(e)(1); the distributor did not show that the distributor was a corporation incorporated or domesticated under the laws of Georgia, because the distributor pointed to no evidence that the distributor obtained the requisite certificate of authority to transact business in the state from the Georgia Secretary of State pursuant to O.C.G.A. § 14-2-

1501(a) and because the distributor was a nonresident subject to the long-arm statute, O.C.G.A. § 9-10-90 et seq. Kitchen Int'l, Inc. v. Evans Cabinet Corp., 310 Ga. App. 648, 714 S.E.2d 139, 2011 Ga. App. LEXIS 622 (2011).

Trial court was authorized to obtain personal jurisdiction over a child's parent under Georgia's long arm statute, O.C.G.A. §§ 9-10-90 and 9-10-91(6), because the child's grandparents petitioned for visitation rights after the parent became a nonresident by moving to Arizona to attend college and reside there upon graduation. Oglesby v. Deal, 311 Ga. App. 622, 716 S.E.2d 749, 2011 Ga. App. LEXIS 805 (2011).

Out-of-state corporation not subject to personal jurisdiction but subject to general jurisdiction. — In a product liability action, the Long Arm Statute, O.C.G.A. § 9-10-90, did not apply to an out-of-state corporation that was authorized to do business in Georgia, and it was not subject to specific personal jurisdiction in Georgia. However, because the appellant was registered and authorized to do business in Georgia, the appellant was subject to the general jurisdiction of Georgia's courts under Klein's general-jurisdiction holding. Cooper Tire & Rubber Co. v. McCall, 312 Ga. 422, 863 S.E.2d 81, 2021 Ga. LEXIS 626 (2021).

Service on corporation authorized to do business in state. — Georgia's long arm statute, O.C.G.A. Art. 4, Ch. 10, T. 9, does not apply to service on a corporation that is authorized to do business in the state. Teledata World Servs., Inc. v. Tele-Mart, Inc., 242 Ga. App. 842, 531 S.E.2d 372, 2000 Ga. App. LEXIS 357 (2000).

O.C.G.A. § 9-10-90 merely provides an alternate means of service to O.C.G.A. § 9-10-91 upon one who was a resident of Georgia at the time the cause of action arose and who subsequently moved to another state before service could be perfected in Georgia. Stone v. First Nat'l Bank, 159 Ga. App. 812, 285 S.E.2d 207, 1981 Ga. App. LEXIS 2827 (1981).

This section, in defining the term "nonresident" to include foreign corporations, describes specifically the foreign corporations included within the term. Bauer Int'l Corp. v. Cagle's, Inc., 225 Ga. 684, 171 S.E.2d 314, 1969 Ga. LEXIS 612 (1969) (see O.C.G.A. § 9-10-90).

The long arm statute, O.C.G.A. § 9-10-90 et seq., did not apply to service of process upon a foreign corporation doing business within this state and having an agent within this state. Cherokee Warehouses Inc. v. Babb Lumber Co., 244 Ga. App. 197, 535 S.E.2d 254, 2000 Ga. App. LEXIS 665 (2000), cert. denied, No. S00C1603, 2001 Ga. LEXIS 135 (Ga. Feb. 2, 2001).

Section not retroactive. — This section, which enumerates nonresident corporations as among those against which actions may be brought in this state, has no effect upon any cause of action originating prior to the effective date of the Georgia Nonresident Motorists' Act, Ga. L. 1957, p. 649. Buckhead Doctors' Bldg., Inc. v. Oxford Fin. Cos., 120 Ga. App. 516, 171 S.E.2d 365, 1969 Ga. App. LEXIS 840 (1969). But see Bituminous Cas. Corp. v. R.D.C., Inc., 334 F. Supp. 1163, 1971 U.S. Dist. LEXIS 10329 (N.D. Ga. 1971) (see O.C.G.A. § 9-10-90).

This section, which defines "nonresident" to include certain foreign corporations, does not apply to cause of action arising prior to the effective date of the amendment. Smith v. O'Neal Steel, Inc., 225 Ga. 778, 171 S.E.2d 519, 1969 Ga. LEXIS 643 (1969). But see Bituminous Cas. Corp. v. R.D.C., Inc., 334 F. Supp. 1163, 1971 U.S. Dist. LEXIS 10329 (N.D. Ga. 1971) (see O.C.G.A. § 9-10-90).

The 1968 amendment to this section, which included corporation within meaning of "nonresident," does not apply to a factual situation arising before the amendment. Griffin v. Air S., Inc., 324 F. Supp. 1284, 1971 U.S. Dist. LEXIS 14056 (N.D. Ga. 1971) (see O.C.G.A. § 9-10-90).

The 1968 amendment to this section is applied retroactively. Bituminous Cas. Corp. v. R.D.C., Inc., 334 F. Supp. 1163, 1971 U.S. Dist. LEXIS 10329 (N.D. Ga. 1971). But see Buckhead Doctors' Bldg., Inc. v. Oxford Fin. Cos., 120 Ga. App. 516, 171 S.E.2d 365, 1969 Ga. App. LEXIS 840 (1969); Smith v. O'Neal Steel,

Inc., 225 Ga. 778, 171 S.E.2d 519, 1969 Ga. LEXIS 643 (1969); Griffin v. Air S., Inc., 324 F. Supp. 1284, 1971 U.S. Dist. LEXIS 14056 (N.D. Ga. 1971) (see O.C.G.A. § 9-10-90).

Inmate in out-of-state prison. — An inmate in a federal prison in South Carolina was a nonresident subject to long arm jurisdiction, even though the inmate had been a Georgia resident at the time the tort cause of action arose in Georgia, and the inmate stated the inmate's intention to return to Georgia upon the inmate's release from prison. Cooper v. Edwards, 235 Ga. App. 48, 508 S.E.2d 708.

How a person becomes a nonresident. — O.C.G.A. § 9-10-90 does not require that a person both intend to and actually establish a residence outside the state to become a nonresident, and thus, either a change in residence or a change in domicile would suffice to make a person a nonresident. Cooper v. Edwards, 235 Ga. App. 48, 508 S.E.2d 708.

Guarantying note sufficient to confer jurisdiction. — Trial court did not err in denying the guarantors' motion to dismiss for lack of personal jurisdiction a bank's action to recover on promissory notes securing loans to a limited liability company (LLC) and on guaranties of those loans because the guarantors transacted business in Georgia within the meaning of the Long Arm Statute, O.C.G.A. § 9-10-91(1), and given the guarantors' purposeful personal dealings with the bank, dealings which bestowed substantial benefits to the guarantors and induced substantial action by the bank to the bank's detriment, neither reasonableness nor fair play nor substantial justice would be offended by haling the guarantors into a Georgia court and exercising jurisdiction over the guarantors; the guarantors understood that the LLC was formed for the sole purpose of developing property in Georgia, the bank's claims arose out of the guarantors' Georgia activities, the guarantors pointed to no evidence showing that litigating the action in Georgia would unduly burden the guarantors, and Georgia had an interest in adjudicating the dispute because the dispute involved both a significant loss suffered by a Georgia financial institution and real property located in the state. Paxton v. Citizens Bank & Trust of W. Ga., 307 Ga. App. 112, 704 S.E.2d 215, 2010 Ga. App. LEXIS 1103 (2010).

Defendants not residents when suit filed. — Trial court did not err in denying a motion filed by a corporate president and the president's spouse to dismiss a corporation's action against them or, in the alternative, to transfer the case because the trial court's application of the relation-back statute, O.C.G.A. § 9-11-15(c), did not violate the constitutional right of the president and the spouse to be sued in the county where they resided under Ga. Const. 1983, Art. VI, Sec. II, Para. VI; because the president and the wife were not residents of Georgia when the suit was filed, the proper venue had to be determined pursuant to Georgia's Long Arm Statute, O.C.G.A. §§ 9-10-91 and 9-10-93. Cartwright v. Fuji Photo Film U.S.A., Inc., 312 Ga. App. 890, 720 S.E.2d 200, 2011 Ga. App. LEXIS 976 (2011), cert. denied, No. S12C0600, 2012 Ga. LEXIS 306 (Ga. Mar. 19, 2012).

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25 Am. Jur. 2d, Domicil, §§ 1 et seq., 8 et seq.

C.J.S.

21 C.J.S., Courts, § 100 et seq.

ALR.

Solicitation within state of orders for goods to be shipped from other state as doing business within state within statutes prescribing conditions of doing business or providing for service of process, 101 A.L.R. 126; 146 A.L.R. 941.

Effect of agreement by foreign corporation to install article with the state to bring transaction within state control, 101 A.L.R. 356.

What amounts to doing business in a state within statute providing for service of process in action against nonresident natural person or persons doing business in state, 10 A.L.R.2d 200.

Long-arm statutes: in personam jurisdiction over nonresident based on owner-

ship, use, possession, or sale of real property, 4 A.L.R.4th 955.

In personam jurisdiction, in libel and slander action, over nonresident who mailed allegedly defamatory letter from outside state, 83 A.L.R.4th 1006.

Execution, outside of forum, of guaranty of obligations under contract to be performed within forum state as conferring jurisdiction over nonresident guarantors under "long-arm" statute or rule of forum, 28 A.L.R.5th 664.

9-10-91. Grounds for exercise of personal jurisdiction over nonresident.

A court of this state may exercise personal jurisdiction over any nonresident or his or her executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he or she were a resident of this state, if in person or through an agent, he or she:

(1) Transacts any business within this state;

(2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;

(3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor 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;

(4) Owns, uses, or possesses any real property situated within this state;

(5) With respect to proceedings for divorce, separate maintenance, annulment, or other domestic relations action or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce; or

(6) Has been subject to the exercise of jurisdiction of a court of this state which has resulted in an order of alimony, child custody, child support, equitable apportionment of debt, or equitable division of property if the action involves modification of such order and the moving party resides in this state or if the action involves enforcement of such order notwithstanding the domicile of the moving party.

History.

Ga. L. 1966, p. 343, § 1; Ga. L. 1970, p. 443, § 1; Ga. L. 1983, p. 1304, § 1; Ga. L. 2010, p. 822, § 1/SB 491; Ga. L. 2011, p. 562, § 3/SB 139.

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Binding effect of child custody decrees on certain nonresidents, §§ 19-9-44, 19-9-45.

Exemption of witnesses from arrest and service of process, § 24-13-96.

Extent of state jurisdiction to persons within state limits, § 50-2-21.

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mum contacts and state jurisdiction, see 15 Ga. L. Rev. 19 (1980).

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For article, "Personal Jurisdiction and the Fairness Factor(s)," see 72 Emory L.J. 781 (2023).

JUDICIAL DECISIONS

Analysis

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General Consideration

Analysis of law. — For comprehensive analysis of Georgia's long-arm statute, O.C.G.A. § 9-10-91, see Hayes v. Irwin, 541 F. Supp. 397, 1982 U.S. Dist. LEXIS 12837 (N.D. Ga. 1982), aff'd, 729 F.2d 1466 (11th Cir. 1984), aff'd, 729 F.2d 1466, 1984 U.S. App. LEXIS 24328 (11th Cir. 1984).

Section not restricted to natural persons. — Restricting this section to natural persons would in large measure frustrate the objective of affording a local forum to Georgia citizens who have causes of action arising from the local activity of those residing out of state; the exclusion of corporations would have no basis in history or logic and would be contrary to the raison d'etre of the long arm. Wilen Mfg. Co. v. Standard Prods. Co., 409 F.2d 56, 1969 U.S. App. LEXIS 8813 (5th Cir. 1969) (see O.C.G.A. § 9-10-91).

Purpose of this section is to protect Georgia residents from the torts of foreign corporations suffered within this state. Scott v. Crescent Tool Co., 296 F. Supp. 147, 1968 U.S. Dist. LEXIS 9665 (N.D. Ga. 1968) (see O.C.G.A. § 9-10-91).

O.C.G.A. § 9-10-90 provides alternate means of service to O.C.G.A. § 9-10-91 upon one who was a resident of Georgia at the time the cause of action arose and who subsequently moved to another state before service could be perfected in Georgia. Stone v. First Nat'l Bank, 159 Ga. App. 812, 285 S.E.2d 207, 1981 Ga. App. LEXIS 2827 (1981).

This section applies to nonresident corporations. Scott v. Crescent Tool Co., 296 F. Supp. 147, 1968 U.S. Dist. LEXIS 9665 (N.D. Ga. 1968) (see O.C.G.A. § 9-10-91).

Nonresident authorized to do business in state. — An out-of-state corporation that is authorized to do business in the state at the time claim arises is "resident" for purposes of personal jurisdiction; thus, such corporation may sue or be sued to the same extent as a resident corporation without regard to provisions of the long-arm statute. Allstate Ins. Co. v. Klein, 262 Ga. 599, 422 S.E.2d 863, 1992 Ga. LEXIS 998 (1992).

Words "or his executor or administrator" in this section could only refer to natural person, and cannot reasonably be construed to include corporations. Bauer Int'l Corp. v. Cagle's, Inc., 225 Ga. 684, 171 S.E.2d 314, 1969 Ga. LEXIS 612 (1969) (see O.C.G.A. § 9-10-91).

This section provides for something less than the "doing business" or contacts rule which required a regular and systematic course of activity in a state to qualify for jurisdiction in that

state. Droke House Publishers, Inc. v. Aladdin Distrib. Corp., 352 F. Supp. 1062, 1972 U.S. Dist. LEXIS 11284 (N.D. Ga. 1972) (see O.C.G.A. § 9-10-91).

Jurisdiction conferred by this section embraces all theories of relief related to the jurisdiction-generating event. Mack Trucks, Inc. v. Arrow Aluminum Castings Co., 510 F.2d 1029, 1975 U.S. App. LEXIS 15341 (5th Cir. 1975) (see O.C.G.A. § 9-10-91).

Focus under this section is on what nonresident defendant has done in Georgia, not on the character of the plaintiff's activities. Fowler Prods. Co. v. Coca-Cola Bottling Co., 413 F. Supp. 1339, 1976 U.S. Dist. LEXIS 14845 (M.D. Ga. 1976) (see O.C.G.A. § 9-10-91).

Commission of single act might in certain circumstances justify the assertion of jurisdiction by a state over a nonresident defendant. Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100, 1975 U.S. Dist. LEXIS 14890 (N.D. Ga. 1975), aff'd, 700 F.2d 1339, 1983 U.S. App. LEXIS 29536 (11th Cir. 1983).

Test for determining jurisdiction. — In determining whether it had jurisdiction over a foreign corporation, trial court did not err in considering such issues as whether the corporation transacted any business in the state, whether it maintained an office or agents here, where negotiations took place, where goods were shipped, whether there was a course of dealing between the parties, whether minimum contacts were shown between the corporation and the state, and whether it had availed itself of any benefits of state law. Hoesch Am., Inc. v. Dai Yang Metal Co., 217 Ga. App. 845, 459 S.E.2d 187, 1995 Ga. App. LEXIS 619 (1995).

In determining whether the defendant has established the minimum contacts necessary for the exercise of jurisdiction, the court looks to whether the defendant has done some act to avail the defendant of the law of the forum state, and whether the claim is related to those acts. SES Indus., Inc. v. Intertrade Packaging Mach. Corp., 236 Ga. App. 418, 512 S.E.2d 316.

When the defendant moved to dismiss for lack of personal jurisdiction, continuous and systematic conduct contacts, when the contacts give rise to the claims in a given case, will support specific jurisdiction, but the contacts are not necessary to the exercise of jurisdiction; jurisdiction will still be proper under O.C.G.A. § 9-10-91(1) and satisfy due process if a corporation engages in a single in-state transaction and that transaction undergirds the plaintiff's claims. Perrigo Co. v. Merial Ltd., 215 F. Supp. 3d 1329, 2016 U.S. Dist. LEXIS 150012 (N.D. Ga. 2016), dismissed, No. 1:18-CV-351, 2018 U.S. Dist. LEXIS 185420 (W.D. Mich. Oct. 30, 2018).

In determining personal jurisdiction under O.C.G.A. § 9-10-91(1), foreseeability is not transacting business and may not be imported into the latter's analysis. Perrigo Co. v. Merial Ltd., 215 F. Supp. 3d 1329, 2016 U.S. Dist. LEXIS 150012 (N.D. Ga. 2016).

In a products liability and negligence case, the plaintiff's claims against a German corporation were properly dismissed based on a lack of personal jurisdiction because the corporation did not purposefully avail itself of the laws of Georgia as the corporation sold the water pump to an out-of-state distributor, and the product eventually found its way into Georgia; the corporation did not target the Georgia market in a manner sufficient to satisfy the stream of commerce; and there was no evidence of a regular flow of product directly from the corporation or regular course of sales of the corporation's water pump in Georgia, nor was there evidence that the corporation had the expectation that its product would be sold in Georgia. Winn v. Vitesco Technologies GmbH, 365 Ga. App. 442, 878 S.E.2d 785, 2022 Ga. App. LEXIS 454 (2022).

Three part inquiry on jurisdiction. — In the Amerireach.com decision the Georgia Supreme Court stated a three-part inquiry for whether jurisdiction exists under O.C.G.A. § 9-10-91(1), and the United States Court of Appeals for the Eleventh Circuit has stated that the first prong of the three-part inquiry satisfies the transacting business requirement of the long arm statute and the second and third prongs satisfy federal due process. Crawford v. Harvard Publ'g Co., No. 17-10439-E, 2018 U.S. App. LEXIS 30885 (11th Cir. Oct. 31, 2018).

Jurisdiction over a nonresident defendant may be exercised under this section when: (1) the nonresident has purposefully done some act or consum-

General Consideration (Cont'd)

mated some transaction with or in the forum but the actual act or omission resulting in the injury need not have occurred in this state; the defendant need not be physically within the forum when this act or transaction occurs, and a single such instance may suffice; (2) the Georgia plaintiff must have a legal cause of action in tort against the nonresident, which arises out of, or results from, the purposeful activity of the defendant involving this state; a resident is the victim of a "tortious act" when the resident suffers an injury due to an act or omission of negligence occurring outside this state; and (3) if the requirements of (1) and (2) are satisfied, the exercise of jurisdiction over the nonresident must be "reasonable." Shellenberger v. Tanner, 138 Ga. App. 399, 227 S.E.2d 266, 1976 Ga. App. LEXIS 2632 (1976); Robinson v. Ravenel Co., 411 F. Supp. 294, 1976 U.S. Dist. LEXIS 16159 (N.D. Ga. 1976); National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305, 1980 U.S. Dist. LEXIS 15640 (N.D. Ga. 1980); Martin Luther King, Jr. Ctr. for Social Change, Inc. v. American Heritage Prods., Inc., 508 F. Supp. 854, 1981 U.S. Dist. LEXIS 12147 (N.D. Ga. 1981), rev'd, 694 F.2d 674, 1983 U.S. App. LEXIS 27928 (11th Cir. 1983) (see O.C.G.A. § 9-10-91).

Elements of jurisdictional "contact" between nonresident and forum. — When a nonresident engages in some activity with or in the forum, even a significant single transaction, whether the nonresident is physically present or not, and as a result business is transacted or a tortious injury occurs, a jurisdictional "contact" exists between that nonresident and the forum. Shellenberger v. Tanner, 138 Ga. App. 399, 227 S.E.2d 266, 1976 Ga. App. LEXIS 2632 (1976); Attwell v. LaSalle Nat'l Bank, 607 F.2d 1157, 1979 U.S. App. LEXIS 9875 (5th Cir. 1979), cert. denied, 445 U.S. 954, 100 S. Ct. 1607, 63 L. Ed. 2d 791, 1980 U.S. LEXIS 1367 (1980); Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co., 623 F.2d 375, 1980 U.S. App. LEXIS 15055 (5th Cir. 1980); Cocklereece v. Moran, 500 F. Supp. 487, 1980 U.S. Dist. LEXIS 16149 (N.D. Ga. 1980); Bankhead Enters., Inc. v. Norfolk & W. Ry., 642 F.2d 802, 1981 U.S. App. LEXIS 14289 (5th Cir. 1981).

Forum selection clause. — In a publisher's suit to collect fees for advertising published in the Yellow Pages against an Ohio advertiser, the trial court erred in sua sponte dismissing the complaint for lack of personal jurisdiction under the Long Arm Statute, O.C.G.A. § 9-10-91, because personal jurisdiction was based on a forum selection clause in the parties' contract, and personal jurisdiction could be waived. YP, LLC v. Ristich, 341 Ga. App. 381, 801 S.E.2d 80, 2017 Ga. App. LEXIS 206 (2017).

Copyright infringement. — For the purposes of O.C.G.A. § 9-10-91, actions brought in federal court for copyright infringement are considered tort actions. CNN, Inc. v. Video Monitoring Servs. of Am., Inc., 723 F. Supp. 765, 1989 U.S. Dist. LEXIS 12425 (N.D. Ga. 1989).

In a trademark infringement case in which the alleged infringer moved to dismiss for lack of personal jurisdiction, the trademark holder unsuccessfully argued that the district court had jurisdiction under O.C.G.A. § 9-10-91(1); the alleged infringement of the holder's mark from its website and alleged wrongful copying in California of one or more pages of the holder's website did not provide the district court with long-arm jurisdiction over the alleged infringer in Georgia. Tortious conduct engaged in over the internet occurs where the offending computer is used, which, in the present case, was in California. FisherBroyles, LLP v. Juris Law Group, No. 1:14-cv-1101-WSD, 2015 U.S. Dist. LEXIS 17312 (N.D. Ga. Feb. 12, 2015).

Limits on jurisdiction must be fair and reasonable in the circumstances. — The limits on the exercise of jurisdiction are not "mechanical or quantitative" but are to be found only in the requirement that the provisions made for this purpose must be fair and reasonable in the circumstances, and must give to the defendant adequate notice of the claim against the defendant, and an adequate and realistic opportunity to appear and be heard in a defense. Coe & Payne Co. v. Wood-Mosaic Corp., 230 Ga. 58, 195

S.E.2d 399, 1973 Ga. LEXIS 811 (1973), overruled in part as stated in Anderson v. Deas, 279 Ga. App. 892, 632 S.E.2d 682, 2006 Ga. App. LEXIS 655 (2006).

Considerations governing jurisdiction for nontortious acts. — It seems reasonably clear that when a corporation commits a tort within a state, jurisdiction over the corporation by the state for the consequences of the tort will be upheld; where action is for a nontortious act, the answer is less clear, and will turn on the number of contacts the defendant has with the state, and a balancing of the convenience to the plaintiff of action against the inconvenience thus caused to the defendant. Marival, Inc. v. Planes, Inc., 302 F. Supp. 201, 1969 U.S. Dist. LEXIS 9836 (N.D. Ga. 1969).

Purposeful contacts by nonresident with forum prerequisite to jurisdiction. — In determining whether in personam jurisdiction exists over nonresident corporation under this section, nonresident must have purposeful contacts with the forum state to the extent that the maintenance of the action does not offend fair play and substantial justice. Interstate Paper Corp. v. Air-O-Flex Equip. Co., 426 F. Supp. 1323, 1977 U.S. Dist. LEXIS 17544 (S.D. Ga. 1977) (see O.C.G.A. § 9-10-91).

This section restricts jurisdiction to causes of action arising from any of the acts enumerated in this section. Thorington v. Cash, 494 F.2d 582, 1974 U.S. App. LEXIS 8543 (5th Cir. 1974) (see O.C.G.A. § 9-10-91).

Time cause of action occurs determines which provision of section applies. — Regardless of when the right to a claim accrued within the meaning of the statute of limitations, the jurisdictional right under this section derives from the occurrence of one of the enumerated acts; thus, the time when one of the enumerated acts occurs is the time to be used in determining what provision of this section should be applied. Coe & Payne Co. v. Wood-Mosaic Corp., 125 Ga. App. 845, 189 S.E.2d 459, 1972 Ga. App. LEXIS 1490 (1972); Standard v. Meadors, 347 F. Supp. 908, 1972 U.S. Dist. LEXIS 12337 (N.D. Ga. 1972) (see O.C.G.A. § 9-10-91).

Claim must arise from act enumerated in section. — Jurisdiction is not acquired merely because a nonresident transacts business in the state or happens to own, use, or possess real estate or commits a tortious act; the claim itself must have arisen from the transaction of the business, from the use, ownership, or possession of the real estate, or from the tortious act. J.C. Penney Co. v. Malouf Co., 125 Ga. App. 832, 189 S.E.2d 453, 1972 Ga. App. LEXIS 1488 (1972), rev'd, 230 Ga. 140, 196 S.E.2d 145, 1973 Ga. LEXIS 839 (1973).

Under this section, court must look to time of act complained of to ascertain what provision of the section would be germane. J.C. Penney Co. v. Malouf Co., 125 Ga. App. 832, 189 S.E.2d 453, 1972 Ga. App. LEXIS 1488 (1972), rev'd, 230 Ga. 140, 196 S.E.2d 145, 1973 Ga. LEXIS 839 (1973) (see O.C.G.A. § 9-10-91).

Act on which jurisdiction is based for third-party complaint must be related to cause of action, and, therefore, court must look to the time of such act to determine what the parties' rights were and are under this section. J.C. Penney Co. v. Malouf Co., 125 Ga. App. 832, 189 S.E.2d 453, 1972 Ga. App. LEXIS 1488 (1972), rev'd, 230 Ga. 140, 196 S.E.2d 145, 1973 Ga. LEXIS 839 (1973) (see O.C.G.A. § 9-10-91).

Sections involving limitations of action and this section are not in pari materia and do not involve similar principles. J.C. Penney Co. v. Malouf Co., 125 Ga. App. 832, 189 S.E.2d 453, 1972 Ga. App. LEXIS 1488 (1972), rev'd, 230 Ga. 140, 196 S.E.2d 145, 1973 Ga. LEXIS 839 (1973) (see O.C.G.A. § 9-10-91).

Independent distributors not agents of nonresident defendant. — Where subsequent sales of defendant's aircraft in Georgia are carried on by independent distributors, not by agents of defendant, these sales do not constitute sales by the defendant "in person or through an agent." Smith v. Piper Aircraft Corp., 425 F.2d 823, 1970 U.S. App. LEXIS 9587 (5th Cir. 1970).

No jurisdiction over foreign corporation whose sole contact is that officers are residents. — This section does not confer jurisdiction upon courts for a tort action against a foreign corporation whose sole contact with Georgia is that its

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officers, directors, and stockholders are residents of the state, and where both the tort and injury occur outside the boundaries of Georgia. Davis v. Haupt Bros. Gas Co., 131 Ga. App. 628, 206 S.E.2d 598, 1974 Ga. App. LEXIS 1498 (1974) (see O.C.G.A. § 9-10-91).

Mere telephone or mail contact with out-of-state defendant, or even defendant's visits to state, is insufficient to establish the purposeful activity with Georgia required by O.C.G.A. § 9-10-91. Wise v. State Bd. for Examination, Qualification & Registration of Architects, 247 Ga. 206, 274 S.E.2d 544, 1981 Ga. LEXIS 639 (1981), overruled in part, Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank, 279 Ga. 672, 620 S.E.2d 352, 2005 Ga. LEXIS 649 (2005).

Stalker who sent emails into Georgia from South Carolina not subject to jurisdiction. — Trial court erred in denying a South Carolina resident's motion to set aside a stalking permanent protective order issued against the resident. The Georgia court did not have personal jurisdiction over the nonresident under O.C.G.A. § 9-10-91 for stalking because the resident did not, in sending harassing emails from South Carolina, engage in conduct in Georgia. Huggins v. Boyd, 304 Ga. App. 563, 697 S.E.2d 253, 2010 Ga. App. LEXIS 571 (2010).

There is no express language in this section that would prevent nonresident plaintiff from using it to bring action in Georgia against a nonresident defendant. Schuehler v. Pait, 239 Ga. 520, 238 S.E.2d 65, 1977 Ga. LEXIS 1231 (1977) (see O.C.G.A. § 9-10-91).

Petition brought against nonresident where service and venue are dependent upon this section must allege facts to state a cause of action; otherwise, the court is without jurisdiction of the person of the defendant. Brown v. Olen, 226 Ga. 492, 175 S.E.2d 838, 1970 Ga. LEXIS 572 (1970) (see O.C.G.A. § 9-10-91).

Nonresident tortfeasor amenable to action in county where tortious act occurred. — Although an action to recover contribution is in the nature of an independent action which can be maintained only in the county of the residence of the alleged joint tortfeasor, the effect of this section is to place the venue of a third-party complaint in the county where the tortious act occurred, thus making a nonresident tortfeasor amenable to action in such county. Gosser v. Diplomat Restaurant, Inc., 125 Ga. App. 620, 188 S.E.2d 412, 1972 Ga. App. LEXIS 1428 (1972) (see O.C.G.A. § 9-10-91).

Suit was not proper where business of nonresidents was transacted. — In the case of a suit brought against six members of a joint venture, four of whom were Georgians and two of whom were Texans, as to the resident joint defendants, suit was not proper in the county where the business of the nonresidents was transacted but had to be brought in the county where residents resided. The Texans were not "residents" for venue purposes and "nonresidents" for long-arm purposes; they were simply nonresidents. Weitzel v. Griffin & Assocs., 192 Ga. App. 89, 383 S.E.2d 653, 1989 Ga. App. LEXIS 904 (1989).

Georgia courts did not have personal jurisdiction over nonresidents. — In an action by a nonresident corporation against nonresident defendants for fraudulent inducement and conversion growing out of a contract for the construction of a plant in Georgia, neither defendant was subject to the exercise of personal jurisdiction in Georgia where the evidence showed that they did not regularly solicit business or derive revenue from goods used or services rendered in the state, and that any out-of-state acts or omissions did not have any in-state consequences within the meaning of the long-arm statute. Taeger Enters., Inc. v. Herdlein Technologies, Inc., 213 Ga. App. 740, 445 S.E.2d 848, 1994 Ga. App. LEXIS 726 (1994).

Venue of action against resident and nonresident joint obligors in any county having jurisdiction. — Where residents and nonresidents are joint obligors or joint tortfeasors, action against them may be brought in any county in the state in which jurisdiction can be obtained over the nonresident defendant. Nelson Assocs. v. Grubbs, 135 Ga. App. 947, 219

S.E.2d 607, 1975 Ga. App. LEXIS 1882 (1975).

Nonresident corporation is, for purposes of action, resident of county of state in which it has an office, agent, and place of business, and an action will lie against such corporation and a resident joint tortfeasor in such county, even though the resident joint tortfeasor resides in a different county. Nelson Assocs. v. Grubbs, 135 Ga. App. 947, 219 S.E.2d 607, 1975 Ga. App. LEXIS 1882 (1975).

Plaintiff may rest on jurisdictional allegations in complaint unless defendant controverts those allegations with factual showing; in that event, the plaintiff has the burden of going forward with sufficient factual evidence to establish a prima facie showing of the jurisdictional allegations. National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305, 1980 U.S. Dist. LEXIS 15640 (N.D. Ga. 1980).

Plaintiff must prove the jurisdictional facts by a preponderance of the evidence at trial. National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305, 1980 U.S. Dist. LEXIS 15640 (N.D. Ga. 1980).

Jurisdiction over New York resident partner. — In bank action to recover on third renewal of a loan made to a partnership in Georgia, Georgia court had jurisdiction over New York resident who executed a partnership agreement stating that the partners were all Georgia residents, that the partnership was to have its principal place of business in Georgia, and that the agreement was to be governed by Georgia law and who executed a certificate of authority that the individual was a general partner and that any partner was authorized to borrow money and to enter commercial banking agreements on behalf of the partnership although the individual never came to Georgia. Bloise v. Trust Co. Bank, 170 Ga. App. 405, 317 S.E.2d 249, 1984 Ga. App. LEXIS 1914 (1984).

Independent proceedings to change child custody. — O.C.G.A. § 9-10-91 does not provide jurisdiction over nonresident defendants in independent proceedings to change child custody. Baker v. Ashburn, 179 Ga. App. 757, 347 S.E.2d 660, 1986 Ga. App. LEXIS 2018, aff'd, 256 Ga. 507, 350 S.E.2d 437, 1986 Ga. LEXIS 950 (1986).

One-time purchase of goods from a company in forum state by a nonresident with no other connection to the forum state, together with visits to the forum state by employees of the purchaser to return the goods after rejecting them, does not create a sufficient contact for the assertion of personal jurisdiction over the nonresident. Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc., 786 F.2d 1055, 1986 U.S. App. LEXIS 24078 (11th Cir. 1986).

Foreign manufacturer subject to jurisdiction despite use of independent distributor. — A Japanese manufacturer of an automobile involved in an accident which occurred in Georgia when plaintiff experienced a failure of the vehicle's braking and cruise control system was subject to jurisdiction under O.C.G.A. § 9-10-91, notwithstanding the fact that the manufacturer had employed an independent distributor of its products in the United States. Burton v. Subaru of Am., Inc., 646 F. Supp. 78, 1986 U.S. Dist. LEXIS 20621 (N.D. Ga. 1986).

Georgia courts did not have personal jurisdiction over a nonresident lessee sued by a Georgia lessor to recover damages for the lessee's alleged failure to make rental payments in accordance with a lease agreement, where the lessee's business was in South Carolina, the order was made in South Carolina, the lease contract was subsequently accepted by the lessor in its office in Georgia and the lessee mailed rental payments directly to that office. Capital Assocs. v. Gallopade Enters. Int'l, Inc., 172 Ga. App. 504, 323 S.E.2d 842, 1984 Ga. App. LEXIS 2561 (1984).

Georgia court lacked personal jurisdiction over nonresident aircraft lessor. — Trial court's dismissal of complaint due to lack of personal jurisdiction was affirmed, where the defendant was a Florida corporation which merely leased an airplane to another Florida corporation. The defendant conducted no business and engaged in no activity in Georgia except for an unrelated act after the crash occurred. McDonnell v. Roy E. Beatty & Assocs., 203 Ga. App. 807, 418 S.E.2d 95,

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1992 Ga. App. LEXIS 643 (1992), cert. denied, No. S92C0976, 1992 Ga. LEXIS 597 (Ga. June 25, 1992).

Choice of laws provision in personal guaranty. — A choice of laws provision in a personal guaranty executed by a nonresident was not sufficient to establish long arm jurisdiction where the guarantor was not party to the contract in question and absent the required minimum contacts with the state. Apparel Resources Int'l, Ltd. v. Amersig S.E., Inc., 215 Ga. App. 483, 451 S.E.2d 113, 1994 Ga. App. LEXIS 1276 (1994).

Jurisdiction of resident who becomes nonresident after tortious conduct. — Because the defendant, during the time period in which the alleged tortious conduct took place, was a resident in the county in Georgia where the suit was filed, the trial judge was authorized to exercise personal jurisdiction over the defendant even though the defendant was a nonresident at the time suit was filed. Long v. Adams, 175 Ga. App. 538, 333 S.E.2d 852, 1985 Ga. App. LEXIS 2201 (1985).

The tolling statute could not be applied to extend the statute of limitations in consolidated personal injury renewal actions because the Long Arm Statute, O.C.G.A. §§ 9-10-91 and 9-10-94, could be utilized to serve the driver against whom the actions had been filed as the driver was a resident of Georgia at the time the driver was involved in an auto accident with a parent and child. Dickson v. Amick, 291 Ga. App. 557, 662 S.E.2d 333, 2008 Ga. App. LEXIS 571 (2008), overruled in part, Giles v. State Farm Mut. Ins. Co., 330 Ga. App. 314, 765 S.E.2d 413, 2014 Ga. App. LEXIS 717 (2014).

Resident's third automobile personal injury lawsuit against a former resident was properly dismissed because service of the resident's second lawsuit was not perfected in accordance with the Georgia Long-Arm Statute, O.C.G.A. § 9-10-91, and the period of limitations in O.C.G.A. § 9-3-33 ran before the third lawsuit (allegedly as a renewal of the second lawsuit under O.C.G.A. § 9-2-61) was filed. Coles v. Reese, 316 Ga. App. 545, 730 S.E.2d 33, 2012 Ga. App. LEXIS 605 (2012).

Jurisdiction of resident who becomes nonresident after executing note. — If defendant executed a promissory note in the county where suit was filed, the fact that the defendant subsequently moved to Florida would not preclude the trial court's exercise of personal jurisdiction over the defendant pursuant to O.C.G.A. § 9-10-91. Georgia Receivables, Inc. v. Murray, 214 Ga. App. 732, 448 S.E.2d 783, 1994 Ga. App. LEXIS 1032 (1994).

Service of process outside the state upon parties defendant who are state residents is subject to the service-of-process requirements of the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, and not the Long-Arm Statute, O.C.G.A. § 9-10-91. Shahan v. Scott, 259 Ga. 172, 377 S.E.2d 859, 1989 Ga. LEXIS 156 (1989).

Enforcing foreign judgment. — In action seeking to perfect Florida judgment, in absence of competent evidence of Florida Long-Arm Statute, it was appropriate that trial court apply the Georgia Long-Arm Statute, O.C.G.A. § 9-10-91. Superior Fertilizer & Chem., Inc. v. Warren, 162 Ga. App. 595, 292 S.E.2d 430, 1982 Ga. App. LEXIS 2256 (1982).

Service upon nonresidents in federal private antitrust case. — As there is no federal statute authorizing extraterritorial service of process upon an individual nonresident defendant in a private antitrust action, service of process upon the nonresident defendants in a private antitrust case must have been in accordance with O.C.G.A. § 9-10-91. Vest v. Waring, 565 F. Supp. 674, 1983 U.S. Dist. LEXIS 16589 (N.D. Ga. 1983).

Federal venue provision narrower than long arm provision. — The concept of "doing business" incorporated in the federal general venue statute is narrower than the concept of "transacting business" as contained in the Georgia long-arm statute, O.C.G.A. § 9-10-91. Flowers Indus., Inc. v. Bakery & Confectionery Union & Indus. Int'l Pension Fund, 565 F. Supp. 286, 1983 U.S. Dist. LEXIS 18423 (N.D. Ga. 1983).

Federal service of process rule. — Fed. R. Civ. P. 4(c)(2)(C)(ii) authorizes service of process by mail upon nonresi-

dent defendants without regard to relevant state law, such as the Georgia long-arm statute, O.C.G.A. § 9-10-91. A.I.M. Int'l, Inc. v. Battenfeld Extrusions Sys., 116 F.R.D. 633, 1987 U.S. Dist. LEXIS 7351 (M.D. Ga. 1987).

Alimony claims. — O.C.G.A. § 9-10-91 is not intended to extend long arm jurisdiction to claims, such as alimony, which arise out of the dissolution of the marriage. Warren v. Warren, 249 Ga. 130, 287 S.E.2d 524, 1982 Ga. LEXIS 742 (1982), but see paragraph added in 1983.

Movant required to exercise due diligence in locating and personally serving nonresident. — Where no evidence suggests that any attempt of personal service was made or that such attempt was impossible, the movant has clearly failed to fulfill the constitutional requirement of exercising reasonable diligence in attempting to locate and personally serve a nonresident prior to moving for constructive service. Gaddis v. Dyer Lumber Co., 168 Ga. App. 334, 308 S.E.2d 852, 1983 Ga. App. LEXIS 2766 (1983).

Jurisdiction limited by long-arm statute. — In a products liability action against a nonresident foreign corporation arising out of an airplane crash in another state, jurisdiction over the corporation was limited by the long-arm statute and, since the corporation was not authorized to transact business in the state, does not have a registered agent for service of process in the state, and did not have the required minimum contacts with the state, there was no basis to exert jurisdiction. Pratt & Whitney Can., Inc. v. Sanders, 218 Ga. App. 1, 460 S.E.2d 94, 1995 Ga. App. LEXIS 635 (1995), cert. denied, No. S95C1772, 1995 Ga. LEXIS 1225 (Ga. Dec. 1, 1995).

"Fiduciary shield" doctrine. — Nothing in O.C.G.A. § 9-10-91(1) suggests that the legislature intended to accord any special treatment to fiduciaries acting on behalf of a corporation or to insulate the fiduciaries from long-arm jurisdiction for acts performed in a corporate capacity, and such special treatment is one of those requirements which has occasionally been engrafted onto O.C.G.A. § 9-10-91(1) and which conflicts with the statute's literal language; thus, to the extent that the decisions apply the "fiduciary shield" doctrine or its equivalent, the Georgia Court of Appeals cases of Southern Electronics Distributors v. Anderson, 232 Ga. App. 648 (1998), and Girard v. Weiss, 160 Ga. App. 295 (1981), are hereby overruled, and the federal cases of Club Car v. Club Car (Quebec) Import, 362 F. 3d 775 (11th Cir. 2004), Canty v. Fry's Electronics, 736 F. Supp. 2d 1352 (N.D. Ga. 2010), and United States for Use and Benefit of WFI Ga. v. Gray Ins. Co., 701 F. Supp. 2d 1320, (N.D. Ga. 2010), will not be followed. Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489, 2011 Ga. LEXIS 948 (2011).

Both the long-arm statute, O.C.G.A. § 9-10-91, and constitutional fairness concerns adequately protect corporate employees and officers, and the fiduciary shield doctrine unfairly prejudices plaintiffs who have valid claims against those individuals who have acted in a corporate capacity in Georgia; as with other corporate officers, those courts which follow the "fiduciary shield" rule either apply the rule to members of a limited liability company (LLC) or make an exception to avoid injustice, and accordingly, for the same reasons that the "fiduciary shield" doctrine is rejected with respect to other corporate officers, the rule is also rejected to members of an LLC but to be subject to the forum court's jurisdiction, a member's own activities must satisfy the minimum contacts test. Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489, 2011 Ga. LEXIS 948 (2011).

Attempted service on person whose status was unknown to servicer was insufficient. — Because service of process of a consolidated declaratory judgment action was not sufficiently perfected on two defendant brothers, neither waived service, and despite the fact that one brother might have had notice of the earlier action and service was attempted against the other pursuant to O.C.G.A. § 9-10-91 and O.C.G.A. § 9-10-94, the clear requirements of O.C.G.A. § 9-11-4(e)(7) were not dispensed with; hence, the trial court erred in denying the brothers' motion to dismiss said action. Tavakolian v. Agio Corp., 283 Ga. App. 881, 642 S.E.2d 903, 2007 Ga. App. LEXIS 237 (2007).

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Florida prison officials. — Florida prison officials who declared that they did not reside in Georgia and did not own any property, real or personal, in Georgia and who did not commit any malfeasance in Georgia, fell outside the scope of Georgia's long-arm statute, O.C.G.A. § 9-10-91. Caraballo-Sandoval v. Honsted, 35 F.3d 521, 1994 U.S. App. LEXIS 28437 (11th Cir. 1994).

Constitutional Aspects and "Minimum Contacts"

This section is not unconstitutional; it does not deprive a nonresident of due process of law. O.N. Jonas Co. v. B & P Sales Corp., 232 Ga. 256, 206 S.E.2d 437, 1974 Ga. LEXIS 923 (1974) (see O.C.G.A. § 9-10-91).

There is no violation of due process or underlying principles of traditional fairness and substantial justice when reasonable notice and opportunity to defend are present. Bosworth v. Cooney, 156 Ga. App. 274, 274 S.E.2d 604, 1980 Ga. App. LEXIS 3030 (1980).

This section is coterminus with the due process clause. Marival, Inc. v. Planes, Inc., 302 F. Supp. 201, 1969 U.S. Dist. LEXIS 9836 (N.D. Ga. 1969); Griffin v. Air S., Inc., 324 F. Supp. 1284, 1971 U.S. Dist. LEXIS 14056 (N.D. Ga. 1971); Stanley v. Local 926, Int'l Union of Operating Eng'rs, 354 F. Supp. 1267, 1973 U.S. Dist. LEXIS 15140 (N.D. Ga. 1973); Harris v. North Am. Rockwell Corp., 372 F. Supp. 958, 1974 U.S. Dist. LEXIS 12007 (N.D. Ga. 1974); Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100, 1975 U.S. Dist. LEXIS 14890 (N.D. Ga. 1975), aff'd, 700 F.2d 1339, 1983 U.S. App. LEXIS 29536 (11th Cir. 1983); Interstate Paper Corp. v. Air-O-Flex Equip. Co., 426 F. Supp. 1323, 1977 U.S. Dist. LEXIS 17544 (S.D. Ga. 1977); Process Control Corp. v. Witherup Fabrication & Erection, Inc., 439 F. Supp. 1284, 1977 U.S. Dist. LEXIS 12951 (N.D. Ga. 1977) (see O.C.G.A. § 9-10-91).

This section contemplates that jurisdiction shall be exercised over nonresidents to the maximum extent permitted by procedural due process. Granite & Quartzite Centre, Inc. v. M/S Virma, 374 F. Supp. 1124, 1974 U.S. Dist. LEXIS 8880 (S.D. Ga. 1974); Shellenberger v. Tanner, 138 Ga. App. 379, 227 S.E.2d 266 (1976); Value Eng'r Co. v. Gisell, 140 Ga. App. 44, 230 S.E.2d 29, 1976 Ga. App. LEXIS 1344 (1976); Cox v. Long, 143 Ga. App. 182, 237 S.E.2d 672, 1977 Ga. App. LEXIS 2235 (1977); Interstate Paper Corp. v. Air-O-Flex Equip. Co., 426 F. Supp. 1323, 1977 U.S. Dist. LEXIS 17544 (S.D. Ga. 1977); Jet Am., Inc. v. Gates Learjet Corp., 145 Ga. App. 258, 243 S.E.2d 584, 1978 Ga. App. LEXIS 1942, rev'd, 242 Ga. 307, 248 S.E.2d 676, 1978 Ga. LEXIS 1185 (1978); Clarkson Power Flow, Inc. v. Thompson, 244 Ga. 300, 260 S.E.2d 9, 1979 Ga. LEXIS 1216 (1979); Hollingsworth v. Cunard Line, 152 Ga. App. 509, 263 S.E.2d 190, 1979 Ga. App. LEXIS 2977 (1979); Shingleton v. Armor Velvet Corp., 621 F.2d 180, 1980 U.S. App. LEXIS 15853 (5th Cir. 1980); National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305, 1980 U.S. Dist. LEXIS 15640 (N.D. Ga. 1980); Bankhead Enters., Inc. v. Norfolk & W. Ry., 642 F.2d 802, 1981 U.S. App. LEXIS 14289 (5th Cir. 1981); Spelsberg v. Sweeney, 514 F. Supp. 622, 1981 U.S. Dist. LEXIS 12337 (S.D. Ga. 1981); National Egg Co. v. Bank Leumi le-Israel, 514 F. Supp. 1125, 1981 U.S. Dist. LEXIS 12451 (N.D. Ga. 1981); Lyons Mfg. Co. v. Gross, 519 F. Supp. 812, 1981 U.S. Dist. LEXIS 13807 (S.D. Ga. 1981) (see O.C.G.A. § 9-10-91).

Intent of this section is to extend personal jurisdiction to perimeters or full limits allowed under the federal Constitution. Greenfield v. Portman, 136 Ga. App. 541, 221 S.E.2d 704, 1975 Ga. App. LEXIS 1412 (1975) (see O.C.G.A. § 9-10-91).

Test to determine whether personal jurisdiction has been exercised consistent with dictates of due process is two-pronged: (1) the defendant must have minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice and (2) the defendant must purposefully avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its law. Bigelow-Sanford, Inc. v. Gunny Corp., 649 F.2d

1060, 1981 U.S. App. LEXIS 11713 (5th Cir. 1981).

There is no objective test by which to judge facts of particular case to determine if the assertion of in personam jurisdiction exceeds the limits of constitutional due process. Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100, 1975 U.S. Dist. LEXIS 14890 (N.D. Ga. 1975), aff'd, 700 F.2d 1339, 1983 U.S. App. LEXIS 29536 (11th Cir. 1983).

Generally, in long arm cases, court must decide if activities in question fall within scope of the state statute, and, if so, whether the due process clause of U.S. Const., Amend. 14 is satisfied by an inclusive construction. Marival, Inc. v. Planes, Inc., 302 F. Supp. 201, 1969 U.S. Dist. LEXIS 9836 (N.D. Ga. 1969).

State decisions on due process limitations on jurisdiction over nonresidents not binding on federal courts. — The extent to which federal due process limits state jurisdiction over nonresidents and foreign corporations is a question of federal law, governed primarily by the pertinent decisions of the Supreme Court of the United States, and state decisions on that question are not binding upon a federal court. Process Systems v. Dixie Packaging Co., 137 Ga. App. 452, 224 S.E.2d 103, 1976 Ga. App. LEXIS 2484 (1976).

O.C.G.A. § 9-10-91 to be applied to limits of due process. — Within the bounds of fairness and substantial justice to the defendant, this section will be applied to the limits of due process so that those who invoke the protection or benefits of the laws of Georgia, or who injure citizens or property in Georgia, will be made to answer therefore in the Georgia courts. Value Eng'r Co. v. Gisell, 140 Ga. App. 44, 230 S.E.2d 29, 1976 Ga. App. LEXIS 1344 (1976) (see O.C.G.A. § 9-10-91).

In diversity case it is appropriate for federal court to exercise jurisdiction over foreign corporation if the state court may do so in compliance with state law and the due process requirements of the United States Constitution. Bankhead Enters., Inc. v. Norfolk & W. Ry., 642 F.2d 802, 1981 U.S. App. LEXIS 14289 (5th Cir. 1981).

Use of this section by local court in serving process on nonresident defendant is not unconstitutional for failing to give defendant a reasonable time to prepare and file defendant's answer where it allowed the defendant more time, not less, than the defendant would have been entitled to in superior court under general law. Action Indus., Inc. v. Redisco, Inc., 122 Ga. App. 754, 178 S.E.2d 735, 1970 Ga. App. LEXIS 1023 (1970) (see O.C.G.A. § 9-10-91).

Due process is satisfied if action is based on a contract which has substantial connection with forum state. Hollingsworth v. Cunard Line, 152 Ga. App. 509, 263 S.E.2d 190, 1979 Ga. App. LEXIS 2977 (1979); Bosworth v. Cooney, 156 Ga. App. 274, 274 S.E.2d 604, 1980 Ga. App. LEXIS 3030 (1980).

This section involves substantive rights and therefore cannot be applied retroactively. Buckhead Doctors' Bldg., Inc. v. Oxford Fin. Cos., 120 Ga. App. 516, 171 S.E.2d 365, 1969 Ga. App. LEXIS 840 (1969); Amos v. Bowers, 121 Ga. App. 801, 175 S.E.2d 877, 1970 Ga. App. LEXIS 1365 (1970); J.C. Penney Co. v. Malouf Co., 125 Ga. App. 832, 189 S.E.2d 453, 1972 Ga. App. LEXIS 1488 (1972), rev'd, 230 Ga. 140, 196 S.E.2d 145, 1973 Ga. LEXIS 839 (1973); Coe & Payne Co. v. Wood-Mosaic Corp., 125 Ga. App. 845, 189 S.E.2d 459, 1972 Ga. App. LEXIS 1490 (1972); Standard v. Meadors, 347 F. Supp. 908, 1972 U.S. Dist. LEXIS 12337 (N.D. Ga. 1972). But see Bituminous Cas. Corp. v. R.D.C., Inc., 334 F. Supp. 1163, 1971 U.S. Dist. LEXIS 10329 (N.D. Ga. 1971) (see O.C.G.A. § 9-10-91).

O.C.G.A. § 9-10-91 cannot be applied retroactively. Outlaw v. John R. Bartlett Found., 166 Ga. App. 381, 304 S.E.2d 507, 1983 Ga. App. LEXIS 2175 (1983).

Post-1966 activities must be considered. — In an action on promissory notes executed in 1965, prior to the effective date of the Long Arm Statute, O.C.G.A. § 9-10-91, inasmuch as that statute cannot be applied retroactively, the court must look at defendant's post-1966 Georgia activities to determine if they had sufficient minimum contacts within the state regarding the unsecured promissory notes to enable a court of this state to

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acquire jurisdiction over them. Outlaw v. John R. Bartlett Found., 166 Ga. App. 381, 304 S.E.2d 507, 1983 Ga. App. LEXIS 2175 (1983).

Nonresident corporation may be subjected retroactively to jurisdiction of this state and court by virtue of this section. Bituminous Cas. Corp. v. R.D.C., Inc., 334 F. Supp. 1163, 1971 U.S. Dist. LEXIS 10329 (N.D. Ga. 1971). But see Buckhead Doctors' Bldg., Inc. v. Oxford Fin. Cos., 120 Ga. App. 516, 171 S.E.2d 365, 1969 Ga. App. LEXIS 840 (1969) (see O.C.G.A. § 9-10-91).

"Minimum contacts" may exist where foreign corporation has not qualified to do business in state. — The statutory scheme established by Georgia clearly anticipates activities of a foreign corporation within the state that would encompass the "minimum contacts" necessary to confer jurisdiction under O.C.G.A. § 9-10-91, but which do not require the foreign corporation to qualify to transact business. Al & Dick, Inc. v. Cuisinarts, Inc., 528 F. Supp. 633, 1981 U.S. Dist. LEXIS 16459 (N.D. Ga. 1981).

Intermediate shipment stop insufficient. — Trial court properly declined to assert personal jurisdiction over Italian insurer not authorized to transact business in the state, with its place of business in Italy, where policy had been issued to insured, another Italian company, who had requested the only contact either party had with Georgia, an intermediate stop of the shipment in Atlanta. Simplex-Rapid v. Italia Assicurazioni, 209 Ga. App. 121, 433 S.E.2d 309, 1993 Ga. App. LEXIS 802 (1993), cert. denied, No. S93C1498, 1993 Ga. LEXIS 913 (Ga. Oct. 5, 1993).

This section is in derogation of common law and must be strictly construed. Taylor v. Jones, 123 Ga. App. 476, 181 S.E.2d 506, 1971 Ga. App. LEXIS 1269 (1971); J.C. Penney Co. v. Malouf Co., 125 Ga. App. 832, 189 S.E.2d 453, 1972 Ga. App. LEXIS 1488 (1972), rev'd, 230 Ga. 140, 196 S.E.2d 145, 1973 Ga. LEXIS 839 (1973) (see O.C.G.A. § 9-10-91).

Jurisdiction must be predicated on existence of ties among defendants, this state, and the litigation so that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Lyons Mfg. Co. v. Gross, 519 F. Supp. 812, 1981 U.S. Dist. LEXIS 13807 (S.D. Ga. 1981).

Reach of O.C.G.A. § 9-10-91 is a question of state law, and federal courts are required to construe it as would the Georgia Supreme Court. Moore v. Lindsey, 662 F.2d 354, 1981 U.S. App. LEXIS 15629 (5th Cir. 1981).

In a diversity action, when the courts of the forum state have interpreted its long-arm statute to confer jurisdiction to the limits allowed by federal due process, state law need not be applied, and the court need only address due process concerns with respect to the exercise of personal jurisdiction over a nonresident defendant. Urspruch v. Greenblum, 968 F. Supp. 707, 1996 U.S. Dist. LEXIS 21121 (S.D. Ga. 1996).

Jurisdiction based upon "minimum contact" must be "reasonable." — Each defendant's contacts with Georgia must be assessed individually. The rules are: (1) the nonresident must purposefully avail the nonresident of the privilege of doing some act or consummating some transaction with or in the forum; (2) the plaintiff must have a legal cause of action against the nonresident, which arises out of, or results from, the activity or activities of the defendant within the forum; and (3) if (and only if) the requirements of Rules 1 and 2 are established, a "minimum contact" between the nonresident and the forum exists; the assumption of jurisdiction must be found to be consonant with the due process notions of "fair play" and "substantial justice." In other words, the exercise of jurisdiction based upon the "minimum contact" must be "reasonable." Kendrick v. Parker, 258 Ga. 210, 367 S.E.2d 544, 1988 Ga. LEXIS 201 (1988); State v. Reeves, 205 Ga. App. 656, 423 S.E.2d 32, 1992 Ga. App. LEXIS 1280 (1992), cert. denied, No. S93C0104, 1993 Ga. LEXIS 76 (Ga. Jan. 14, 1993).

Greater contacts required in contract cases. — O.C.G.A. § 9-10-91 requires greater contacts between the defendant and the forum in contract cases than in tort cases. GECC v. Scott's Furn. Whse.

Showroom, Inc., 699 F. Supp. 907, 1988 U.S. Dist. LEXIS 12866 (N.D. Ga. 1988).

Contacts insufficient under long-arm statute although constitutional minimum contacts existed. — In a diversity action to collect on accounts receivable obtained from a carpet manufacturer, among which accounts were a nonresident's obligations for carpet purchased, the court dismissed for lack of personal jurisdiction, although constitutional minimum contacts existed, because jurisdiction was not permitted by the long-arm statute (this section), the only "contacts" of the defendant consisting of the following: (1) the defendant regularly attended trade fairs in Georgia; (2) it visited a manufacturer's mill in Georgia to determine whether it would buy carpet; (3) the defendant returned to another state and placed orders with the manufacturer; (4) the defendant sent its trucks into Georgia to pick up the carpet; (5) during this trip, the defendant hauled goods for Georgia residents unrelated to the carpet transaction; and (6) relating to this trucking business, the defendant maintained a certificate of authority and a registered agent. Irving Commercial Corp. v. Sound Floor Coverings, Inc., 595 F. Supp. 536, 1984 U.S. Dist. LEXIS 23553 (N.D. Ga. 1984); Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co., 623 F.2d 375, 1980 U.S. App. LEXIS 15055 (5th Cir. 1980).

Minimum contacts with state required by section. — The only requirement of this section is that the act or acts of the nonresident giving rise to the cause of action must have some relationship to the State of Georgia; there must be minimum contacts with this state. Davis Metals, Inc. v. Allen, 230 Ga. 623, 198 S.E.2d 285, 1973 Ga. LEXIS 1008 (1973); North Peachtree I-285 Properties, Ltd. v. Hicks, 136 Ga. App. 426, 221 S.E.2d 607, 1975 Ga. App. LEXIS 1374 (1975); Tri B Mfg., Inc. v. R.V. Seating, Inc., 154 Ga. App. 600, 269 S.E.2d 94, 1980 Ga. App. LEXIS 2306 (1980) (see O.C.G.A. § 9-10-91).

In a wrongful death action, Florida mental clinic's motion to dismiss was upheld because plaintiff did not establish that clinic was subject to personal jurisdiction in Georgia as matter of due process. Brandenburg v. City of Vidalia, 366 Ga. App. 51, 880 S.E.2d 625, 2022 Ga. App. LEXIS 526 (2022).

In rem jurisdiction. — "Minimum contacts" requirement for in personam jurisdiction applies to in rem jurisdiction as well. Lyons Mfg. Co. v. Gross, 519 F. Supp. 812, 1981 U.S. Dist. LEXIS 13807 (S.D. Ga. 1981).

In order to justify an exercise of jurisdiction in rem, the basis for jurisdiction must be sufficient to justify exercising jurisdiction over the interest of persons in a thing. Lyons Mfg. Co. v. Gross, 519 F. Supp. 812, 1981 U.S. Dist. LEXIS 13807 (S.D. Ga. 1981).

Nonresident invoking benefits of forum's law subject to its jurisdiction. — Only if a nonresident defendant has such "minimum contacts" with the state that the maintenance of action against it does not offend traditional notions of fair play and substantial justice, or if the defendant has performed some act by which it purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws, may the forum, consistent with due process, extend its long arm to embrace it. Thornton v. Toyota Motor Sales U.S.A., Inc., 397 F. Supp. 476, 1975 U.S. Dist. LEXIS 12154 (N.D. Ga. 1975).

Nonresident defendant is subject to jurisdiction of Georgia courts only if the nonresident has established "minimum contacts" in this state so that the exercise of jurisdiction is consistent with "traditional notions of fair play and substantial justice." Swafford v. Avakian, 581 F.2d 1224, 1978 U.S. App. LEXIS 8399 (5th Cir. 1978), cert. denied, 440 U.S. 959, 99 S. Ct. 1500, 59 L. Ed. 2d 772, 1979 U.S. LEXIS 1196 (1979); Clarkson Power Flow, Inc. v. Thompson, 244 Ga. 300, 260 S.E.2d 9, 1979 Ga. LEXIS 1216 (1979).

Under this section, jurisdiction can be exercised only where certain minimum contacts with forum state are present. Harris v. North Am. Rockwell Corp., 372 F. Supp. 958, 1974 U.S. Dist. LEXIS 12007 (N.D. Ga. 1974) (see O.C.G.A. § 9-10-91).

The exercise of jurisdiction over defendant would offend notions of fair play and justice where defendant neither lived in

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Georgia nor filed any action related to her divorce in the Georgia courts. She could not have expected to be haled into a Georgia court merely because seven years earlier she sent a California wage assignment order to the United States Army payroll headquarters in Indiana which resulted in her receiving a portion of plaintiff's military pay which would otherwise have been forwarded to him in Georgia. Millard v. Millard, 204 Ga. App. 399, 419 S.E.2d 718, 1992 Ga. App. LEXIS 880 (1992).

However minimal the burden of defending in foreign tribunal, defendant may not be called upon to do so unless the defendant has had the "minimum contacts" with that state which are a prerequisite to its exercise of power over the defendant. Harris v. North Am. Rockwell Corp., 372 F. Supp. 958, 1974 U.S. Dist. LEXIS 12007 (N.D. Ga. 1974).

Unilateral activity of those who claim some relationship with nonresident defendant cannot satisfy the requirement of contact with the forum state; the application of this rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. Harris v. North Am. Rockwell Corp., 372 F. Supp. 958, 1974 U.S. Dist. LEXIS 12007 (N.D. Ga. 1974); Fowler Prods. Co. v. Coca-Cola Bottling Co., 413 F. Supp. 1339, 1976 U.S. Dist. LEXIS 14845 (M.D. Ga. 1976).

Mere "connection" between plaintiff and nonresident insufficient. — Where the unilateral actions of a forum plaintiff merely involve or somehow relate to a nonresident who has in no way conducted some activity with or in the state, there may be a "connection" between the nonresident and the plaintiff but there is no "contact" between the nonresident and the forum such that jurisdiction will lie. Shellenberger v. Tanner, 138 Ga. App. 399, 227 S.E.2d 266, 1976 Ga. App. LEXIS 2632 (1976); Attwell v. LaSalle Nat'l Bank, 607 F.2d 1157, 1979 U.S. App. LEXIS 9875 (5th Cir. 1979), cert. denied, 445 U.S. 954, 100 S. Ct. 1607, 63 L. Ed. 2d 791, 1980 U.S. LEXIS 1367 (1980); Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co., 623 F.2d 375, 1980 U.S. App. LEXIS 15055 (5th Cir. 1980); Cocklereece v. Moran, 500 F. Supp. 487, 1980 U.S. Dist. LEXIS 16149 (N.D. Ga. 1980).

Implicit or explicit showing of activity with or in state by nonresident required. — The mere allegation that, as a result of an act or omission by a nonresident outside this state, an injury has occurred to a Georgia plaintiff does not establish a "contact" with this forum in the absence of an implicit or explicit showing of activity with or in Georgia by the nonresident. Shellenberger v. Tanner, 138 Ga. App. 399, 227 S.E.2d 266, 1976 Ga. App. LEXIS 2632 (1976); Attwell v. LaSalle Nat'l Bank, 607 F.2d 1157, 1979 U.S. App. LEXIS 9875 (5th Cir. 1979), cert. denied, 445 U.S. 954, 100 S. Ct. 1607, 63 L. Ed. 2d 791, 1980 U.S. LEXIS 1367 (1980).

In order to satisfy constitutional requirement of procedural due process, it must be shown that the nonresident defendant has some "minimum contact" with the forum state so as to make that state's exercise of jurisdiction over the defendant reasonable. Hollingsworth v. Cunard Line, 152 Ga. App. 509, 263 S.E.2d 190, 1979 Ga. App. LEXIS 2977 (1979); Bosworth v. Cooney, 156 Ga. App. 274, 274 S.E.2d 604, 1980 Ga. App. LEXIS 3030 (1980).

Where a corporate officer of a golf cart distributor acted in a purposeful fashion, created continuing personal obligations between the officer and a golf cart manufacturer on behalf of the distributor, and was far from being a passive party in the distributor's business dealings with the manufacturer, the officer was subject to personal jurisdiction under the Georgia long-arm statute and the due process clause of the United States Constitution. Club Car, Inc. v. Club Car (Quebec) Import, Inc., 276 F. Supp. 2d 1276, 2003 U.S. Dist. LEXIS 13861 (S.D. Ga. 2003), aff'd, 362 F.3d 775, 2004 U.S. App. LEXIS 4832 (11th Cir. 2004).

Relation of claims to contacts. — Georgia trial court lacked personal jurisdiction over State of South Carolina and

South Carolina Department of Corrections for claims unrelated to their contacts with the forum state. State v. Reeves, 205 Ga. App. 656, 423 S.E.2d 32, 1992 Ga. App. LEXIS 1280 (1992), cert. denied, No. S93C0104, 1993 Ga. LEXIS 76 (Ga. Jan. 14, 1993).

The relationship between a Spanish corporation that owned a resort in the Dominican Republic and its contacts with Georgia — which included an Internet web site — and the negligence of a taxi driver who allegedly injured the taxi's passengers, residents of Georgia who had been vacationing at the resort, was too tenuous to permit jurisdiction over the corporation in Georgia. Sol Melia v. Brown, 301 Ga. App. 760, 688 S.E.2d 675, 2009 Ga. App. LEXIS 1438 (2009).

Existence of personal jurisdiction depends upon presence of reasonable notice to defendant that action has been brought and upon a sufficient connection between the defendant and the forum state as to make it fair to require defense of the action in the forum. Hollingsworth v. Cunard Line, 152 Ga. App. 509, 263 S.E.2d 190, 1979 Ga. App. LEXIS 2977 (1979).

Plaintiff's residence alone insufficient. — The trial court correctly held that it lacked personal jurisdiction over defendant, a Florida corporation, in a tort claim where both the allegedly tortious act and the resulting injury occurred outside Georgia — the mere residence of plaintiff within the state was insufficient to establish minimum contacts. Smith v. Air Ambulance Network, Inc., 207 Ga. App. 75, 427 S.E.2d 305, 1993 Ga. App. LEXIS 71 (1993).

Shipping contract insufficient. — Contracts to deliver cargo to a Georgia port, in and of themselves, did not constitute sufficient minimum contacts with Georgia to justify the exercise of specific in personam jurisdiction over Danish shipping partnerships in Georgia. Francosteel Corp. v. M/V Charm, 19 F.3d 624, 1994 U.S. App. LEXIS 8334 (11th Cir. 1994).

Effect of suit by corporation's own Georgia-based employee. — The same minimum contacts based upon the activities conducted by the employee of a foreign corporation lose no efficacy because the corporation's own Georgia-based employee is suing it for commissions earned in part by virtue of the employee's work in Georgia on behalf of the corporation. Pascavage v. Can-Do, Inc., 178 Ga. App. 566, 344 S.E.2d 261, 1986 Ga. App. LEXIS 1703 (1986).

Negotiating and signing contract in Georgia. — By negotiating and signing within the geographic boundaries of Georgia an agreement which provided the protection of the laws of Georgia to the parties, a Florida motel company president established a sufficient "minimum contact" with the state. Tampa Motel Mgt. Co. v. Stratton of Fla., Inc., 186 Ga. App. 135, 366 S.E.2d 804, 1988 Ga. App. LEXIS 276 (1988).

Nonresident's involvement in a conspiracy to defraud a Georgia corporation constituted sufficient contacts with Georgia to support the exercise of personal jurisdiction over the nonresident. Georgia Gulf Corp. v. Ward, 701 F. Supp. 1556, 1987 U.S. Dist. LEXIS 14352 (N.D. Ga. 1987).

Demonstrating machines at trade shows. — French corporation established sufficient contacts within Georgia to subject it to jurisdiction on a patent infringement claim, where its American subsidiary demonstrated allegedly infringing machines at trade shows in the state, and the corporation's sales personnel were present at those shows. Gerber Garment Technology, Inc. v. Lectra Sys., 699 F. Supp. 1576, 1988 U.S. Dist. LEXIS 12846 (N.D. Ga. 1988).

Collection of operating expenses by mail alone failed to establish the requisite minimum contacts by non-resident defendant corporation for purposes of exercising personal jurisdiction. Burt v. Energy Servs. Inv. Corp., 207 Ga. App. 210, 427 S.E.2d 576, 1993 Ga. App. LEXIS 132 (1993).

Personal jurisdiction in revival action retained. — When a defendant had the requisite minimum contacts with the forum state for that state to exercise personal jurisdiction over the defendant during the original litigation, those same contacts were sufficient to provide personal jurisdiction to the trial court for any revival action concerning the judgment en-

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tered in the course of the original litigation. Kaylor v. Turner, 210 Ga. App. 2, 435 S.E.2d 233, 1993 Ga. App. LEXIS 1056 (1993), cert. denied, No. S93C1819, 1993 Ga. LEXIS 1072 (Ga. Nov. 5, 1993).

Sufficient contacts found to warrant finding of personal jurisdiction. — See A.L. Williams & Assocs. v. D.R. Richardson & Assocs., 98 F.R.D. 748, 1983 U.S. Dist. LEXIS 14492 (N.D. Ga. 1983).

Evidence showed that security deed holder was personally served outside the state with the former property owner's declaratory judgment action in the same manner as in Georgia for a defendant who was subject to personal jurisdiction because the security deed holder had sufficient contact with Georgia in that the holder held a security deed to Georgia property that the former property owner claimed had to be canceled under Georgia law. Lebbos v. Davis, 256 Ga. App. 1, 567 S.E.2d 345, 2002 Ga. App. LEXIS 800 (2002).

Insufficient contacts. — South Carolina automobile dealer who retained a Georgia attorney to represent the dealer in matters relating to the sale of the dealership, in connection with a possible suit over title to South Carolina land, and in connection with proceedings before the South Carolina department of consumer affairs defending alleged violations of South Carolina law, did not have minimum contacts with Georgia sufficient to allow the superior court to exercise personal jurisdiction over the dealer. Hyatt v. Broyles, Dunstan & Dunstan, 198 Ga. App. 109, 400 S.E.2d 665, 1990 Ga. App. LEXIS 1560 (1990).

Federal and state-law claims of a company with a principal place of business in Georgia against a Florida physician were based on the physician's alleged involvement in a series of medical articles and advertisements claiming that a particular medical device was 86 percent effective; however, the company did not satisfy the company's burden of establishing the district court's personal jurisdiction over the physician under Georgia's long-arm statute. The physician's only contacts with Georgia included a single visit to a doctor's office to conduct training on the medical device and one or two related phone calls; because neither the business trip nor the phone calls were related to or gave rise to the company's claims against the physician, the company did not establish that the physician's actual contacts with Georgia arose out of or related to the company's allegations against the physician. N. Am. Med. Corp. v. Axiom Worldwide, Inc., No. 1:06-CV-1678-JTC, 2009 U.S. Dist. LEXIS 32280 (N.D. Ga. Apr. 9, 2009).

Although South Carolina defendants met the requirements of Georgia's long-arm statute, O.C.G.A. § 9-10-91, the defendants did not deliberately engage in significant activities in Georgia and did not have fair warning that the defendants might be haled into court in Georgia simply by hiring Georgia lawyers to handle litigation that occurred in Massachusetts. Therefore, the defendants were not subject to suit in Georgia by a company that provided expert witness and consulting services to the defendant in the Massachusetts litigation. Schmidt v. JPS Indus., No. 1:09-CV-3584-JEC, 2011 U.S. Dist. LEXIS 35284 (N.D. Ga. Mar. 31, 2011).

Minimum contacts found. — Former wife had the requisite "minimum contacts" in Georgia, in a suit brought by her former husband to enforce an alleged oral contract to pay her share of the marital indebtedness, where she exercised the privilege of jointly conducting business activities in Georgia and enjoyed the benefits and protection of the laws of Georgia. Calhoun v. Somogyi, 190 Ga. App. 502, 379 S.E.2d 595, 1989 Ga. App. LEXIS 298 (1989).

Florida corporation purposefully established the requisite minimum contacts with Georgia, where it made a single, calculated visit to the state which resulted in a contract with a Georgia firm to manufacture and sell ladies' handbags. Complete Concepts, Ltd. v. General Handbag Corp., 880 F.2d 382, 1989 U.S. App. LEXIS 11881 (11th Cir. 1989).

Connecticut corporation's contacts with Georgia were sufficient, where it purposefully directed mailings to Georgia residents in an attempt to obtain an economic

advantage over its local competitor, and it solicited customers in Georgia and contracted with a sales representative whose territory included Georgia. Quikrete Cos. v. Nomix Corp., 705 F. Supp. 568, 1989 U.S. Dist. LEXIS 937 (N.D. Ga. 1989), aff'd, 34 F.3d 1078, 1994 U.S. App. LEXIS 31968 (Fed. Cir. 1994).

New York defendant had the required minimum contacts with Georgia, where the defendant contacted plaintiff, a Georgia corporation, the parties entered into an agreement, after negotiations were conducted over the telephone, and defendant made two trips to plaintiff's company, at which time a modification of commission rates was negotiated and executed. Electronic Transaction Network v. Katz, 734 F. Supp. 492, 1989 U.S. Dist. LEXIS 16601 (N.D. Ga. 1989).

South Carolina advertising agency which entered into contracts with Georgia television stations to air commercials on behalf of a client, from which the agency profited financially, had sufficient contacts with Georgia to justify the exercise of personal jurisdiction over it. Atlanta Gas Light Co. v. Semaphore Adv., Inc., 747 F. Supp. 715, 1990 U.S. Dist. LEXIS 12154 (S.D. Ga. 1990).

Defendant shareholders, all Ohio residents, established the requisite minimum contacts by executing agreements in Georgia through an agent, thereby submitting themselves to personal jurisdiction of the Georgia court. Booksing v. Holley, 210 Ga. App. 869, 437 S.E.2d 857, 1993 Ga. App. LEXIS 1364 (1993).

No minimum contacts found. — Georgia plaintiff failed to present a prima facie case of personal jurisdiction over California defendant, where all the dealings between the parties were through the mail, or by telephone or facsimile machine, there was no personal contact, and the defendant never entered Georgia. Commercial Cas. Ins. Co. v. BSE Mgt., Inc., 734 F. Supp. 511, 1990 U.S. Dist. LEXIS 3696 (N.D. Ga. 1990).

Where a nonresident's sole contacts with Georgia were telephoning and sending a facsimile that contained false information to a day care center, thus causing a tort to be perpetrated on a resident, such actions have repeatedly been held to be insufficient to confer personal jurisdiction under the Georgia long arm statute, O.C.G.A. § 9-10-91. Worthy v. Eller, 265 Ga. App. 487, 594 S.E.2d 699, 2004 Ga. App. LEXIS 156 (2004), cert. denied, No. S04C1061, 2004 Ga. LEXIS 514 (Ga. June 7, 2004).

Because a foreign corporation did not independently perform any acts in Georgia that would subject it to the state's long-arm jurisdiction under O.C.G.A. § 9-10-91, the trial court properly dismissed a domestic corporation's contract and tort claims. Catholic Stewardship Consultants, Inc. v. Ruotolo Assocs., Inc., 270 Ga. App. 751, 608 S.E.2d 1, 2004 Ga. App. LEXIS 1347 (2004), cert. denied, No. S05C0680, 2005 Ga. LEXIS 401 (Ga. May 23, 2005).

In the context of truck driver's Bivens action against the former director of the credentialing program office for the Transportation Security Administration, claiming that the revocation of the driver's hazardous material endorsement violated the driver's Fifth Amendment rights, the court lacked personal jurisdiction over the director because Georgia's long-arm statute and the requirements of due process were not satisfied; three or four one-day trips, occurring over the span of six years did not demonstrate continuous and systematic general business contacts between the director and the driver's cause of action simply did not arise out of, or relate to, the director's contacts with Georgia. Mahmud v. Oberman, 508 F. Supp. 2d 1294, 2007 U.S. Dist. LEXIS 44267 (N.D. Ga. 2007), aff'd, 262 Fed. Appx. 935, 2008 U.S. App. LEXIS 1068 (11th Cir. 2008).

Exercise of personal jurisdiction held reasonable. — Because a seller sued an Illinois limited liability company (LLC) on an open account, long-arm jurisdiction over the LLC under the "transacting business" section of O.C.G.A. § 9-10-91(1) was reasonable and comported with due process. The LLC initiated the relationship with the seller and handled payment, the goods were delivered in Georgia to a Georgia apartment complex controlled by a related Georgia entity, and there was a long course of dealing between the parties. Home Depot Supply, Inc. v.

Constitutional Aspects and "Minimum Contacts" (Cont'd)

Hunter Mgmt., LLC, 289 Ga. App. 286, 656 S.E.2d 898, 2008 Ga. App. LEXIS 62 (2008).

Grounds for Jurisdiction over Nonresidents

1. Transacting Business

Where jurisdiction over nonresident is posited under paragraph (1) of this section, due process must be satisfied by the existence of "minimum contacts" of the nonresident with the state in which the nonresident is sued. Newman v. Fleming, 331 F. Supp. 973, 1971 U.S. Dist. LEXIS 12067 (S.D. Ga. 1971) (see O.C.G.A. § 9-10-91).

For purposes of this section, "transacting business" requires some minimum contacts with the state which should be decided on the individual circumstances of each case. Coe & Payne Co. v. Wood-Mosaic Corp., 125 Ga. App. 845, 189 S.E.2d 459, 1972 Ga. App. LEXIS 1490 (1972) (see O.C.G.A. § 9-10-91).

Cause of action arising from business transaction satisfies minimum contact requirement. — A showing that a nonresident defendant has "transacted any business" in Georgia, and that a cause of action arises therefrom, ipso facto satisfies the minimum contact requirement. Shellenberger v. Tanner, 138 Ga. App. 399, 227 S.E.2d 266, 1976 Ga. App. LEXIS 2632 (1976).

Because an Iowa bank transacted some business in the State of Georgia, even if only with one of its account holders, and because that business was sufficient to meet the constitutional standard for minimum contacts, the trial court did not err in denying the bank's motion to dismiss for lack of personal jurisdiction; moreover, even if the bank did not regularly conduct business or engage in a persistent course of conduct in Georgia, it sought to derive economic benefit from its interstate business activity involving the account holder so that the trial court's exercise of personal jurisdiction over it based on this one transaction was not unlawful. First Nat'l Bank of Ames, Iowa v. Innovative Clinical & Consulting Servs., 280 Ga. App. 337, 634 S.E.2d 88, 2006 Ga. App. LEXIS 748 (2006), cert. denied, No. S06C2001, 2006 Ga. LEXIS 800 (Ga. Oct. 2, 2006), cert. denied, 549 U.S. 1321, 127 S. Ct. 1910, 167 L. Ed. 2d 565, 2007 U.S. LEXIS 3802 (2007).

Without the actions of a corporation, a salesman acting as the corporation's agent would not have been in a position to receive a limited liability company's (LLC's) checks or to fail to deliver title to a truck to the LLC. As these actions occurred in Georgia, the corporation was not forced to litigate there solely as a result of "random, fortuitous, or attenuated" contacts; it did business in Georgia sufficient to authorize the exercise of personal jurisdiction over the corporation under O.C.G.A. § 9-10-91(1). ATCO Sign & Lighting Co., LLC v. Stamm Mfg., 298 Ga. App. 528, 680 S.E.2d 571, 2009 Ga. App. LEXIS 725 (2009).

Court could exercise personal jurisdiction over a Canadian citizen pursuant to O.C.G.A. § 9-10-91 based on allegations that the nonresident—as a company's founder, leader, and majority shareholder—purposefully sought to acquire a Georgia business, drain the business's value for that citizen and the citizen's various entities, and leave the company bereft for the company's creditors. Kipperman v. Onex Corp., 411 B.R. 805, 2009 U.S. Dist. LEXIS 71666 (N.D. Ga. 2009).

In a suit brought by an insurer seeking legal and equitable recission of an aviation insurance policy, the trial court properly denied the out-of-state insureds' motion to dismiss premised on lack of personal jurisdiction because the evidence showed that the insureds, through their agent, transacted business in Georgia and they were not being forced to litigate in Georgia because of random, fortuitous, or attenuated circumstances. Lima Delta Co. v. Global Aero., Inc., 325 Ga. App. 76, 752 S.E.2d 135, 2013 Ga. App. LEXIS 969 (2013), cert. denied, No. S14C0479, 2014 Ga. LEXIS 279 (Ga. Mar. 28, 2014), cert. denied, 574 U.S. 826, 135 S. Ct. 166, 190 L. Ed. 2d 49, 2014 U.S. LEXIS 5034 (2014).

Sale of goods in another state, knowing that they will be resold in Georgia, is a

purposeful activity sufficient to establish a "contact" with Georgia. University of Iowa Press v. Urrea, 211 Ga. App. 564, 440 S.E.2d 203, 1993 Ga. App. LEXIS 1574 (1993), cert. denied, No. S94C0548, 1994 Ga. LEXIS 526 (Ga. Feb. 18, 1994).

Term "transacting any business" as used in this section is not limited by its definition in Title 14. Patron Aviation, Inc. v. Teledyne Indus., Inc., 154 Ga. App. 13, 267 S.E.2d 274, 1980 Ga. App. LEXIS 2030 (1980) (see O.C.G.A. § 9-10-91).

Paragraph (1) of this section applies to matters in contract, not to those sounding in tort. Scott v. Crescent Tool Co., 296 F. Supp. 147, 1968 U.S. Dist. LEXIS 9665 (N.D. Ga. 1968); Whitaker v. Krestmark of Ala., Inc., 157 Ga. App. 536, 278 S.E.2d 116, 1981 Ga. App. LEXIS 1899 (1981), overruled, Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank, 279 Ga. 672, 620 S.E.2d 352, 2005 Ga. LEXIS 649 (2005); Lutz v. Chrysler Corp., 691 F.2d 996, 1982 U.S. App. LEXIS 24100 (11th Cir. 1982) (see O.C.G.A. § 9-10-91).

The "transacts any business" test of paragraph (1) of O.C.G.A. § 9-10-91 applies only to contract claims. Delong Equip. Co. v. Washington Mills Abrasive Co., 840 F.2d 843, 1988 U.S. App. LEXIS 3580 (11th Cir. 1988), superseded by statute as stated in, Bell v. Rosen, No. CV214-127, 2015 U.S. Dist. LEXIS 126752 (S.D. Ga. Sept. 22, 2015).

Transacting business did not support motion to dismiss. — The denial of defendant's motion to dismiss cannot be sustained on the ground that the defendant was transacting business within the purview of subsection (1) of O.C.G.A. § 9-10-91. White v. Roberts, 216 Ga. App. 273, 454 S.E.2d 584, 1995 Ga. App. LEXIS 116 (1995).

Truck driver improperly reached. — The transacting business clause under subsection (1) of O.C.G.A. § 9-10-91 applies only to contract claims, and where plaintiff asserted tort claims against truck driver for father's death in negligence, the district court did not have personal jurisdiction under subsection (1); nor could defendant truck driver be reached under subsections (2) and (3), where the alleged tortious act and injury occurred in South Carolina. Mathews v. Rail Express, Inc., 836 F. Supp. 873, 1993 U.S. Dist. LEXIS 15857 (N.D. Ga. 1993).

Trips into state by nonresident agent after consummation of business do not constitute transacting of business under the long-arm statute. Pennington v. Toyomenka, Inc., 512 F.2d 1291, 1975 U.S. App. LEXIS 14684 (5th Cir. 1975).

Action in tort cannot be based on paragraph (1) of section. — By including tortious action under paragraph (2) of this section, the legislature could not have meant for a cause of action in tort to arise from the transaction of business under paragraph (1) of this section as well. Scott v. Crescent Tool Co., 296 F. Supp. 147, 1968 U.S. Dist. LEXIS 9665 (N.D. Ga. 1968) (see O.C.G.A. § 9-10-91).

Paragraph (1) of this section does not apply to tortious conduct. Griffin v. Air S., Inc., 324 F. Supp. 1284, 1971 U.S. Dist. LEXIS 14056 (N.D. Ga. 1971) (see O.C.G.A. § 9-10-91).

Paragraph (1) of this section has been held applicable only to cases sounding in contract, and the cause of action must arise from the very transaction of business which forms the basis for personal jurisdiction. Standard v. Meadors, 347 F. Supp. 908, 1972 U.S. Dist. LEXIS 12337 (N.D. Ga. 1972) (see O.C.G.A. § 9-10-91).

Where duty breached arises solely from contract, personal jurisdiction cannot be based on "tortious injury" committed in this state. Unistrut Ga., Inc. v. Faulkner Plastics, Inc., 135 Ga. App. 305, 217 S.E.2d 611, 1975 Ga. App. LEXIS 1656 (1975).

The "transacting business" provision of O.C.G.A. § 9-10-91 is inapplicable to tort actions. Martin Luther King, Jr. Ctr. for Social Change, Inc. v. American Heritage Prods., Inc., 508 F. Supp. 854, 1981 U.S. Dist. LEXIS 12147 (N.D. Ga. 1981), rev'd, 694 F.2d 674, 1983 U.S. App. LEXIS 27928 (11th Cir. 1983).

Noncommercial claims arising from personal relationships not covered. — The scope of the "transacts any business" portion of the long arm statute does not extend to include noncommercial claims arising from personal relation-

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ships. Garvey v. Mendenhall, 199 Ga. App. 241, 404 S.E.2d 613, 1991 Ga. App. LEXIS 423 (1991), cert. denied, No. S91C0982, 1991 Ga. LEXIS 736 (Ga. May 22, 1991).

California resident's social visits to Georgia were not sufficient to subject the Californian to the jurisdiction of the Georgia courts in a paternity and breach of promise action. Garvey v. Mendenhall, 199 Ga. App. 241, 404 S.E.2d 613, 1991 Ga. App. LEXIS 423 (1991), cert. denied, No. S91C0982, 1991 Ga. LEXIS 736 (Ga. May 22, 1991).

Prerequisites for jurisdiction on basis of transacting business. — Under this section, jurisdiction over a nonresident exists on the basis of transacting business in this state: if the nonresident has purposefully done some act or consummated some transaction in this state; if the cause of action arises from or is connected with such act or transaction, and if the exercise of jurisdiction by the courts of this state does not offend traditional fairness and substantial justice. Davis Metals, Inc. v. Allen, 230 Ga. 623, 198 S.E.2d 285, 1973 Ga. LEXIS 1008 (1973); O.N. Jonas Co. v. B & P Sales Corp., 232 Ga. 256, 206 S.E.2d 437, 1974 Ga. LEXIS 923 (1974); Granite & Quartzite Centre, Inc. v. M/S Virma, 374 F. Supp. 1124, 1974 U.S. Dist. LEXIS 8880 (S.D. Ga. 1974); Porter v. Mid-State Homes, Inc., 133 Ga. App. 706, 213 S.E.2d 10, 1975 Ga. App. LEXIS 2247 (1975); Hollingsworth v. Cunard Line, 152 Ga. App. 509, 263 S.E.2d 190, 1979 Ga. App. LEXIS 2977 (1979); Attwell v. LaSalle Nat'l Bank, 607 F.2d 1157, 1979 U.S. App. LEXIS 9875 (5th Cir. 1979), cert. denied, 445 U.S. 954, 100 S. Ct. 1607, 63 L. Ed. 2d 791, 1980 U.S. LEXIS 1367 (1980); Atlas Aviation, Inc. v. Hungate, 153 Ga. App. 517, 265 S.E.2d 851, 1980 Ga. App. LEXIS 1877 (1980); Patron Aviation, Inc. v. Teledyne Indus., Inc., 154 Ga. App. 13, 267 S.E.2d 274, 1980 Ga. App. LEXIS 2030 (1980); Bosworth v. Cooney, 156 Ga. App. 274, 274 S.E.2d 604, 1980 Ga. App. LEXIS 3030 (1980); Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co., 623 F.2d 375, 1980 U.S. App. LEXIS 15055 (5th Cir. 1980); Manton v. California Sports, Inc., 493 F. Supp. 496, 1980 U.S. Dist. LEXIS 12179 (N.D. Ga. 1980) (see O.C.G.A. § 9-10-91).

In cases arising out of actions ex contractu, an individual's contract with an out-of-state party alone cannot automatically establish sufficient minimum contacts in the other party's home forum. Prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing must be evaluated in determining whether the defendant has purposefully established minimum contacts with the forum. Klein v. Allstate Ins. Co., 202 Ga. App. 188, 413 S.E.2d 777, 1991 Ga. App. LEXIS 1721 (1991), aff'd, 262 Ga. 599, 422 S.E.2d 863, 1992 Ga. LEXIS 998 (1992).

Because prior judicial precedent improperly limited the scope of the transacting business element of O.C.G.A. § 9-10-91(1), the court of appeals did not fully consider whether the trial court had personal jurisdiction over the bank; consequently, the Georgia Supreme Court reinterpreted the statute and overruled conflicting decisions. Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank, 279 Ga. 672, 620 S.E.2d 352, 2005 Ga. LEXIS 649 (2005).

Because nothing in O.C.G.A. § 9-10-91(1) limits its application to contract cases, requires the physical presence of the nonresident in Georgia, or minimizes the import of a nonresident's intangible contacts with the state, the Supreme Court of Georgia overrules all prior cases that fail to accord the appropriate breadth to the construction of the "transacting any business" language of O.C.G.A. § 9-10-91(1). Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank, 279 Ga. 672, 620 S.E.2d 352, 2005 Ga. LEXIS 649 (2005).

In a manufacturer's breach of contract action alleging nonpayment by a nonresident corporation for two shipments received at the manufacturer's Georgia facility, personal jurisdiction over the nonresident corporation was appropriate under O.C.G.A. § 9-10-91(1) because the nonresident corporation transacted business in Georgia by sending purchase orders to the manufacturer in Georgia, requesting delivery by customer pickup at

the manufacturer's plant in Georgia, directing third parties to accept delivery of the goods in Georgia, taking legal title to the goods in Georgia, and promising to pay money in Georgia on the two shipments in question. Diamond Crystal Brands, Inc. v. Food Movers Int'l, 593 F.3d 1249, 2010 U.S. App. LEXIS 786 (11th Cir.), cert. denied, 562 U.S. 836, 131 S. Ct. 158, 178 L. Ed. 2d 39, 2010 U.S. LEXIS 5846 (2010).

Out of state corporation not subject to personal jurisdiction but subject to general jurisdiction. — In a product liability action, the Long Arm Statute, O.C.G.A. § 9-10-90, did not apply to an out-of-state corporation that was authorized to do business in Georgia, and the corporation was not subject to specific personal jurisdiction in Georgia. However, because the appellant was registered and authorized to do business in Georgia, the appellant was subject to the general jurisdiction of Georgia's courts under Klein's general-jurisdiction holding. Cooper Tire & Rubber Co. v. McCall, 312 Ga. 422, 863 S.E.2d 81, 2021 Ga. LEXIS 626 (2021).

Emails and other actions sufficient to constitute transaction of business. — Trial court erred in dismissing a customer's action against an organization on the ground that the customer failed to join a corporation as a party because the order did not show that the trial court considered the factors listed in O.C.G.A. § 9-11-19(b), and the corporation was doing business in the state sufficient to confer jurisdiction under O.C.G.A. § 9-10-91(1); the corporation participated in a safari auction, which was advertised to the customer in Georgia, and numerous email messages were exchanged between the corporation in Africa and the customer in Georgia. Wright v. Safari Club Int'l, 307 Ga. App. 136, 706 S.E.2d 84, 2010 Ga. App. LEXIS 1113 (2010).

Interactive website to obtain Georgia clients sufficient. — Georgia court had personal jurisdiction under O.C.G.A. § 9-10-91(1) over a Nebraska company that operated a website through which student-athletes, including Georgia residents, registered to become clients and which hired a Georgia resident as an independent contractor to help obtain more Georgia clients, which the resident did; the suit stemmed from the procurement of the Georgia clients. American College Connection, Inc. v. Berkowitz, 332 Ga. App. 867, 775 S.E.2d 226, 2015 Ga. App. LEXIS 406 (2015).

Tortious activity of officer sufficiently alleged to establish personal jurisdiction. — Where plaintiff judgment creditor filed suit against defendants for breach of fiduciary duty, fraud, and other torts relating to representations that the debtor, under a settlement agreement in a bankruptcy adversary proceeding, was to pay funds held in a segregated account to the creditor, the officers' argument that there was no personal jurisdiction over them failed because the first officer was alleged to have personally participated in a tort on behalf of the corporation by filing a false affidavit with the bankruptcy court, and the second officer, as the president of the debtor and the only person able to act on its behalf, was alleged to have personally participated in every false representation and intentional failure to perform the debtor's obligations, and thus the creditor had sufficiently alleged that the officers personally participated in tortious activity on behalf of the debtor. Clough Mktg. Servs. v. Main Line Corp., No. 1:07-CV-0173-RLV, 2007 U.S. Dist. LEXIS 34425 (N.D. Ga. May 10, 2007).

Status of president of company alone will not establish jurisdiction. — Company president did not fall within the reach of the state long-arm statute because the employee failed to show that the president personally transacted any business in the state and the mere fact that the individual was the president of a company that did business in the state was insufficient to establish jurisdiction. Canty v. Fry's Elecs., Inc., 736 F. Supp. 2d 1352, 2010 U.S. Dist. LEXIS 90624 (N.D. Ga. 2010).

Proper venue had to be determined pursuant to Georgia's Long Arm Statute. — Trial court did not err in denying a motion filed by a corporate president and the president's spouse to dismiss a corporation's action against them or, in the alternative, to transfer the case because the trial court's application of the relation-

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back statute, O.C.G.A. § 9-11-15(c), did not violate the constitutional right of the president and the spouse to be sued in the county where they resided under Ga. Const. 1983, Art. VI, Sec. II, Para. VI; because the president and the wife were not residents of Georgia when the suit was filed, the proper venue had to be determined pursuant to Georgia's Long Arm Statute, O.C.G.A. §§ 9-10-91 and 9-10-93. Cartwright v. Fuji Photo Film U.S.A., Inc., 312 Ga. App. 890, 720 S.E.2d 200, 2011 Ga. App. LEXIS 976 (2011), cert. denied, No. S12C0600, 2012 Ga. LEXIS 306 (Ga. Mar. 19, 2012).

Prerequisites for jurisdiction where liability predicated on contractual breach. — Where plaintiff's theory of liability is predicated on contractual breach and there is no claim of any tortious act or omission by defendant foreign corporation occurring either in or outside Georgia, inquiry in determining whether foreign corporation is subject to in personam jurisdiction under this section is limited to whether the corporation was transacting business within Georgia and, if so, whether it had sufficient contacts to satisfy the constitutional requirements of due process. Interstate Paper Corp. v. Air-O-Flex Equip. Co., 426 F. Supp. 1323, 1977 U.S. Dist. LEXIS 17544 (S.D. Ga. 1977); Spelsberg v. Sweeney, 514 F. Supp. 622, 1981 U.S. Dist. LEXIS 12337 (S.D. Ga. 1981); Lyons Mfg. Co. v. Gross, 519 F. Supp. 812, 1981 U.S. Dist. LEXIS 13807 (S.D. Ga. 1981); Outlaw v. John R. Bartlett Found., 166 Ga. App. 381, 304 S.E.2d 507, 1983 Ga. App. LEXIS 2175 (1983); Georgia R.R. Bank & Trust Co. v. Barton, 169 Ga. App. 821, 315 S.E.2d 17, 1984 Ga. App. LEXIS 2825 (1984) (see O.C.G.A. § 9-10-91).

As to jurisdiction over a foreign manufacturer and designer of automobiles, see Vermeulen v. Renault, U.S.A., Inc., 965 F.2d 1014, 1992 U.S. App. LEXIS 38371 (11th Cir. 1992), amended, 975 F.2d 746, 1992 U.S. App. LEXIS 15370 (11th Cir. 1992), modified, sub. op., 985 F.2d 1534, 1993 U.S. App. LEXIS 5205 (11th Cir. 1993).

In product liability suit, Georgia's exercise of personal jurisdiction over French manufacturer of automobiles was consistent with Georgia law and with the due process clause of the fourteenth amendment since the manufacturer designed the car in question for the Georgia market, advertised that car in Georgia, established channels for customers in Georgia to seek advice about the car, and maintained a distribution network by which the cars were brought to Georgia, thus establishing minimum contacts with Georgia sufficient to satisfy due process requirements; and since Georgia's exercise of jurisdiction over the manufacturer comported with traditional notions of fair play and substantial justice. Vermeulen v. Renault U.S.A., Inc., 975 F.2d 746 (11th Cir. 1992), revised 985 F.2d 1534 (11th Cir. 1993), cert. denied, 508 U.S. 907, 113 S. Ct. 2334, 124 L. Ed. 2d 246 (1993).

Reasonableness of long arm statutes. — To the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state; the exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to an action brought to enforce them, in most instances, can hardly be said to be undue. Hollingsworth v. Cunard Line, 152 Ga. App. 509, 263 S.E.2d 190, 1979 Ga. App. LEXIS 2977 (1979).

This section requires that the defendant's liability arise out of the business transacted. Smith v. Piper Aircraft Corp., 425 F.2d 823, 1970 U.S. App. LEXIS 9587 (5th Cir. 1970); Castleberry v. Gold Agency, Inc., 124 Ga. App. 694, 185 S.E.2d 557, 1971 Ga. App. LEXIS 1067 (1971); Coe & Payne Co. v. Wood-Mosaic Corp., 125 Ga. App. 845, 189 S.E.2d 459, 1972 Ga. App. LEXIS 1490 (1972); Fulghum Indus., Inc. v. Walterboro Forest Prods., Inc., 345 F. Supp. 296, 1972 U.S. Dist. LEXIS 13300 (S.D. Ga. 1972), aff'd, 477 F.2d 910, 1973 U.S. App. LEXIS 10579 (5th Cir. 1973); Fowler Prods. Co. v. Coca-Cola Bottling Co., 413 F. Supp. 1339, 1976 U.S. Dist. LEXIS 14845 (M.D. Ga. 1976); Wise v. State Bd. for Examination, Qualification & Registration of Architects,

247 Ga. 206, 274 S.E.2d 544, 1981 Ga. LEXIS 639 (1981), overruled in part, Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank, 279 Ga. 672, 620 S.E.2d 352, 2005 Ga. LEXIS 649 (2005) (see O.C.G.A. § 9-10-91).

Personal jurisdiction could be exercised, consistent with due process, over nonresidents who negotiated the terms of loan documents and other contracts with a Georgia resident in Georgia. Ralls Corp. v. Huerfano River Wind, LLC, 27 F. Supp. 3d 1303, 2014 U.S. Dist. LEXIS 87414 (N.D. Ga. 2014).

No jurisdiction absent business transaction giving rise to liability. — A defendant is not subject to in personam jurisdiction under paragraph (1) of this section where it has never transacted business within Georgia out of which liability would arise. Smith v. Piper Aircraft Corp., 425 F.2d 823, 1970 U.S. App. LEXIS 9587 (5th Cir. 1970) (see O.C.G.A. § 9-10-91).

Trend is to construe long arm "transacting any business" statutes most liberally and to uphold the jurisdiction of the court of the plaintiff's residence in actions arising, either directly or indirectly, out of such transactions. Davis Metals, Inc. v. Allen, 230 Ga. 623, 198 S.E.2d 285, 1973 Ga. LEXIS 1008 (1973); Hollingsworth v. Cunard Line, 152 Ga. App. 509, 263 S.E.2d 190, 1979 Ga. App. LEXIS 2977 (1979); Bosworth v. Cooney, 156 Ga. App. 274, 274 S.E.2d 604, 1980 Ga. App. LEXIS 3030 (1980).

It is a mistake to assume that the trend to construe "transacting any business" liberally heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Fowler Prods. Co. v. Coca-Cola Bottling Co., 413 F. Supp. 1339, 1976 U.S. Dist. LEXIS 14845 (M.D. Ga. 1976).

To obtain personal jurisdiction under paragraph (1) of this section, cause of action must arise from the act of transacting the business within Georgia. Fulghum Indus., Inc. v. Walterboro Forest Prods., Inc., 477 F.2d 910, 1973 U.S. App. LEXIS 10579 (5th Cir. 1973) (see O.C.G.A. § 9-10-91).

Basic requirement of "any" business transaction under this section is that transaction have "some relationship, some connection with the cause of action, and there must be minimum contacts with the state." Unistrut Ga., Inc. v. Faulkner Plastics, Inc., 135 Ga. App. 305, 217 S.E.2d 611, 1975 Ga. App. LEXIS 1656 (1975) (see O.C.G.A. § 9-10-91).

This section permits personal jurisdiction over nonresident if the nonresident or the nonresident's agent "transacts any business" in the state; the cause of action must arise from the transactions upon which the court bases the exercise of its long arm jurisdiction, and other business which defendant might have done in Georgia is not relevant. Luxury Air Serv., Inc. v. Cessna Aircraft Co., 78 F.R.D. 410, 1978 U.S. Dist. LEXIS 18743 (N.D. Ga. 1978) (see O.C.G.A. § 9-10-91).

Where the defendant initiated contact with the plaintiff and a concentrated period of negotiations occurred concerning the exact specifications of the custom-made piece of equipment being sought by the defendant, the equipment then being built on an accelerated schedule, and the defendant's plant manager traveling to the plant for inspection and finalization of the contract, personal jurisdiction over the defendant was established. SES Indus., Inc. v. Intertrade Packaging Mach. Corp., 236 Ga. App. 418, 512 S.E.2d 316.

A trial court properly found that personal jurisdiction existed against an automobile manufacturer, despite the fact that the manufacturer's principal place of business was located in California as the manufacturer: (1) had a registered agent in the State of Georgia; (2) transacted business in Georgia through the agent; and (3) made judicial admissions that the manufacturing was in the business of designing, testing, and manufacturing motor vehicles for use in Georgia as well as the United States. Moreover, the exercise of jurisdiction over the manufacturer was reasonable and did not violate notions of fair play and substantial justice. Mitsubishi Motors Corp. v. Colemon, 290 Ga. App. 86, 658 S.E.2d 843, 2008 Ga. App. LEXIS 255 (2008).

Transacting of business requires only purposeful involvement. — The transacting of business in Georgia re-

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quires only that the defendant engage in a transaction as a result of some purposeful involvement with Georgia. Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co., 623 F.2d 375, 1980 U.S. App. LEXIS 15055 (5th Cir. 1980).

Given the defendant's consistent and purposeful personal dealings with the Georgia corporation, dealings which bestowed substantial benefits to the defendant and induced substantial action by the Georgia corporation to its detriment, the court has personal jurisdiction over the defendant. White House, Inc. v. Winkler, 202 Ga. App. 603, 415 S.E.2d 185, 1992 Ga. App. LEXIS 104 (1992); Habersham Metal Prods. Co. v. Huntsville Fastener & Supply, Inc., 216 Ga. App. 646, 455 S.E.2d 356, 1995 Ga. App. LEXIS 267 (1995).

Business transactions resulting from purposeful involvement provide requisite connection. — If a nonresident corporation purposefully seeks to avail itself of business opportunities in Georgia, the resulting business transactions have the requisite connection with Georgia to sustain jurisdiction, regardless of whether the nonresident itself comes into the state or has agents or independent contractors effect this result. Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co., 623 F.2d 375, 1980 U.S. App. LEXIS 15055 (5th Cir. 1980).

Evidence of sales by the foreign corporation in Georgia demonstrating purposeful activity that related either directly or indirectly to the subject of the suit was sufficient to show "minimum contacts" by the corporation with the state warranting the exercise of personal jurisdiction. HTL Sp. Z O.O. v. Nissho Corp., 245 Ga. App. 625, 538 S.E.2d 525, 2000 Ga. App. LEXIS 1027 (2000), cert. denied, No. S01C0010, 2001 Ga. LEXIS 130 (Ga. Feb. 2, 2001).

Guarantying a note sufficient to confer jurisdiction. — Georgia long-arm statute, O.C.G.A. § 9-10-91(1), allowed a Georgia court to exercise personal jurisdiction over a guarantor who lived in residences in California and Arizona because the guarantor transacted business in Georgia by purposefully guarantying a note in Georgia. Furthermore, the creditor's suit arose from the act of guaranty, and the exercise of jurisdiction by the courts of Georgia did not offend traditional fairness and substantial justice. Robertson v. CRI, Inc., 267 Ga. App. 757, 601 S.E.2d 163, 2004 Ga. App. LEXIS 780 (2004).

Trial court did not err in denying the guarantors' motion to dismiss for lack of personal jurisdiction a bank's action to recover on promissory notes securing loans to a limited liability company (LLC) and on guaranties of those loans because the guarantors transacted business in Georgia within the meaning of the Long Arm Statute, O.C.G.A. § 9-10-91(1), and given the guarantors' purposeful personal dealings with the bank, dealings which bestowed substantial benefits to the guarantors and induced substantial action by the bank to the bank's detriment, neither reasonableness nor fair play nor substantial justice would be offended by haling the guarantors into a Georgia court and exercising jurisdiction over the guarantors; the guarantors understood that the LLC was formed for the sole purpose of developing property in Georgia, the bank's claims arose out of the guarantors' Georgia activities, the guarantors pointed to no evidence showing that litigating the action in Georgia would unduly burden the guarantors, and Georgia had an interest in adjudicating the dispute because the dispute involved both a significant loss suffered by a Georgia financial institution and real property located in the state. Paxton v. Citizens Bank & Trust of W. Ga., 307 Ga. App. 112, 704 S.E.2d 215, 2010 Ga. App. LEXIS 1103 (2010).

Use of agent to sign guarantee sufficient for jurisdiction. — Defendants transacted business in Georgia sufficient to satisfy the long-arm statute, O.C.G.A. § 9-10-91(1), because powers of attorney which the defendants executed were valid, and hence defendants' guarantees— signed by the defendants' agent— were valid. The guarantee agreements constituted sufficient minimum contacts with Georgia to satisfy due process without offending traditional notions of fair play and substantial justice. Bank of Ozarks v. Kingsland Hospitality, LLC, No. 4:11-cv-

237, 2012 U.S. Dist. LEXIS 144666 (S.D. Ga. Oct. 5, 2012).

Corporate personality is legal fiction, and corporate "act," "contact," or "presence" may be consummated only through personnel authorized to act for it; presence in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. Hollingsworth v. Cunard Line, 152 Ga. App. 509, 263 S.E.2d 190, 1979 Ga. App. LEXIS 2977 (1979); Wise v. State Bd. for Examination, Qualification & Registration of Architects, 247 Ga. 206, 274 S.E.2d 544, 1981 Ga. LEXIS 639 (1981), overruled in part, Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank, 279 Ga. 672, 620 S.E.2d 352, 2005 Ga. LEXIS 649 (2005).

Subsidiary's transactions imputable to parent corporation. — Where the court has determined two subsidiaries and their parent corporation have acted as mere alter egos of one another, the transactions of the subsidiary in such a situation are properly attributable to the parent for jurisdictional purposes. Najran Co. v. Fleetwood Enters., Inc., 659 F. Supp. 1081, 1986 U.S. Dist. LEXIS 19578 (S.D. Ga. 1986).

When an alleged injured party asserted product liability claims against a defunct manufacturer of a gas container and its parent company, the manufacturer had sufficient contacts with Georgia for personal jurisdiction, and the alleged injured party alleged enough for the court to find that discovery was warranted on the claim that the parent company actually designed the gas container, and the claim that the defunct manufacturer served as the mere alter ego of the parent company. Williamson v. Walmart Stores, Inc., No. 3:14-CV-97, 2015 U.S. Dist. LEXIS 45657 (M.D. Ga. Apr. 8, 2015).

Actions of affiliated companies. — Trial court erred in denying hotel entities' motion to dismiss based on lack of personal jurisdiction as the evidence did not show they entered any agreements with the corporation in Georgia or that they transacted any business in Georgia, and the fact that the corporation's parent company had a separate affiliate with dealings in Georgia and an interest in the hotel entities was insufficient to support personal jurisdiction over the hotel entities. Yukon Ptnrs, Inc. v. Lodge Keeper Group, Inc., 258 Ga. App. 1, 572 S.E.2d 647, 2002 Ga. App. LEXIS 1242 (2002).

Conduct unrelated to action is irrelevant to jurisdiction. — Business of a defendant in Georgia, which is unrelated to the contract being sued upon by the plaintiff, is irrelevant to the existence of jurisdiction under this section. Fulghum Indus., Inc. v. Walterboro Forest Prods., Inc., 345 F. Supp. 296, 1972 U.S. Dist. LEXIS 13300 (S.D. Ga. 1972), aff'd, 477 F.2d 910, 1973 U.S. App. LEXIS 10579 (5th Cir. 1973) (see O.C.G.A. § 9-10-91).

Attendance of foreign company's president at trade show in Georgia. — The fact that a California company's president attended a trade show that was held in Atlanta on one occasion was fortuitous, and could not be said to constitute transacting business in Georgia without a showing that the president's attendance was important to the performance of the contract. Mayacamas Corp. v. Gulfstream Aerospace Corp., 190 Ga. App. 892, 380 S.E.2d 303, 1989 Ga. App. LEXIS 453, cert. vacated, 259 Ga. 455, 385 S.E.2d 412, 1989 Ga. LEXIS 337 (1989).

Activities subsequent to cause of action sufficient to constitute transacting business in state will not furnish a jurisdictional basis. J.C. Penney Co. v. Malouf Co., 125 Ga. App. 832, 189 S.E.2d 453, 1972 Ga. App. LEXIS 1488 (1972), rev'd, 230 Ga. 140, 196 S.E.2d 145, 1973 Ga. LEXIS 839 (1973).

Activity under paragraph (1) must be more extensive than under paragraph (2). — Activity under paragraph (1) of this section must be more extensive than activity which will support a finding of a "contact" with Georgia for the purpose of exercising jurisdiction in a tort claim under paragraph (2) of this section. Swafford v. Avakian, 581 F.2d 1224, 1978 U.S. App. LEXIS 8399 (5th Cir. 1978), cert.

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denied, 440 U.S. 959, 99 S. Ct. 1500, 59 L. Ed. 2d 772, 1979 U.S. LEXIS 1196 (1979) (see O.C.G.A. § 9-10-91).

Forum has interest in welfare of its residents dealing with nonresidents. — When a nonresident defendant enters Georgia to negotiate with a plaintiff who is resident and present within the state, the nonresident defendant has voluntarily chosen to deal commercially with a person in whose welfare the forum state has an interest. Marival, Inc. v. Planes, Inc., 302 F. Supp. 201, 1969 U.S. Dist. LEXIS 9836 (N.D. Ga. 1969).

Substituted service on nonresident entering into single contract invalid. — Substituted service on a nonresident who enters into a single contract of purchase by signing same in a state or mailing it to a resident thereof is not valid. Newman v. Fleming, 331 F. Supp. 973, 1971 U.S. Dist. LEXIS 12067 (S.D. Ga. 1971).

Realty corporations transacted business in state through agents. — Where plaintiff was employed by persons acting as agents for all three defendant corporations to attempt to sell Florida realty in this state, the three corporations have interlocking directors and control, and the contracts, when executed, created contractual obligations with in-state residents which contracts are of pecuniary benefit to all three corporations, the evidence is sufficient to hold the defendants liable in this state for transacting business within the state. Palm Beach Inv. Properties, Inc. v. Dingman, 126 Ga. App. 17, 189 S.E.2d 906, 1972 Ga. App. LEXIS 1028 (1972).

Connection with forum state required. Transfer of personal property confers in personam jurisdiction only where such transfer of personalty has some connection with the forum state beyond mere fact of ownership in the state. Lyons Mfg. Co. v. Gross, 519 F. Supp. 812, 1981 U.S. Dist. LEXIS 13807 (S.D. Ga. 1981).

Union's organizing activities give jurisdiction. — Where the facts establish a fairly continuous course of representation and/or of organizing on the part of a defendant union in this forum, in that a union in the recent past has chartered a local in the federal district and sued in the state to enforce rights against an employer, and the union is engaged in organization of a plaintiff cable television news network's workers in Atlanta, these contacts go beyond those required to sustain in personam jurisdiction, under paragraph (1) of O.C.G.A. § 9-10-91. CNN, Inc. v. ABC, 528 F. Supp. 365, 1981 U.S. Dist. LEXIS 16623 (N.D. Ga. 1981).

Suit for damages resulting from crash of airplane. — The plaintiff's jurisdictional allegations in the plaintiff's complaint, that the plaintiff purchased a ticket for an out-of-state airline flight, aboard a plane owned and operated by a foreign corporation not licensed to do business in Georgia, from an airline corporation with its headquarters in Georgia, at a ticket office of the state corporation in Georgia, and was subsequently injured while deplaning at the conclusion of the out-of-state flight, were sufficient to support an inference that the foreign corporation had subjected itself to the jurisdiction of courts sitting in Georgia and that the defendant had sufficient contacts with Georgia to satisfy all statutory and constitutional requirements for the exercise of long-arm jurisdiction, which allegations were not overcome by proof that the sale of tickets in Georgia was an isolated and individual event. Bracewell v. Nicholson Air Servs., Inc., 748 F.2d 1499, 1984 U.S. App. LEXIS 15876 (11th Cir. 1984).

Delivery of buses in state held sufficient to meet statutory requirement. — Where a nonresident defendant's contact with Georgia was that under the defendant's contract with a nonresident plaintiff the most important performance of the contract, i.e., delivery of school buses and payment for them, occurred in Georgia when defendant was present in the state, this contact was minimal but sufficient to satisfy the transacting-any-business requirement of paragraph (1) of O.C.G.A. § 9-10-91. Prosser v. Hancock Bus Sales, Inc., 181 Ga. App. 642, 353 S.E.2d 529, 1987 Ga. App. LEXIS 1525 (1987).

Execution of guaranty contract sufficient transaction of business. — Where the act giving rise to plaintiff's cause of action against defendants for

nonpayment of loan was defendants' execution of the Georgia guaranty contract, the conditions for applicability of this section were fully satisfied. Strickland v. Foundation Life Ins. Co., 129 Ga. App. 614, 200 S.E.2d 306, 1973 Ga. App. LEXIS 1078 (1973) (see O.C.G.A. § 9-10-91).

Neither reasonableness, fair play, nor substantial justice would be offended by haling a guarantor into a Georgia court and exercising jurisdiction over the guarantor in a lessor's action to recover the amount of a judgment the lessor obtained against a lessee for rent owed under a lease because the lease was for the rental of retail space in a Georgia shopping mall, and the guarantor personally guaranteed the rent obligations under the lease; although not all of the guarantor's contacts with the state directly related to the guaranty, the contacts did concern the business that the loan had funded and showed a nexus between the guarantor, the forum, and the transaction as a whole. and even though the consent to jurisdiction provision in the lease did not individually and directly bind the guarantor, it was relevant to show that the guarantor could anticipate being sued in a Georgia court for claims arising out of the operation of the store. Noorani v. Sugarloaf Mills L.P., 308 Ga. App. 800, 708 S.E.2d 685, 2011 Ga. App. LEXIS 299 (2011).

Execution of promissory note constitutes "transacting business." — Execution of promissory notes totalling $125,000 in favor of a resident in return for certain sums of money, while using forms supplied by a state bank, constituted "doing business" within meaning of O.C.G.A. § 9-10-91. Georgia R.R. Bank & Trust Co. v. Barton, 169 Ga. App. 821, 315 S.E.2d 17, 1984 Ga. App. LEXIS 2825 (1984).

Where nonresident executed note in county where suit to collect is later filed and, at the time, the nonresident was a resident of that county, the trial court is authorized to exercise personal jurisdiction over the nonresident pursuant to the provisions of Georgia's long arm statute. Davis v. Peoples Bank, 168 Ga. App. 383, 308 S.E.2d 871, 1983 Ga. App. LEXIS 2781 (1983).

Agreement to jurisdiction of state. — Where defendants expressly agreed in a promissory note that for the purpose of service of process they would be deemed to be doing business in Georgia and subject to the jurisdiction of the state, a district court could assert personal jurisdiction over the defendants. National Serv. Indus., Inc. v. Vafla Corp., 694 F.2d 246, 1982 U.S. App. LEXIS 23192 (11th Cir. 1982).

Continuing payment of interest on notes executed in Georgia by a Georgia trustee of a Georgia trust operating a Georgia farm, and the breach of the contracts are sufficient minimum contacts to constitute "transacting any business" in Georgia after the effective date of the Georgia long arm statute, O.C.G.A. § 9-10-91, and enable a court of this state to exercise jurisdiction over former members or beneficiaries of the trust. Outlaw v. John R. Bartlett Found., 166 Ga. App. 381, 304 S.E.2d 507, 1983 Ga. App. LEXIS 2175 (1983).

Business negotiations conducted within state involving nonresident constitute required "minimum contacts" necessary for "transacting business" within the intent of this section; there is no violation of due process or the underlying principles of fair play, reasonable notice, and opportunity to defend. Delta Equities, Inc. v. Larwin Mtg. Investors, 133 Ga. App. 382, 211 S.E.2d 9, 1974 Ga. App. LEXIS 1078 (1974) (see O.C.G.A. § 9-10-91).

Negotiations within state constituted required "minimum contacts" necessary to hold that appellee was "transacting business" within the intent of this section. Shea/Rustin, Inc. v. Home Fashion Guild Ltd., 135 Ga. App. 88, 217 S.E.2d 405, 1975 Ga. App. LEXIS 1575 (1975) (see O.C.G.A. § 9-10-91).

Requirements met where nonresidents negotiated within state, then later sought advice within state. — Where officers and agents of defendant appeared in Georgia to observe plaintiff's plant, began negotiations in Georgia for a later purchase of plaintiff's product, and after shipment of the product appeared in the state seeking advice on the application of the product, the requirements of paragraph (1) of O.C.G.A. § 9-10-91 were sat-

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isfied. Thermo-Cell S.E., Inc. v. Technetic Indus., Inc., 605 F. Supp. 1122, 1985 U.S. Dist. LEXIS 21329 (N.D. Ga. 1985).

Employment of agents and conduct of activity allows jurisdiction. — A district court could constitutionally exercise personal jurisdiction over seller-defendant where, even though the contract at issue was neither executed nor breached in Georgia, seller-defendant both employed agents and conducted purposeful activity within Georgia. Bigelow-Sanford, Inc. v. Gunny Corp., 649 F.2d 1060, 1981 U.S. App. LEXIS 11713 (5th Cir. 1981).

Exercise of specific jurisdiction over insurer was proper as: (1) the insurer inclusion of Georgia within its covered territory for uninsured motorist coverage was related to the insured's cause of action; (2) the insurer purposefully availed itself of the privileges and benefits of providing insurance coverage in Georgia and the entire United States; and (3) the insurer also reasonably should have foreseen being haled into court in Georgia because its policy covered the entire United States. McGow v. McCurry, 412 F.3d 1207, 2005 U.S. App. LEXIS 11108 (11th Cir. 2005).

Trips into state by nonresident agent after consummation of business do not constitute transacting of business under the long-arm statute. Pennington v. Toyomenka, Inc., 512 F.2d 1291, 1975 U.S. App. LEXIS 14684 (5th Cir. 1975).

Trips and email satisfied minimum contacts. — Counterclaim defendant's trips to Georgia to meet with defendant's president and to visit the offices of a business venture, with emails that counterclaim defendant sent to defendant's president regarding formation and initial operations of venture, were sufficient to satisfy the minimum contacts. requirement, O.C.G.A. § 9-10-91(1). Lowdon PTY Ltd. v. Westminster Ceramics, LLC, 534 F. Supp. 2d 1354, 2008 U.S. Dist. LEXIS 46915 (N.D. Ga. 2008).

Attorney's representation of client did not equate to personal jurisdiction. — Trial court correctly concluded that it did not have personal jurisdiction over the attorney as the attorney did not maintain an office in Georgia, advertise in Georgia, derive a substantial income from services rendered in Georgia, or engage in a persistent course of conduct within Georgia; accordingly, the attorney had done none of the acts which had to be done to be subjected to personal jurisdiction of a Georgia court. Gee v. Reingold, 259 Ga. App. 894, 578 S.E.2d 575, 2003 Ga. App. LEXIS 296 (2003).

Hazardous product. — When a manufacturer from another state sells its product, particularly one with a hazardous potential, to a wholesaler customer from Florida knowing that its product will ultimately be sold in that customer's wholesale outlets in Georgia, it should reasonably expect to be haled into court in Georgia for an injury caused in the state by that product. Continental Research Corp. v. Reeves, 204 Ga. App. 120, 419 S.E.2d 48, 1992 Ga. App. LEXIS 708 (1992), superseded by statute as stated in Johns v. Suzuki Motor of Am., Inc., 310 Ga. 159, 850 S.E.2d 59, 2020 Ga. LEXIS 760 (2020).

Construction activities. — In defendant's motion to transfer from Maryland to Georgia, the transferee court had personal jurisdiction over the defendant, pursuant to O.C.G.A. § 9-10-91(1), because the matter involved the defendant's rental of a crane from the plaintiff for a construction project located in Georgia and, as such, the defendant transacted business in Georgia so as to satisfy the Georgia long-arm statute; the exercise of personal jurisdiction also comported with due process given the extent of defendant's presence in Georgia. Elliot AmQuip, LLC v. Bay Elec. Co., No. ELH-10-3598, 2011 U.S. Dist. LEXIS 59234 (D. Md. June 2, 2011).

Trips for purpose of negotiating contracts sufficient "minimum contact." — Defendant's trips from Florida to Georgia to negotiate contract of sale and escrow contract, and execution of the escrow contract in Georgia, provided sufficient "minimum contact" within the meaning and intent of this section. Bosworth v. Cooney, 156 Ga. App. 274, 274 S.E.2d 604, 1980 Ga. App. LEXIS 3030 (1980) (see O.C.G.A. § 9-10-91).

In a Georgia golf cart manufacturer's action against a Canadian golf cart distributor and its president, the district court properly exercised personal jurisdiction over the president where the president had sufficient minimum contacts with Georgia under the long-arm statute, O.C.G.A. § 9-10-91(1); the president's contacts with Georgia went beyond the visits to Georgia as president of the distributorship because the president engaged in negotiations with the manufacturer for the underlying distribution agreements as well as a personal guaranty. Club Car, Inc. v. Club Car (Quebec) Imp., Inc., 362 F.3d 775, 2004 U.S. App. LEXIS 4832 (11th Cir.), cert. denied, 543 U.S. 1002, 125 S. Ct. 618, 160 L. Ed. 2d 461, 2004 U.S. LEXIS 7728 (2004).

Defendant not subjected to jurisdiction. — Defendant's minimal contacts in this state did not subject defendant to the jurisdiction of the Georgia court, where nothing other than attempts at collection for the alleged debt which is the subject of this lawsuit occurred in Georgia. Compo Mach. Corp. v. Pants Ltd., 203 Ga. App. 728, 417 S.E.2d 443, 1992 Ga. App. LEXIS 609 (1992).

The debtor's contacts with Georgia were insufficient for the exercise of long-arm jurisdiction where the debtor's Georgia agent drafted a promissory note with the debtor as maker but the debtor was a resident of Florida, the note in question was executed in Florida, the note was payable in the Bahamas, the creditor was a Cayman corporation, and the note originally had been executed as payment of rent for a residence in the Bahamas. International Capital Realty Inv. Co. v. West, 234 Ga. App. 725, 507 S.E.2d 545.

Where plaintiff initiated a letter agreement with the nonresident defendant which called for delivery of railcars to defendant outside of Georgia and no representative of defendant visited Georgia in connection with the performance of the agreement, defendant was not subject to personal jurisdiction in Georgia. Railcar, Ltd. v. Southern Ill. Railcar Co., 42 F. Supp. 2d 1369, 1999 U.S. Dist. LEXIS 3489 (N.D. Ga. 1999).

Trial court erred in denying summary judgment pursuant to O.C.G.A. § 9-11-56 to a guarantor in a company's action to collect on a promissory note; the guarantor was not subject to personal jurisdiction in Georgia pursuant to O.C.G.A. § 9-10-91, as the guarantor was a resident of Illinois and was never in Georgia during the course of the negotiations, the guarantor did not initiate or solicit the sale of a restaurant to the guarantor's son, and the guarantor agreed to guaranty the note only after a company requested the guarantor's guaranty as a condition of the sale, and therefore the guarantor did not purposefully utilize the privilege of doing business in Georgia. Stuart v. Peykan, Inc., 261 Ga. App. 46, 581 S.E.2d 609, 2003 Ga. App. LEXIS 382 (2003), cert. denied, No. S03C1262, 2003 Ga. LEXIS 831 (Ga. Sept. 22, 2003).

Copyright infringement suit against a website was dismissed for lack of personal jurisdiction under O.C.G.A. § 9-10-91(1) because there were insufficient contacts with the state since the website did not own any property or have any employees in the state and the website generated very little revenue from the website's few Georgia users. Imageline, Inc. v. Fotolia LLC, 663 F. Supp. 2d 1367, 2009 U.S. Dist. LEXIS 94839 (N.D. Ga. 2009).

Hotel's maintenance of an Internet website with a reservation system alone did not constitute sufficient minimum contacts to assert specific personal jurisdiction over the hotel, and the record contained no evidence showing that the hotel's owner advertised or solicited business in Georgia and, thus, the trial court did not err in determining that the court could not exercise jurisdiction over the owner under Georgia's Long Arm Statute, O.C.G.A. § 9-10-91. Pascarelli v. Koehler, 346 Ga. App. 591, 816 S.E.2d 723, 2018 Ga. App. LEXIS 425 (2018).

Injured e-cigarette purchasers failed to establish personal jurisdiction over a battery manufacturer under O.C.G.A. § 9-10-91 since the purchasers neither alleged nor presented evidence that the batteries were used, sold, manufactured, or even transported by the manufacturer through Georgia. Durham v. LG Chem, Ltd., No. 1:20-cv-02737-SDG, No. 1:20-cv-02522-SDG, 2021 U.S. Dist. LEXIS 77393 (N.D. Ga. Apr. 22, 2021), aff'd, No. 21-

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11814, 2022 U.S. App. LEXIS 2804 (11th Cir. Jan. 31, 2022).

Telephone or mail contact, or visits, insufficient. — Mere telephone or mail contact with an out-of-state defendant, or even the defendant's visits to this state, are insufficient to establish the purposeful activity with Georgia required by O.C.G.A. § 9-10-91. Commercial Food Specialties, Inc. v. Quality Food Equip. Co., 176 Ga. App. 892, 338 S.E.2d 865, 1985 Ga. App. LEXIS 2598 (1985).

Activities to investigate possibility of entering into contract insufficient. — Where officials of a defendant foreign corporation enter Georgia to investigate the possibility of entering into a contract with a Georgia plaintiff to design and manufacture machinery to be installed at defendant's plant in South Carolina, inspect two similar plants and look over plaintiff's operation in Georgia, visit plaintiff's headquarters in order to observe the manufacture of the machinery, and undertake part of the negotiations in Georgia, such activities taken either in isolation or in totality, do not constitute "minimum contacts" that satisfy the constitutional test for exercise of jurisdiction. Fulghum Indus., Inc. v. Walterboro Forest Prods., Inc., 345 F. Supp. 296, 1972 U.S. Dist. LEXIS 13300 (S.D. Ga. 1972), aff'd, 477 F.2d 910, 1973 U.S. App. LEXIS 10579 (5th Cir. 1973).

Negotiation of contract within state is sufficient in itself under Georgia law to enable a Georgia court to acquire jurisdiction. Fowler Prods. Co. v. Coca-Cola Bottling Co., 413 F. Supp. 1339, 1976 U.S. Dist. LEXIS 14845 (M.D. Ga. 1976).

Execution of even a single contract may, in certain circumstances, satisfy the minimum contacts test. Stanley v. Local 926, Int'l Union of Operating Eng'rs, 354 F. Supp. 1267, 1973 U.S. Dist. LEXIS 15140 (N.D. Ga. 1973).

Jurisdiction over corporate officers in action alleging violations of the Georgia Sale of Business Opportunities Act. — Court of appeals did not err in ruling that a trial court had personal jurisdiction over the officers of a limited liability company (LLC) in a physician's action alleging that the officers violated the Sale of Business Opportunities Act, O.C.G.A. § 10-1-415(d)(1), because the allegations of a physician's complaint were sufficient to withstand the attack on the trial court's jurisdiction over the officers on the ground that the officers acted in their corporate capacities; the "fiduciary shield" doctrine did not apply, and the allegations in the complaint supported a finding that the officers were "primary participants" in the LLC's transaction of business within the state, that the cause of action arose from or was connected with such act or transaction, and that the "minimum contacts" test was therefore met. Amerireach.com, LLC v. Walker, 290 Ga. 261, 719 S.E.2d 489, 2011 Ga. LEXIS 948 (2011).

Long-arm personal jurisdiction over out-of-state parent company not established. — Trial court erred by denying an out-of-state company's motion to dismiss based on lack of personal jurisdiction because the company met the company's burden of showing a lack of minimum contacts needed to support the exercise of personal jurisdiction, and that conclusion was consistent with other jurisdictional authority holding that ownership of a resident nursing home subsidiary by an out-of-state parent corporation without more is insufficient to obtain jurisdiction of the parent corporation. Drumm Corp. v. Wright, 326 Ga. App. 41, 755 S.E.2d 850, 2014 Ga. App. LEXIS 112 (2014).

Contract with state resident. — Jurisdiction is not conferred upon a nonresident who merely contracts with a Georgia resident. Rather, the nonresident must purposefully do some act or consummate some transaction in Georgia from which the claim arises or to which the claim is related. Further, the exercise of jurisdiction must not offend traditional notions of fair play and substantial justice. A.I.M. Int'l, Inc. v. Battenfeld Extrusions Sys., 116 F.R.D. 633, 1987 U.S. Dist. LEXIS 7351 (M.D. Ga. 1987).

Where parties allegedly negotiated at least three times, twice in Atlanta, such negotiations involved discussions as to both the terms of a contract and the modification of these terms, commission rates

and sales territories were discussed and agreed upon, and these negotiations and the resulting contract prompted plaintiffs to represent themselves as defendants' agents and as such to consummate substantial sales of defendants' products, but defendants failed to pay commissions allegedly due plaintiffs, defendants purposefully established sufficient minimum contacts with the forum state and the plaintiffs' claim arose from such contacts, thus enabling the court to properly assert in personam jurisdiction over the defendants, including foreign nationals, without offending traditional notions of fair play and substantial justice. A.I.M. Int'l, Inc. v. Battenfeld Extrusions Sys., 116 F.R.D. 633, 1987 U.S. Dist. LEXIS 7351 (M.D. Ga. 1987).

Texas corporation which entered into an agency agreement with a Georgia insurer, solicited and issued insurance contracts underwritten by the insurer, and collected premiums on the contracts, "transacted business" in Georgia within the meaning of the long-arm statute, O.C.G.A. § 9-10-91. Evans v. American Surplus Underwriters Corp., 739 F. Supp. 1526, 1989 U.S. Dist. LEXIS 17062 (N.D. Ga. 1989).

Massachusetts corporation was subject to long-arm jurisdiction based on employee search contract entered into with Georgia personnel company where corporation initiated the contact between the parties through company's office in Atlanta and induced company to perform services to its financial detriment, to the benefit of the corporation. Garrett Assocs., Inc. v. Mediplex Group, Inc., 209 Ga. App. 738, 434 S.E.2d 568, 1993 Ga. App. LEXIS 1007 (1993).

Trial court erred in granting a lender's motion to dismiss on the ground of lack of personal jurisdiction because the trial court had personal jurisdiction pursuant to O.C.G.A. § 9-10-91(1); the lender negotiated the transaction in Georgia, decided to require a guaranty from a Georgia resident, and sent loan documents to the guarantor in Georgia for the purpose of availing itself of the guarantor's financial resources in Georgia to consummate the closing of the underlying transaction; the lender's conduct in negotiating with a Georgia broker and sending documents to a Georgia resident for execution in Georgia provided fair warning that the lender could be subject to suit in Georgia. Crossing Park Props., LLC v. JDI Fort Lauderdale, LLC, 316 Ga. App. 471, 729 S.E.2d 605, 2012 Ga. App. LEXIS 592 (2012).

Mere contracting with Georgia resident is insufficient to extend the long arm of Georgia courts. Fowler Prods. Co. v. Coca-Cola Bottling Co., 413 F. Supp. 1339, 1976 U.S. Dist. LEXIS 14845 (M.D. Ga. 1976).

Despite contract with resident, no jurisdiction. — Where a nonresident defendant executed an agreement in the defendant's home state, the resident plaintiff traveled to the defendant's home state for the only meeting of the parties, and the agreement contemplated further work on a vehicle which was to occur in the defendant's home state, this did not constitute the transaction of business within the state of Georgia and personal jurisdiction over the defendant was properly denied. Phears v. Doyne, 220 Ga. App. 550, 470 S.E.2d 236.

A Tennessee corporation was transacting business in Georgia where it commenced negotiations for an employment contract in Georgia which resulted in hiring a Georgia resident to transact business in Georgia, where the company president and other employees came to Georgia over a period of several years regarding company business, and where the president was personally involved in handling two accounts in the Atlanta area. Pascavage v. Can-Do, Inc., 178 Ga. App. 566, 344 S.E.2d 261, 1986 Ga. App. LEXIS 1703 (1986).

Negotiations leading up to contract outside forum are insufficient contact. — Where a foreign corporation defendant contracted with a Georgia resident after the Georgia resident had come into its home state to solicit its business and after negotiations leading to consummation of the contract had taken place there, the foreign corporation cannot fairly be said to have subjected itself to the jurisdiction of the courts of Georgia by transacting any business within it. Fowler Prods. Co. v. Coca-Cola Bottling Co., 413

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F. Supp. 1339, 1976 U.S. Dist. LEXIS 14845 (M.D. Ga. 1976).

Negotiation of agreement outside state insufficient to confer in personam jurisdiction. — The negotiation and execution of agreements outside the forum state, which affect a domestic corporation under the laws of the forum and which delimit a resident party's control over that corporation, will not, without more, confer in personam jurisdiction over a nonresident party to the agreements. Lyons Mfg. Co. v. Gross, 519 F. Supp. 812, 1981 U.S. Dist. LEXIS 13807 (S.D. Ga. 1981).

Insufficient contact where no negotiations or contracts entered into in forum state. — Where there are no negotiations or contracts entered into in the forum state, with respect to the goods that are the subject matter of litigation, there have not been sufficient "contacts" with the forum state to comply with the transacting business requirement of this section. Berry v. Jeff Hunt Mach. Co., 148 Ga. App. 35, 250 S.E.2d 813, 1978 Ga. App. LEXIS 3010 (1978) (see O.C.G.A. § 9-10-91).

Contact not relating to cause of action insufficient. — While an out-of-state corporation's first visit to Georgia might be considered as part of contract negotiations, such limited contact alone is not enough to sustain the exercise of Georgia's long arm jurisdiction; a second visit which occurred after the sales contract was signed and the purchase finalized, does not relate to the contract giving rise to the action, and it cannot provide a basis for the exercise of long arm jurisdiction under paragraph (1) of this section. Luxury Air Serv., Inc. v. Cessna Aircraft Co., 78 F.R.D. 410, 1978 U.S. Dist. LEXIS 18743 (N.D. Ga. 1978) (see O.C.G.A. § 9-10-91).

Placing goods in stream of commerce pursuant to contract is "transacting business." — The manufacture and shipment of merchandise for delivery in Georgia places the merchandise in the stream of commerce for resale at retail to Georgia citizens; and placing the merchandise in that stream pursuant to a warranty-indemnity contract amounts to "transacting any business" in Georgia under paragraph (1) of this section. J.C. Penney Co. v. Malouf Co., 230 Ga. 140, 196 S.E.2d 145, 1973 Ga. LEXIS 1103 (1973) (see O.C.G.A. § 9-10-91).

Placing goods in stream of commerce pursuant to contract is "transacting business." — Placing merchandise in the stream of commerce for resale at retail to Georgia citizens, pursuant to a warranty-indemnity contract, amounts to "transacting any business" in Georgia under paragraph (1) of this section. Granite & Quartzite Centre, Inc. v. M/S Virma, 374 F. Supp. 1124, 1974 U.S. Dist. LEXIS 8880 (S.D. Ga. 1974) (see O.C.G.A. § 9-10-91).

Placing parts into stream of commerce for resale. — In five consolidated aviation wrongful death cases and one aviation property case, the trial court properly denied the motion to dismiss for lack of personal jurisdiction filed by an out-of-state damper part seller as the seller's activities in placing the seller's dampers into the stream of commerce by manufacturing, selling, and delivering the parts for resale were sufficient to satisfy the requirements of due process and to confer jurisdiction over the company. Vibratech, Inc. v. Frost, 291 Ga. App. 133, 661 S.E.2d 185, 2008 Ga. App. LEXIS 385 (2008), cert. denied, No. S08C1426, 2008 Ga. LEXIS 692 (Ga. Sept. 8, 2008), overruled in part, Bowen v. Savoy, 308 Ga. 204, 839 S.E.2d 546, 2020 Ga. LEXIS 133 (2020).

Use of independent contractor to transact business. — Manufacturer could not place its products in the stream of commerce with the intent of achieving nationwide sales and conduct its commercial activity in support of its sales goals through a contractual process with an independent contractor, thereby insulating itself from the jurisdiction of Georgia courts. Continental Research Corp. v. Reeves, 204 Ga. App. 120, 419 S.E.2d 48, 1992 Ga. App. LEXIS 708 (1992), superseded by statute as stated in Johns v. Suzuki Motor of Am., Inc., 310 Ga. 159, 850 S.E.2d 59, 2020 Ga. LEXIS 760 (2020).

Merchandiser breaching agreement to indemnify purchaser answerable in forum. — Third-party defendant, by placing its merchandise in the stream

of Georgia commerce under an agreement to indemnify its purchaser for damages caused the latter by the merchandise, has availed itself of the privilege of conducting activities within Georgia, and it must therefore respond for breach of its agreement in the Georgia forum. J.C. Penney Co. v. Malouf Co., 230 Ga. 140, 196 S.E.2d 145, 1973 Ga. LEXIS 1103 (1973).

When coupled with a warranty-indemnity contract, shipping goods into Georgia constitutes "transacting business." Pennington v. Toyomenka, Inc., 512 F.2d 1291, 1975 U.S. App. LEXIS 14684 (5th Cir. 1975).

Shipping goods into state under warranty-indemnity contract is "transacting business." — The manufacture and shipment of merchandise covered by a warranty-indemnity contract by a nonresident defendant for delivery in Georgia places the merchandise in the stream of Georgia commerce and amounts to "transacting any business" in Georgia under this section. Patron Aviation, Inc. v. Teledyne Indus., Inc., 154 Ga. App. 13, 267 S.E.2d 274, 1980 Ga. App. LEXIS 2030 (1980) (see O.C.G.A. § 9-10-91).

Minimum contacts not imputed to originator of goods or services. — New Jersey cleaning solvent manufacturer, which shipped its product to an independent distributor who then controlled where it was ultimately sent, was not amendable to suit under the Georgia long arm statute, O.C.G.A. § 9-10-91, for injuries sustained by a user. Bond v. Octagon Process, Inc., 745 F. Supp. 710, 1990 U.S. Dist. LEXIS 12475 (M.D. Ga. 1990), aff'd, 926 F.2d 1573, 1991 U.S. App. LEXIS 4848 (11th Cir. 1991).

Nebraska firm which lent money to a Tennessee cattle broker was not subject to long-arm jurisdiction in a Georgia cattle dealer's action alleging fraud, libel and tortious interference with contractual relations, where the broker's regular business conduct in Georgia was not attributable to the firm, and the firm's conduct of mailing checks and telephoning into Georgia were insignificant. James Whiten Livestock, Inc. v. Western Iowa Farms, Co., 750 F. Supp. 529, 1990 U.S. Dist. LEXIS 14991 (N.D. Ga. 1990), aff'd, 948 F.2d 731, 1991 U.S. App. LEXIS 26451 (11th Cir. 1991), aff'd, 948 F.2d 731, 1991 U.S. App. LEXIS 26452 (11th Cir. 1991).

Internet car seller. — Internet car seller purposefully transacted business in the State of Georgia when its agent conducted business negotiations with a buyer who lived in Georgia and when the seller delivered the vehicle in the state, so as to have established sufficient minimum contacts with the State of Georgia to authorize Georgia's exercise of personal jurisdiction over the seller under the Georgia long arm statute, O.C.G.A. § 9-10-91; moreover, the state court correctly resolved the factual conflict created by the seller's affidavits and supporting documentation in favor of the buyer so as to find, for purposes of the motion to dismiss, that the buyer had not been provided with, nor agreed to, that part of the agreement containing the forum selection clause. Aero Toy Store, LLC v. Grieves, 279 Ga. App. 515, 631 S.E.2d 734, 2006 Ga. App. LEXIS 626 (2006).

"Transacting business" is not involved where sole local performance is delivery of items ordered to Georgia. Pennington v. Toyomenka, Inc., 512 F.2d 1291, 1975 U.S. App. LEXIS 14684 (5th Cir. 1975).

Under O.C.G.A. § 11-2-401(2), a nonresident corporation took legal title to goods when the manufacturer tendered those goods to a third-party customer at the manufacturer's Georgia facility and issued a bill of lading listing the nonresident corporation as the consignee. Taking physical possession of the goods was not necessary; the nonresident corporation took legal title to goods located in Georgia, and that was sufficient for purposes of "transacting business" under O.C.G.A. § 9-10-91(1). Diamond Crystal Brands, Inc. v. Food Movers Int'l, 593 F.3d 1249, 2010 U.S. App. LEXIS 786 (11th Cir.), cert. denied, 562 U.S. 836, 131 S. Ct. 158, 178 L. Ed. 2d 39, 2010 U.S. LEXIS 5846 (2010).

Plaintiff's sending of single, unsolicited letter and defendant's sending of single letter of rejection do not amount to "transacted business" under paragraph (1) of this section. Smith v. Piper Aircraft Corp., 425 F.2d 823, 1970 U.S. App. LEXIS 9587 (5th Cir. 1970) (see O.C.G.A. § 9-10-91).

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Transacting business encompasses more than mail orders which require acceptance in nonresident's state, and would not be involved where the sole local performance was delivery of items ordered to this state. Coe & Payne Co. v. Wood-Mosaic Corp., 125 Ga. App. 845, 189 S.E.2d 459, 1972 Ga. App. LEXIS 1490 (1972).

Communications by mail and negotiation of checks insufficient contacts. — Transmittal of communications from a sister state to Georgia by mail, the negotiation of checks in a sister state drawn on a Georgia bank, and the employing of a Georgia law firm for legal advice subsequent to the creation of a contract, are insufficient contacts to meet the requirement of transacting any business within this state under paragraph (1) of this section. Robinson v. Ravenel Co., 411 F. Supp. 294, 1976 U.S. Dist. LEXIS 16159 (N.D. Ga. 1976) (see O.C.G.A. § 9-10-91).

For purposes of long arm jurisdiction, mailing or telephoning orders to another state does not of itself constitute the transaction of any business. Berry v. Jeff Hunt Mach. Co., 148 Ga. App. 35, 250 S.E.2d 813, 1978 Ga. App. LEXIS 3010 (1978).

Activities of nonprofit corporation in connection with enactment of legislation do not provide sufficient basis for jurisdiction under O.C.G.A. § 9-10-91.Wise v. State Bd. for Examination, Qualification & Registration of Architects, 247 Ga. 206, 274 S.E.2d 544, 1981 Ga. LEXIS 639 (1981), overruled in part, Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank, 279 Ga. 672, 620 S.E.2d 352, 2005 Ga. LEXIS 649 (2005).

Residence in this state of director of defendant nonprofit corporation is not alone a basis for jurisdiction; nor does the presence in Georgia of the defendant state board confer personal jurisdiction over it, and, even if the board were a creature of the corporation, the mere residence of a subsidiary or affiliate does not, without more, establish the residence of the parent organization. Wise v. State Bd. for Examination, Qualification & Registration of Architects, 247 Ga. 206, 274 S.E.2d 544, 1981 Ga. LEXIS 639 (1981), overruled in part, Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank, 279 Ga. 672, 620 S.E.2d 352, 2005 Ga. LEXIS 649 (2005).

Jurisdiction acquired where defendant purchased advertising space in local newspaper. — Where nonresident defendant purchased advertising space in a local newspaper in connection with the plaintiffs' claim and where plaintiffs directly paid defendant's attorney in Georgia, jurisdiction over defendant was acquired pursuant to paragraph (1) of this section. Porter v. Mid-State Homes, Inc., 133 Ga. App. 706, 213 S.E.2d 10, 1975 Ga. App. LEXIS 2247 (1975) (see O.C.G.A. § 9-10-91).

Advertising in national publications and marketing products through distributor licensed to do business in Georgia. — "Substantial connection" existed between Dutch aircraft manufacturing corporation and Georgia, where the corporation advertised in national publications, some of whose audience was presumably in Georgia, and marketed its products through a distributor which serviced its products exclusively and was licensed to do business in Georgia. Cartwright v. Fokker Aircraft U.S.A., Inc., 713 F. Supp. 389, 1988 U.S. Dist. LEXIS 16288 (N.D. Ga. 1988).

National and local advertising alone would not necessarily constitute transaction of business generally within a specific state. Hollingsworth v. Cunard Line, 152 Ga. App. 509, 263 S.E.2d 190, 1979 Ga. App. LEXIS 2977 (1979).

No jurisdiction where race car driver's agent's personnel never entered state. — Where a race car driver's booking agent was a foreign corporation which had furnished a contract between the driver and a drag strip in this state but none of the agent's personnel had ever entered the state in connection with negotiating the contract, jurisdiction over the agent was not proper in a wrongful death action based on an accident at the drag strip involving the driver. Castleberry v. Gold Agency, Inc., 124 Ga. App. 694, 185 S.E.2d 557, 1971 Ga. App. LEXIS 1067 (1971).

Entering of judgment by state court does not constitute transaction of business on the part of one of the parties to that litigation. Hemphill v. Hemphill, 398 F. Supp. 1134, 1975 U.S. Dist. LEXIS 16735 (N.D. Ga. 1975).

Georgia court lacked jurisdiction over Wisconsin residents who placed a sale advertisement in a trade paper for a customized truck and trailer pursuant to which a Georgia resident sent a $6,000 deposit toward the purchase price of a vehicle, where the sellers then refused to return the deposit after the purchaser declined to accept a substitute vehicle. Gust v. Flint, 257 Ga. 129, 356 S.E.2d 513, 1987 Ga. LEXIS 833 (1987).

Nonexclusive distributor agreement failed to demonstrate any significant connection with Georgia. — Mere mail and telephone contacts and even defendant's visits to this state were insufficient to establish the necessary purposeful activity required under O.C.G.A. § 9-10-91. Scovill Fasteners, Inc. v. Sure-Snap Corp., 207 Ga. App. 539, 428 S.E.2d 435, 1993 Ga. App. LEXIS 264 (1993).

Action of nonresident wife in bringing suit in Georgia to domesticate foreign divorce decree does not constitute "transaction of business" so as to permit Georgia courts to assert in personam jurisdiction over her in husband's subsequent actions to terminate alimony. Stone v. Stone, 254 Ga. 519, 330 S.E.2d 887, 1985 Ga. LEXIS 764 (1985).

Circumstances insufficient to constitute transaction of business. — In an action seeking collection of a certain promissory note for which the nonresident defendant executed a guarantee in favor of the resident plaintiff, the defendant did not "transact business" in this state, and there was, accordingly, no personal jurisdiction over the defendant under the following circumstances: (1) the guaranty was neither solicited nor executed in Georgia; (2) no contract negotiations occurred within Georgia; (3) the defendant did not have any other financial dealings with the plaintiff; and (4) the guaranty contained a choice-of-law provision calling for the application of Georgia law. Algemene Bank Nederland v. Mattox, 611 F. Supp. 144, 1985 U.S. Dist. LEXIS 19561 (N.D. Ga. 1985).

The collection by an out-of-state bank, through normal banking channels, of a check drawn on a Georgia bank does not constitute the transaction of business in Georgia so as to subject the out-of-state bank to the jurisdiction of the Georgia courts in a suit alleging that the check was paid on an improper endorsement. First United Bank v. First Nat'l Bank, 255 Ga. 505, 340 S.E.2d 597, 1986 Ga. LEXIS 606 (1986).

There was no personal jurisdiction over the defendant corporation with regard to a breach of contract claim since there was no evidence that the corporation or its CEO negotiated a letter of intent in Georgia or otherwise transacted business in the state; a single visit to Georgia by the CEO was insufficient to establish jurisdiction, and it was undisputed that all of the negotiations for the letter of intent took place on the phone or via mail or fax. ETS Payphone, Inc. v. TK Indus., 236 Ga. App. 713, 513 S.E.2d 257.

Nonresident's actions in mailing a response to the arbitration notice and a letter to the arbitrator, standing alone, were not sufficient to confer personal jurisdiction. Galindo v. Lanier Worldwide, Inc., 241 Ga. App. 78, 526 S.E.2d 141.

Nonresident company was not subject to personal jurisdiction under O.C.G.A. § 9-10-91 since it was undisputed that all of the contract negotiations took place on the phone or through the Internet, mail or fax. Object Techs., Inc. v. Marlabs, Inc., 246 Ga. App. 202, 540 S.E.2d 216, 2000 Ga. App. LEXIS 1193 (2000), overruled in part as stated in Wright v. Safari Club Int'l, 307 Ga. App. 136, 706 S.E.2d 84, 2010 Ga. App. LEXIS 1113 (2010).

Where plaintiffs' complaint did not allege that defendant property partnership transacted any business within Georgia, owned any property within Georgia, or committed any tortious conduct within Georgia, in arguing that the property partnership could be subject to personal jurisdiction for making loans secured by property in Georgia, plaintiffs ignored the second requirement of O.C.G.A. § 9-10-91(3); thus, plaintiffs had failed to satisfy the requirements of the Georgia long-arm statute for personal jurisdiction over the property partnership. BMC-Benchmark

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Mgmt. Co. v. Ceebraid-Signal Corp., 508 F. Supp. 2d 1287, 2007 U.S. Dist. LEXIS 43118 (N.D. Ga. 2007).

Father's defamation action against a foreign corporation and associated individuals was properly dismissed because the father failed to demonstrate personal jurisdiction under Georgia's long-arm statute, O.C.G.A. § 9-10-91, and personal jurisdiction did not exist under Fed. R. Civ. P. 4(k)(2) since the claims arose under state, not federal, law; the district court could not exercise jurisdiction under § 9-10-91(1) because the father's cause of action for defamation did not arise out of, or was connected to, any business transaction in Georgia, and § 9-10-91(3) did not authorize jurisdiction because the father failed to show that the corporation and individuals actually conducted or solicited business in Georgia, much less on a regular basis, or that they derived substantial revenue from goods used or services rendered in Georgia. Henriquez v. El Pais Q'Hubocali.com, 500 Fed. Appx. 824, 2012 U.S. App. LEXIS 25107 (11th Cir. 2012).

In a wrongful death action against a Delaware company, the trial court erred when the court determined that Georgia courts could exercise personal jurisdiction over the company because the shipment of borax was sold through a contract between the shipper and the customer, and the company had no relationship with the Georgia customer; there was no evidence that the company had ever provided services of any kind to the Georgia customer (or any customer) from a location within Georgia; and, even though the record established that the company had derived revenue from the relationship with its Georgia customer, as that revenue was not the fruit of services performed in Georgia, that alone could not satisfy the requirements for personal jurisdiction. Intercontinental Servs. of Del., LLC v. Kent, 343 Ga. App. 567, 807 S.E.2d 485, 2017 Ga. App. LEXIS 533 (2017), cert. denied, No. S18C0471, 2018 Ga. LEXIS 376 (Ga. May 21, 2018).

Not transacting business. — Telephonic orders and one brief appearance at home office which was not necessary to establishment of contract do not constitute those minimal contacts necessary to establish venue. Superior Fertilizer & Chem., Inc. v. Warren, 162 Ga. App. 595, 292 S.E.2d 430, 1982 Ga. App. LEXIS 2256 (1982).

Mere telephone or mail contact with an out-of-state defendant is insufficient to establish the activity required by O.C.G.A. § 9-10-91. Phillips v. Electrical Constructors of Am., Inc., 535 F. Supp. 1387, 1982 U.S. Dist. LEXIS 11745 (M.D. Ga. 1982).

Where the only contact was the transaction in which the defendant made one shipment of goods into Georgia on the debtor's order, this does not amount to "transacting business" in the state under the long-arm statute, O.C.G.A. § 9-10-91. Bonapfel v. Cascade Imperial Mills, Ltd. (In re All Am. of Ashburn, Inc.), 78 B.R. 355, 1987 Bankr. LEXIS 1573 (Bankr. N.D. Ga. 1987).

Totality of circumstances did not weigh in favor of the exercise of personal jurisdiction over defendant Alabama furniture and appliance retailers, where defendants never entered Georgia in connection with the transactions which were the subject of plaintiff's action for breach of contract, and plaintiff solicited defendants' business in Alabama. GECC v. Scott's Furn. Whse. Showroom, Inc., 699 F. Supp. 907, 1988 U.S. Dist. LEXIS 12866 (N.D. Ga. 1988).

Trial court correctly concluded that it did not have personal jurisdiction over the attorney on the basis of the attorney's having transacted business in Georgia as the only Georgia-based contacts between the supplier and the attorney with respect to the Wisconsin lawsuit were telephone conversations and facsimile transmissions between the supplier in Georgia and the attorney in Tennessee, which were initiated by the supplier. Gee v. Reingold, 259 Ga. App. 894, 578 S.E.2d 575, 2003 Ga. App. LEXIS 296 (2003).

In a wrongful death action, the trial court erred when the court determined that Georgia courts could exercise personal jurisdiction over a Delaware company as the company did not transact any business in Georgia or avail itself of the privilege of doing business in Georgia be-

cause the company's services were provided by personnel located exclusively in Delaware; although shipments loaded by the company made their way to Georgia, those activities could not be reasonably characterized as creating a purposeful contact with Georgia; and the company's only relevant agreement was with the shipper of the product, and that agreement was limited to the services provided for the shipper in regard to the product that arrived at the Port of Wilmington. Intercontinental Servs. of Del., LLC v. Kent, 343 Ga. App. 567, 807 S.E.2d 485, 2017 Ga. App. LEXIS 533 (2017), cert. denied, No. S18C0471, 2018 Ga. LEXIS 376 (Ga. May 21, 2018).

Mere operation of website not transacting business. — Plaintiff failed to demonstrate that the defendants transacted business in Georgia sufficient to meet the requirements of Georgia's long-arm statute, O.C.G.A. § 9-10-91, because an injury suffered by the plaintiff in Georgia due to an intentional tort did not satisfy the Georgia long-arm statute's transaction of business requirement, and merely operating a website accessible in Georgia, and everywhere else, did not constitute the actual transaction of business—the doing of some act or consummation of some transaction—by the defendants in the state. Jordan Outdoor Enters., Ltd. v. That 70's Store, LLC, 819 F. Supp. 2d 1338, 2011 U.S. Dist. LEXIS 109271 (M.D. Ga. 2011).

Contacts not related to claims. — Contacts of an employee of defendant with Georgia did not provide a basis for personal jurisdiction over the company in plaintiff's trademark infringement action; even though the parties might have established a commercial relationship involving certain, limited contacts in Georgia, plaintiff's claims for trademark infringement did not stem directly from those Georgia contacts. Barton Southern Co. v. Manhole Barrier Sys., 318 F. Supp. 2d 1174, 2004 U.S. Dist. LEXIS 9559 (N.D. Ga. 2004).

Website not basis for personal jurisdiction. — Defendant's website did not provide a basis for personal jurisdiction; defendant's customers were not located in Georgia, defendant received no purchase orders from persons in Georgia, the website did not allow customers to make payments or complete orders, nothing on the website showed intent to reach out to persons living in Georgia, and there was no evidence that any Georgia residents had done business with defendant. Barton Southern Co. v. Manhole Barrier Sys., 318 F. Supp. 2d 1174, 2004 U.S. Dist. LEXIS 9559 (N.D. Ga. 2004).

Transacting business under power of attorney. — Trial court erred in determining that the court could not exercise personal jurisdiction over the ex-husband's daughter in an action for contempt of a divorce decree because the allegations sufficiently alleged that the daughter, as power of attorney for the ex-husband, had done some act or consummated some transaction in Georgia on behalf of her father as power of attorney. Sullivan v. Bunnell, 340 Ga. App. 283, 797 S.E.2d 499, 2017 Ga. App. LEXIS 58 (2017), cert. denied, No. S17C1260, 2017 Ga. LEXIS 655 (Ga. Aug. 14, 2017).

2. Tortious Acts Within State

Jurisdiction limited. — The plain language of paragraph (2) of O.C.G.A. § 9-10-91 authorizes the exercise of personal jurisdiction only when the non-resident defendant "commits a tortious act or omission within this state... ." White v. Roberts, 216 Ga. App. 273, 454 S.E.2d 584, 1995 Ga. App. LEXIS 116 (1995).

Jurisdictional reach limited only by due process. — The jurisdictional reach of paragraph (2) of this section is limited only by the ultimate constraints imposed by the due process clause. Thornton v. Toyota Motor Sales U.S.A., Inc., 397 F. Supp. 476, 1975 U.S. Dist. LEXIS 12154 (N.D. Ga. 1975) (see O.C.G.A. § 9-10-91).

Burden on plaintiff to show that jurisdictional requirements have been met. — Paragraph (2) of O.C.G.A. § 9-10-91 confers jurisdiction where negligence occurred outside this state and the damage resulting therefrom occurred inside this state. Spelsberg v. Sweeney, 514 F. Supp. 622, 1981 U.S. Dist. LEXIS 12337 (S.D. Ga. 1981).

Jurisdiction over a nonresident may be exercised by virtue of O.C.G.A. § 9-10-91

Tortious Acts Within State (Cont'd)

when the nonresident has purposely done some act or consummated some transaction with or in the forum, the Georgia plaintiff has a legal cause of action in tort against the nonresident, which arises out of, or results from, the purposeful activity of the defendant involving this state, and the exercise of jurisdiction over the nonresident is reasonable; it is plaintiff 's burden to show these jurisdictional requirements have been met. National Egg Co. v. Bank Leumi le-Israel, 514 F. Supp. 1125, 1981 U.S. Dist. LEXIS 12451 (N.D. Ga. 1981).

Section applies to conscious decision to harm Georgia resident. — Reasonable anticipation of being held subject to the in personam jurisdiction of this state's courts should be prevalent where a defendant consciously chose to inflict harm on a Georgia resident. National Egg Co. v. Bank Leumi le-Israel, 514 F. Supp. 1125, 1981 U.S. Dist. LEXIS 12451 (N.D. Ga. 1981).

There is no essential difference between paragraphs (2) and (3) of O.C.G.A. § 9-10-91. Spelsberg v. Sweeney, 514 F. Supp. 622, 1981 U.S. Dist. LEXIS 12337 (S.D. Ga. 1981).

Requirements of paragraph (2) less stringent than paragraph (3). — "Minimum contacts" may be present under paragraph (2) of O.C.G.A. § 9-10-91 and jurisdiction thereunder may be appropriate even when it could not be achieved under the more stringent statutory requirements of paragraph (3) of O.C.G.A. § 9-10-91. Psychological Resources Support Sys. v. Gerleman, 624 F. Supp. 483, 1985 U.S. Dist. LEXIS 12165 (N.D. Ga. 1985).

Due process satisfied by "substantial number" of manufacturer's products in forum. — The due process requirement implicit in paragraph (2) of this section is satisfied by the presence within the forum state of a "substantial number" of the manufacturer's product. Thornton v. Toyota Motor Sales U.S.A., Inc., 397 F. Supp. 476, 1975 U.S. Dist. LEXIS 12154 (N.D. Ga. 1975) (see O.C.G.A. § 9-10-91).

One reasonably expecting product will enter forum's stream of commerce subject to section. — For purposes of due process, a nonresident who sends a defective product into the forum state or who simply places the product in the stream of commerce with reason to anticipate that it may find its way into the forum state is amenable to service of process under paragraph (2) of this section. Thornton v. Toyota Motor Sales U.S.A., Inc., 397 F. Supp. 476, 1975 U.S. Dist. LEXIS 12154 (N.D. Ga. 1975) (see O.C.G.A. § 9-10-91).

Limitations similar to those present in paragraph (3) of this section are constitutionally mandated under paragraph (2) of this section. Clarkson Power Flow, Inc. v. Thompson, 244 Ga. 300, 260 S.E.2d 9, 1979 Ga. LEXIS 1216 (1979); Spelsberg v. Sweeney, 514 F. Supp. 622, 1981 U.S. Dist. LEXIS 12337 (S.D. Ga. 1981); Yarbrough v. Estate of Yarbrough, 173 Ga. App. 386, 326 S.E.2d 517, 1985 Ga. App. LEXIS 1555 (1985) (see O.C.G.A. § 9-10-91).

When paragraph (2) confers jurisdiction. — Paragraph (2) of O.C.G.A. § 9-10-91 confers jurisdiction over nonresident who purposefully conducts some activity in or with this state and as a result of that activity a Georgia resident suffers injury here even though the actual act or omission occurred outside this forum. Spelsberg v. Sweeney, 514 F. Supp. 622, 1981 U.S. Dist. LEXIS 12337 (S.D. Ga. 1981).

In order to confer jurisdiction over nonresident under paragraph (2) of O.C.G.A. § 9-10-91, nonresident's purposeful activity in the forum must be of a nature similar to the "contacts" prescribed in paragraph (3) of § 9-10-91. Spelsberg v. Sweeney, 514 F. Supp. 622, 1981 U.S. Dist. LEXIS 12337 (S.D. Ga. 1981).

There was no personal jurisdiction over the defendant corporation with regard to a tort claim where the corporation had no agent in Georgia and was not authorized to do business in Georgia and where, additionally, neither the corporation nor its CEO regularly conducted business in Georgia, derived substantial income from services rendered in Georgia, or engaged in a persistent course of conduct within Georgia. ETS Payphone, Inc. v. TK Indus., 236 Ga. App. 713, 513 S.E.2d 257.

Trial court did not err when the court set aside the default judgment entered against the nonresident company on grounds that the court lacked personal jurisdiction over the company because the plaintiff's purported service on the company was deficient in that the entry of service form contained no indication that the individual who was served was authorized to accept service. Delta Aliraq, Inc. v. Arcturus Int'l, LLC, 345 Ga. App. 778, 815 S.E.2d 129, 2018 Ga. App. LEXIS 282 (2018).

Jurisdiction over nonresidents in tort actions carries no "minimum contacts" requirement. Newman v. Fleming, 331 F. Supp. 973, 1971 U.S. Dist. LEXIS 12067 (S.D. Ga. 1971). But see Marival, Inc. v. Planes, Inc., 302 F. Supp. 201, 1969 U.S. Dist. LEXIS 9836 (N.D. Ga. 1969).

The New York rule has been rejected in favor of the so-called Illinois rule: jurisdiction may attach under paragraph (2) of O.C.G.A. § 9-10-91 when injury occurs in Georgia resulting from a tortious act or omission outside of Georgia. Spelsberg v. Sweeney, 514 F. Supp. 622, 1981 U.S. Dist. LEXIS 12337 (S.D. Ga. 1981).

Mere allegation that act of nonresident outside the state, without more, that ultimately results in injury to a citizen of this state, does not establish a "contact" with this state in the absence of implicit or explicit evidence of purposefully sought activity with or in Georgia by the nonresident. National Egg Co. v. Bank Leumi le-Israel, 514 F. Supp. 1125, 1981 U.S. Dist. LEXIS 12451 (N.D. Ga. 1981).

A single tort committed in forum state is sufficient to satisfy the minimum contacts test and to vest jurisdiction in the state where the tort was committed. Marival, Inc. v. Planes, Inc., 302 F. Supp. 201, 1969 U.S. Dist. LEXIS 9836 (N.D. Ga. 1969). But see Newman v. Fleming, 331 F. Supp. 973, 1971 U.S. Dist. LEXIS 12067 (S.D. Ga. 1971).

Where nonresident enters state and commits tort, no showing of continuous activity in jurisdiction is required, and jurisdiction over the tortfeasor is sustained by the commission of a single tort. Newman v. Fleming, 331 F. Supp. 973, 1971 U.S. Dist. LEXIS 12067 (S.D. Ga. 1971).

Prerequisites for exercise of jurisdiction. — The nonresident must purposefully utilize the privilege of doing some act or consummating some transaction with or in the forum, the plaintiff must have a legal cause of action, and the exercise of jurisdiction over the nonresident must be reasonable. Swafford v. Avakian, 581 F.2d 1224, 1978 U.S. App. LEXIS 8399 (5th Cir. 1978), cert. denied, 440 U.S. 959, 99 S. Ct. 1500, 59 L. Ed. 2d 772, 1979 U.S. LEXIS 1196 (1979).

Tortious act is act of such character as to subject actor to liability under tort principles. Process Control Corp. v. Witherup Fabrication & Erection, Inc., 439 F. Supp. 1284, 1977 U.S. Dist. LEXIS 12951 (N.D. Ga. 1977).

Cases of negligent manufacture should be considered tortious acts committed within forum state when the injury occurred there. Scott v. Crescent Tool Co., 296 F. Supp. 147, 1968 U.S. Dist. LEXIS 9665 (N.D. Ga. 1968).

State's failure to grant a speedy trial is not a "tortious act" within the purpose and intent of this section. Lawrence v. Blackwell, 298 F. Supp. 708, 1969 U.S. Dist. LEXIS 8993 (N.D. Ga. 1969) (see O.C.G.A. § 9-10-91).

Paragraph (2) inapplicable absent commission of tortious act in state. — Defendant is not subject to in personam jurisdiction under paragraph (2) of this section where it has never committed a tortious act in Georgia. Smith v. Piper Aircraft Corp., 425 F.2d 823, 1970 U.S. App. LEXIS 9587 (5th Cir. 1970) (see O.C.G.A. § 9-10-91).

Overhaul of part used in aircraft that later crashed in Mississippi. — Georgia court lacked jurisdiction under paragraph (2) of O.C.G.A. § 9-10-91 over a German company which overhauled a used propeller and certified its airworthiness for reassembly and installation on an aircraft which subsequently crashed in Mississippi. Atlanta Propeller Serv., Inc. v. Hoffman GMBH & Co., 191 Ga. App. 529, 382 S.E.2d 109, 1989 Ga. App. LEXIS 687, cert. denied, 259 Ga. 361, 382 S.E.2d 355 (1989).

Paragraph (2) of this section does not apply to tortious acts occurring

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outside state causing injury inside state. Standard v. Meadors, 347 F. Supp. 908, 1972 U.S. Dist. LEXIS 12337 (N.D. Ga. 1972) (see O.C.G.A. § 9-10-91).

Jurisdiction conferred by commission of tortious act in state. — Paragraph (2) of this section confers personal jurisdiction over a nonresident defendant if the cause of action arises out of defendant's commission of a tortious act within the State of Georgia. Standard v. Meadors, 347 F. Supp. 908, 1972 U.S. Dist. LEXIS 12337 (N.D. Ga. 1972).

Commission of tortious act by nonresident outside state which causes injury within state is not a "tortious act" under this section. Coe & Payne Co. v. Wood-Mosaic Corp., 125 Ga. App. 845, 189 S.E.2d 459, 1972 Ga. App. LEXIS 1490 (1972) (see O.C.G.A. § 9-10-91).

When a father made threatening telephone calls from another state to a mother and to their child, a trial court could not exercise jurisdiction over the father under the Family Violence Act, O.C.G.A. § 19-13-1 et seq., which applied the long arm statute, O.C.G.A. § 9-10-91, because, under O.C.G.A. § 9-10-91(3), even though the father committed a tortious injury in Georgia, no other factors in that section applied, and, under O.C.G.A. § 9-10-91(2), providing long arm jurisdiction over one committing a tortious act in Georgia, while the harmful effects of the father's acts were felt in Georgia, the father never came to Georgia to commit them. Anderson v. Deas, 273 Ga. App. 770, 615 S.E.2d 859, 2005 Ga. App. LEXIS 611 (2005).

Defendant did not commit a tort in Georgia when, in pursuing a certificate from a federal agency, defendant's employees met with agency officials in Atlanta and submitted allegedly misappropriated documents; the alleged tort occurred not during the application process but, rather, when plaintiffs' trade secrets were allegedly purloined. Lamb v. Turbine Designs, Inc., 41 F. Supp. 2d 1362, 1999 U.S. Dist. LEXIS 3602 (N.D. Ga. 1999), aff'd, 240 F.3d 1316, 2001 U.S. App. LEXIS 1523 (11th Cir. 2001).

Trial court did not err in dismissing the terminated employees' suit against the one business, a foreign corporation, for want of jurisdiction, as their complaint involving their alleged wrongful discharge failed to allege that the one business committed any tortious act in Georgia, and, thus, the trial court did not have personal jurisdiction over the one business. Balmer v. Elan Corp., 261 Ga. App. 543, 583 S.E.2d 131, 2003 Ga. App. LEXIS 596 (2003), cert. denied, No. S03C1499, 2003 Ga. LEXIS 931 (Ga. Oct. 20, 2003), aff'd, 278 Ga. 227, 599 S.E.2d 158, 2004 Ga. LEXIS 541 (2004).

Under the Georgia long-arm statute, O.C.G.A. § 9-10-91, defendants' tortious act did not occur in Georgia because the defendants' alleged tortious conduct occurred in Arkansas, where the defendants created the websites displaying the products, and injury to the plaintiff in Georgia as a result of the defendants' conduct in Arkansas could not have been considered a tortious act or omission within Georgia for purposes of O.C.G.A. § 9-10-91(2). Jordan Outdoor Enters., Ltd. v. That 70's Store, LLC, 819 F. Supp. 2d 1338, 2011 U.S. Dist. LEXIS 109271 (M.D. Ga. 2011).

Out of state residents performed acts in Georgia. — In a dispute between siblings over corporate funds, the trial court's exercise of personal jurisdiction over the two sisters from Mississippi did not contravene traditional notions of fair play and substantial justice because the brothers' claims were related directly to the sisters' purposeful acts in Georgia and the sisters reasonably could have expected to be sued in Georgia. Stubblefield v. Stubblefield, 296 Ga. 481, 769 S.E.2d 78, 2015 Ga. LEXIS 100 (2015).

Tortious act causing damage within state also occurs within state within meaning of section. — A "tortious act" is a composite of both negligence and damage, and if damage occurs within the state then the tortious act occurs within the state within the meaning of paragraph (2) of this section; this interpretation is based on the premise that this section contemplates that jurisdiction shall be exercised over nonresident parties to the maximum extent permitted by procedural due process. Coe & Payne Co. v. Wood-Mosaic Corp., 230 Ga. 58, 195 S.E.2d 399, 1973 Ga. LEXIS 811 (1973), overruled in part

as stated in Anderson v. Deas, 279 Ga. App. 892, 632 S.E.2d 682, 2006 Ga. App. LEXIS 655 (2006); Swafford v. Avakian, 581 F.2d 1224, 1978 U.S. App. LEXIS 8399 (5th Cir. 1978), cert. denied, 440 U.S. 959, 99 S. Ct. 1500, 59 L. Ed. 2d 772, 1979 U.S. LEXIS 1196 (1979) (see O.C.G.A. § 9-10-91).

Paragraph (2) of this section confers jurisdiction where negligence occurs outside state and damage resulting therefrom occurs inside state. Coe & Payne Co. v. Wood-Mosaic Corp., 230 Ga. 58, 195 S.E.2d 399, 1973 Ga. LEXIS 811 (1973), overruled in part as stated in Anderson v. Deas, 279 Ga. App. 892, 632 S.E.2d 682, 2006 Ga. App. LEXIS 655 (2006); Thornton v. Toyota Motor Sales U.S.A., Inc., 397 F. Supp. 476, 1975 U.S. Dist. LEXIS 12154 (N.D. Ga. 1975) (see O.C.G.A. § 9-10-91).

Paragraph (3) of this section was obviously enacted to legislatively "get around" the legal reasoning on which the decisions in O'Neal Steel, Inc. v. Smith, 120 Ga. App. 106, 169 S.E.2d 827 (1969), and Castleberry v. Gold Agency, Inc., 124 Ga. App. 694, 185 S.E.2d 557 (1971), under paragraph (2) of this section were based. Coe & Payne Co. v. Wood-Mosaic Corp., 230 Ga. 58, 195 S.E.2d 399, 1973 Ga. LEXIS 811 (1973), overruled in part as stated in Anderson v. Deas, 279 Ga. App. 892, 632 S.E.2d 682, 2006 Ga. App. LEXIS 655 (2006) (see O.C.G.A. § 9-10-91).

Jurisdictional requirements under paragraph (2) not as stringent as under paragraph (1). — Activity which will support a finding of a "contact" with Georgia for purposes of exercising jurisdiction under paragraph (2) of this section need not be so extensive as to meet the definition requirements of paragraph (1) of this section. Shellenberger v. Tanner, 138 Ga. App. 399, 227 S.E.2d 266, 1976 Ga. App. LEXIS 2632 (1976) (see O.C.G.A. § 9-10-91).

Jurisdiction conferrable where act or omission occurs outside forum. — Paragraph (2) of this section confers jurisdiction over a nonresident who conducts some activity in or with this state (such as manufacture for distribution of defective goods or shipment of those goods into Georgia) and as a result of that activity a Georgia resident suffers injury here (as through contact with defectively manufactured goods shipped into this state) even though the actual act or omission (defective manufacture) occurred outside this forum. Shellenberger v. Tanner, 138 Ga. App. 399, 227 S.E.2d 266, 1976 Ga. App. LEXIS 2632 (1976) (see O.C.G.A. § 9-10-91).

Paragraph (2) of this section still provides basis for jurisdiction over one committing act outside the state which causes tortious injury within the state pursuant to the Illinois rule which indicates that a tort is part negligence and part damage, and if any damage occurs within the state though the precipitating act is without the state, this section is applicable. Atlanta Coliseum, Inc. v. Carling Brewing Co., 411 F. Supp. 253, 1976 U.S. Dist. LEXIS 15527 (N.D. Ga. 1976) (see O.C.G.A. § 9-10-91).

Paragraph (2) of this section confers jurisdiction where tortious act occurs outside of State of Georgia and the damage resulting therefrom occurs inside the state; such exercise of jurisdiction is authorized to the maximum extent permitted by procedural due process, which requires a showing that the nonresident defendant has some "minimum contact" with the forum state so as to make that state's exercise of jurisdiction over the defendant reasonable. Timberland Equip., Ltd. v. Jones, 146 Ga. App. 589, 246 S.E.2d 709, 1978 Ga. App. LEXIS 2468 (1978) (see O.C.G.A. § 9-10-91).

Decision in Coe & Payne v. Wood-Mosaic reaffirmed. — Paragraph (2) of this section confers jurisdiction where the negligence occurs outside the state and the damage resulting therefrom occurs inside the state, reaffirming the decision in Coe & Payne Co. v. Wood-Mosaic Corp., 230 Ga. 58, 195 S.E.2d 399 (1973). Clarkson Power Flow, Inc. v. Thompson, 244 Ga. 300, 260 S.E.2d 9, 1979 Ga. LEXIS 1216 (1979) (see O.C.G.A. § 9-10-91).

Paragraph (2) of this section applies to tortious act or omission occurring outside Georgia causing an injury in Georgia. National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305, 1980 U.S. Dist. LEXIS 15640 (N.D. Ga. 1980) (see O.C.G.A. § 9-10-91).

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Applying paragraph (2) of this section to contractual sale would render redundant paragraph (1) of this section, which deals specifically with cases sounding in contract. Standard v. Meadors, 347 F. Supp. 908, 1972 U.S. Dist. LEXIS 12337 (N.D. Ga. 1972) (see O.C.G.A. § 9-10-91).

Paragraphs (2) and (3) deal only with "tortious conduct;" to base an action for breach of contract on either of these two paragraphs would be erroneous. Swafford v. Avakian, 581 F.2d 1224, 1978 U.S. App. LEXIS 8399 (5th Cir. 1978), cert. denied, 440 U.S. 959, 99 S. Ct. 1500, 59 L. Ed. 2d 772, 1979 U.S. LEXIS 1196 (1979).

Section available to nonresident plaintiff to revive cause of action barred elsewhere. — An airplane crash occurring in the State of Georgia, which involves no other contact with the state nor any substantive rights of Georgia citizens, would allow a nonresident plaintiff to take advantage of this section to revive a cause of action elsewhere barred by limitations. Newman v. Fleming, 331 F. Supp. 973, 1971 U.S. Dist. LEXIS 12067 (S.D. Ga. 1971) (see O.C.G.A. § 9-10-91).

Overpayment of retirement funds connected to conduct undertaken in state. — In a suit filed by the Employees' Retirement System of Georgia (ERSGA) against a beneficiary, a non-resident of the State of Georgia, for overpayment of retirement funds, the trial court erred by finding that the court lacked personal jurisdiction over the decedent's beneficiary because, under Georgia's Long Arm Statute, O.C.G.A. § 9-10-91, by assisting the decedent in designating in Georgia the location to which the retirement funds should be directed by ERSGA, a Georgia resident, and then by allegedly converting overpayments made by the Georgia resident, the beneficiary was subject to personal jurisdiction in Georgia as the injury alleged to have occurred was connected to the conduct the beneficiary undertook in Georgia. Employees' Ret. Sys. of Ga. v. Pendergrass, 344 Ga. App. 888, 812 S.E.2d 322, 2018 Ga. App. LEXIS 149 (2018).

No valid basis for disallowing utilization of section in third-party claim. — Where the tortious acts out of which the right to contribution arose were alleged to be committed in this state by a nonresident, this would clearly fall within the purview of this section; and there is no valid basis, in a case of this nature, to disallow the utilization of this section in a third-party claim. Gosser v. Diplomat Restaurant, Inc., 125 Ga. App. 620, 188 S.E.2d 412, 1972 Ga. App. LEXIS 1428 (1972).

Third-party complaint not dismissible where single paragraph concerns defamation. — Where the third-party defendant as to whom service was perfected under this section contends the third-party complaint should be dismissed because a paragraph of the plaintiff's complaint seeks to recover for defamation of character, that is, that the third-party complaint seeks contribution for an act which is expressly excluded from this section, since the motion to dismiss was addressed to the complaint as a whole and since the third-party complaint is not solely involved with the action for defamation of character, it is not subject to a motion to dismiss. Gosser v. Diplomat Restaurant, Inc., 125 Ga. App. 620, 188 S.E.2d 412, 1972 Ga. App. LEXIS 1428 (1972).

Nonresident knowingly sending false statement into state has acted within state. — Where a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, the defendant has, for jurisdictional purposes, acted within that state. Thorington v. Cash, 494 F.2d 582, 1974 U.S. App. LEXIS 8543 (5th Cir. 1974).

Conspiracy to commit tort. — Where a conspiracy involving a resident and nonresident was targeted at a Georgia resident specifically, the imputation to the nonresident of the in-state acts of the co-conspirator to satisfy requirements of the long-arm statute was not precluded by due process. Rudo v. Stubbs, 221 Ga. App. 702, 472 S.E.2d 515.

Nonresident defendant in defamation action may be subject to process if other sufficient minimum contacts with the forum exist, although a defamatory act itself may not confer in personam jurisdiction. Spelsberg v. Sweeney, 514 F. Supp. 622, 1981 U.S. Dist. LEXIS 12337 (S.D. Ga. 1981).

The tortious act of defamation alone is insufficient to grant jurisdiction over a nonresident. Process Control Corp. v. Witherup Fabrication & Erection, Inc., 439 F. Supp. 1284, 1977 U.S. Dist. LEXIS 12951 (N.D. Ga. 1977).

The language of O.C.G.A. § 9-10-91 is clear, unequivocal, and unambiguous in mandating the exclusion of an action predicated on defamation; thus, a motion to dismiss a defamation action for lack of personal jurisdiction over a nonresident should have been granted. Worthy v. Eller, 265 Ga. App. 487, 594 S.E.2d 699, 2004 Ga. App. LEXIS 156 (2004), cert. denied, No. S04C1061, 2004 Ga. LEXIS 514 (Ga. June 7, 2004).

Tortious act in defamation action occurs at place where libelous material is delivered and circulated. Process Control Corp. v. Witherup Fabrication & Erection, Inc., 439 F. Supp. 1284, 1977 U.S. Dist. LEXIS 12951 (N.D. Ga. 1977).

In defamation action, "tortious act" occurs in the state where the libelous material is distributed. Spelsberg v. Sweeney, 514 F. Supp. 622, 1981 U.S. Dist. LEXIS 12337 (S.D. Ga. 1981).

In defamation action defendant must have contacts other than those giving rise to defamation. — Paragraph (2) of this section means that Georgia courts may exercise personal jurisdiction over any nonresident who commits a tortious act or omission within Georgia, except as to a cause of action for defamation of character arising from the act, in which case the nonresident must also have sufficient minimum contacts with Georgia other than the contacts which arise from the acts constituting the defamation. Process Control Corp. v. Witherup Fabrication & Erection, Inc., 439 F. Supp. 1284, 1977 U.S. Dist. LEXIS 12951 (N.D. Ga. 1977) (see O.C.G.A. § 9-10-91).

In a dispute alleging that the plaintiff never received full payment on proceeds from the sale of a Georgia company and past due royalties, the trial court erred in ruling that the court lacked personal jurisdiction over the multinational music publishing company under Georgia's Long Arm Statute as the publishing company engaged in purposeful acts and transacted business in Georgia to the extent that it was provided fair warning that it could be subject to a Georgia court's jurisdiction because the publishing company purchased music publication rights from and made routine royalty payments to the Georgia company, leased a studio in Georgia to develop Georgia artists, and ultimately purchased the Georgia company. Weathers v. Dieniahmar Music, LLC, 337 Ga. App. 816, 788 S.E.2d 852, 2016 Ga. App. LEXIS 412 (2016).

Allegation that defendants concealed defect in real property located within Georgia was sufficient to sustain jurisdiction under paragraph (2) of O.C.G.A. § 9-10-91. Edelschick v. Blanchard, 177 Ga. App. 410, 339 S.E.2d 628, 1985 Ga. App. LEXIS 2607 (1985).

Personal jurisdiction where nonresident painted pornographic picture for nationally circulated magazine. — In action for defamation and invasion of privacy against a New York resident who painted a pornographic picture of plaintiff for a nationally circulated magazine, the court held that it had personal jurisdiction over the defendant based on paragraph (2) of O.C.G.A. § 9-10-91. Mays v. Laurant Publishing, Ltd., 600 F. Supp. 29, 1984 U.S. Dist. LEXIS 24012 (N.D. Ga. 1984).

Acts entirely within capacity of corporate officer or director. — It is reasonable and comports with notions of "fair play" and "substantial justice" to extend a forum's long-arm statute to a nonresident individual who commits an act in the forum for which the individual can be held substantively liable, even if the individual's actions in and contacts with the forum were entirely in the individual's capacity as a corporate officer or director. Delong Equip. Co. v. Washington Mills Abrasive Co., 840 F.2d 843, 1988 U.S. App. LEXIS 3580 (11th Cir. 1988), superseded by statute as stated in, Bell v. Rosen, No. CV214-127, 2015 U.S. Dist. LEXIS 126752 (S.D. Ga. Sept. 22, 2015).

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Contacts of a Connecticut corporation and its vice-president with Georgia were sufficient to invoke O.C.G.A. § 9-10-91, where the vice-president met with a Georgia resident in Atlanta and made statements relating to an alleged conspiracy to restrain the trade and monopolize the sale of "media" in a tri-state area. Delong Equip. Co. v. Washington Mills Abrasive Co., 840 F.2d 843, 1988 U.S. App. LEXIS 3580 (11th Cir. 1988), superseded by statute as stated in, Bell v. Rosen, No. CV214-127, 2015 U.S. Dist. LEXIS 126752 (S.D. Ga. Sept. 22, 2015).

Single phone call to Georgia resident held insignificant. — Corporate officer's minimal contact with Georgia — a single phone call to a Georgia resident regarding the arrival of the officer's brother for an Atlanta meeting—was so insignificant that it did not satisfy the terms of the long-arm statute, O.C.G.A. § 9-10-91. Delong Equip. Co. v. Washington Mills Abrasive Co., 840 F.2d 843, 1988 U.S. App. LEXIS 3580 (11th Cir. 1988), superseded by statute as stated in, Bell v. Rosen, No. CV214-127, 2015 U.S. Dist. LEXIS 126752 (S.D. Ga. Sept. 22, 2015).

Fraudulent inducement to marry. — Trial court properly exercised personal jurisdiction over defendant who was a Georgia resident when the defendant fraudulently induced plaintiff to marry the defendant and then apparently became domiciled in Florida for a brief period just before service was perfected. Morgan v. Morgan, 193 Ga. App. 302, 388 S.E.2d 2, 1989 Ga. App. LEXIS 1464 (1989).

Misrepresentations by foreign corporate officer. — Since services provider alleged that the corporate president, a Mississippi resident, executed a contract on behalf of the corporation in Georgia and made misrepresentations in Georgia to the services provider while executing that contract, the Georgia trial court had personal jurisdiction over the corporate president, as the services provider alleged that the corporate president could be personally liable in Georgia for engaging in a tort in Georgia on behalf of the corporation. Mitchell v. Gilwil Group, Inc., 261 Ga. App. 882, 583 S.E.2d 911, 2003 Ga. App. LEXIS 799 (2003).

Jurisdiction over former resident. — Georgia's Nonresident Motorist Act, O.C.G.A. § 40-12-1 et seq., did not apply when the driver was a resident of Georgia at the time of the tort, and while the injured person could have utilized the Georgia Long Arm Statute, O.C.G.A. § 9-10-90 et seq., the limitations period of O.C.G.A. § 9-3-33 was not tolled where the injured person failed to exercise due diligence, and effected service on the driver 15 months after the complaint was filed, and one year after the driver, then living in Illinois had filed an answer. Andrews v. Stark, 264 Ga. App. 792, 592 S.E.2d 438, 2003 Ga. App. LEXIS 1569 (2003).

3. Tortious Acts Outside State

Paragraph (3) of this section was obviously enacted to legislatively "get around" the legal reasoning on which the decisions in O'Neal Steel, Inc. v. Smith, 120 Ga. App. 106, 169 S.E.2d 827 (1969), and Castleberry v. Gold Agency, Inc., 124 Ga. App. 694, 185 S.E.2d 557 (1971), under paragraph (2) of this section, were based. Coe & Payne Co. v. Wood-Mosaic Corp., 230 Ga. 58, 195 S.E.2d 399, 1973 Ga. LEXIS 811 (1973), overruled in part as stated in Anderson v. Deas, 279 Ga. App. 892, 632 S.E.2d 682, 2006 Ga. App. LEXIS 655 (2006) (see O.C.G.A. § 9-10-91).

Legislative intent in adopting paragraph (3). — The General Assembly adopted paragraph (3) of this section, not to restrict the applicability of paragraph (2) of this section, but rather to liberalize the interpretation that this court had given to "tortious act or omission within this state." Value Eng'r Co. v. Gisell, 140 Ga. App. 44, 230 S.E.2d 29, 1976 Ga. App. LEXIS 1344 (1976) (see O.C.G.A. § 9-10-91).

Jurisdiction attaches where damage caused by outside act occurs. — The tortious act is a composite of both negligence and damage, and where the damage occurs within the state, although caused by an act committed outside the state, jurisdiction attaches. Lincoln Land Co. v. Palfery, 130 Ga. App. 407, 203

S.E.2d 597, 1973 Ga. App. LEXIS 1335 (1973).

Subjecting nonresident to jurisdiction is reasonable. — It is reasonable, under "traditional notions of fair play and substantial justice," to subject a nonresident tortfeasor to the jurisdiction of the Georgia courts when the nonresident has one of the additional "contacts" with this state listed in paragraph (3) of O.C.G.A. § 9-10-91. Spelsberg v. Sweeney, 514 F. Supp. 622, 1981 U.S. Dist. LEXIS 12337 (S.D. Ga. 1981).

Rule conferring jurisdiction over nonresident tort-feasors committing tortious acts or omissions outside the state which cause injury within the state exists judicially under paragraph (2) of O.C.G.A. § 9-10-91 and legislatively under paragraph (3) of § 9-10-91. Spelsberg v. Sweeney, 514 F. Supp. 622, 1981 U.S. Dist. LEXIS 12337 (S.D. Ga. 1981).

Paragraph (3) superfluous in light of adoption of Illinois rule. — Liberal construction of paragraph (2) of this section and adoption of the Illinois rule, which indicates that since a tortious act involves both negligence and damage, if damage occurs within the state then subsection (b) of this section applies, has resulted in a broader exercise of extraterritorial jurisdiction than would arguably be permissible under the plain language of paragraph (3) of this section; as a result, the courts have concluded that paragraph (3) is actually superfluous. Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100, 1975 U.S. Dist. LEXIS 14890 (N.D. Ga. 1975), aff'd, 700 F.2d 1339, 1983 U.S. App. LEXIS 29536 (11th Cir. 1983) (see O.C.G.A. § 9-10-91).

Reason for adoption of Illinois rule. — The Supreme Court of Georgia adopted the Illinois rule, not as a stopgap measure to cover occurrences prior to the adoption of paragraph (3) of this section, but rather as a protective policy for Georgia's citizens, so that such citizens could seek redress in Georgia courts limited only by the parameters of due process. Atlanta Coliseum, Inc. v. Carling Brewing Co., 411 F. Supp. 253, 1976 U.S. Dist. LEXIS 15527 (N.D. Ga. 1976) (see O.C.G.A. § 9-10-91).

Jurisdiction may be obtained under this section even for tortious acts outside the state if the injury produced by those acts occurred within the state. Grey v. Continental Mktg. Assocs., 315 F. Supp. 826, 1970 U.S. Dist. LEXIS 11247 (N.D. Ga. 1970) (see O.C.G.A. § 9-10-91).

No jurisdiction existed when collision in North Carolina. — Trial court did not err in granting the defendant's motion to dismiss the complaint for damages arising from an automobile collision based on lack of personal jurisdiction because the automobile collision in North Carolina giving rise to the litigation did not occur because the defendant owned, used, or possessed real property situated within Georgia and was not related to the defendant's visit to the campground. Stanton v. Harris, 356 Ga. App. 554, 848 S.E.2d 186, 2020 Ga. App. LEXIS 489 (2020).

Jurisdiction conferred by injury in state caused by conduct outside state. — Where defendant's conduct in a state other than Georgia leads to an injury and a completed tort in Georgia, paragraph (3) of this section confers jurisdiction. H.K. Corp. v. Lauter, 336 F. Supp. 79, 1971 U.S. Dist. LEXIS 11237 (N.D. Ga. 1971) (see O.C.G.A. § 9-10-91).

Commission of negligent act outside state causing injury within state may constitute commission of tortious act within the state. Martin Luther King, Jr. Ctr. for Social Change, Inc. v. American Heritage Prods., Inc., 508 F. Supp. 854, 1981 U.S. Dist. LEXIS 12147 (N.D. Ga. 1981), rev'd, 694 F.2d 674, 1983 U.S. App. LEXIS 27928 (11th Cir. 1983).

Implicit or explicit showing of contact between nonresident and forum required. — The mere allegation that as a result of an act or omission by a nonresident outside this state an injury has occurred to a Georgia plaintiff, does not establish a "contact" with this forum in the absence of an implicit or explicit showing of activity with or in Georgia by the nonresident. Cocklereece v. Moran, 500 F. Supp. 487, 1980 U.S. Dist. LEXIS 16149 (N.D. Ga. 1980).

Effect of advertising in Georgia newspaper. — The fact that nonresident owners of a lodge in North Carolina had a contract for advertising in a Georgia newspaper did not extend jurisdiction to Georgia over a tort action for personal

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injuries suffered at the lodge. Allen v. Black, 214 Ga. App. 450, 447 S.E.2d 718, 1994 Ga. App. LEXIS 910 (1994).

Paragraph (3) of O.C.G.A. § 9-10-91 does not modify the extension of paragraph (2) of § 9-10-91 to provide a basis for securing jurisdiction over one who commits an act outside the state which causes injury within the state. Spelsberg v. Sweeney, 514 F. Supp. 622, 1981 U.S. Dist. LEXIS 12337 (S.D. Ga. 1981).

Where both the tortious act and the resulting injury occurred outside Georgia, paragraphs (2) and (3) of O.C.G.A. § 9-10-91 are inapplicable. Whitaker v. Krestmark of Ala., Inc., 157 Ga. App. 536, 278 S.E.2d 116, 1981 Ga. App. LEXIS 1899 (1981), overruled, Innovative Clinical & Consulting Servs., LLC v. First Nat'l Bank, 279 Ga. 672, 620 S.E.2d 352, 2005 Ga. LEXIS 649 (2005).

Paragraph (3) may be applied retroactively. — Paragraph (3) of this section does not change the right against a defendant, and thus may be applied retroactively. Griffin v. Air S., Inc., 324 F. Supp. 1284, 1971 U.S. Dist. LEXIS 14056 (N.D. Ga. 1971) (see O.C.G.A. § 9-10-91).

Prerequisites for applicability of paragraph (3). — For paragraph (3) of this section to apply as a matter of law, it is necessary that the defendant 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 Georgia. H.K. Corp. v. Lauter, 336 F. Supp. 79, 1971 U.S. Dist. LEXIS 11237 (N.D. Ga. 1971) (see O.C.G.A. § 9-10-91).

Paragraph (3) of O.C.G.A. § 9-10-91 confers personal jurisdiction over a nonresident tortfeasor who causes injury within the state by an act or omission outside the state if the tortfeasor regularly does or solicits its 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. Spelsberg v. Sweeney, 514 F. Supp. 622, 1981 U.S. Dist. LEXIS 12337 (S.D. Ga. 1981).

Jurisdiction conferred by placing products in stream of commerce of forum. — 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. National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305, 1980 U.S. Dist. LEXIS 15640 (N.D. Ga. 1980).

Copyright infringement. — By having licensed their song to a distributor, knowing that the distributor distributed or licensed the song nationally, including within the State of Georgia, defendants established sufficient minimum contacts with Georgia so that plaintiff's copyright infringement action did not violate due process guarantees. Payne v. Kristofferson, 631 F. Supp. 39, 1985 U.S. Dist. LEXIS 13273 (N.D. Ga. 1985), But see, Gust v. Flint, 257 Ga. 129, 356 S.E.2d 513, 1987 Ga. LEXIS 833 (1987).

Georgia television network's complaint alleging copyright infringement by New York video monitoring company was subject to dismissal, where the allegations were insufficient to support a reasonable inference that defendant could be subjected to the jurisdiction of the court under paragraph (3) of O.C.G.A. § 9-10-91. CNN, Inc. v. Video Monitoring Servs. of Am., Inc., 723 F. Supp. 765, 1989 U.S. Dist. LEXIS 12425 (N.D. Ga. 1989).

Conspiracy between agent and principal. — Where plaintiff judgment creditor filed suit against defendants, a former Florida debtor in possession, its officers, and the debtor's former Florida bankruptcy law firm, for conspiracy relating to representations that the debtor, under a settlement agreement in a bankruptcy adversary proceeding, was to pay funds held in a segregated account to the creditor, the court did not have personal jurisdiction over the law firm under O.C.G.A. § 9-10-91(3) because there had been no attempt to distinguish the firm

from its client the debtor and an agent could not conspire with its principal. Clough Mktg. Servs. v. Main Line Corp., No. 1:07-CV-0173-RLV, 2007 U.S. Dist. LEXIS 34425 (N.D. Ga. May 10, 2007).

Shipment into this state satisfies the requirement of due process as to minimum contacts. Granite & Quartzite Centre, Inc. v. M/S Virma, 374 F. Supp. 1124, 1974 U.S. Dist. LEXIS 8880 (S.D. Ga. 1974).

Foreign corporation amenable to jurisdiction by placing allegedly defective article into stream of commerce. — If a party introduces an allegedly defective and dangerous article into the stream of commerce which allegedly causes injuries claimed to have been sustained in Georgia as a direct consequence of shipping the material by interstate carrier, then that party has sufficient contacts to be amenable to personal jurisdiction in this state to answer for those injuries. Value Eng'r Co. v. Gisell, 140 Ga. App. 44, 230 S.E.2d 29, 1976 Ga. App. LEXIS 1344 (1976).

Irrelevant that purchase was made from independent middleman or shipment not made by defendant. — Where alleged liability arises from the manufacture of products presumably sold in contemplation of use in Georgia, it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into the state. Jet Am., Inc. v. Gates Learjet Corp., 145 Ga. App. 258, 243 S.E.2d 584, 1978 Ga. App. LEXIS 1942, rev'd, 242 Ga. 307, 248 S.E.2d 676, 1978 Ga. LEXIS 1185 (1978).

Foreseeability that product will cause injury in given state is not sufficient reason to hold the seller of the product subject to the jurisdiction of that state. National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305, 1980 U.S. Dist. LEXIS 15640 (N.D. Ga. 1980).

Sale of goods in another state, resold in Georgia. — The sale of goods in another state, when the seller knows that they will be resold in Georgia, is a purposeful activity sufficient to establish a "contact" with Georgia. Showa Denko K.K. v. Pangle, 202 Ga. App. 245, 414 S.E.2d 658, 1991 Ga. App. LEXIS 1751 (1991), cert. denied, No. S92C0420, 1992 Ga. LEXIS 188 (Ga. Feb. 10, 1992).

Sales by independent contractors not to be considered acts of defendant. — Where the distributors of a product are independent contractors and are not acting on behalf of defendant, none of their sales can be considered acts of the defendant. Smith v. Piper Aircraft Corp., 425 F.2d 823, 1970 U.S. App. LEXIS 9587 (5th Cir. 1970).

Section inapplicable to defendant whose products are brought into state by independent distributors. — Where at no time did defendant manufacture any of the defendant's aircraft in Georgia, does not do so now, nor does the defendant sell the completed aircraft in Georgia, but rather all aircraft are sold to independent distributors F.O.B. factory in Florida or Pennsylvania, and it is only when these distributors bring the aircraft into Georgia and sell them to Georgia customers that the defendant's product comes into Georgia, this section does not apply. Smith v. Piper Aircraft Corp., 425 F.2d 823, 1970 U.S. App. LEXIS 9587 (5th Cir. 1970) (see O.C.G.A. § 9-10-91).

Defendant's sale of allegedly infringing goods in state conferred jurisdiction. — In action for trademark infringement and unfair competition, where a nonresident defendant sold $19,000.00 of allegedly infringing goods in Georgia through an agent whose orders were only accepted at defendant's manufacturing plant in another state, paragraph (3) of this section confers jurisdiction, since defendant's actions constitute the regular solicitation of business and a persistent course of conduct in Georgia, leading to the defendant's deriving substantial revenue from goods used in Georgia. H.K. Corp. v. Lauter, 336 F. Supp. 79, 1971 U.S. Dist. LEXIS 11237 (N.D. Ga. 1971) (see O.C.G.A. § 9-10-91).

Defamation with "minimum contacts." — Under paragraph (3) of O.C.G.A. § 9-10-91, Georgia courts have jurisdiction over nonresident defendants in defamation cases when there exists requisite minimum contacts other than commission of tort itself. Bradlee Mgt. Servs., Inc. v. Cassells, 249 Ga. 614, 292 S.E.2d 717, 1982 Ga. LEXIS 887 (1982).

Foreign corporation's activities through in-state subsidiaries. — Alle-

Tortious Acts Outside State (Cont'd)

gations of tortious interference with a contract and of unfair competition were sufficient to invoke long-arm jurisdiction over a foreign corporation which exercised pervasive and tight control over its in-state subsidiaries (accomplished primarily through interlocking directorates, commonality of officers, and necessity of parent review and approval of subsidiary actions), rendering these subsidiaries functionally equivalent to departments or divisions of the parent corporation. Coca-Cola Co. v. Procter & Gamble Co., 595 F. Supp. 304, 1983 U.S. Dist. LEXIS 20185 (N.D. Ga. 1983).

Mailing of forged disinterment form. — Defendant's placement of relative's signature on a disinterment application, even if tortious, occurred in Alabama, and the mere mailing of the form into Georgia did not constitute a single event "in the forum" having its impact within the territory of the forum for purposes of O.C.G.A. § 9-10-91. Metzler v. Love, 207 Ga. App. 447, 428 S.E.2d 384, 1993 Ga. App. LEXIS 217 (1993), cert. denied, No. S93C0859, 1993 Ga. LEXIS 427 (Ga. Apr. 15, 1993).

Daily phone calls. — Family Violence Act, O.C.G.A. § 19-13-1 et seq., gave Georgia courts jurisdiction over a nonresident only if the act with which the nonresident was charged met the requirements of O.C.G.A. § 9-10-91(2), (3); further, the conduct giving rise to the offense occurred when the maker of the call spoke into the telephone; a father's daily calls to Georgia from another state to speak to the father's daughter or when the father made the calls that allegedly threatened and harassed the mother did not confer jurisdiction in Georgia. Anderson v. Deas, 279 Ga. App. 892, 632 S.E.2d 682, 2006 Ga. App. LEXIS 655 (2006), cert. denied, No. S06C1896, 2006 Ga. LEXIS 772 (Ga. Sept. 8, 2006).

Intervention and transfer not required. — In decedent's family members' wrongful death action pursuant to Tenn. Code Ann. § 20-5-106(a), personal jurisdiction over defendant under O.C.G.A. § 9-10-91(3) and (4) comported with due process, but under Fed. R. Civ. P. 24, decedent's estate administrator was not entitled to intervene and transfer was warranted pursuant to 28 U.S.C. § 1404(a). Hidalgo v. Ohio Sec. Ins. Co., No. 4:10-CV-0183-HLM, 2011 U.S. Dist. LEXIS 46002 (N.D. Ga. Feb. 24, 2011).

Because defendants, a New Hampshire resident and a Pennsylvania corporation, used computers outside of Georgia to access plaintiff Georgia corporation's computer file, the defendants were not subject to personal jurisdiction under O.C.G.A. § 9-10-91(2). LabMD, Inc. v. Tiversa, Inc., 509 Fed. Appx. 842, 2013 U.S. App. LEXIS 2495 (11th Cir. 2013).

4. Real Property Within State

Jurisdiction over one who owns, uses, or possesses realty in state. — O.C.G.A. § 9-10-91 confers personal jurisdiction over any nonresident as to a cause of action if the nonresident owns, uses, or possesses any real property situated within the state. Moore v. Lindsey, 662 F.2d 354, 1981 U.S. App. LEXIS 15629 (5th Cir. 1981).

O.C.G.A. § 9-10-91 requires that the cause of action arise from the ownership, use, or possession of real property situated within the state. Moore v. Lindsey, 662 F.2d 354, 1981 U.S. App. LEXIS 15629 (5th Cir. 1981).

In an in rem action to set aside a fraudulent conveyance of property, the court had personal jurisdiction over the nonresident grantee of the property and service on the nonresident as authorized by O.C.G.A. § 9-10-94 was proper. Forrister v. Manis Lumber Co., 232 Ga. App. 370, 501 S.E.2d 606.

Record title holder without agents in Georgia is subject to paragraph (4) of this section. Cox v. Long, 143 Ga. App. 182, 237 S.E.2d 672, 1977 Ga. App. LEXIS 2235 (1977) (see O.C.G.A. § 9-10-91).

Paragraph (4) of this section includes entering into transactions in connection with real property in this state. Cox v. Long, 143 Ga. App. 182, 237 S.E.2d 672, 1977 Ga. App. LEXIS 2235 (1977) (see O.C.G.A. § 9-10-91).

Forum state has no "manifest interest" with respect to sale of personal property. — Georgia has a manifest interest in providing redress in a contro-

versy concerning the sale of real property situated in this state. The forum state does not share such an obvious "manifest interest" with respect to personal property. Lyons Mfg. Co. v. Gross, 519 F. Supp. 812, 1981 U.S. Dist. LEXIS 13807 (S.D. Ga. 1981).

Under paragraph (4) of this section, jurisdictional requirements are satisfied when substantial connection or nexus exists between the basis of the controversy and the property within this state. Hart v. DeLowe Partners, Ltd., 147 Ga. App. 715, 250 S.E.2d 169, 1978 Ga. App. LEXIS 2918 (1978) (see O.C.G.A. § 9-10-91).

This section does not require that ownership, use, or possession exist at time action is commenced; rather, this section merely requires that cause of action arise from the ownership, use, or possession of real property situated within this state. Hart v. DeLowe Partners, Ltd., 147 Ga. App. 715, 250 S.E.2d 169, 1978 Ga. App. LEXIS 2918 (1978) (see O.C.G.A. § 9-10-91).

Ownership of property. — Where the only connection between the property owned by defendant and the claim asserted by plaintiff is that it was once an asset in an estate for which plaintiff served as executor, such a tenuous connection would not give rise to the exercise of personal jurisdiction over a nonresident owner of real estate because the claim does not satisfy the requirement that it arise out of the ownership of the property. Murray v. Reese, 210 Ga. App. 352, 436 S.E.2d 79, 1993 Ga. App. LEXIS 1150 (1993).

A nonresident debtor's ownership of closely held corporations that owned Georgia real estate was not sufficient to establish jurisdiction under O.C.G.A. § 9-10-91. International Capital Realty Inv. Co. v. West, 234 Ga. App. 725, 507 S.E.2d 545.

Buyer failed to make an affirmative showing that the return of service was false because the complaint and summons were served upon the buyer at the buyer's Oregon address, and that service was proper under the Long Arm Statute, O.C.G.A. § 9-10-91 et seq., which applied to the buyer as the owner of real property situated within Georgia; the sworn return of service found in the record, which showed that the buyer was served at the buyer's Oregon address, constituted a prima facie showing of personal service, and the buyer submitted no evidence refuting the sworn return of service. Haamid v. First Franklin Fin. Corp., 299 Ga. App. 828, 683 S.E.2d 891, 2009 Ga. App. LEXIS 980 (2009).

Divestment of interest in property prior to filing action does not defeat jurisdiction. — In personam jurisdiction may be predicated on defendants' ownership, use, or possession of property even though they are nonresident defendants and no longer own the property in question; the fact that defendants divested themselves of their interest in the property prior to the filing of plaintiff's complaint will not defeat the exercise of jurisdiction. Hart v. DeLowe Partners, Ltd., 147 Ga. App. 715, 250 S.E.2d 169, 1978 Ga. App. LEXIS 2918 (1978).

Jurisdiction must be predicated on ties among defendants, forum, and litigation. — Mere fact of title ownership of realty in Georgia will not support the exercise of personal jurisdiction, which must be predicated on the existence of ties among the defendants, this state, and the litigation, so that the maintenance of the action does not offend traditional notions of fair play and substantial justice. Hart v. DeLowe Partners, Ltd., 147 Ga. App. 715, 250 S.E.2d 169, 1978 Ga. App. LEXIS 2918 (1978).

Note executed by nonresident land purchasers was sufficient connection for jurisdiction. — In action on a note executed by nonresident purchasers for the purpose of becoming record title owners in improved Georgia realty, since the note was executed by the nonresident purchasers with full knowledge that the note would be used in conjunction with, and as an integral part of, a Georgia real estate transaction, a substantial connection with the state existed so as to make the exercise of jurisdiction over the nonresident defendants reasonable. Hart v. DeLowe Partners, Ltd., 147 Ga. App. 715, 250 S.E.2d 169, 1978 Ga. App. LEXIS 2918 (1978).

Officers of corporation which purchased and operated real estate in state came under section. — Officers of

Real Property Within State (Cont'd)

a corporation which purchased and operated real estate holdings in Georgia, who were personally within the State of Georgia when they endorsed the original promissory note, which was issued in connection with the real estate operations and expressly provided for future extensions, and where a security agreement pledging the real estate was duly recorded in Cobb County, Georgia, were within easy reach of this section. Trust Co. v. Italiano, 427 F.2d 1147, 1970 U.S. App. LEXIS 8678 (5th Cir. 1970) (see O.C.G.A. § 9-10-91).

Jurisdiction conferred by defendant's exercise of power of sale of its property in state. — Where plaintiffs' cause of action arose from the nonresident defendant's exercise of its power of sale of property within the state granted by security deed and the defendant had legal title to the property pursuant to former Code 1933, § 67-1301 (see O.C.G.A. § 44-14-60), jurisdiction over the defendant was acquired pursuant to Ga. L. 1970, p. 443, § 1 (see O.C.G.A. § 9-10-91). Porter v. Mid-State Homes, Inc., 133 Ga. App. 706, 213 S.E.2d 10, 1975 Ga. App. LEXIS 2247 (1975).

Nonresident vendor. — O.C.G.A. § 9-10-91 confers jurisdiction over nonresident vendor of real property even though the nonresident owns no property in Georgia at time of service. Moore v. Lindsey, 662 F.2d 354, 1981 U.S. App. LEXIS 15629 (5th Cir. 1981).

Jurisdiction may be affected over nonresident assignee of security deed to Georgia real property. Regante v. Reliable-Triple Cee of N.J., Inc., 251 Ga. 629, 308 S.E.2d 372, 1983 Ga. LEXIS 944 (1983).

A devisee's interest in real property is "ownership" for purposes of the long-arm statute, O.C.G.A. § 9-10-91. Moore v. Moore, 255 Ga. 308, 336 S.E.2d 804, 1985 Ga. LEXIS 968 (1985).

Lease containing Georgia choice of law clause. — The leasing of real property in Georgia for operation of a retail establishment and execution of a lease agreement that contained a Georgia choice of law clause created the "substantial connection," between the controversy, the lessee, and property within the state to satisfy the minimum contacts requirement. Goodman v. Vilston, Inc., 197 Ga. App. 718, 399 S.E.2d 241, 1990 Ga. App. LEXIS 1448 (1990), cert. denied, No. S91C0418, 1991 Ga. LEXIS 480 (Ga. Jan. 31, 1991).

5. Proceedings for Alimony, Child Support, Other Domestic Issues

Legislative intent. — The legislature intended by enacting paragraph (5) of O.C.G.A. § 9-10-91 to allow children and spouses to seek modification against nonresident defendants in the same manner as if the nonresident were a resident of the state. Smith v. Smith, 254 Ga. 450, 330 S.E.2d 706, 1985 Ga. LEXIS 745 (1985).

Trial court's finding that it lacked personal jurisdiction over a wife in a divorce case was error and was reversed where the husband and the wife had maintained a marital residence in Georgia for at least five years before the wife returned to Britain, where the wife had availed herself of the privilege of maintaining a matrimonial domicile in Georgia, where the husband continued to maintain his domicile in Georgia and intended to remain in Georgia, and where the husband, an Irish citizen, had obtained permanent resident alien status, had designated himself a year round Georgia resident on state tax returns, and had declared himself to be a non-resident of Britain for tax purposes. Cooke v. Cooke, 277 Ga. 731, 594 S.E.2d 370, 2004 Ga. LEXIS 279 (2004).

Continuing jurisdiction. — Since the original decree was entered in Georgia and the ex-husband, who was seeking modification and enforcement, continued to reside in Georgia, under the plain terms of O.C.G.A. § 9-10-91(6), the ex-wife was amenable to the jurisdiction of Georgia courts and the Constitution did not forbid the exercise of such jurisdiction. Barker v. Barker, 294 Ga. 572, 757 S.E.2d 42, 2014 Ga. LEXIS 123 (2014).

"Dependent" under paragraph (5). — One who is receiving or is supposed to receive alimony is a dependent under paragraph (5) of O.C.G.A. § 9-10-91. Smith v. Smith, 254 Ga. 450, 330 S.E.2d 706, 1985 Ga. LEXIS 745 (1985).

Residing in Georgia pursuant to military orders does not prevent a member of the military from electing to become a resident of the state. Kendrick v. Parker, 258 Ga. 210, 367 S.E.2d 544, 1988 Ga. LEXIS 201 (1988).

Contempt actions. — O.C.G.A. § 9-10-91 is Georgia's domestic relations long-arm statute authorizing the courts to exercise personal jurisdiction over a party who has become a nonresident, and applies to a contempt action seeking enforcement of a Georgia alimony and child-support judgment. Braden v. Braden, 260 Ga. 269, 392 S.E.2d 710, 1990 Ga. LEXIS 253 (1990).

Exercise of jurisdiction over nonresident former husband in action for contempt and modification of Georgia divorce decree was consonant with due process notions of "fair play" and "substantial justice" because: (1) Georgia has a legitimate interest in protecting resident spouses and children; (2) the courts of Georgia remain open to appellant to enforce the appellant's rights, and the appellant enjoys the benefits and protection of the laws of Georgia; (3) the inconvenience to appellant is outweighed by the inconvenience to appellee who would be forced to sue in a foreign forum on a cause of action which arose from their Georgia matrimonial domicile and their Georgia divorce; and (4) the legislature gave the courts of Georgia through paragraph (5) of O.C.G.A. § 9-10-91 the authority to entertain litigation against nonresidents who incur some form of family related obligation while maintaining a matrimonial domicile or while residing within this state. Smith v. Smith, 254 Ga. 450, 330 S.E.2d 706, 1985 Ga. LEXIS 745 (1985).

Where both parties were residents of Georgia at the time of their 1986 divorce, and the wife subsequently moved to Colorado, but in 1989 filed a motion in Georgia for contempt against the husband who had remained in Georgia, the exercise of jurisdiction over the wife comported with due process notions of fair play and substantial justice. To the extent that Medeiros v. Tarpley, 258 Ga. 372, 369 S.E.2d 482 (1988) and Boyce v. Boyce, 259 Ga. 831, 388 S.E.2d 524 (1990) hold that compliance by a nonresident with a Georgia divorce decree insulates the nonresident from subjection to jurisdiction in Georgia court, they are overruled. Straus v. Straus, 260 Ga. 327, 393 S.E.2d 248, 1990 Ga. LEXIS 283 (1990).

Paragraph (5) of O.C.G.A. § 9-10-91 is applicable to contempt action to enforce alimony judgment. Smith v. Smith, 254 Ga. 450, 330 S.E.2d 706, 1985 Ga. LEXIS 745 (1985).

A modification action for custody and child support is an independent action within the contemplation of paragraph (5) of O.C.G.A. § 9-10-91. Lee v. Pace, 252 Ga. 546, 315 S.E.2d 417, 1984 Ga. LEXIS 763 (1984).

Motion to decrease alimony. — Where a former wife had filed a divorce action in Georgia after moving out of state, and had twice filed garnishment during the three years that had passed since then, she was subject to the jurisdiction of Georgia courts for the purposes of a motion to decrease alimony. Fralix v. Cordle, 261 Ga. 224, 403 S.E.2d 793, 1991 Ga. LEXIS 219 (1991).

No jurisdiction to modify child visitation rights where nonresident custodial parent not served. — Trial court lacked jurisdiction over a resident noncustodial father's action against a nonresident custodial mother seeking to modify visitation rights and to hold the mother in contempt of the visitation provisions of a Georgia decree, where personal service had not been made on the mother in Georgia. Ashburn v. Baker, 256 Ga. 507, 350 S.E.2d 437, 1986 Ga. LEXIS 950 (1986), superseded by statute as stated in Croft v. Croft, 298 Ga. App. 303, 680 S.E.2d 150, 2009 Ga. App. LEXIS 676 (2009).

A nonresident parent alleged to be in contempt of the visitation provisions of a Georgia divorce judgment and who was served outside Georgia may divest the court of its power to enforce its judgment by timely asserting a defense of lack of jurisdiction. Dyer v. Surratt, 266 Ga. 220, 466 S.E.2d 584.

Jurisdiction for modification of child custody matters, which include visitation, is in the home state of the child. O.C.G.A. § 9-10-91, the "domestic-rela-

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tions long arm statute" applies by its own terms only to actions involving alimony, child support, and division of property. Kemp v. Sharp, 261 Ga. 600, 409 S.E.2d 204, 1991 Ga. LEXIS 814 (1991).

Trial court was authorized to obtain personal jurisdiction over a child's parent under Georgia's long arm statute, O.C.G.A. §§ 9-10-90 and 9-10-91(6), because the child's grandparents petitioned for visitation rights after the parent had moved to Arizona to attend college and reside there upon graduation. Oglesby v. Deal, 311 Ga. App. 622, 716 S.E.2d 749, 2011 Ga. App. LEXIS 805 (2011).

Contempt for denial of visitation rights. — The trial court lacks jurisdiction under paragraph (5) of O.C.G.A. § 9-10-91 over a nonresident parent on whom personal service was perfected out-of-state, in a proceeding for contempt for denial of visitation rights. Paul v. Paul, 184 Ga. App. 217, 361 S.E.2d 221, 1987 Ga. App. LEXIS 2229 (1987).

Sufficient contacts found. — Fairness dictated that Georgia courts exercise jurisdiction over a wife's divorce action against her husband, who resided in Saudi Arabia, where Georgia was the only state that had any contact with the parties and their marital relationship. Beasley v. Beasley, 260 Ga. 419, 396 S.E.2d 222, 1990 Ga. LEXIS 297 (1990).

Where a husband did not present any evidence demonstrating a lack of personal jurisdiction, there was nothing to refute the wife's showing that the parties' only marital domicile in the United States was Georgia and that the husband had come back to Georgia several times in an attempt to reconcile; therefore, the trial court erred in dismissing the divorce for lack of personal jurisdiction. Walters v. Walters, 277 Ga. 221, 586 S.E.2d 663, 2003 Ga. LEXIS 796 (2003).

Insufficient contacts with state. — Where the only contact between defendant and the state after his marriage in Georgia in March 1970 occurred during the period between March 1970 and August 1971, when Georgia was the marital domicile of the couple, plus several short visits after his wife moved back to the state, there was no indication that any of the events which led to the dissolution of the marriage occurred in Georgia, and the last domicile of the parties before their separation was Nashville, Tennessee, where they had been living for several years prior to the separation in 1977, there were insufficient contacts with the state for defendant to reasonably anticipate being haled into court in Georgia. Marbury v. Marbury, 256 Ga. 651, 352 S.E.2d 564, 1987 Ga. LEXIS 598 (1987).

Where, although the husband maintained a marital residence in Georgia and the separation occurred in Georgia, the divorce decree was actually entered in Arkansas and the husband had not been a Georgia resident for nearly 20 years, his connection with the state was sufficiently attenuated under these facts that due process would be offended by the exercise of jurisdiction over his person to modify the domesticated Arkansas divorce decree. Popple v. Popple, 257 Ga. 98, 355 S.E.2d 657, 1987 Ga. LEXIS 749 (1987).

A former husband's connection with Georgia was sufficiently attenuated that due process would be offended by the exercise of long-arm jurisdiction over his person to hold him in contempt of a Georgia divorce judgment, where the parties maintained no marital residence in Georgia since they separated upon moving into the state in 1975, the husband had not been a resident of Georgia for over 15 years, and the wife had not been a resident of Georgia for over four years. Paul v. Paul, 264 Ga. 434, 444 S.E.2d 770, 1994 Ga. LEXIS 471 (1994).

Nonresident former husband's phone call to his children in Georgia and to the court in regard to Uniform Reciprocal Enforcement of Support Proceedings were insufficient contacts to confer jurisdiction. Riersgard v. Morton, 267 Ga. 451, 479 S.E.2d 748.

Wife's motion to dismiss issues related to alimony, division of marital property, and attorney fees was wrongly denied as there were not sufficient minimum contacts under O.C.G.A. § 9-10-91(5). The wife had not lived in Georgia since 2003, she did not own any property in Georgia

and had not transacted any business in Georgia since 2003, the last marital domicile was in Virginia, the circumstances giving rise to the dissolution of the marriage occurred in Virginia, and the wife's only connection with Georgia had been brief visits during which she had no contact with the husband. Ennis v. Ennis, 290 Ga. 890, 725 S.E.2d 311, 2012 Ga. LEXIS 355 (2012).

Out of state husband not properly served. — Trial court erred by denying the husband's motion for a new trial in a divorce and child support action because the husband was not properly served with the summons and complaint as there was an absence of any evidence that service was made upon a resident of the husband's dwelling or usual place of abode in California; therefore, the court had to conclude that service was improper. Guerrero v. Guerrero, 296 Ga. 432, 768 S.E.2d 451, 2015 Ga. LEXIS 12 (2015).

RESEARCH REFERENCES

Am. Jur. 2d.

20 Am. Jur. 2d, Courts, §§ 94, 100, 114, 122 et seq.

C.J.S.

21 C.J.S., Courts, § 99 et seq.

ALR.

Mandamus to compel court to assume or exercise jurisdiction where it has erroneously dismissed the cause or refused to proceed on the ground of supposed lack of jurisdiction, 4 A.L.R. 582; 82 A.L.R. 1163.

Subsequent dealing, by seller, with property sold conditionally in interstate commerce, as taking it out of the protection of the interstate commerce clause, 30 A.L.R. 417.

Power of court, in exercise of discretion, to refuse to entertain action for nonstatutory tort occurring in another state or country, 32 A.L.R. 6; 48 A.L.R.2d 800.

Jurisdiction to order performance of positive acts in another state, 71 A.L.R. 1351.

Extraterritorial enforcement of arbitral award, 73 A.L.R. 1460.

May presence within the state of bonds or other evidence of indebtedness or title sustain the jurisdiction to determine rights or obligations in them in a suit or proceeding quasi in rem and without personal jurisdiction over the parties affected, 87 A.L.R. 485.

Power of state to provide for service, other than personal, of process upon nonresident individual doing business within the state so as to subject him to judgment in personam, 91 A.L.R. 1327.

Foreign transportation company as subject to service of process in state in which it merely solicits interstate or extrastate business, 95 A.L.R. 1478.

Solicitation within state of orders for goods to be shipped from other state as doing business within state within statutes prescribing conditions of doing business or providing for service of process, 101 A.L.R. 126; 146 A.L.R. 941.

Effect of agreement by foreign corporation to install article within the state to bring transaction within state control, 101 A.L.R. 356.

Suits that may be regarded as in rem or quasi in rem, jurisdiction in which may rest upon constructive service, 126 A.L.R. 664.

Effect of agreement by foreign corporation to service or repair article sold or leased by it to bring transaction within state control, 126 A.L.R. 1104.

Loss, after commencement of suit, of attachment or other lien, upon which jurisdiction against nonresident defendant originally depended, as defeating jurisdiction in rem or precluding judgment in personam against defendant who appeared, 132 A.L.R. 1286.

What suits at domicil of corporation involving corporate stock or rights and obligations incident thereto are in rem, jurisdiction in which may rest upon constructive service of process against nonresidents, 145 A.L.R. 1393.

Suits and remedies against alien enemies, 155 A.L.R. 1451; 156 A.L.R. 1448; 157 A.L.R. 1449.

What amounts to doing business in a state within statute providing for service of process in action against nonresident natural person or persons doing business in state, 10 A.L.R.2d 200.

Immunity of nonresident defendant in

criminal case from service of process, 20 A.L.R.2d 163.

Power of state to subject foreign corporation to jurisdiction of its courts on sole ground that corporation committed tort within state, 25 A.L.R.2d 1202.

What is an action for damages to personal property within venue statute, 29 A.L.R.2d 1270.

Jurisdiction of action at law for damages for tort concerning real property in another state or country, 30 A.L.R.2d 1219.

What constitutes doing business within state by a foreign magazine, newspaper, or other publishing corporation, for purposes other than taxation, 38 A.L.R.2d 747.

Who is subject to constructive or substituted service of process under statutes providing for such service on nonresident motorists, 53 A.L.R.2d 1164.

State's power to subject nonresident individual other than a motorist to jurisdiction of its courts in action for tort committed within state, 78 A.L.R.2d 397.

Holding directors', officers', stockholders', or sales meetings or conventions in a state by foreign corporation as doing business or otherwise subjecting it to service of process and suit, 84 A.L.R.2d 412.

Doctrine of forum non conveniens: assumption or denial of jurisdiction of contract action involving foreign elements, 90 A.L.R.2d 1109.

Prohibition as appropriate remedy to restrain civil action for lack of jurisdiction of the person, 92 A.L.R.2d 247.

Validity of service of process on nonresident owner of watercraft, under state "long-arm" statutes, 99 A.L.R.2d 287.

Choice of law in construction of insurance policy originally governed by law of one state as affected by modification, renewal, exchange, replacement, or reinstatement in different state, 3 A.L.R.3d 646.

Attorney representing foreign corporation in litigation as its agent for service of process in unconnected actions or proceedings, 9 A.L.R.3d 738.

Products liability: in personam jurisdiction over nonresident manufacturer or seller under "long arm" statutes, 19 A.L.R.3d 13.

Retrospective operation of state statutes or rules of court conferring in personam jurisdiction over nonresidents or foreign corporations on the basis of isolated acts or transactions, 19 A.L.R.3d 138.

State statutes or rules of court conferring in personam jurisdiction over nonresidents on the basis of isolated acts or transactions within state as applicable to personal representative of deceased nonresident, 19 A.L.R.3d 171.

Applicability, to actions not based on products liability, of state statutes or rules of court predicating in personam jurisdiction over foreign manufacturers or distributors upon use of their goods within state, 20 A.L.R.3d 957.

Validity, as a matter of due process, of state statutes or rules of court conferring in personam jurisdiction over nonresidents or foreign corporations on the basis of isolated business transacted within state, 20 A.L.R.3d 1201.

Construction and application, as to isolated acts or transactions, of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations upon the doing of an act, or upon doing or transacting business or "any" business, within the state, 27 A.L.R.3d 397.

Choice of law in actions arising from airplane crash in territorial waters of state, 39 A.L.R.3d 196.

Long-arm statutes: obtaining jurisdiction over nonresident parent in filiation or support proceeding, 76 A.L.R.3d 708.

Doctrine of forum non conveniens: assumption or denial of jurisdiction in action between nonresident individuals based upon tort occurring within forum state, 92 A.L.R.3d 797.

In personam jurisdiction over nonresident director of forum corporation under long-arm statutes, 100 A.L.R.3d 1108.

Long-arm statutes: in personam jurisdiction over nonresident based on ownership, use, possession, or sale of real property, 4 A.L.R.4th 955.

In personam jurisdiction under long-arm statute of nonresident banking institution, 9 A.L.R.4th 661.

In personam jurisdiction, under long-arm statute, over nonresident attorney in legal malpractice action, 23 A.L.R.4th 1044.

In personam jurisdiction, under long-arm statute, over nonresident physician, dentist, or hospital in medical malpractice action, 25 A.L.R.4th 706.

Religious activities as doing or transaction of business under "long-arm" statutes or rules of court, 26 A.L.R.4th 1176.

In personam jurisdiction, in libel and slander action, over nonresident who mailed allegedly defamatory letter from outside state, 83 A.L.R.4th 1006.

Doctrine of forum non conveniens: assumption or denial of jurisdiction of action involving matrimonial dispute, 55 A.L.R.5th 647.

Validity, construction, and application of "fiduciary shield" doctrine — modern cases, 79 A.L.R.5th 587.

In personam jurisdiction, under long-arm statute, over nonresident attorney in legal malpractice action, 78 A.L.R.6th 151.

Service of process by mail in international civil action as permissible under Hague Convention, 112 A.L.R. Fed. 241.

Effect of use, or alleged use, of Internet on personal jurisdiction in, or venue of, federal court case, 155 A.L.R. Fed. 535.

Time limit for service of process under the Hague Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, Art. 1 et seq., Fed. R. Civ. P. 4 note (Hague Service Convention), 15 A.L.R. Fed.3d 4.

9-10-92. Effect of appearance.

Where personal jurisdiction is based solely upon this article, an appearance does not confer such jurisdiction with respect to causes of action not arising from the conduct enumerated in Code Section 9-10-91.

History.

Ga. L. 1966, p. 343, § 2; Ga. L. 1970, p. 443, § 2.

Cross references.

Immunity from service of civil process for persons brought into state to answer criminal charges, § 17-13-45.

Law reviews.

For article, "The Georgia Long Arm Statute: A Significant Advance in the Concept of Personal Jurisdiction," see 4 Ga. St. B.J. 13 (1967).

For note discussing the 1970 amendments to the long arm statute as an enlargement of in personam jurisdiction, see 22 Mercer L. Rev. 451 (1971).

For note analyzing the long arm statute and suggesting some reforms, see 11 Ga. L. Rev. 149 (1976).

For article discussing Georgia's long arm statute, prejudgment attachment and habeas corpus, with respect to judicial developments in practice and procedure in the fifth circuit, see 30 Mercer L. Rev. 925 (1979).

For comment on World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980), and Rush v. Savchuk, 444 U.S. 320, 100 S. Ct. 591, 62 L. Ed. 2d 516 (1980), regarding minimum contacts and state jurisdiction, see 15 Ga. L. Rev. 19 (1980).

RESEARCH REFERENCES

Am. Jur. 2d.

4 Am. Jur. 2d, Appearance, § 1 et seq. 20 Am. Jur. 2d, Courts, §§ 60 et seq., 93 et seq.

Am. Jur. Pleading and Practice Forms.

2 Am. Jur. Pleading and Practice Forms, Appearance, § 2.

C.J.S.

21 C.J.S., Courts, §§ 99 et seq., 124.

ALR.

Jurisdiction to entertain suit or render judgment against foreign executor or administrator who appears or submits to jurisdiction of court, 77 A.L.R. 251.

Appearance for purpose of making ap-

plication for removal of cause to federal court as a general appearance, 81 A.L.R. 1219.

Participation by defendant in trial on merits after his objection to jurisdiction, made under special appearance, has been overruled, as waiver of objection, 93 A.L.R. 1302; 62 A.L.R.2d 937.

Solicitation within state of orders for goods to be shipped from other state as doing business within state within statutes prescribing conditions of doing business or providing for service of process, 101 A.L.R. 126; 146 A.L.R. 941.

Relief as to costs or disbursements as changing special appearance to general appearance, 102 A.L.R. 224.

Suits and remedies against alien enemies, 155 A.L.R. 1451; 156 A.L.R. 1448, 157 A.L.R. 1449.

Doctrine of forum non conveniens: assumption or denial of jurisdiction of contract action involving foreign elements, 90 A.L.R.2d 1109.

Prohibition as appropriate remedy to restrain civil action for lack of jurisdiction of the person, 92 A.L.R.2d 247.

Long-arm statutes: in personam jurisdiction over nonresident based on ownership, use, possession, or sale of real property, 4 A.L.R.4th 955.

9-10-93. Venue.

Venue in cases under this article shall lie in any county wherein a substantial part of the business was transacted, the tortious act, omission, or injury occurred, or the real property is located. Where an action is brought against a resident of this state, any nonresident of this state who is involved in the same transaction or occurrence and who is suable under the provisions of this article may be joined as a defendant in the county where a resident defendant is suable. Under such circumstances, jurisdiction and venue of the court of and over such nonresident defendant shall not be affected or lost if at trial a verdict or judgment is returned in favor of such resident defendant. If such resident defendant is dismissed from the action prior to commencement of the trial, the action against the nonresident defendant shall not abate but shall be transferred to a court in a county where venue is proper.

History.

Ga. L. 1966, p. 343, § 4; Ga. L. 1968, p. 1419, § 1; Ga. L. 1970, p. 443, § 3; Ga. L. 1997, p. 480, § 1.

Cross references.

Venue of actions against noncitizens found in state, § 9-10-33.

Law reviews.

For article, "The Georgia Long Arm Statute: A Significant Advance in the Concept of Personal Jurisdiction," see 4 Ga. St. B.J. 13 (1967).

For article, "An Introduction to the New Georgia Corporation Law," see 4 Ga. St. B. J. 419 (1968).

For note discussing the 1970 amendments to the long arm statute as an enlargement of in personam jurisdiction, see 22 Mercer L. Rev. 451 (1971).

For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

For article, "Foreign Corporations in Georgia," see 10 Ga. St. B.J. 243 (1973).

For note discussing some complications of filing suit against a nonresident in a multiparty action or against a resident who might implead a nonresident under the venue rules, see 11 Ga. L. Rev. 149 (1976).

For article discussing venue and jurisdictional requirements for third party practice, see 13 Ga. L. Rev. 13 (1978).

For article discussing Georgia's long arm statute, prejudgment attachment and habeas corpus, with respect to judicial developments in practice and procedure in the fifth circuit, see 30 Mercer L. Rev. 925 (1979).

For comment on World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980), and Rush v. Savchuk, 444 U.S. 320, 100 S. Ct. 591, 62 L. Ed. 2d 516 (1980), regarding minimum contacts and state jurisdiction, see 15 Ga. L. Rev. 19 (1980).

For comment, "Jurisdiction over Nonresidents in Georgia: Crowder v. Ginn," see 17 Ga. L. Rev. 201 (1982).

For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982).

For annual survey of trial practice and procedure, see 38 Mercer L. Rev. 383 (1986).

For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 9 (1997).

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This section is merely an elaboration of residence in Ga. Const. 1976, Art. VI, Sec. XIV, Par. VI (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI). Scott v. Crescent Tool Co., 296 F. Supp. 147, 1968 U.S. Dist. LEXIS 9665 (N.D. Ga. 1968) (see O.C.G.A. § 9-10-93).

Forum selection clauses in payday lending actions. — District court correctly found that forum selection clauses in class borrowers' payday lending agreements were unenforceable as against Georgia public policy in the borrowers' suit alleging usury violations, and the term "county" in O.C.G.A. § 16-17-2 referred only to Georgia counties, not out of state counties, since Georgia venue provisions commonly use the term "county" or "counties" in reference to Georgia counties, without explicitly saying so. The lenders' argument — that by using the term "county" instead of "Georgia county" in § 16-17-2(c)(1), the General Assembly opened a back door for out-of-state forum selection clauses — would effectively "hide elephants in mouseholes." Davis v. Oasis Legal Fin. Operating Co., LLC, 936 F.3d 1174, 2019 U.S. App. LEXIS 26064 (11th Cir. 2019).

Venue properly lies in county where business transacted. — Where all the business transacted by the defendants is consummated in the same county in which the action is brought, there is no justification for an allegation of improper venue under this section. Palm Beach Inv. Properties, Inc. v. Dingman, 126 Ga. App. 17, 189 S.E.2d 906, 1972 Ga. App. LEXIS 1028 (1972) (see O.C.G.A. § 9-10-93).

In a dispute between siblings over corporate funds, venue was proper with respect to the sisters in Forsyth County, Georgia since a substantial amount of the sisters' activities which gave rise to the brothers' claims were transacted in Forsyth County. Stubblefield v. Stubblefield, 296 Ga. 481, 769 S.E.2d 78, 2015 Ga. LEXIS 100 (2015).

Internet car seller purposefully transacted business in the State of Georgia when its agent conducted business negotiations with a buyer who lived in Georgia and when the seller delivered the vehicle in the state, so as to have established sufficient minimum contacts with the State of Georgia to authorize Georgia's exercise of personal jurisdiction over the seller under the Georgia Long Arm Statute, O.C.G.A. § 9-10-91; moreover, the state court correctly resolved the factual conflict created by the seller's affidavits and supporting documentation in favor of the buyer so as to find, for purposes of the motion to dismiss, that the buyer had not been provided with, nor agreed to, that part of the agreement containing the forum selection clause. Aero Toy Store, LLC v. Grieves, 279 Ga. App. 515, 631 S.E.2d 734, 2006 Ga. App. LEXIS 626 (2006).

Venue established in county where nonresident transacted business. — Where the sole general partner was a nonresident, personal jurisdiction may be exercised under Ga. L. 1970, p. 443, § 1 (see O.C.G.A. § 9-10-91) by the courts of this state as if the person were a resident, and venue was established in the county

where the business was transacted. Reading Assocs., Ltd. v. Reading Assocs. of Ga., Inc., 236 Ga. 906, 225 S.E.2d 899, 1976 Ga. LEXIS 1065 (1976).

Substantial parts of the business. — Since substantial parts of the business under a gasoline supply contract were transacted in both Union County and Hall County, there was no basis for reversing the trial court's finding, pursuant to O.C.G.A. § 9-10-93, that venue was in Hall County for purposes of a breach of contract action under the agreement. Dickey v. Clipper Petroleum, Inc., 280 Ga. App. 475, 634 S.E.2d 425, 2006 Ga. App. LEXIS 768 (2006).

Action against nonresident motor common carrier. — Even though a nonresident interstate motor common carrier was registered in Georgia and had a registered agent for service of process, venue of a personal injury action against the carrier and nonresident driver was proper only in the county in which the accident occurred. Southern Drayage, Inc. v. Williams, 216 Ga. App. 721, 455 S.E.2d 418, 1995 Ga. App. LEXIS 241 (1995).

While the trial court held that, under O.C.G.A. § 9-10-93, venue did not appear to be properly established in a case between plaintiff former husband and defendant former wife regarding division of marital assets and breach of contract, a review of the record did not reveal any evidence regarding venue except for the wife's representation in her brief that the husband resided in Cobb County, Georgia, where the action was filed, and that the bulk of the marital assets were located in DeKalb County, Georgia; thus, the trial court's ruling regarding venue was reversed. Barolia v. Pirani, 260 Ga. App. 513, 580 S.E.2d 297, 2003 Ga. App. LEXIS 423 (2003).

Venue proper. — Trial court's finding that the a corporate president and the president's spouse were subject to a corporation's suit in Fulton County pursuant to the Georgia Long Arm Statute was not error because the brokers sued the corporation in Fulton County, thereby submitting themselves to jurisdiction and venue on the corporation's counterclaim; thus, the brokers were "suable" on the corporation's claims in Fulton County, and under O.C.G.A. § 9-10-93, Fulton County was the proper venue as to the president and the spouse. Cartwright v. Fuji Photo Film U.S.A., Inc., 312 Ga. App. 890, 720 S.E.2d 200, 2011 Ga. App. LEXIS 976 (2011), cert. denied, No. S12C0600, 2012 Ga. LEXIS 306 (Ga. Mar. 19, 2012).

RESEARCH REFERENCES

Am. Jur. 2d.

77 Am. Jur. 2d, Venue, §§ 1 et seq., 8 et seq., 43 et seq., 48 et seq.

C.J.S.

92A C.J.S., Venue, § 7.

ALR.

Guardianship of incompetent or infant as affecting venue of action, 111 A.L.R. 167.

State or country deemed to be the place of tort causing personal injury or death, as regards principle that law of place of tort governs, 77 A.L.R.2d 1266.

Long-arm statutes: in personam jurisdiction over nonresident based on ownership, use, possession, or sale of real property, 4 A.L.R.4th 955.

Place where corporation is doing business for purposes of state venue statute, 42 A.L.R.5th 221.

9-10-94. Service.

A person subject to the jurisdiction of the courts of the state under Code Section 9-10-91, or his executor or administrator, may be served with a summons outside the state in the same manner as service is made within the state by any person authorized to make service by the laws of the state, territory, possession, or country in which service is made or by any duly qualified attorney, solicitor, barrister, or the equivalent in such jurisdiction.

History.

Ga. L. 1966, p. 343, § 3.

Law reviews.

For article, "The Georgia Long Arm Statute: A Significant Advance in the Concept of Personal Jurisdiction," see 4 Ga. St. B.J. 13 (1967).

For article summarizing law relating to jurisdiction and venue over domestic and foreign corporations in Georgia, and service therein, see 21 Mercer L. Rev. 457 (1970).

For article, "Foreign Corporations in Georgia," see 10 Ga. St. B.J. 243 (1973).

For note analyzing the long arm statute and suggesting some reforms, see 11 Ga. L. Rev. 149 (1976).

For article discussing Georgia's long arm statute, prejudgment attachment and habeas corpus, with respect to judicial developments in practice and procedure in the fifth circuit, see 30 Mercer L. Rev. 925 (1979).

For comment on World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980), and Rush v. Savchuk, 444 U.S. 320, 100 S. Ct. 591, 62 L. Ed. 2d 516 (1980), regarding minimum contacts and state jurisdiction, see 15 Ga. L. Rev. 19 (1980).

For annual survey of domestic relations, see 43 Mercer L. Rev. 243 (1991).

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Words "or his executor or administrator" in this section could only refer to natural person, and cannot reasonably be construed to include corporations. Bauer Int'l Corp. v. Cagle's, Inc., 225 Ga. 684, 171 S.E.2d 314, 1969 Ga. LEXIS 612 (1969) (see O.C.G.A. § 9-10-94).

Notice of intent to prove foreign law. — O.C.G.A. § 9-10-94 on its face provides the requisite notice of intent to prove foreign law, as it pertains to the issue of by whom service of process can be made under the long arm statute. Samay v. Som, 213 Ga. App. 812, 446 S.E.2d 230, 1994 Ga. App. LEXIS 737 (1994), cert. denied, No. S94C1694, 1994 Ga. LEXIS 1132 (Ga. Oct. 28, 1994).

Contempt actions. — In a contempt action, a rule nisi is the summons which is to be served on a nonresident defendant giving the defendant notice of the charges and the opportunity to be heard at a specified time and place. Braden v. Braden, 260 Ga. 269, 392 S.E.2d 710, 1990 Ga. LEXIS 253 (1990).

Service on nonresidents must be in same manner as on residents. — This section provides that service on nonresidents be made in the same manner as it is on residents; service of process must be personally delivered by one authorized to make service in the jurisdiction where the nonresident is found, and there is no provision under Georgia law that allows service to be effected through the use of the mails. Luxury Air Serv., Inc. v. Cessna Aircraft Co., 78 F.R.D. 410, 1978 U.S. Dist. LEXIS 18743 (N.D. Ga. 1978) (see O.C.G.A. § 9-10-94).

Georgia Bureau of Investigation (GBI) agent was without authority to serve process on a former Georgia resident who had moved to Florida, and the agent's attempt to do so was without effect. Denny v. Croft, 195 Ga. App. 871, 395 S.E.2d 72, 1990 Ga. App. LEXIS 760 (1990).

Evidence showed that security deed holder was personally served outside the state with the former property owner's declaratory judgment action in the same manner as in Georgia for a defendant who was subject to personal jurisdiction because the security deed holder had sufficient contact with Georgia in that the holder held a security deed to Georgia property that the former property owner claimed had to be canceled under Georgia law. Lebbos v. Davis, 256 Ga. App. 1, 567 S.E.2d 345, 2002 Ga. App. LEXIS 800 (2002).

Because service of process of a consolidated declaratory judgment action was not sufficiently perfected on two defendant brothers, neither waived service, and despite the fact that one brother might have had notice of the earlier action and service was attempted against the other pursuant to O.C.G.A. § 9-10-91 and O.C.G.A. § 9-10-94, the clear require-

ments of O.C.G.A. § 9-11-4(e)(7) were not dispensed with; hence, the trial court erred in denying the brothers' motion to dismiss said action. Tavakolian v. Agio Corp., 283 Ga. App. 881, 642 S.E.2d 903, 2007 Ga. App. LEXIS 237 (2007).

Trial court erred by denying the husband's motion for a new trial in a divorce and child support action because the husband was not properly served with the summons and complaint as there was an absence of any evidence that service was made upon a resident of the husband's dwelling or usual place of abode in California; therefore, the court had to conclude that service was improper. Guerrero v. Guerrero, 296 Ga. 432, 768 S.E.2d 451, 2015 Ga. LEXIS 12 (2015).

Trial court did not err when the court set aside the default judgment entered against the nonresident company on grounds that the court lacked personal jurisdiction over the company because the plaintiff's purported service on the company was deficient in that the entry of service form contained no indication that the individual who was served was authorized to accept service. Delta Aliraq, Inc. v. Arcturus Int'l, LLC, 345 Ga. App. 778, 815 S.E.2d 129, 2018 Ga. App. LEXIS 282 (2018).

Service on nonresident who was a resident at time action accrued. — The tolling statute could not be applied to extend the statute of limitations in consolidated personal injury renewal actions because the Long Arm Statute, O.C.G.A. §§ 9-10-91 and 9-10-94, could be utilized to serve the driver against whom the actions had been filed as the driver was a resident of Georgia at the time the driver was involved in an auto accident with a parent and child. Dickson v. Amick, 291 Ga. App. 557, 662 S.E.2d 333, 2008 Ga. App. LEXIS 571 (2008), overruled in part, Giles v. State Farm Mut. Ins. Co., 330 Ga. App. 314, 765 S.E.2d 413, 2014 Ga. App. LEXIS 717 (2014).

Service of process must be in conformance with statutory requirements. American Photocopy Equip. Co. v. Lew Deadmore & Assocs., 127 Ga. App. 207, 193 S.E.2d 275, 1972 Ga. App. LEXIS 835 (1972).

Who may serve process under long arm statute. — While the method of service under the long arm statute must conform to the laws of Georgia, the issue of who may serve process is determined by the law of the foreign jurisdiction in which service is made. Samay v. Som, 213 Ga. App. 812, 446 S.E.2d 230, 1994 Ga. App. LEXIS 737 (1994), cert. denied, No. S94C1694, 1994 Ga. LEXIS 1132 (Ga. Oct. 28, 1994).

Plaintiff's substituted service on defendant's wife at defendant's home in Florida was sufficient under the long-arm statute. Jacobson v. Garland, 227 Ga. App. 81, 487 S.E.2d 640.

Service on nonresident valid. — Nonresident defendant to civil suit was properly served with process by deputy sheriff where defendant was served as a sojourner, even though defendant was not served in the county where a default judgment had been issued against the individual. Coe v. Peterson, 172 Ga. App. 531, 323 S.E.2d 715, 1984 Ga. App. LEXIS 2570 (1984).

Trial court erred in dismissing plaintiff injured party's personal injury suit against defendant motorist arising out of an automobile collision in Georgia based on insufficient service of process; although service of process was not perfected under the Georgia Non-Resident Motorist Act, O.C.G.A. § 40-12-1 et seq., the motorist, who was a Pennsylvania resident, was personally served with process under O.C.G.A. § 9-10-94 of the Georgia Long Arm Statute prior to the expiration of the applicable statute of limitations such that the trial court acquired personal jurisdiction over the motorist. King v. Barrios, 257 Ga. App. 538, 571 S.E.2d 531, 2002 Ga. App. LEXIS 1206 (2002).

Given service on an Alabama resident by a private process server who verified the resident's identity through a closed door at the resident's residence before leaving the papers at the door as instructed, a trial court did not err in finding that service was proper under O.C.G.A. § 9-10-94 and striking the resident's untimely answer. The timing of the filing of the return of service was not relevant under O.C.G.A. § 9-11-4(h). Newsome v. Johnson, 305 Ga. App. 579, 699 S.E.2d 874, 2010 Ga. App. LEXIS 757 (2010).

O.C.G.A. § 9-11-4(e)(1) did not govern service of process in a manufacturer's

breach of contract action against a distributor because the distributor was not "authorized to transact business in the State" as that phrase was used in § 9-11-4(e)(1); the distributor did not show that the distributor was a corporation incorporated or domesticated under the laws of Georgia, because the distributor pointed to no evidence that the distributor obtained the requisite certificate of authority to transact business in the state from the Georgia Secretary of State pursuant to O.C.G.A. § 14-2-1501(a) and because the distributor was a nonresident subject to the long-arm statute, O.C.G.A. § 9-10-90 et seq. Kitchen Int'l, Inc. v. Evans Cabinet Corp., 310 Ga. App. 648, 714 S.E.2d 139, 2011 Ga. App. LEXIS 622 (2011).

Trial court did not err when the court concluded that, pursuant to O.C.G.A. § 9-11-12(h)(1), a contractor waived objection to the sufficiency of service by a North Carolina deputy sheriff because the contractor appeared in court and filed a responsive pleading and motion, and the contractor failed to raise the issue of service by a North Carolina deputy sheriff in the contractor's first pleading or motion. Merry v. Robinson, 313 Ga. App. 321, 721 S.E.2d 567, 2011 Ga. App. LEXIS 1063 (2011), cert. denied, No. S12C0720, 2012 Ga. LEXIS 403 (Ga. Apr. 24, 2012).

Service on nonresident invalid. — In an in rem action to set aside a fraudulent conveyance of property, the court had personal jurisdiction over the nonresident grantee of the property and service on the nonresident as authorized by O.C.G.A. § 9-10-94 was proper. Forrister v. Manis Lumber Co., 232 Ga. App. 370, 501 S.E.2d 606.

In five consolidated aviation wrongful death cases and one aviation property case, the trial court properly denied the motion to dismiss filed by an out-of-state damper part seller on the ground of insufficient service of process as personal service upon the seller's registered agent was appropriate under both the seller's State of Delaware and under Georgia law. Vibratech, Inc. v. Frost, 291 Ga. App. 133, 661 S.E.2d 185, 2008 Ga. App. LEXIS 385 (2008), cert. denied, No. S08C1426, 2008 Ga. LEXIS 692 (Ga. Sept. 8, 2008), overruled in part, Bowen v. Savoy, 308 Ga. 204, 839 S.E.2d 546, 2020 Ga. LEXIS 133 (2020).

Attempted service upon foreign corporation by mail is invalid even when made by court order. American Photocopy Equip. Co. v. Lew Deadmore & Assocs., 127 Ga. App. 207, 193 S.E.2d 275, 1972 Ga. App. LEXIS 835 (1972).

Regardless of availability of local place of business of nonresident corporation, attempted service by mail was a nullity. American Photocopy Equip. Co. v. Lew Deadmore & Assocs., 127 Ga. App. 207, 193 S.E.2d 275, 1972 Ga. App. LEXIS 835 (1972).

Defendant's learning of filing of action does not dispense with necessity of service. — Where there has been no service of action, or waiver thereof, the necessity of service is not dispensed with by the mere fact that the defendant may in some way learn of the filing of the action. American Photocopy Equip. Co. v. Lew Deadmore & Assocs., 127 Ga. App. 207, 193 S.E.2d 275, 1972 Ga. App. LEXIS 835 (1972).

Resident at time claim arose but nonresident when service attempted not subject to section. — Defendant who resided in Georgia at the time the claim arose but who was a nonresident when service was attempted, was not amenable to service under Ga. L. 1966, p. 343, § 3 (see O.C.G.A. § 9-10-94) or Ga. L. 1967, p. 800, § 1 (see O.C.G.A. § 40-12-1). Parham v. Edwards, 346 F. Supp. 968, 1972 U.S. Dist. LEXIS 12678 (S.D. Ga. 1972), aff'd, 470 F.2d 1000, 1973 U.S. App. LEXIS 12150 (5th Cir. 1973).

Section applicable in domesticating foreign action absent proof of foreign statute. — Where plaintiffs sought to domesticate action in Maryland for debt against a partnership in which Georgia resident was served by allegedly mailing the Georgia resident a copy of the pleadings in the State of Georgia, the law of Georgia as to validity of service would apply in the absence of any proof of the Maryland statute. Maxwell v. Columbia Realty Venture, 155 Ga. App. 289, 270 S.E.2d 704, 1980 Ga. App. LEXIS 2559 (1980).

Service by publication. — In the absence of a showing that the wife had

received or waived receipt of actual notice of the lawsuit, or that reasonable diligence had been exercised in attempting to find her, judgment was vacated and case remanded to the trial court for a determination whether service by publication met due process constitutional guarantees. McDade v. McDade, 263 Ga. 456, 435 S.E.2d 24, 1993 Ga. LEXIS 620 (1993).

Defense of lack of jurisdiction not waived. — A foreign corporation did not waive the defense of lack of jurisdiction by not raising it in a responsive pleading or filing a motion to dismiss after being served under the long arm statute, O.C.G.A. § 9-10-91. Hoesch Am., Inc. v. Dai Yang Metal Co., 217 Ga. App. 845, 459 S.E.2d 187, 1995 Ga. App. LEXIS 619 (1995).

RESEARCH REFERENCES

Am. Jur. 2d.

62B Am. Jur. 2d, Process, § 91 et seq.

C.J.S.

72 C.J.S., Process, § 30.

ALR.

Action or proceeding which directly or indirectly seeks to establish liability of, or to recover judgment against, a nonresident executor or administrator, or other fiduciary, as one in personam or in rem, as regards acquisition of jurisdiction upon constructive or substituted service of process, 136 A.L.R. 621.

Suits and remedies against alien enemies, 155 A.L.R. 1451; 156 A.L.R. 1448; 157 A.L.R. 1449.

What amounts to doing business in a state within statute providing for service of process in action against nonresident natural person or persons doing business in state, 10 A.L.R.2d 200.

Who is subject to constructive or substituted service of process under statutes providing for such service on nonresident motorists, 53 A.L.R.2d 1164.

Propriety of service of process in an in personam action on resident minor defendant whose only guardian is a nonresident and cannot be served validly either within or without state, 86 A.L.R.2d 1183.

Prohibition as appropriate remedy to restrain civil action for lack of jurisdiction of the person, 92 A.L.R.2d 247.

Attorney representing foreign corporation in litigation as its agent for service of process in unconnected actions or proceedings, 9 A.L.R.3d 738.

Long-arm statutes: in personam jurisdiction over nonresident based on ownership, use, possession, or sale of real property, 4 A.L.R.4th 955.

Doctrine of forum non conveniens: assumption or denial of jurisdiction of action involving matrimonial disputes, 55 A.L.R.5th 647.

ARTICLE 5

VERIFICATION

9-10-110. Petitions for extraordinary equitable relief to be verified or supported by proof.

Petitions for a restraining order, injunction, receiver, or other extraordinary equitable relief shall be verified positively by the petitioner or supported by other satisfactory proofs.

History.

Civil Code 1895, § 4966; Civil Code 1910, § 5544; Code 1933, § 81-110; Ga. L. 1982, p. 3, § 9.

JUDICIAL DECISIONS

Purpose of section. — Evident purpose of this section is that nothing putting in motion the extraordinary powers of the court should be done by the judge until the application for the exercise of such powers has been vouched for by some kind of proof or verification; a rule nisi on such a petition is as much a part of the equitable relief or remedy sought as a restraining order or one appointing a receiver. Kilgore v. Paschall, 202 Ga. 416, 43 S.E.2d 520, 1947 Ga. LEXIS 456 (1947) (see O.C.G.A. § 9-10-110).

O.C.G.A. § 9-10-110 does not apply to petitions for condemnation. Chester v. State, 168 Ga. App. 618, 309 S.E.2d 897, 1983 Ga. App. LEXIS 2869 (1983).

Amendment offered on final trial need not be verified. — This section relates to preliminaries, such as sanction, filing, and interlocutory hearing, and does not require that an amendment offered on final trial shall be verified. Jacobs v. Rittenbaum, 193 Ga. 838, 20 S.E.2d 425, 1942 Ga. LEXIS 501 (1942) (see O.C.G.A. § 9-10-110).

Petitions for a restraining order, injunction, or other extraordinary equitable relief must be verified. Harvard v. Walton, 243 Ga. 860, 257 S.E.2d 280, 1979 Ga. LEXIS 1459 (1979).

Failure to verify a petition is an amendable defect. Harvard v. Walton, 243 Ga. 860, 257 S.E.2d 280, 1979 Ga. LEXIS 1459 (1979).

Although medical LLCs' petitions for a temporary restraining order and interlocutory injunction against a doctor's widow were not verified as required by O.C.G.A. § 9-10-110, the trial court found satisfactory proofs supported the granting of these orders and the trial court allowed the LLCs to perfect the record by filing a verification as an amendment to their motion. Davis v. VCP South, LLC, 297 Ga. 616, 774 S.E.2d 606, 2015 Ga. LEXIS 488 (2015).

Verified petition amendable by unverified amendment. — There is authority for the proposition that a verified petition may be amended in some respects by an unverified amendment. Harvard v. Walton, 243 Ga. 860, 257 S.E.2d 280, 1979 Ga. LEXIS 1459 (1979).

Verification that allegations are true to best of affiant's belief insufficient. — Verification of a petition by a person to the effect that the allegations contained therein are true and correct to the best of the person's information and belief, is not a positive verification as contemplated by this section. Kilgore v. Paschall, 202 Ga. 416, 43 S.E.2d 520, 1947 Ga. LEXIS 456 (1947); Carter v. Hayes, 214 Ga. 782, 107 S.E.2d 799, 1959 Ga. LEXIS 340 (1959); Stinchcomb v. Hoard, 221 Ga. 77, 143 S.E.2d 174, 1965 Ga. LEXIS 387 (1965) (see O.C.G.A. § 9-10-110).

Insufficiently verified petition supportable by other proofs. — Where the verification of a petition for injunction is not in positive terms, but only to the best of the applicant's knowledge, information, or belief, the trial judge may exercise judicial discretion and permit the petition to be supported by "other satisfactory proofs." Kilgore v. Paschall, 202 Ga. 416, 43 S.E.2d 520, 1947 Ga. LEXIS 456 (1947).

Director of the Environmental Protection Division of the Georgia Department of Natural Resources sought an injunction against a permittee for allegedly violating its permit and the Georgia Water Quality Control Act, O.C.G.A. § 12-5-20 et seq. Although the sworn verification filed with the complaint pursuant to O.C.G.A. § 9-10-110 was not phrased in positive language, dismissal of the complaint was not required because the Director submitted "other satisfactory proofs" in support of the complaint. Agri-Cycle LLC v. Couch, 284 Ga. 90, 663 S.E.2d 175, 2008 Ga. LEXIS 546 (2008).

Petition may be verified by attorney. — While this section states that petition shall be verified by the petitioner, where an attorney swears positively to the effect that the recitals of fact in the petition are true, this is a sufficient verification; thus, a petition positively verified by the attorney is one "supported by other satisfactory proofs." Kilgore v. Paschall,

202 Ga. 416, 43 S.E.2d 520, 1947 Ga. LEXIS 456 (1947) (see O.C.G.A. § 9-10-110).

Unverified petition curable by amendment at interlocutory hearing. — Where the original petition for injunction was not verified as required by this section, the court did not err in allowing this defect to be cured by amendment at the interlocutory hearing. Pratt v. Rosa Jarmulowsky Co., 177 Ga. 522, 170 S.E. 365, 1933 Ga. LEXIS 344 (1933) (see O.C.G.A. § 9-10-110).

Unverified petition for injunction not dismissible as matter of law. — The fact that a petition for injunction is not verified as required by this section does not as a matter of law demand its dismissal, but the petition may be retained in court and an injunction granted thereon, where "other satisfactory proofs" are submitted. Bracewell v. Cook, 192 Ga. 678, 16 S.E.2d 432, 1941 Ga. LEXIS 602 (1941); Harper v. Atlanta Milling Co., 203 Ga. 608, 48 S.E.2d 89, 1948 Ga. LEXIS 391 (1948); Edwards v. Edwards, 227 Ga. 307, 180 S.E.2d 358, 1971 Ga. LEXIS 680 (1971) (see O.C.G.A. § 9-10-110).

Sworn petition and answer serve as both pleadings and evidence on application for injunction where there is no other evidence. Salter v. Ashburn, 218 Ga. 62, 126 S.E.2d 404, 1962 Ga. LEXIS 430 (1962).

Petition to have one held in contempt for failure to pay alimony may be unverified. — A petition seeking to have a husband held in contempt of court for failure to pay alimony need not be verified. Brown v. Olen, 226 Ga. 492, 175 S.E.2d 838, 1970 Ga. LEXIS 572 (1970).

RESEARCH REFERENCES

Am. Jur. 2d.

61B Am. Jur. 2d, Pleading, §§ 181 et seq., 771 et seq.

Am. Jur. Pleading and Practice Forms.

5A Am. Jur. Pleading and Practice Forms, Captions, Prayers, and Formal Parts, § 606.

ALR.

Perjury in verifying pleadings, 7 A.L.R. 1283.

9-10-111. When verified answer required; by whom made for corporate defendant.

In all cases where the plaintiff files a pleading with an affidavit attached to the effect that the facts stated in the pleading are true to the best of his knowledge and belief, the defendant shall in like manner verify any answer. If the defendant is a corporation, the affidavit may be made by the president, vice-president, superintendent, or any officer or agent who knows, or whose official duty it is to know, about the matters set out in the answer.

History.

Ga. L. 1895, p. 44, § 1; Civil Code 1895, § 5055; Civil Code 1910, § 5638; Code 1933, § 81-401.

Law reviews.

For annual survey of law of real property, see 38 Mercer L. Rev. 319 (1986).

JUDICIAL DECISIONS

Sworn averments as to agency or authority of corporate officer to make affidavit are not required. Georgia Lumber Co. v. Thompson, 34 Ga. App. 281, 129 S.E. 303, 1925 Ga. App. LEXIS 222 (1925).

Where petition was not sworn to be

true by plaintiff, defendant was not required to verify its plea by this section. Shelton v. Fidelity & Cas. Co., 86 Ga. App. 818, 72 S.E.2d 813, 1952 Ga. App. LEXIS 1073 (1952) (see O.C.G.A. § 9-10-111).

Where plaintiff, proceeding pro se, signed an original complaint and had it notarized, but failed to include an affidavit or other statement regarding its truth, defendants were not required to verify their answer. Ware v. Fidelity Acceptance Corp., 225 Ga. App. 41, 482 S.E.2d 536.

Attorney not an agent of corporation in other capacity may not verify. — While a plea filed by a defendant corporation may be verified by an officer or agent of the defendant corporation, an attorney-at-law for a defendant corporation who does not profess to be the corporation's agent in any other capacity may not verify a plea to the jurisdiction. Guarantee Trust Life Ins. Co. v. Ricker, 93 Ga. App. 554, 92 S.E.2d 323, 1956 Ga. App. LEXIS 798 (1956).

Paper signed absent oath cannot be regarded as affidavit. — Where it appears that no oath was in fact administered to one whose name is subscribed to a paper which purports to be one's affidavit, or that one signed it without consciously assuming the obligation of an oath, the paper cannot be regarded as an affidavit. Cone v. Sing Motor Implement, Inc., 96 Ga. App. 389, 100 S.E.2d 154, 1957 Ga. App. LEXIS 589 (1957).

The passage of Ch. 11, of this title, did not make former Code 1933, § 81-401 (see O.C.G.A. § 9-10-111) inoperative. Sing Recording Co. v. LeFevre Sound Studios, Inc., 122 Ga. App. 327, 176 S.E.2d 657, 1970 Ga. App. LEXIS 864 (1970).

Omission to verify an answer is an amendable defect. Sing Recording Co. v. LeFevre Sound Studios, Inc., 122 Ga. App. 327, 176 S.E.2d 657, 1970 Ga. App. LEXIS 864 (1970); Janet Ricker Builder, Inc. v. Gardner, 244 Ga. App. 753, 536 S.E.2d 777, 2000 Ga. App. LEXIS 846 (2000).

Where the record showed that a verification was, in fact, filed prior to a trial court's ruling, the trial court erred in finding that defendant did not verify an amended answer. Person v. State, 260 Ga. App. 644, 580 S.E.2d 649, 2003 Ga. App. LEXIS 446 (2003).

Verification not required. — Verification was not required under O.C.G.A. § 9-10-111 because condemnation actions were in rem proceedings against the property, and owner did not become a party defendant merely by being served with and answering the complaints. Jones v. State, 210 Ga. App. 140, 435 S.E.2d 507, 1993 Ga. App. LEXIS 1099 (1993).

In plaintiff insured's action against defendant insurer, removed due to diversity of jurisdiction, federal rules applied as to procedures and thus, Fed. R. Civ. P. 11(a) applied, not O.C.G.A. § 9-10-111 and the insurer's answer was not required to be verified. Kirkland v. Guardian Life Ins. Co. of Am., 352 Fed. Appx. 293, 2009 U.S. App. LEXIS 18633 (11th Cir. 2009), cert. denied, 560 U.S. 965, 130 S. Ct. 3412, 177 L. Ed. 2d 325, 2010 U.S. LEXIS 4911 (2010).

Garnishee's answer to a verified post-judgment garnishment petition need not be verified. First Nat'l Bank v. Sinkler, 170 Ga. App. 668, 317 S.E.2d 897, 1984 Ga. App. LEXIS 2908 (1984).

Tenant's answer to a dispossessory complaint need not be verified. Henry v. Wild Pines Apts., 177 Ga. App. 576, 340 S.E.2d 233, 1986 Ga. App. LEXIS 1492 (1986).

RESEARCH REFERENCES

Am. Jur. 2d.

61B Am. Jur. 2d, Pleading, §§ 181 et seq., 771 et seq.

C.J.S.

71 C.J.S., Pleading, §§ 486, 488.

ALR.

Necessity of showing authority or qualification of affiant in affidavit made on behalf of corporation, 3 A.L.R. 132.

9-10-112. Verification of answer in action on open account.

Whenever an action is brought on an open account and the same is

verified by the plaintiff as provided by law, the answer either shall deny that the defendant is indebted in any sum or shall specify the amount in which the defendant admits he may be indebted and it shall be verified as required by law.

History.

Ga. L. 1901, p. 55, § 1; Civil Code 1910, § 4728; Code 1933, § 81-410.

History of Section.

The language of this Code section is derived in part from the decision in Rich v. Belcher, 42 Ga. App. 511, 156 S.E. 626 (1931).

JUDICIAL DECISIONS

O.C.G.A. § 9-10-112 is not "faulty" for conflicting with O.C.G.A. § 9-11-8(b). — Code Section 9-10-112, as the more specific statute, prevails over § 9-11-8(b). Baylis v. Daryani, 294 Ga. App. 729, 669 S.E.2d 674, 2008 Ga. App. LEXIS 1190 (2008), cert. dismissed, No. S09C0555, 2009 Ga. LEXIS 123 (Ga. Mar. 9, 2009).

Essential elements of defendant's plea. — It is essential to the defendant's plea of no indebtedness that it be alleged in the plea that the defendant is not indebted "in any sum," or that it specify the amount of indebtedness which the defendant admits. Walker v. Seawell, 42 Ga. App. 511, 156 S.E. 475, 1931 Ga. App. LEXIS 35 (1931).

Business owner filed a verified complaint on an open account against the defendants. As the defendants' answer did not deny specifically, as required by O.C.G.A. § 9-10-112, that the defendants were indebted to the owner in any sum or allege any specific amounts that the defendants were indebted to the owner, the answer had to be stricken. Baylis v. Daryani, 294 Ga. App. 729, 669 S.E.2d 674, 2008 Ga. App. LEXIS 1190 (2008), cert. dismissed, No. S09C0555, 2009 Ga. LEXIS 123 (Ga. Mar. 9, 2009).

Plea alleging payment to plaintiff of portion of account at issue improper. — Where the plaintiff's petition contains a paragraph alleging that the defendant is indebted to the plaintiff in a named sum, a plea which generally denies a number of the paragraphs of the petition, and which further alleges that the defendant has paid a designated portion of the amount of the account sued on and has not been given credit therefor, is not a plea denying that the defendant is indebted in any sum, or a plea specifying for what amount, if any, of the sum sued for, the defendant admits an indebtedness. Walker v. Seawell, 42 Ga. App. 511, 156 S.E. 475, 1931 Ga. App. LEXIS 35 (1931).

In action on an open account, pleas of payment, setoff, and recoupment are special pleas. Wilkes v. Arkansas Fuel Oil Co., 60 Ga. App. 775, 5 S.E.2d 269, 1939 Ga. App. LEXIS 173 (1939).

Plea specifically denying all allegations not dismissible. — When a petition in one paragraph alleges that the defendant "is indebted" to the plaintiff "upon an open account," setting forth a copy thereof, and in another paragraph alleges that, although the account is past due, the defendant refuses to pay the same, an answer which in terms specifically denies all the allegations in these paragraphs is good and ought not to be stricken on demurrer (now motion to dismiss). Wilkes v. Arkansas Fuel Oil Co., 60 Ga. App. 775, 5 S.E.2d 269, 1939 Ga. App. LEXIS 173 (1939).

Failure to verify merely relieves the defendant of the requirements of this section. Braswell v. Hodges, 95 Ga. App. 231, 97 S.E.2d 588, 1957 Ga. App. LEXIS 761 (1957) (see O.C.G.A. § 9-10-112).

Dismissal of the answer is appropriate where the denial is general but fails to deny indebtedness in any sum or to specify any amount of indebtedness. Riverdale Beverage Corp. v. Brick & Whalen, 162 Ga. App. 516, 292 S.E.2d 98, 1982 Ga. App. LEXIS 2203 (1982).

Dismissal inappropriate. — Trial court lacked the authority to involuntarily

dismiss the case, without a hearing or trial, merely because the law firm failed to make a prima facie showing on the firm's open account claim. Fisher & Phillips, LLP v. Amerex Envtl. Techs., Inc., 332 Ga. App. 261, 772 S.E.2d 59, 2015 Ga. App. LEXIS 276 (2015).

Plea failing to satisfy requirements of section demurrable. — Where action is brought on a verified open account and the defendant's plea fails to either deny that the defendant is indebted in any sum or to specify the amount in which the defendant admits the defendant may be indebted, the court properly strikes such plea. Nelson v. Mexicana de Jugo y Sabores, 139 Ga. App. 612, 229 S.E.2d 102, 1976 Ga. App. LEXIS 1906 (1976).

Account not verified. — In an action on account against a corporation and an individual defendant because the account was not verified as to the individual defendant's liability, the trial court was not authorized to apply the pleading requirements of O.C.G.A. § 9-10-112 to the individual defendant. Harper v. Carroll Tire Co., 237 Ga. App. 767, 516 S.E.2d 811.

Retail installment contract for purchase of automobile. — After the plaintiff filed a verified complaint, the trial court erred in granting the plaintiff's motion to strike the defendant's unverified answer and for judgment on the pleadings as the retail installment contract for the purchase of an automobile was not the type of contract that was the appropriate subject matter for a suit on an open account, and the defendant was not required to verify the defendant's responsive pleadings because retail installment transactions were expressly excluded from the definition of a commercial account; and the contract provided a number of remedies to the plaintiff in the event of nonpayment by the defendant that deviated from the traditional understanding of what constituted an open account. Scott v. Prestige Fin. Servs., 345 Ga. App. 530, 813 S.E.2d 610, 2018 Ga. App. LEXIS 223 (2018).

Counterclaim. — Validity of a counterclaim was not affected by the failure to comply with O.C.G.A. § 9-10-112. Riverdale Beverage Corp. v. Brick & Whalen, 162 Ga. App. 516, 292 S.E.2d 98, 1982 Ga. App. LEXIS 2203 (1982).

RESEARCH REFERENCES

Am. Jur. 2d.
61B Am. Jur. 2d, Pleading, §§ 181 et seq., 771 et seq.

C.J.S.
71 C.J.S., Pleading, §§ 486, 488.

9-10-113. When verification sufficient.

All affidavits, petitions, answers, defenses, or other proceedings required to be verified or sworn to under oath shall be held to be sufficient when the same are sworn to before any notary public, magistrate, judge of any court, or any other officer of the state or county where the oath is made who is authorized by the laws thereof to administer oaths. The oath if made outside this state shall have the same force and effect as if it had been made before an officer of this state authorized to administer the same. The official attestation of the officer before whom the oath or affidavit is made shall be prima-facie evidence of the official character of the officer and that he was authorized by law to administer oaths. However, this Code section shall not apply to such affidavits as may be expressly required by statute to be made before some particular officer within the state.

History.
Ga. L. 1853-54, p. 50, § 1; Code 1863, § 4108; Code 1868, § 4139; Ga. L. 1870, p. 415, §§ 1, 2; Code 1873, §§ 3450, 4198; Code 1882, §§ 3450, 4198; Civil Code 1895, §§ 5060, 5062; Ga. L. 1905, p. 103, § 1; Civil Code 1910, §§ 5643, 5645, 5646; Ga. L. 1913, p. 56, § 1; Code 1933, §§ 81-407, 81-408, 81-409; Ga. L. 1983, p. 884, § 4-1.

JUDICIAL DECISIONS

This section is applicable to federal courts and verification by justice of peace within its terms is sufficient. Bank of Edgefield v. Farmers' Co-op. Mfg. Co., 52 F. 98, 1892 U.S. App. LEXIS 1383 (5th Cir. 1892) (see O.C.G.A. § 9-10-113).

Affidavit of illegality is a defense and falls within the provision of this section. Craige v. Fraser, 73 Ga. 246, 1884 Ga. LEXIS 109 (1884) (see O.C.G.A. § 9-10-113).

Where answers are sworn to out of state, oath should be administered by someone authorized by Georgia laws or the Acts of Congress. Royston v. Royston, 21 Ga. 161, 1857 Ga. LEXIS 27 (1857).

Affidavit made in another state will not be recognized here without authentication of official character of the person taking the affidavit. Behn & Foster v. William H. Young & Co., 21 Ga. 207, 1857 Ga. LEXIS 38 (1857); Charles v. Foster, 56 Ga. 612, 1876 Ga. LEXIS 385 (1876); Castellaw v. Blanchard, 106 Ga. 97, 31 S.E. 801, 1898 Ga. LEXIS 26 (1898); Brunswick Hdwe. Co. v. Bingham, 107 Ga. 270, 33 S.E. 56, 1899 Ga. LEXIS 50 (1899).

Affidavit in forma pauperis before foreign notary, with the notary's seal attached, is receivable in the courts of this state, and is sufficient to prevent a dismissal of a bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50) for failure to pay costs. Whatley v. Macon & N. Ry., 104 Ga. 764, 30 S.E. 1003, 1898 Ga. LEXIS 423 (1898); Shockley v. Turnell & Bearden, 114 Ga. 378, 40 S.E. 279, 1901 Ga. LEXIS 707 (1901); Simpson v. Wicker, 120 Ga. 418, 47 S.E. 965, 1904 Ga. LEXIS 575 (1904).

Verification filed with court does not have to be original signed version. — When a trust filed a purportedly verified complaint against the defendant to which the defendant did not file a verified answer, the trial court erred in deeming that the trust's complaint was not verified because the verification met the requirements set forth in O.C.G.A. § 9-10-113 as the verification contained the signature of the trust's authorized representative and was attested to by a notary public commissioned in Ohio; nothing in the language of O.C.G.A. § 9-10-113 suggested that the document filed with the court had to be the original signed version; and no authority under the Uniform Superior Court Rules or a local standing order suggested that a purported verification was defective if the original signed version was not filed with the court. Cornerstone Quarry 2010 A Trust v. Heath, 345 Ga. App. 806, 815 S.E.2d 557, 2018 Ga. App. LEXIS 283 (2018).

RESEARCH REFERENCES

Am. Jur. 2d.
61B Am. Jur. 2d, Pleading, §§ 181 et seq., 771 et seq.

C.J.S.
71 C.J.S., Pleading, § 512.

ALR.
Failure of affidavit for publication of summons to state the facts required by statute as subjecting the judgment to collateral attack, 25 A.L.R. 1258.

9-10-114. Use of verified answer as evidence; amendment of sworn answer.

The defendant shall always have the privilege of filing an answer

under oath for the purpose of using the same as evidence on any motion to dissolve an injunction or to set aside any extraordinary process or remedy granted. A sworn answer may be amended at any time, by leave of the court, as other pleadings; but an admission made in the answer shall always be evidence when offered by the other party.

History.
Orig. Code 1863, § 4105; Code 1868, § 4136; Code 1873, § 4195; Code 1882, § 4195; Civil Code 1895, § 5056; Civil Code 1910, § 5639; Code 1933, § 81-402.

History of Section.
The language of this Code section is derived in part from the decision in Greer v. Andrew, 133 Ga. 193, 65 S.E. 416 (1909).

JUDICIAL DECISIONS

What the answer admits as true, if charged in the bill, need not be proved. Imboden v. Etowah & Battle Branch Mining Co., 70 Ga. 86, 1883 Ga. LEXIS 300 (1883).

Though answer be waived, complainant is not deprived of privilege of availing the complainant of admissions made in it. Hickson v. Bryan, 75 Ga. 392, 1885 Ga. LEXIS 142 (1885).

RESEARCH REFERENCES

Am. Jur. 2d.
61B Am. Jur. 2d, Pleading, §§ 181 et seq., 771 et seq.

C.J.S.
32A C.J.S., Evidence, § 864 et seq.

ALR.
Admission by pleading of a parol contract as preventing pleader from taking advantage of the statute of frauds, 22 A.L.R. 723.

Necessity in action on judgment of sister state confessed under warrant of attorney, of alleging and proving the law of the latter state permitting such judgment, 155 A.L.R. 921.

Admissibility in evidence of withdrawn, superseded, amended, or abandoned pleading as containing admissions against interest, 52 A.L.R.2d 516.

ARTICLE 6

AMENDMENTS

9-10-130. When affidavits amendable.

All affidavits for the foreclosure of liens, including mortgages, all affidavits that are the foundation of legal proceedings, and all counter affidavits shall be amendable to the same extent as ordinary pleadings and with only the restrictions, limitations, and consequences of ordinary pleadings.

History.
Orig. Code 1863, § 3433; Code 1868, § 3453; Code 1873, § 3504; Code 1882, § 3504; Ga. L. 1887, p. 59, § 1; Ga. L. 1889, p. 110, § 1; Civil Code 1895, § 5122; Civil Code 1910, § 5706; Code 1933, § 81-1203.

JUDICIAL DECISIONS

Construction of this section should be broad and liberal. Wilensky v. Agoos, 74 Ga. App. 688, 41 S.E.2d 182, 1947 Ga. App. LEXIS 671 (1947) (see O.C.G.A. § 9-10-130).

Where the plaintiff filed a valid affidavit as a substitute for a defective one before the court ruled on defendant's motion to dismiss, this amendment by substitution was as permissible as amendment by striking from or adding to the contents of the paper which it is sought to amend. Phoebe Putney Mem. Hosp. v. Skipper, 235 Ga. App. 534, 510 S.E.2d 101.

It is permissible for an affidavit to be made by a landlord's agent and any technical defect in the landlord's affidavit is amendable. Hyman v. Leathers, 168 Ga. App. 112, 308 S.E.2d 388, 1983 Ga. App. LEXIS 2698 (1983).

Affidavit amendable by inserting proper venue. — Where the heading of venue of an affidavit made under former Code 1933, § 3-509 (see O.C.G.A. § 9-2-63), for the purpose of recommencing action voluntarily dismissed by the plaintiff, was by mistake incorrectly stated to be in a state and county other than the state and county where it was actually signed and sworn to, and it appeared from the jurat that it was signed and sworn to in the proper jurisdiction (the officer before whom the affidavit was made and who took the oath of the affiant being presumed to have properly performed the officer's duty, and having jurisdiction in the county where the affidavit was actually signed and sworn to, and not having jurisdiction in the county incorrectly stated in the heading), the judge did not err in allowing such affidavit to be amended by striking therefrom the incorrect venue and inserting in lieu thereof the proper venue. Southern Grocery Stores, Inc. v. Kelly, 52 Ga. App. 551, 183 S.E. 924, 1936 Ga. App. LEXIS 181 (1936).

Affidavit amendable by attaching verified copy of mortgage. — Where an affidavit, made as the foundation for the foreclosure of a chattel mortgage, recites that the mortgage is "annexed" to it, the affidavit is, upon the trial of an issue formed by a counter affidavit, subject to amendment by attaching thereto a verified copy of the mortgage referred to in the affidavit. Stanfield v. Darby, 45 Ga. App. 686, 165 S.E. 864, 1932 Ga. App. LEXIS 654 (1932).

Omissions constituted amendable defects cured by verdict and judgment. — Where a judgment had been rendered against the defendant and the surety on the defendant's replevy bond, upon the trial of an issue arising upon the foreclosure of a landlord's lien for supplies, as provided in O.C.G.A. §§ 44-14-340 and 44-14-550, the judgment was not subject to arrest upon the ground that it appeared from the record that no demand for payment had been made upon the defendant, and that it did not appear why such demand was not made as required by the statute as to affidavits as the basis for the foreclosure of such liens, because the omissions referred to constituted amendable defects which were cured by the verdict and judgment. McBride v. Sconyers, 46 Ga. App. 235, 167 S.E. 309, 1933 Ga. App. LEXIS 6 (1933).

Affidavit amendable by identifying plaintiff as corporation. — Where, in an affidavit to foreclose a mortgage on crops, the name of the plaintiff does not itself import a corporation and there is no allegation as to its corporate entity, it is not erroneous for the trial court to allow the plaintiff to amend the same by inserting the word "Incorporated" after its name therein, and to refuse to dismiss the affidavit. Taliaferro v. J.S. Cowart & Son, 47 Ga. App. 730, 171 S.E. 406, 1933 Ga. App. LEXIS 629 (1933).

Affidavits of foreclosure of mortgages are amendable to the same extent as ordinary petitions. Miller Serv., Inc. v. Miller, 77 Ga. App. 413, 48 S.E.2d 761, 1948 Ga. App. LEXIS 569 (1948).

Judgment conclusive where unaccrued payments could have been put in issue by amendment. — In an action for the foreclosure of a bill of sale on personal property to secure a debt wherein the affidavit alleges the whole debt to be due, but the evidence shows a part of the payments provided for in the instrument sought to be foreclosed are

past due and other payments not yet accrued, the judgment, which contains provisions for the control of the surplus of the funds derived from the sale of the property so as to protect the lien created for the unaccrued installments of the debt, is conclusive between the parties because the unaccrued payments could have been put in issue by amendment. Miller Serv., Inc. v. Miller, 77 Ga. App. 413, 48 S.E.2d 761, 1948 Ga. App. LEXIS 569 (1948).

Laborer's lien does not rest upon contract. Waller v. Morris, 78 Ga. App. 821, 52 S.E.2d 583, 1949 Ga. App. LEXIS 989 (1949).

Judgment in laborer's lien foreclosure is res judicata only as to particular debt involved and does not prevent plaintiff from thereafter suing the defendant for items of debt of a different nature, though testimony as to these debts was given in the trial of the laborer's lien case. Waller v. Morris, 78 Ga. App. 821, 52 S.E.2d 583, 1949 Ga. App. LEXIS 989 (1949).

Affidavits that are the foundation of legal proceedings shall be amendable to the same extent as ordinary petitions and pleas. Southern Grocery Stores, Inc. v. Kelly, 52 Ga. App. 551, 183 S.E. 924, 1936 Ga. App. LEXIS 181 (1936).

Claim affidavit is amendable by member of partnership. — An affidavit as the basis of a claim for personal property, as provided in former Code 1933, § 39-801 (see O.C.G.A. § 9-13-90), was amendable to the same extent as ordinary petitions, and such affidavit may be made by the person claiming title to the property or by the person's agent; a member of a partnership was an agent of the partnership and as such was authorized to execute the claim affidavit on behalf of the partnership. GMAC v. Allen, 59 Ga. App. 614, 1 S.E.2d 705, 1939 Ga. App. LEXIS 372 (1939); Roberts v. Wilson, 198 Ga. 428, 31 S.E.2d 707, 1944 Ga. LEXIS 412 (1944).

Landlord's dispossessory warrant affidavit amendable by striking one of two grounds. — Where the affidavit of a landlord in a dispossessory warrant action alleged that the tenant "fails to pay rent now due on said house and premises (or that said tenant is holding said house and premises over and beyond the term for which same were rented or leased to the tenant)," and where the tenant moved to dismiss the affidavit for the reason that it was stated in the disjunctive and there was no cause of action set out, and the landlord offered an amendment striking that part of the affidavit in parentheses and stating therein that the landlord elects to proceed alone on the single ground, to-wit, that the said tenant "fails to pay rent now due on the said house and premises," it was not error to allow such amendment over the objection that the affidavit could not be amended. Wilensky v. Agoos, 74 Ga. App. 688, 41 S.E.2d 182, 1947 Ga. App. LEXIS 671 (1947).

Amendment to landlord's dispossessory warrant affidavit not subject to motion to dismiss. — In dispossessory warrant proceeding, allegation that the tenant failed to pay rent due, or that the tenant was holding over and beyond the tenant's term, to which the defendant filed a counter affidavit, denying that there was any rent due or that the tenant was holding the premises over and beyond the tenant's term, and the plaintiff then amended the proceeding by striking the allegation that the defendant failed to pay rent due and by alleging that the defendant was a tenant at sufferance who had refused the plaintiff's demand for possession on a certain date, such amendment did not add a new and distinct cause of action and was not subject to the general demurrer (now motion to dismiss) interposed thereto on such ground. Hunter v. Ranitz, 88 Ga. App. 182, 76 S.E.2d 542, 1953 Ga. App. LEXIS 1036 (1953).

No error in allowing amendment possibly inconsistent with part of original allegations. — Under this section, trial court did not err in allowing an amendment to the affidavit of illegality, although it may have been in part inconsistent with the allegations of the original pleadings so far as the question of ownership was concerned. Jack Fred Co. v. Lago, 96 Ga. App. 675, 101 S.E.2d 165, 1957 Ga. App. LEXIS 661 (1957) (see O.C.G.A. § 9-10-130).

Defects in garnishments cured. — Since affidavits filed in support of legal proceedings are amendable as provided by

O.C.G.A. § 9-10-130, assuming there were technical defects in the issuance of the garnishments, these defects were cured at the hearing on the traverses where the orders of the trial court (although finding them technically correct) dismissed them as moot because of the satisfaction of the indebtedness. Young v. Bank of Quitman, 180 Ga. App. 491, 349 S.E.2d 510, 1986 Ga. App. LEXIS 2192 (1986).

RESEARCH REFERENCES

Am. Jur. 2d.
61A Am. Jur. 2d, Pleading, § 241.

C.J.S.
71 C.J.S., Pleading, § 415.

9-10-131. Bonds in judicial proceedings amendable.

All bonds taken under requirement of law in the course of a judicial proceeding may be amended and new security given if necessary.

History.
Orig. Code 1863, § 3434; Code 1868, § 3454; Code 1873, § 3505; Code 1882, § 3505; Civil Code 1895, § 5123; Civil Code 1910, § 5707; Code 1933, § 81-1204.

Cross references.
Corresponding provision relating to criminal procedure, § 17-6-18.

JUDICIAL DECISIONS

Amendment is timely if made before entry of order of dismissal. — The motion to amend a bond given on filing an affidavit of illegality is in time if made before any order or judgment dismissing the illegality has been entered, although the court has orally announced that the motion to dismiss is sustained. Lytle v. DeVaughn, 81 Ga. 226, 7 S.E. 281, 1888 Ga. LEXIS 98 (1888).

Bond not amendable where wife signs as security for spouse. — Where a wife signs as security an appeal bond given by her husband, and there is no other security on the bond, the appeal is a nullity and the bond cannot be amended by the addition or substitution of another security. Dillingham v. Eslinger, 32 Ga. App. 36, 122 S.E. 627, 1924 Ga. App. LEXIS 238 (1924).

Bond in attorney's name for plaintiff amendable. — The execution of a bond by the attorney in the attorney's own name for the plaintiff by name, instead of in the name of the plaintiff by the attorney, is amendable. Whitley v. Jackson, 34 Ga. App. 286, 129 S.E. 662, 1925 Ga. App. LEXIS 227 (1925).

Bond in certiorari is not amendable, since this section does not apply to certiorari, which is an entirely different proceeding from an appeal. Hunter v. Lanier, 74 Ga. App. 177, 39 S.E.2d 79, 1946 Ga. App. LEXIS 480, 1946 Ga. App. LEXIS 481 (1946) (see O.C.G.A. § 9-10-131).

Bonds unamendable where appellant is own surety. — The only instances where appeal bonds have been held to be nullities and not amendable are those cases in which the appellant in effect became the appellant's own surety. Hunter v. Lanier, 74 Ga. App. 177, 39 S.E.2d 79, 1946 Ga. App. LEXIS 480, 1946 Ga. App. LEXIS 481 (1946).

Appellants in a court of ordinary must give bond, which bond may be amended or new security may be given, if necessary. Peppers v. Peppers, 96 Ga. App. 668, 101 S.E.2d 105, 1957 Ga. App. LEXIS 658 (1957).

Where corporation is purported surety, bond must show power of attorney. — Where the purported surety on appeal bond is a corporation, and its signature is made by one who purports to act as its attorney in fact, the appeal is subject to dismissal unless the bond is accompanied by a power of attorney showing the

authority of the one purporting to act for the corporation in executing a bond. Maddox v. Waldrop, 60 Ga. App. 702, 4 S.E.2d 684, 1939 Ga. App. LEXIS 146 (1939).

Bond executed by one prohibited by power of attorney is nullity. — Where the act of the individual executing an appeal bond, purportedly as attorney in fact for an indemnity company, was without any authority and was expressly prohibited from so doing by the power of attorney attached to the bond, the bond was without a surety or security and was a nullity, not merely a defective or insufficient instrument; therefore, the appeal was likewise a nullity for want of lawful security or surety. Maddox v. Waldrop, 60 Ga. App. 702, 4 S.E.2d 684, 1939 Ga. App. LEXIS 146 (1939).

The bond executed by an applicant for garnishment is amendable under this section; where neither the obligations of the sureties are altered nor the rights of the opposite party prejudiced, such bond may be amended in any manner to conform to the requirements of the statute, without the consent of the sureties. Carrollton Bank v. Glass, 35 Ga. App. 89, 132 S.E. 238, 1926 Ga. App. LEXIS 564 (1926) (see O.C.G.A. § 9-10-131).

Bond in mortgage fi. fa. for postponing sale of personal property amendable. — A bond given by the defendant in a mortgage fi. fa. when the defendant's affidavit of illegality is filed for the purpose of postponing the sale of personal property comes within this section and is amendable. Miller Serv., Inc. v. Miller, 76 Ga. App. 143, 45 S.E.2d 466, 1947 Ga. App. LEXIS 394 (1947) (see O.C.G.A. § 9-10-131).

Judgment below cures amendable defect absent objection by plaintiff. — Where the bond given by defendant in a mortgage fi. fa. is amendable and the plaintiff makes no objections to the form of the bond in the court below and makes no motion to dismiss the affidavit, the judgment in the trial below cures this amendable defect. Miller Serv., Inc. v. Miller, 76 Ga. App. 143, 45 S.E.2d 466, 1947 Ga. App. LEXIS 394 (1947).

Replevy bond given on filing affidavit of illegality is amendable by changing obligee and condition to make the bond conform to statute. Gelders v. Mathews, 6 Ga. App. 144, 64 S.E. 576, 1909 Ga. App. LEXIS 213 (1909); Smith v. Powell, 134 Ga. 356, 67 S.E. 936, 1910 Ga. LEXIS 199 (1910); Sherman v. Morris, 17 Ga. App. 446, 87 S.E. 709, 1916 Ga. App. LEXIS 1005 (1916).

Replevy bond is amendable by changing name of obligee to make it conform to statute where the opposite party is not prejudiced thereby, and this may be done without the consent of the sureties where their obligations are not altered. J.S. Cowart & Sons v. Cook, 55 Ga. App. 717, 191 S.E. 173, 1937 Ga. App. LEXIS 473 (1937).

RESEARCH REFERENCES

Am. Jur. 2d.
12 Am. Jur. 2d, Bonds, § 1 et seq.

C.J.S.
11 C.J.S., Bonds, § 1 et seq.

9-10-132. Amendment of misnomers on motion.

All misnomers, whether in the Christian name or surname, made in writs, pleadings, or other civil judicial proceedings, shall, on motion, be amended and corrected instanter without working unnecessary delay to the party making the same.

History.
Laws 1850, Cobb's 1851 Digest, p. 493.; Code 1863, § 3413; Code 1868, § 3433; Code 1873, § 3483; Code 1882, § 3483; Civil Code 1895, § 5102; Civil Code 1910, § 5686; Code 1933, § 81-1206.

Law reviews.
For annual survey on trial practice and

procedure, see 61 Mercer L. Rev. 363 (2009).

JUDICIAL DECISIONS

Construed with O.C.G.A. § 9-11-15. — To the extent that O.C.G.A. §§ 9-10-132 and 9-11-15 are inconsistent, the latter expression of the legislature, § 9-11-15, controls. Where a party named in a complaint is reasonably recognizable as a misnomer for the real party in interest, the misnomer may be corrected by amendment to the pleadings pursuant to § 9-11-15. United States Xpress, Inc. v. W. Timothy Askey & Co., 194 Ga. App. 730, 391 S.E.2d 707, 1990 Ga. App. LEXIS 297 (1990).

Motion required. — Personal injury plaintiff's amendment to the complaint to add a party defendant without having first obtained leave of court was ineffective, as O.C.G.A. § 9-10-132 was inapplicable to support plaintiff's claim that it was merely correcting a misnomer because there was no motion made for such relief. Valdosta Hotel Props., LLC v. White, 278 Ga. App. 206, 628 S.E.2d 642, 2006 Ga. App. LEXIS 289 (2006), cert. denied, No. S06C1296, 2006 Ga. LEXIS 425 (Ga. June 12, 2006).

Mandatory nature of section. — The word "shall" as used in O.C.G.A. § 9-10-132 is mandatory and there is no time limit in which a motion for correction of a scrivener's error must be made. Weaver v. Bowers, 218 Ga. App. 724, 463 S.E.2d 50, 1995 Ga. App. LEXIS 855 (1995).

"Christian name" includes name of corporation. — The term, "Christian name," is used in the sense of given name, and includes the name given to a corporation by law. Knight's Pharmacy Co. v. McCall, 181 Ga. 617, 183 S.E. 497, 1936 Ga. LEXIS 398 (1936); Love v. Commercial Credit Co., 64 Ga. App. 18, 12 S.E.2d 99, 1940 Ga. App. LEXIS 122 (1940); Robinson v. Reward Ceramic Color Mfg., Inc., 120 Ga. App. 380, 170 S.E.2d 724, 1969 Ga. App. LEXIS 785 (1969).

This section is applicable to corporations as well as natural persons. Love v. Commercial Credit Co., 64 Ga. App. 18, 12 S.E.2d 99, 1940 Ga. App. LEXIS 122 (1940) (see O.C.G.A. § 9-10-132).

Courts of this state will take judicial cognizance of names and existence of corporations which are of record in the office of the Secretary of State, pursuant to general statutory provisions requiring them to be thus issued and recorded. McGowans v. Speed Oil Co., 94 Ga. App. 35, 93 S.E.2d 597, 1956 Ga. App. LEXIS 456 (1956).

Misnomer of corporation as party in pleadings has same effect as does misnomer of individual. Robinson v. Reward Ceramic Color Mfg., Inc., 120 Ga. App. 380, 170 S.E.2d 724, 1969 Ga. App. LEXIS 785 (1969).

Misnomer of a defendant corporation is waived by an appearance and pleading to the merits. Temperature Control, Inc. v. Diversified Eng'r, Inc., 120 Ga. App. 522, 171 S.E.2d 373, 1969 Ga. App. LEXIS 845 (1969).

Petition brought in trade name of individual may be amended by stating real or true name of the person who purports to carry on the business to which the allegations of the petition relate; the amendment cannot state a new cause of action or introduce a new party. Hudgins Contracting Co. v. Redmond, 178 Ga. 317, 173 S.E. 135, 1934 Ga. LEXIS 45 (1934).

Amendment not permitted if new party is introduced. — Where the effect of an amendment will be to correct the name under which the right party is sued, it should be allowed; if its effect will be to bring a new party on the record, it should be refused. Bell v. Ayers, 82 Ga. App. 92, 60 S.E.2d 523, 1950 Ga. App. LEXIS 1060 (1950).

Trial court properly denied plaintiffs' motion to amend their medical malpractice complaint against state entities in order to "correct an alleged misnomer," pursuant to O.C.G.A. § 9-10-132, as plaintiffs sought to add two party defendants, who were new and distinct and who had not been served with process; there was no showing that the parties sought to be added had actual notice of the litigation, pursuant to O.C.G.A. § 9-11-15(c),

for purposes of amendment under the relation back doctrine. Green v. Cent. State Hosp., 275 Ga. App. 569, 621 S.E.2d 491, 2005 Ga. App. LEXIS 995 (2005), cert. denied, No. S06C0302, 2006 Ga. LEXIS 137 (Ga. Feb. 13, 2006).

Where one corporation is sued for a tort, declaration cannot be amended by substituting another as defendant under the guise of correcting a misnomer. McGowans v. Speed Oil Co., 94 Ga. App. 35, 93 S.E.2d 597, 1956 Ga. App. LEXIS 456 (1956); but see Franklyn Gesner Fine Paintings, Inc. v. Ketcham, 252 Ga. 537, 314 S.E.2d 903, 1984 Ga. LEXIS 752 (1984); Pacific Nat'l Fire Ins. Co. v. Cummins Diesel of Ga., Inc., 213 Ga. 4, 96 S.E.2d 881, 1957 Ga. LEXIS 276 (1957).

Misnomers in any judicial proceeding on civil side of court may be amended and corrected instanter on the motion. Knight's Pharmacy Co. v. McCall, 181 Ga. 617, 183 S.E. 497, 1936 Ga. LEXIS 398 (1936).

Prior to judgment, action misnaming the defendant can be amended to correct the misnomer. Smith v. Hartrampf, 105 Ga. App. 40, 123 S.E.2d 417, 1961 Ga. App. LEXIS 561 (1961).

Insubstantial misnomer curable by verdict and judgment. — Where a misnomer is an insubstantial but amendable defect which could not injure the defendant, the matter is cured by a verdict and judgment. Robinson v. Reward Ceramic Color Mfg., Inc., 120 Ga. App. 380, 170 S.E.2d 724, 1969 Ga. App. LEXIS 785 (1969).

Judicial notice will be taken of ordinary and commonly used abbreviations and equivalents of Christian names. Robinson v. Reward Ceramic Color Mfg., Inc., 120 Ga. App. 380, 170 S.E.2d 724, 1969 Ga. App. LEXIS 785 (1969).

Misnomer amendable at subsequent term on motion of misnamed party. — Where the verdict against the defendant in attachment is in favor of the "Albany Hardware & Mill Supply Company" as the plaintiff, a judgment rendered thereon against the garnishee which was entered in the name of "Albany Mill Supply Company," was, at a subsequent term of court, amendable on motion of the plaintiff, by striking therefrom "Albany Mill Supply Company" as the plaintiff, and substituting therefor the "Albany Hardware & Mill Supply Company." Merchants' Grocery Co. v. Albany Hdwe. & Mill Supply Co., 44 Ga. App. 412, 160 S.E. 658 (1931).

No error in allowing amendment of defendant's corporate name. — Where petition was brought against "Knight Drug Stores, Inc.," court did not err in allowing an amendment, inserting in lieu thereof the correct corporate name "Knight Pharmacy Company," especially when the witness admitted that the witness was president of Knight Pharmacy Company and was served with the petition and process. Knight's Pharmacy Co. v. McCall, 181 Ga. 617, 183 S.E. 497, 1936 Ga. LEXIS 398 (1936).

Grant of motion to correct a misnomer in corporate name inappropriate. — In a negligence suit brought by a pedestrian against an originally named company in the complaint, the trial court abused the court's discretion by granting the pedestrian's motion to correct a misnomer thereby changing the name of the defendant in the action to a limited partnership as the limited partnership was never served with the complaint, delivery of the summons and complaint to the limited partnership's registered agent was insufficient for service as the originally named company was used in the pleadings and the registered agent did not represent that originally named company, and the name change was not a mere correction but more of a party substitution. Nat'l Office Partners, L.P. v. Stanley, 293 Ga. App. 332, 667 S.E.2d 122, 2008 Ga. App. LEXIS 934 (2008).

Allowance of amendment of misnamed defendant without notice to defendant. — A petition in which it is alleged that the defendant is "The Coca-Cola Bottling Company" is amendable without notice by an amendment which corrects a misnomer in the name of the defendant so as to read that the defendant is "The Coca-Cola Bottling Company of Carrollton;" notice to the defendant of the allowance of the amendment is not necessary where the amendment was allowed subject to demurrer (now motion to dismiss). Carrollton Coca-Cola Bottling Co. v.

Pace, 56 Ga. App. 267, 192 S.E. 473, 1937 Ga. App. LEXIS 331 (1937).

Dismissal of action seeking confirmation of arbitration award due to a misnomer in the application was error, especially because the defendants in the action would not have suffered any harm by the correction. Wolfpack Enters. v. Arrington, 272 Ga. App. 175, 612 S.E.2d 35, 2005 Ga. App. LEXIS 231 (2005).

Correction of misnomer did not constitute substitution of parties under O.C.G.A. § 9-10-132 or amendment of complaint under O.C.G.A. § 9-11-15(a). — Consumer's lawsuit against a telecommunications company was improperly dismissed because the consumer had effected service, but had wrongly named the company, and correction of the misnomer did not constitute a substitution of the parties under O.C.G.A. § 9-10-132 or an amendment of the complaint under O.C.G.A. § 9-11-15(a); thus, the consumer should not have been required to effect service on the company a second time. Mathis v. BellSouth Telecomms., Inc., 301 Ga. App. 881, 690 S.E.2d 210, 2010 Ga. App. LEXIS 16 (2010).

RESEARCH REFERENCES

Am. Jur. 2d.

61A Am. Jur. 2d, Pleading, § 634 et seq.

C.J.S.

71 C.J.S., Pleading, §§ 340 et seq., 346 et seq.

ALR.

Amendment of process or pleading by changing description or characterization of party from corporation to individual, partnership, or other association, or vice versa, 121 A.L.R. 1325.

Use of abbreviations of name of municipal body or private corporation in designating party to judicial proceedings, 167 A.L.R. 1217.

Relation back of amended pleading substituting true name of defendant for fictitious name used in earlier pleading so as to avoid bar of limitations, 85 A.L.R.3d 130.

9-10-133. Mistake by clerk or ministerial officer.

The mistake or misprision of a clerk or other ministerial officer shall in no case work to the injury of a party where by amendment justice may be promoted.

History.

Laws 1799, Cobb's 1851 Digest, p. 480; Code 1863, § 3436; Code 1868, § 3456; Code 1873, § 3507; Code 1882, § 3507; Civil Code 1895, § 5125; Civil Code 1910, § 5709; Code 1933, § 81-1205.

Cross references.

Corresponding provision relating to criminal procedure, § 17-1-3.

Law reviews.

For note discussing the procedure for the issuance and amendment of a writ of execution, see 12 Ga. L. Rev. 814 (1978).

JUDICIAL DECISIONS

This section applies even where the defendant moves to dismiss the proceeding. Brinson v. Georgia R.R. Bank & Trust Co., 45 Ga. App. 459, 165 S.E. 321,

1932 Ga. App. LEXIS 563 (1932) (see O.C.G.A. § 9-10-133).

Certificate of registrars properly admitted in evidence though not marked "filed." — A certificate of registrars showing the number of qualified voters of the county was properly admitted in evidence even though it was not marked "filed" by the clerk. Andrews v. Butts County, 29 Ga. App. 302, 114 S.E. 912, 1922 Ga. App. LEXIS 258 (1922).

Clerical variance in name of defendant as it appears in petition and process is curable by amendment. Grand Lodge Knights of Pythias v. Massey, 35 Ga. App. 140, 132 S.E. 270, 1926 Ga. App. LEXIS 589 (1926).

Judgments to be amended only by inspection of record. — A judgment may be revised or amended, or entered of record, nunc pro tunc, on proper motion, at a term subsequent to that at which the judgment was rendered, so as to make the judgment speak the truth of the decision that was actually rendered, or to make it conform to the verdict; but the judgment must be amended by an inspection of the record, including the pleadings and the verdict, without resort to extraneous evidence. Allen v. Community Loan & Inv. Corp., 78 Ga. App. 611, 51 S.E.2d 872, 1949 Ga. App. LEXIS 942 (1949).

Omission of formal direction to officer executing process curable by amendment. — Where the process contains a command to the defendant to appear in court at a certain time for a specified purpose, and where this process is actually executed by the proper officer, the mere fact that the formal direction to the officer to execute the process is omitted therefrom would be at most a mere clerical omission or irregularity, which could be cured by amendment. Gay v. Sylvania Cent. Ry., 79 Ga. App. 362, 53 S.E.2d 713, 1949 Ga. App. LEXIS 656 (1949).

Defective process may properly serve its purpose. — If, by virtue of a process, although defective, a defendant has been properly served by one lawfully authorized to effect the service, although the process was not so directed to the officer, and if that process has properly put the defendant on notice of the proceeding, and when the defendant's appearance will be required, such process has properly served its purpose. Gay v. Sylvania Cent. Ry., 79 Ga. App. 362, 53 S.E.2d 713, 1949 Ga. App. LEXIS 656 (1949).

Good faith delivery of complaint to deputy sheriff deemed filing with clerk. — Where there is a timely and good faith compliance with a deputy clerk's uncontroverted intention that the act of delivery of a complaint to a deputy sheriff would constitute delivery to and receipt by the clerk for purposes of filing, the complaint is to be considered filed as of the date of the compliance with that expressed intention and the trial court errs in failing to grant a motion to direct the clerk to change the "clerical error" regarding the filing date of the complaint. Forsyth v. Hale, 166 Ga. App. 340, 304 S.E.2d 81, 1983 Ga. App. LEXIS 2160 (1983).

RESEARCH REFERENCES

Am. Jur. 2d.

15A Am. Jur. 2d, Clerks of Court, § 48.

C.J.S.

14 C.J.S., Clerks of Courts, § 53. 71 C.J.S., Pleading, § 80.

ALR.

Effect of mistake in reference in statute to another statute, constitution, public document, record, or the like, 5 A.L.R. 996; 14 A.L.R. 274.

9-10-134. Amendment by negligent party; payment of costs; terms.

If a party must apply for leave to amend his pleadings and has been negligent or dilatory in respect to the subject of the amendment, the court may order the party to pay to his adversary the cost of any proceedings which he proposes by amendment and, in the court's

discretion, may order reasonable and equitable terms for amendment not affecting the merits of the case.

History.
Ga. L. 1853-54, p. 48, § 1; Code 1863, § 3412; Code 1868, § 3432; Code 1873, § 3482; Code 1882, § 3482; Civil Code 1895, § 5101; Civil Code 1910, § 5685; Code 1933, § 81-1207.

Cross references.
Amendment of pleadings generally, § 9-11-15.

RESEARCH REFERENCES

Am. Jur. 2d.
61A Am. Jur. 2d, Pleading, § 634 et seq.
C.J.S.
71 C.J.S., Pleading, §§ 346 et seq., 355 et seq.

9-10-135. Amendment of pleadings on court ruling not waiver of objection thereto.

Either party who amends or attempts to amend his complaint or other pleadings in response to an order or other ruling of the court shall not be held to have waived his objection to the order or ruling but may thereafter take exception thereto as in other cases.

History.
Civil Code 1895, § 5045; Civil Code 1910, § 5628; Code 1933, § 81-1001; Ga. L. 1946, p. 761, § 1; Ga. L. 1952, p. 243, § 1; Ga. L. 1953, Nov.-Dec. Sess., p. 82, § 1; Ga. L. 1962, p. 682, § 1; Ga. L. 1966, p. 451, § 1; Ga. L. 1966, p. 609, § 135; Ga. L. 1967, p. 226, § 42.
Cross references.
Amendment of pleadings generally, § 9-11-15.

JUDICIAL DECISIONS

Legal sufficiency of answer in nature of cross-action cannot be tested by motion for new trial. Nixon v. Nixon, 194 Ga. 301, 21 S.E.2d 702, 1942 Ga. LEXIS 586 (1942).

Offer to amend different from tender of amendment. — While a party to an action has a right to amend at any time prior to the rendition of the final judgment, an offer to amend is different from the tender of an amendment. Deese v. City of Dublin, 88 Ga. App. 341, 76 S.E.2d 629, 1953 Ga. App. LEXIS 1084 (1953).

Rulings on pleadings and allowing time to amend of no binding force. — Under this section, an order making a ruling on pleadings and allowing time within which to amend is of no binding force and does not constitute the law of the case. Southern Ry. v. Thornton, 94 Ga. App. 278, 94 S.E.2d 152, 1956 Ga. App. LEXIS 524 (1956) (see O.C.G.A. § 9-10-135).

One who procures ruling on construction of pleadings in accordance with one's contention cannot thereafter complain that such construction is erroneous. Bowdoin v. Kingloff, 102 Ga. App. 783, 118 S.E.2d 197, 1960 Ga. App. LEXIS 749 (1960).

Opportunity for plaintiff to amend within discretion of trial judge. — It is within the discretion of the trial judge on sustaining the general demurrer (now motion to dismiss) as to whether the judge will allow the plaintiff an opportunity to

amend. Harris v. Towns, 106 Ga. App. 217, 126 S.E.2d 718, 1962 Ga. App. LEXIS 678 (1962).

Error to dismiss petition for failure to amend demurred subparagraph. — Where the petition set out a cause of action, irrespective of the ruling on the special demurrer (now motion to dismiss) to one subparagraph, it was error for the trial judge to dismiss the petition on the ground that the plaintiff failed or refused to amend that subparagraph, which had previously been stricken on special demurrer, and especially was this true where the order sustaining the special demurrer to the subparagraph did not authorize or require that such paragraph be amended or impose a penalty of dismissal of the petition for failure to amend the subparagraph. McBurney v. Woodward, 84 Ga. App. 807, 67 S.E.2d 398, 1951 Ga. App. LEXIS 802 (1951).

Motion to dismiss should be renewed if petition materially amended. — Demurrer (now motion to dismiss) to an original petition does not, without more, cover the petition after it has been amended in material respects; but in such case the demurrer should be renewed if it is still relied on. Williams v. Hudgens, 217 Ga. 706, 124 S.E.2d 746, 1962 Ga. LEXIS 367 (1962).

Petition stating cause of action for some of relief sought not dismissible. — Petition which sets out a cause of action for at least some of the relief sought is not subject to general demurrer (now motion to dismiss). R.L. Bass, Inc. v. Brown, 111 Ga. App. 250, 141 S.E.2d 200, 1965 Ga. App. LEXIS 936 (1965).

Motion to dismiss properly denied where amended petition as whole states cause of action. — Where the original order to sustain a demurrer (now motion to dismiss) relates to the future rather than the present, the whole petition is open for amendment within the time limited, and another demurrer afterwards filed to the petition as amended should be overruled if the petition as a whole sets forth a cause of action, whether the matter contained in the amendment aids it or not. R.L. Bass, Inc. v. Brown, 111 Ga. App. 250, 141 S.E.2d 200, 1965 Ga. App. LEXIS 936 (1965).

Amendment not allowable where motions to dismiss sustained with no extension to amend. — Where special demurrers (now motion to dismiss) are sustained and there is no order of the court extending the time for amending, the court does not have the authority to allow an amendment over the defendant's objection that the amendment came too late. Georgia Ports Auth. v. Pushay, 223 Ga. 616, 157 S.E.2d 488, 1967 Ga. LEXIS 629 (1967).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms.

20A Am. Jur. Pleading and Practice Forms, Pretrial Conference and Procedure, § 3.

ALR.

Conclusiveness of judgment on demurrer, 13 A.L.R. 1104; 106 A.L.R. 437.

Effect of proving case not pleaded where amendment cannot be made, 29 A.L.R. 638.

Complaint or declaration which fails to allege that action for wrongful death was brought within statutory period, or affirmatively shows that it was not, as subject to demurrer, 107 A.L.R. 1048.

Failure of complaint to state cause of action for unliquidated damages as ground for dismissal of action at hearing to determine amount of damages following defendant's default, 163 A.L.R. 496.

Appealability of ruling on demurrer to plea, answer, or reply, 171 A.L.R. 1433.

Appealability of order entered on motion to strike pleading, 1 A.L.R.2d 422.

Proof of title to motor vehicle requisite to recovery for injury thereof, 7 A.L.R.2d 1347.

Counsel's right, in summation in civil case, to point out inconsistencies between opponent's pleading and testimony, 72 A.L.R.2d 1304.

ARTICLE 7
CONTINUANCES

Cross references.
Effect of continuance or recess, Uniform Rules for the Juvenile Courts of Georgia, Rule 22.7.

JUDICIAL DECISIONS

Rulings on motion for continuance not disturbed absent abuse of discretion. — Motion for continuance is addressed to the sound legal discretion of the court, and its judgment overruling the motion will not be disturbed unless it appears that there was a manifest abuse of discretion. J.L. Young Co. v. Minchew, 42 Ga. App. 228, 155 S.E. 356, 1930 Ga. App. LEXIS 304 (1930); Bloodworth v. Caldwell, 150 Ga. App. 443, 258 S.E.2d 64, 1979 Ga. App. LEXIS 2344 (1979).

Absence of counsel without leave to attend trials in other courts is no ground for continuance or postponement. Bloodworth v. Caldwell, 150 Ga. App. 443, 258 S.E.2d 64, 1979 Ga. App. LEXIS 2344 (1979).

RESEARCH REFERENCES

ALR.
Time during or after civil trial at which court may entertain, or properly grant or deny, motion for continuance of trial, 112 A.L.R. 395.

Effect of war on litigation pending at the time of its outbreak, 137 A.L.R. 1335; 147 A.L.R. 1298; 148 A.L.R. 1384; 149 A.L.R. 1451; 149 A.L.R. 1452; 150 A.L.R. 1417; 150 A.L.R. 1418; 151 A.L.R. 1453; 152 A.L.R. 1450; 154 A.L.R. 1447.

Stay of civil proceedings pending determination of action in another state or country, 19 A.L.R.2d 301.

Withdrawal or discharge of counsel in civil case as ground for continuance, 48 A.L.R.2d 1155.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 A.L.R.4th 1144.

Propriety of Continuance to Accommodate Pregnancy or Birth of Child, 53 A.L.R.7th 6.

9-10-150. Grounds for continuance and stay — Attendance of party or attorney in General Assembly; writing requirement; considerations.

(a) A member of the General Assembly who is a party to or the attorney for a party to a case; any member of the Office of Legislative Counsel, including the legislative counsel and persons provided for under subsection (d) of Code Section 28-4-3, appearing on behalf of the General Assembly in a case; or any member of the staff of the Lieutenant Governor, the Speaker of the House of Representatives, the President Pro Tempore of the Senate, the Speaker Pro Tempore of the House of Representatives, or the chairperson of the Judiciary Committee or Special Judiciary Committee of the Senate or of the Judiciary Committee or Judiciary, Non-civil Committee of the House of Representatives who is the lead counsel for a party to a case pending in any trial or appellate court or before any administrative agency of this state, shall be granted a continuance and stay of the case. The

continuance and stay shall apply to all aspects of the case, including, but not limited to, the filing and serving of an answer to a complaint, the making of any discovery or motion, or of any response to any subpoena, discovery, or motion, and appearance at any hearing, trial, or argument. Unless a shorter length of time is requested by the member, the continuance and stay shall last for the seven days prior to the regular or extraordinary session of the General Assembly; the length of any regular or extraordinary session of the General Assembly; during the first three weeks following any recess or adjournment, including an adjournment sine die of any regular or extraordinary session; and the entirety of any day during the calendar year on which a legislative committee for which the member serves or is staff holds a scheduled meeting, the member attends a national legislative conference or board meeting, the member attends a caucus meeting, or the member attends a meeting of a study committee of the General Assembly. Notwithstanding any other provision of law, rule of court, or administrative rule or regulation, the time for doing any act in the case which is delayed by the continuance provided by this Code section shall be automatically extended by the same length of time as the continuance or stay covered.

(b)(1) For such other times not provided for in subsection (a) of this Code section, a member of the General Assembly who is a party to a case or the lead counsel for a party to a case may request a continuance or stay as the member of the General Assembly certifies to the court that his or her presence elsewhere is required by his or her duties with the General Assembly. The certification by the member of the General Assembly shall be in writing and shall state with particularity the nature of the General Assembly duties that require the continuance or stay. Opposing counsel, a party to the case, or the court on its own motion shall have ten days from receipt of the request for a continuance or stay to object to the request by stating with particularity the grounds upon which it is determined that such stay or continuance will cause significant harm to the rights of a party or would otherwise be detrimental to the interest of justice. The court upon receipt of the objection, or on its own motion, shall consider the following in determining whether to grant or deny the continuance or stay:

(A) The length of time that the case has been pending;

(B) The length of delay that such stay or continuance will cause in the resolution of the case;

(C) The nature of the General Assembly duties that require the continuance or stay; and

(D) Such other factors that the court determines to be relevant in determining the harm to the rights of the parties or the

interest of justice in the granting or denial of the request for a continuance or stay.

(2) Absent a ruling by the court denying the continuance or stay certified by the member under paragraph (1) of this subsection, such continuance or stay shall be considered granted as a matter of law.

History.

Ga. L. 1905, p. 93, § 1; Civil Code 1910, § 5711; Code 1933, § 81-1402; Ga. L. 1952, p. 26, § 1; Ga. L. 1973, p. 478, § 1; Ga. L. 1977, p. 760, § 1; Ga. L. 1991, p. 376, § 1; Ga. L. 1996, p. 112, § 1; Ga. L. 2002, p. 403, § 1; Ga. L. 2006, p. 494, § 1/HB 912; Ga. L. 2009, p. 303, § 18/HB 117; Ga. L. 2019, p. 777, § 1/HB 502.

Cross references.

Corresponding provision relating to criminal procedure, § 17-8-26.

Editor's notes.

Ga. L. 2009, p. 303, § 20/HB 117, not codified by the General Assembly, provides that: "This Act is intended to reflect the current internal organization of the Georgia Senate and House of Representatives and is not otherwise intended to change substantive law. In the event of a conflict with any other Act of the 2009 General Assembly, such other Act shall control over this Act."

Ga. L. 2019, p. 777, § 5/HB 502, not codified by the General Assembly, provides: "This Act shall apply to all civil and criminal cases, including, but not limited to, any case currently initiated within any court in this state."

Law reviews.

For review of 1996 criminal procedure legislation, see 13 Ga. St. U.L. Rev. 30 (1996).

JUDICIAL DECISIONS

Failure to establish that the absent counsel was leading counsel warranted refusal of the continuance. Stewart v. County of Bacon, 148 Ga. 105, 95 S.E. 983, 1918 Ga. LEXIS 207 (1918).

Allowance of summary judgment hearing while attorney at session of General Assembly. — Trial court violated a legislative stay under O.C.G.A. § 9-10-150 by allowing a summary judgment hearing to continue while the borrower's attorney, a state representative, attended a session of the General Assembly, as it was undisputed that the representative was the borrower's attorney as the representative's name appeared on all relevant court documents. Hill v. First Atl. Bank, 323 Ga. App. 731, 747 S.E.2d 892, 2013 Ga. App. LEXIS 727 (2013).

No abuse of discretion found. — Trial court's denial of a minority owner's first request for a continuance was not an abuse of discretion as, while the minority owner's life was threatened on the day before the hearing, the party that threatened the minority owner was not in the courtroom, the minority owner testified knowledgeably and cogently, and the minority owner declined a second opportunity to testify, weeks later. Talmadge v. Elson Props., 279 Ga. 268, 612 S.E.2d 780, 2005 Ga. LEXIS 298 (2005).

Trial court's denial of a minority owner's second request for a continuance was not an abuse of discretion as any inability of a minority owner to obtain an appraisal before the hearing was the result of the owner's own dilatoriness. Talmadge v. Elson Props., 279 Ga. 268, 612 S.E.2d 780, 2005 Ga. LEXIS 298 (2005).

In a deprivation action, given the fact that at the time a parent became ill and could no longer proceed, the hearing was nearly concluded, coupled with the fact that counsel did not intend to present any additional witnesses, the court's denial of a request to continue the hearing was not an abuse of discretion, particularly since the hearing had already been delayed two months after the Department of Children and Family Services had presented its evidence. In the Interest of S.P., 282 Ga. App. 82, 637 S.E.2d 802, 2006 Ga. App. LEXIS 1310 (2006).

Failure to grant a parent a continuance in the parent's termination of parental

rights hearing was not an abuse of discretion as the juvenile court reopened the evidence and allowed the parent to testify and the parent's attorney participated in the entire hearing. In the Interest of C.M., 282 Ga. App. 502, 639 S.E.2d 323, 2006 Ga. App. LEXIS 1314 (2006).

RESEARCH REFERENCES

Am. Jur. 2d.

17 Am. Jur. 2d, Continuance, §§ 1 et seq., 10 et seq., 80 et seq.

C.J.S.

17 C.J.S., Continuances, §§ 44, 53, 115.

ALR.

Effect of war on litigation pending at the time of its outbreak, 154 A.L.R. 1447.

Counsel's absence because of attendance on legislature, as ground for continuance, 49 A.L.R.2d 1073.

Amendment of pleading with respect to parties or their capacity as ground for continuance, 67 A.L.R.2d 477.

9-10-151. Grounds for continuance — Attendance at board of regents or education meeting.

Should any member of the Board of Regents of the University System of Georgia or any member of the State Board of Education be otherwise occupied, at the time of any meeting of the board, as counsel or party in any case pending in the courts of this state and should the case be called for trial during the regular session of the board, the absence of the member to attend the session shall be good ground for a postponement or continuance of the case until the session of the board has come to an end.

History.

Ga. L. 1931, p. 7, § 56; Code 1933, § 81-1404; Ga. L. 1985, p. 1406, § 1; Ga. L. 2019, p. 777, § 2/HB 502.

Cross references.

Corresponding provision relating to criminal procedure, § 17-8-29.

Editor's notes.

Ga. L. 2019, p. 777, § 5/HB 502, not codified by the General Assembly, provides: "This Act shall apply to all civil and criminal cases, including, but not limited to, any case currently initiated within any court in this state."

RESEARCH REFERENCES

Am. Jur. 2d.

17 Am. Jur. 2d, Continuance, §§ 10 et seq..

C.J.S.

17 C.J.S., Continuances, §§ 44, 53.

9-10-152. Grounds for continuance — Attendance at meeting of Board of Human Services or Board of Behavioral Health and Developmental Disabilities.

Should any member of the Board of Human Services or the Board of Behavioral Health and Developmental Disabilities be engaged, at the time of any meeting of the board, as counsel or party in any case pending in the courts of this state and should the case be called for trial during the regular session of the board, the absence of the member to attend the session shall be good ground for a postponement or a

continuance of the case until the session of the board has come to an end.

History.
Ga. L. 1933, p. 7, § 1; Code 1933, § 81-1405; Ga. L. 2009, p. 453, § 2-3/HB 228; Ga. L. 2010, p. 286, § 9/SB 244.

Cross references.
Corresponding provision relating to criminal procedure, § 17-8-30.

RESEARCH REFERENCES

Am. Jur. 2d.
17 Am. Jur. 2d, Continuance, §§ 10 et seq..

C.J.S.
17 C.J.S., Continuances, §§ 44, 53.

9-10-153. Grounds for continuance — Service in National Guard; oath of party or statement of counsel.

It shall be the duty of any judge of a court of this state, on or without motion, to continue any case in the court when the case is reached and any party thereto or his leading counsel is absent from the court by reason of his service in the armed forces when such service directly prevents his attendance in court or by reason of his attendance as a member of the National Guard upon any duty prescribed by the Governor or the adjutant general, unless the party, in the absence of his leading counsel, or the leading counsel, in the absence of the party, on the call of the case, announces ready for trial. If counsel is absent it shall be necessary for his client to make oath that he cannot safely go to trial without the absent counsel; and, if the party plaintiff or defendant is absent, his counsel shall state in his place that he cannot safely go to trial without the client.

History.
Ga. L. 1925, p. 149, § 1; Code 1933, § 81-1406; Ga. L. 1991, p. 404, § 1.

Cross references.
Corresponding provision relating to criminal procedure, § 17-8-31.

JUDICIAL DECISIONS

Motion for continuance properly denied. — Trial court did not abuse its discretion in denying an injured party's motion for a continuance as the injured party did not attach the military orders to the motion and the counsel's assertion that the injured party had received orders to report for military duty were not evidence of any service requirements. King v. Irvin, 273 Ga. App. 64, 614 S.E.2d 190, 2005 Ga. App. LEXIS 414 (2005), cert. denied, No. S05C1399, 2005 Ga. LEXIS 585 (Ga. Sept. 19, 2005).

RESEARCH REFERENCES

Am. Jur. 2d.
17 Am. Jur. 2d, Continuance, §§ 10 et seq.
C.J.S.
17 C.J.S., Continuances, §§ 44, 53.
ALR.
Effect of war on litigation pending at the time of its outbreak, 137 A.L.R. 1335; 147 A.L.R. 1298; 148 A.L.R. 1384; 149 A.L.R. 1451; 149 A.L.R. 1452; 150 A.L.R. 1417; 150 A.L.R. 1418; 151 A.L.R. 1453; 152 A.L.R. 1450; 154 A.L.R. 1447.

Validity and construction of war legislation in nature of moratory statute, 147 A.L.R. 1311; 148 A.L.R. 1388; 149 A.L.R. 1457; 150 A.L.R. 1400; 151 A.L.R. 1456; 152 A.L.R. 1452; 153 A.L.R. 1422; 154 A.L.R. 1448; 155 A.L.R. 1452; 156 A.L.R. 1450; 157 A.L.R. 1450; 158 A.L.R. 1450.

Appealability of order granting or refusing stay or continuance under federal civil relief act because of litigant's military service, 34 A.L.R.2d 1149.

Soldiers' and Sailors' Civil Relief Acts, 35 A.L.R. Fed. 649.

9-10-154. Grounds for continuance — Party providentially prevented from attendance; statement of counsel.

If either party is providentially prevented from attending the trial of a case, and the counsel of the absent party will state in his place that he cannot go safely to trial without the presence of the absent party, the case shall be continued, provided the continuances of the party have not been exhausted.

History.
Orig. Code 1863, § 3453; Code 1868, § 3473; Code 1873, § 3524; Code 1882, § 3524; Civil Code 1895, § 5131; Civil Code 1910, § 5717; Code 1933, § 81-1412.
Cross references.
Corresponding provision relating to criminal procedure, § 17-8-23.

Law reviews.
For annual survey on trial practice and procedure, see 42 Mercer L. Rev. 469 (1990).

JUDICIAL DECISIONS

General manager of a corporation is not a party within the meaning of this section. Persons-Phillips-Oxford Co. v. Morris Fertilizer Co., 20 Ga. App. 100, 92 S.E. 545, 1917 Ga. App. LEXIS 737 (1917) (see O.C.G.A. § 9-10-154).

Plaintiff cannot have a continuance because of absence of defendant. Boardman v. Taylor, 66 Ga. 638, 1881 Ga. LEXIS 77 (1881).

No error in denying motion where several continuances granted for illness. — Where there have been several continuances of the case because of the illness of a party, the court does not abuse its discretion in overruling a motion to again continue for the same cause. Bomar v. Equitable Mtg. Co., 121 Ga. 466, 49 S.E. 267, 1904 Ga. LEXIS 195 (1904); Porter v. Porter, 17 Ga. App. 456, 87 S.E. 707, 1916 Ga. App. LEXIS 680 (1916); Heath v. Edwards, 29 Ga. App. 28, 113 S.E. 46, 1922 Ga. App. LEXIS 27 (1922); Smith v. Williamson, 29 Ga. App. 103, 114 S.E. 86, 1922 Ga. App. LEXIS 87 (1922).

Denial of motion based on sufficient counter-showing not error. — Where a showing for a continuance is made, based upon the providential absence of a party, and evidence is introduced which denies that the absence of the party is due to providential cause, and this testimony is sufficient to rebut the showing for a continuance, the determination of the issue of fact thus raised is a matter for the trial judge, and the exercise of judicial discre-

tion cannot be said to have been abused if there was sufficient evidence to support the counter-showing. Owen v. Sweat, 155 Ga. 559, 117 S.E. 749, 1923 Ga. LEXIS 123 (1923).

No error in denying motion where movant to be unavailable in future. — The trial court does not err in refusing to grant a continuance based on the defendant's alleged inability to appear in court due to physical infirmities where it does not appear that the defendant's condition is expected to improve so as to enable the defendant to be present at a future trial of the case. Allen v. Brookshire, 169 Ga. App. 391, 312 S.E.2d 862, 1984 Ga. App. LEXIS 1561 (1984).

Continuance properly denied where no indication defendant's condition would improve. — Failure of defendant's counsel to make statement required by O.C.G.A. § 9-10-154 and to show that defendant's condition was expected to improve justified denial of motion for continuance. Wasson v. Cox, 176 Ga. App. 684, 337 S.E.2d 445, 1985 Ga. App. LEXIS 2546 (1985).

Motion for continuance properly denied. — Trial court did not abuse its discretion in denying an injured party's motion for a continuance as the injured party did not attach the military orders to the motion and the counsel's assertion that the injured party had received orders to report for military duty were not evidence of any service requirements. King v. Irvin, 273 Ga. App. 64, 614 S.E.2d 190, 2005 Ga. App. LEXIS 414 (2005), cert. denied, No. S05C1399, 2005 Ga. LEXIS 585 (Ga. Sept. 19, 2005).

In a proceeding to legitimate a child, the trial court did not abuse the court's discretion by denying the petitioning parent's motion for a continuance as seven continuances had already been granted in the case, five of which were attributable to the petitioning parent, and the trial court had scheduled the trial to accommodate the petitioning parent's surgery schedule, which was to have occurred after the trial. Appling v. Tatum, 295 Ga. App. 78, 670 S.E.2d 795, 2008 Ga. App. LEXIS 1146 (2008).

Trial court did not abuse its discretion by denying a client's motion for a continuance because the client was not absent due to the providential cause contemplated by O.C.G.A. § 9-10-154 but for failing to maintain communication about a pending case; the client failed to maintain contact with counsel after having been personally served with notice that a law firm had terminated a stipulation to pursue alternative dispute resolution, and that demonstrated a lack of the due diligence required to obtain a continuance under O.C.G.A. § 9-10-166. McLellan v. Chilivis, 302 Ga. App. 562, 692 S.E.2d 26, 2010 Ga. App. LEXIS 181 (2010).

Superior court did not abuse the court's discretion in denying a stepson's amended motion for continuance because the stepson failed to present any evidence under oath that the stepson was prevented from attending the trial of the case; the attorney's assertions in the amended motion for continuance regarding the stepson's health were not evidence. Bocker v. Crisp, 313 Ga. App. 585, 722 S.E.2d 186, 2012 Ga. App. LEXIS 29 (2012).

Denial of motion not error where defendant's absence would not hurt defense. — Where defendant was very old and helpless on account of sickness, which was the defendant's last illness, would never be able to attend court or to give depositions, and would be of no help to the defendant's counsel were the defendant present in court at the trial, the court did not err, in the exercise of sound discretion, in denying the defendant's motion to continue based on the ground of the absence of the defendant. Gaines v. Alexander, 69 Ga. App. 512, 26 S.E.2d 130, 1943 Ga. App. LEXIS 127 (1943).

Whether to grant continuance based on physician's affidavit within court's discretion. — Where a physician's affidavit to the effect that the wife was suffering from a medical condition and appearance in court would be detrimental to her health, whether a continuance should be granted was a matter within the legal discretion of the trial judge. Williford v. Williford, 230 Ga. 543, 198 S.E.2d 181, 1973 Ga. LEXIS 977 (1973).

Physician's letter which stated that because of her physical condition defendant was unable to bear up under the stress of

legal proceedings and that "if she continues on her present course I think she may be able to testify in approximately six months" did not entitle defendant to a continuance absent the statement required by O.C.G.A. § 9-10-154. Worn v. Warren, 191 Ga. App. 448, 382 S.E.2d 112, 1989 Ga. App. LEXIS 681 (1989).

Partial denial of motion for continuance not an abuse of discretion. — Partial denial of a father's motion for a continuance in proceedings to terminate the father's parental rights was not an abuse of discretion as the father did not object to the trial court's proposal and decision to allow a mother to testify without delay, and the father failed to show that additional time would have benefitted the father; the termination of the father's parental rights was based on: (1) a divorce decree permanently prohibiting the father from all contact with the child; and (2) the father's conviction of soliciting someone to murder the child. In the Interest of M.H.W., 275 Ga. App. 586, 621 S.E.2d 779, 2005 Ga. App. LEXIS 1039 (2005), cert. denied, No. S06C0251, 2006 Ga. LEXIS 138 (Ga. Feb. 13, 2006).

RESEARCH REFERENCES

Am. Jur. 2d.

17 Am. Jur. 2d, Continuance, §§ 10 et seq.

C.J.S.

17 C.J.S., Continuance, §§ 41, 51.

ALR.

Suits and remedies against alien enemies, 157 A.L.R. 1449.

Validity, construction, and effect of provisions in life or accident policy in relation to military service, 36 A.L.R.2d 1018.

Amendment of pleading with respect to parties or their capacity as ground for continuance, 67 A.L.R.2d 477.

Continuance of civil case because of illness or death of party, 68 A.L.R.2d 470.

9-10-155. Grounds for continuance — Illness or absence of counsel; oath of party.

The illness or absence, from providential cause, of counsel where there is but one, or of the leading counsel where there are more than one, shall be a sufficient ground for continuance, provided that the party making the application for a continuance will swear that he cannot go safely to trial without the services of the absent counsel, that he expects his services at the next term, and that the application is not made for delay only.

History.

Orig. Code 1863, § 3454; Code 1868, § 3474; Code 1873, § 3525; Code 1882, § 3525; Civil Code 1895, § 5132; Penal Code 1895, § 964; Civil Code 1910, § 5718; Penal Code 1910, § 990; Code 1933, § 81-1413.

Cross references.

Corresponding provision relating to criminal procedure, § 17-8-24.

JUDICIAL DECISIONS

Continuance based on illness of counsel is not favored. Allen v. State, 10 Ga. 85, 1851 Ga. LEXIS 73 (1851); Cotton States Life Ins. Co. v. Edwards, 74 Ga. 220, 1884 Ga. LEXIS 369 (1885); Curry v. State, 17 Ga. App. 377, 87 S.E. 685, 1915 Ga. App. LEXIS 433 (1915).

Compliance with this section must be full. House v. House, 149 Ga. 63, 99 S.E. 37, 1919 Ga. LEXIS 127 (1919) (see O.C.G.A. § 9-10-155).

Strict compliance with O.C.G.A. § 9-10-155 is required to obtain continuance of case proceeding. Adams v. Hill, 177 Ga. App. 492, 340 S.E.2d 27, 1986 Ga. App. LEXIS 1463 (1986).

The trial court did not err in concluding that plaintiffs failed to appear and failed to comply with the requirements for a continuance, where there was no motion for continuance and their counsel, who claimed an inability to attend trial due to illness, made no entry of appearance as counsel of record until more than two months after the trial court granted defendant's motion to dismiss. Martin v. Wyatt, 243 Ga. App. 319, 533 S.E.2d 149, 2000 Ga. App. LEXIS 456 (2000).

Conditions for continuance based on absence of counsel. — A showing of compliance with O.C.G.A. § 9-10-155 plus a showing of diligence under O.C.G.A. § 9-10-166 is required to obtain a continuance due to the absence of counsel. McKinnon v. Shoemaker, 166 Ga. App. 231, 303 S.E.2d 770, 1983 Ga. App. LEXIS 2113 (1983).

Requisites of motion for continuance for absence of counsel. — Motion for continuance under this section, on account of absence of counsel from providential cause, must be in strict compliance with this section and must affirmatively disclose the essentials provided for herein, and the party making the application must swear to the essential requirements thereof. Mosley v. Bridges, 71 Ga. App. 156, 30 S.E.2d 355, 1944 Ga. App. LEXIS 306 (1944) (see O.C.G.A. § 9-10-155).

Movant for continuance must swear to conditions enumerated in section. — Where a party in a cause makes a motion for a continuance on the ground of the absence of the party's counsel, where there is but one, or of leading counsel, movant must swear that the movant cannot go safely to trial without the services of such absent counsel, that the movant expects counsel's services at the next term of court, and that the application for a continuance is not made for delay only. Lancaster v. Ralston, 61 Ga. App. 853, 7 S.E.2d 792, 1940 Ga. App. LEXIS 287 (1940); Williams v. Gooding, 226 Ga. 549, 176 S.E.2d 64, 1970 Ga. LEXIS 591 (1970). See also Smith, Son & Bro. v. Printup Bros. & Co., 59 Ga. 610, 1877 Ga. LEXIS 348 (1877); Lamar v. McDaniel, 78 Ga. 547, 3 S.E. 409, 1887 Ga. LEXIS 25 (1887); Whitley v. Clegg, 120 Ga. 1038, 48 S.E. 406, 1904 Ga. LEXIS 788 (1904); Manion v. Varn, 152 Ga. 654, 111 S.E. 30, 1922 Ga. LEXIS 246 (1922).

Motion for continuance is addressed to the sound discretion of the court. Hilton v. Haynes, 147 Ga. 725, 95 S.E. 220, 1918 Ga. LEXIS 122 (1918).

A motion for continuance is addressed to the sound discretion of the trial court, and a denial will not be disturbed in the absence of a manifest abuse of discretion. Blair v. State, 166 Ga. App. 434, 304 S.E.2d 535, 1983 Ga. App. LEXIS 2201 (1983).

If movant complies with this section it is error to refuse a continuance. Thomas v. State, 92 Ga. 1, 18 S.E. 44, 1893 Ga. LEXIS 2 (1893); Dennard v. Farmers & Merchants Bank, 151 Ga. 445, 107 S.E. 56, 1921 Ga. LEXIS 285 (1921) (see O.C.G.A. § 9-10-155).

The trial court erred in denying motion for continuance where lead counsel was involved in the trial of another case in another court and had with due diligence made the showings required by this statute that the client could not go safely into trial without the lead counsel's services and that the continuance was not sought solely for the purposes of delay. Georgia Am. Ins. Co. v. Varnum, 179 Ga. App. 195, 345 S.E.2d 863, 1986 Ga. App. LEXIS 1878 (1986).

Mere absence of counsel is not sufficient, even if counsel has in the counsel's possession papers which would establish the defense. Hook v. Teasley, 72 Ga. 901, 1884 Ga. LEXIS 346 (1884).

Absence of plaintiff's counsel, without leave, to attend proceedings in other courts is not ground for continuance or postponement. Davis v. Barnes, 158 Ga. App. 89, 279 S.E.2d 330, 1981 Ga. App. LEXIS 2085 (1981).

Continuance due to counsel's engagement in trial in different circuit not favored. — The postponement of the trial of a case on account of the absence of counsel therein, who is, without leave, engaged in the trial of a case in a court of a different circuit, is in the discretion of the court, and a postponement for such cause is not favored. Progressive Life Ins. Co. v. Haygood, 53 Ga. App. 231, 185 S.E. 534, 1936 Ga. App. LEXIS 48 (1936).

Continuance because of the absence of counsel is not favored. Atlanta W. Enters., Inc. v. Cobb County Bank, 150 Ga. App. 577, 258 S.E.2d 193, 1979 Ga. App. LEXIS 2212 (1979).

Trial court may deny continuance where co-counsel present and defendant uninjured. — Where none of the statutory requirements necessary for the granting of a continuance were put forth by co-counsel when the case was called, and there has been no showing that the defendant was injured by the absence of lead counsel, there was no merit in the complaint that the trial court erred in denying the defendant's motion for continuance because of the absence of counsel and that the defendant had been denied the defendant's sixth amendment right to counsel and the defendant's fifth amendment right to due process as guaranteed by the state and federal Constitutions. Blair v. State, 166 Ga. App. 434, 304 S.E.2d 535, 1983 Ga. App. LEXIS 2201 (1983).

Second motion properly denied where ground of illness submitted only after first motion denied. — Trial judge made a proper ruling when the judge refused to grant a continuance upon the ground of the illness of counsel, when this latter ground was not submitted for the consideration of the court until after a former motion asking for a continuance had been decided adversely to the movant. Aiken v. Carmichael, 127 Ga. 407, 56 S.E. 440, 1907 Ga. LEXIS 283 (1907).

A doctor's affidavit of illness is not required. Martin v. Wyatt, 243 Ga. App. 319, 533 S.E.2d 149, 2000 Ga. App. LEXIS 456 (2000).

Motion not in compliance with section properly denied. — Where the defendant stated that the defendant had counsel to represent the defendant, and exhibited a telegram from such counsel that counsel was ill, that counsel was so writing the trial judge, and that counsel was enclosing in such letter a doctor's certificate, the defendant did not comply with this section in making the defendant's motion for continuance, and the trial judge did not err in refusing to continue the case. Felker v. Still, 48 Ga. App. 24, 171 S.E. 838, 1933 Ga. App. LEXIS 444 (1933) (see O.C.G.A. § 9-10-155).

Corporation's postponement request was properly denied as the corporation had fired the attorney making the request and the unsworn application failed to set forth all of the representations strictly required by O.C.G.A. § 9-10-155. Chattowah Open Land Trust, Inc. v. Jones, 281 Ga. 97, 636 S.E.2d 523, 2006 Ga. LEXIS 839 (2006).

Continuance granted where counsel absent with leave of court. — Where the sole counsel, or one of the counsel whose presence is necessary on account of the circumstances of the case, is absent with leave granted by the court, a continuance should be granted. Farmer v. Perry, 46 Ga. 543, 1872 Ga. LEXIS 115 (1872); Ross v. Head, 51 Ga. 605, 1874 Ga. LEXIS 209 (1874).

Continuance properly denied where no showing that absent counsel was leading counsel. — Where it did not appear from the ground of a motion for new trial that A was leading counsel in the case, the court did not err in refusing a continuance because of the absence of counsel. J.L. Young Co. v. Minchew, 42 Ga. App. 228, 155 S.E. 356, 1930 Ga. App. LEXIS 304 (1930).

Fact that attorney has substituted another in the place does not become binding on the attorney's client and deprive the client of right to continue. Dalton City Co. v. Dalton Mfg. Co., 33 Ga. 243, 1862 Ga. LEXIS 22 (1862), aff'd, Dalton City Co. v. Hawes & Willoughby, 37 Ga. 115, 1867 Ga. LEXIS 139 (1867).

Counsel's attempt to relay information to judge through third person at counsel's and client's peril. — Where counsel attempts to relay information to a trial judge through a third person, counsel does so at counsel's peril and at the peril of the client. Atlanta W. Enters., Inc. v. Cobb County Bank, 150 Ga. App. 577, 258 S.E.2d 193, 1979 Ga. App. LEXIS 2212 (1979).

Absence of one of three counsel. — As there was no showing that parties were injured by the absence of one of their three counsel from trial, the court did not abuse its discretion in denying their motion for continuance. Opatut v. Guest Pond Club, Inc., 188 Ga. App. 478, 373 S.E.2d 372, 1988 Ga. App. LEXIS 1098 (1988).

RESEARCH REFERENCES

Am. Jur. 2d.
17 Am. Jur. 2d, Continuance, §§ 10 et seq.
C.J.S.
17 C.J.S., Continuances, § 51.
ALR.
Right to continuance because counsel is in attendance at another court, 112 A.L.R. 593.
Continuance of civil case because of illness or death of counsel, 67 A.L.R.2d 497.

9-10-156. Grounds for continuance — Occupation of counsel as Attorney General in aid of General Assembly.

When any case pending in the courts of this state in which the Attorney General is of counsel is scheduled to be called for any purpose during sessions of the General Assembly or during a period of 15 days preceding or following sessions of the General Assembly, on motion of the Attorney General or an assistant attorney general, it shall be a good ground for continuance that the Attorney General and his staff are occupied in aid of the business of the General Assembly.

History.
Ga. L. 1956, p. 700, § 1.
Cross references.
Corresponding provision relating to criminal procedure, § 17-8-27.

RESEARCH REFERENCES

Am. Jur. 2d.
17 Am. Jur. 2d, Continuance, § 10et seq.
C.J.S.
17 C.J.S., Continuances, § 53.

9-10-157. When amending party granted continuance.

The party amending pleadings or other proceedings in any of the courts of this state shall not be entitled to delay or continuance on account of the amendment, except by leave of the court to enable him to make the amendment.

History.
Orig. Code 1863, § 3449; Code 1868, § 3469; Code 1873, § 3520; Code 1882, § 3520; Civil Code 1895, § 5127; Civil Code 1910, § 5713; Code 1933, § 81-1408.

JUDICIAL DECISIONS

The grant of a continuance is within the sound discretion of the trial court for the purpose of amending an affidavit; thus, in a summary judgment proceeding, a continuance may be denied absent a showing of due diligence by the applicant. Landers v. Georgia Baptist Medical Ctr., 175 Ga. App. 500, 333 S.E.2d 884, 1985 Ga. App. LEXIS 2150 (1985).

RESEARCH REFERENCES

Am. Jur. 2d.
17 Am. Jur. 2d, Continuance, §§ 10 et seq., 80.

C.J.S.
17 C.J.S., Continuances, § 31.

9-10-158. Continuance to enable opposite party to meet amendment; when charged to amending party.

When a pleading is amended, if the opposite party makes oath or his counsel states in his place that he is surprised and not fully prepared for trial because of the amendment, upon a showing of the manner of unpreparedness and that surprise is not claimed for the purpose of delay, the case may be continued and the continuance charged to the amending party.

History.
Orig. Code 1863, § 3450; Code 1868, § 3470; Code 1873, § 3521; Code 1882, § 3521; Civil Code 1895, § 5128; Civil Code 1910, § 5714; Code 1933, § 81-1409.

JUDICIAL DECISIONS

Section is mandatory. — The requirement of this section, that the opposite party must, personally or by counsel, state that the party is surprised and less prepared for trial by the amendment, is mandatory. Haines v. Currey, 36 Ga. 602, 1867 Ga. LEXIS 103 (1867); Peters v. West, 70 Ga. 343, 1883 Ga. LEXIS 335 (1883); Ledbetter v. McWilliams, 90 Ga. 43, 15 S.E. 634, 1892 Ga. LEXIS 119 (1892); Craddock v. Kelley, 129 Ga. 818, 60 S.E. 193, 1908 Ga. LEXIS 202 (1908); Hill v. Harris, 11 Ga. App. 358, 75 S.E. 518, 1912 Ga. App. LEXIS 404 (1912) (see O.C.G.A. § 9-10-158).

Error as to denial of continuance without merit where party unharmed. — Where the defendant enumerates as error the denial of the defendant's motion for continuance on the ground that the defendant is unprepared to defend a claim contained in an amendment to the complaint, but the defendant cannot show any harm the defendant suffered from the denial of the defendant's motion since the jury found for the defendant on the issue, the enumerated error is without merit. McFarland v. Hodge Homebuilders, Inc., 168 Ga. App. 733, 309 S.E.2d 853, 1983 Ga. App. LEXIS 2908 (1983).

Express statement that surprise not for purpose of delay required. — It is an indispensable requisite of the motion under this section that the movant, or the movant's attorney, make an oath that the claim or surprise is not for the purpose of delay; this matter is not left to inference, but must be an express statement. Georgia Life Ins. v. Hanvey, 143 Ga. 786, 85 S.E. 1036, 1915 Ga. LEXIS 617 (1915); Camp & Camp v. Interstate Chem. Co., 18 Ga. App. 416, 89 S.E. 491, 1916 Ga. App. LEXIS 381 (1916); Hoffman v. Franklin Motor Car Co., 32 Ga. App. 229, 122 S.E. 896, 1924 Ga. App. LEXIS 344 (1924); Potts v. Wilson, 158 Ga. 316, 123 S.E. 294, 1924 Ga. LEXIS 145 (1924) (see O.C.G.A. § 9-10-158).

Motion defective absent express representation that surprise not for purpose of delay. — A motion for a continuance upon the ground of surprise, made upon the allowance of an amendment to the petition, is defective where it is not at the time expressly represented to the court that such surprise is "not claimed for the purpose of delay." William-

son v. Gentry, 44 Ga. App. 596, 162 S.E. 395, 1932 Ga. App. LEXIS 411 (1932).

Denial of motion absent express statement not reversible. — There must be an express statement to the effect that delay is not the purpose of the application; and, in the absence of such express statement, a judgment refusing to continue the case will not be reversed. Abdill v. Barden, 221 Ga. 591, 146 S.E.2d 299, 1965 Ga. LEXIS 538 (1965).

Defendant's motion properly denied where surprise unsupported by circumstances. — Where action had been instituted by the plaintiff manufacturing company long before it was adjudicated a bankrupt, the defendant must necessarily have had knowledge that the company claimed title to the account sued on, and there had been ample opportunity to obtain proof to the contrary, the judge did not abuse the judge's discretion in refusing a continuance on account of the plaintiff's amendment, allowed without objection, by reason of which the defendant claimed surprise. Manry v. Williams Mfg. Co., 45 Ga. App. 833, 166 S.E. 222, 1932 Ga. App. LEXIS 726 (1932).

In motion for new trial ground excepting to refusal of continuance insufficient. — In a motion for new trial, if a ground excepting to the refusal of a continuance fails to show that surprise was not claimed for the purpose of delay, or how and wherein the movant was less prepared to go on with the trial, the ground is insufficient. Jones Mercantile Co. v. Copeland, 54 Ga. App. 647, 188 S.E. 586, 1936 Ga. App. LEXIS 721 (1936).

Continuance properly denied where movant had sufficient notice of amendment. — Copy of an amendment having been served upon the defendant's counsel in December 1889, but the original not having been filed until October 27, 1890, and the trial occurring on October 30, 1890, it was no abuse of discretion to overrule a motion for continuance. Southern Bell Tel. & Tel. Co. v. Jordan, 87 Ga. 69, 13 S.E. 202, 1891 Ga. LEXIS 95 (1891).

Court's discretion not abused where opposite parties had three weeks' notice of facts in amendment. — Under the express provision of this section, on application of a party pleading surprise upon the filing of an amendment, the granting or refusing of such continuance is within the discretion of the court and this discretion is not abused where the opposite parties had approximately three weeks' notice of the facts set forth in the amendment. Central Truckaway Sys. v. Harrigan, 79 Ga. App. 117, 53 S.E.2d 186, 1949 Ga. App. LEXIS 598 (1949) (see O.C.G.A. § 9-10-158).

Continuance properly refused where movant's witness is nonresident with unknown address. — Party does not meet the requirements of the law in the party's motion for a continuance where the witness is a nonresident of the county having jurisdiction of the case and the witness's address is unknown, and the court does not abuse its discretion in refusing the continuance. Griffin v. State, 85 Ga. App. 602, 69 S.E.2d 665, 1952 Ga. App. LEXIS 793 (1952).

Refusal to grant short continuance proper absent compliance with section. — Where plaintiff amended the plaintiff's petition materially and defendant stated that the defendant was surprised by the amendment and moved that the trial be halted until the afternoon session of the court, refusal to grant a continuance should not be reversed in light of the statutory requirement that the movant make an oath, or that the movant's counsel state in the movant's place, that such surprise is not claimed for the purpose of delay. Gregory v. Ross, 214 Ga. 306, 104 S.E.2d 452, 1958 Ga. LEXIS 408 (1958).

Motion for continuance, not to dismiss, proper for party surprised by amendment. — That a party is surprised, or less ready for trial, by reason of an amendment is not cause for demurrer (now motion to dismiss) thereto, the party should move for a continuance under this section. Wells v. Wells, 118 Ga. 812, 45 S.E. 669, 1903 Ga. LEXIS 722 (1903) (see O.C.G.A. § 9-10-158).

RESEARCH REFERENCES

Am. Jur. 2d.
17 Am. Jur. 2d, Continuance, §§ 10 et seq., 80 et seq.
C.J.S.
17 C.J.S., Continuances, § 31.
ALR.
Refusal of continuance in criminal trial, asked for on account of occurrences during trial, as abuse of discretion, 5 A.L.R. 914.
Party litigant's absence in civil case because of illness of relative or member of family, as ground for continuance, 47 A.L.R.2d 1058.
Amendment of pleading before trial with respect to amount or nature of relief sought as ground for continuance, 56 A.L.R.2d 650.

9-10-159. Legislator attending General Assembly excused as witness; deposition in civil case.

Any person summoned as a witness in any case shall be excused by the judge from attending the court by reason of his attendance as a legislator in the General Assembly. In all civil cases it shall be the right of either party thereto to take the deposition, as provided by law, of any person desired to be used as a witness in the case who is a member of the General Assembly when the session of the General Assembly conflicts with the session of the court in which such case is to be tried.

History.
Ga. L. 1905, p. 93, § 2; Civil Code 1910, § 5712; Code 1933, § 81-1407.

Cross references.
Corresponding provision relating to criminal procedure, § 17-8-28.

RESEARCH REFERENCES

Am. Jur. 2d.
17 Am. Jur. 2d, Continuance, §§ 10 et seq., 80 et seq.

C.J.S.
17 C.J.S., Continuances, § 70.

9-10-160. Continuance for absence of witness; what application to show.

All applications for continuances upon the ground of the absence of a witness shall show to the court:

(1) That the witness is absent;

(2) That he has been subpoenaed;

(3) That he does not reside outside of the state;

(4) That his testimony is material;

(5) That the witness is not absent by the permission, directly or indirectly, of the applicant;

(6) That the applicant expects he will be able to procure the testimony of the witness at the next term of the court;

(7) That the application is not made for the purpose of delay but

to enable the party to procure the testimony of the absent witness; and

(8) The facts expected to be proved by the absent witness.

History.

Orig. Code 1863, § 3451; Code 1868, § 3471; Code 1873, § 3522; Code 1882, § 3522; Civil Code 1895, § 5129; Penal Code 1895, § 962; Civil Code 1910, § 5715; Penal Code 1910, § 987; Code 1933, § 81-1410; Ga. L. 1959, p. 342, § 1; Ga. L. 1991, p. 376, § 2.

Cross references.

Use of depositions of absent witnesses, § 9-11-32.

Corresponding provision relating to criminal procedure, § 17-8-25.

JUDICIAL DECISIONS

Movant for a continuance must demonstrate compliance with this section by showing that: (a) the testimony of the absent witness would be material (and such testimony must be set forth); (b) the movant has made every effort to procure such testimony; (c) there are no other witnesses present by whom the movant can satisfactorily prove the same facts; and (d) the absent witness has been subpoenaed. Thomas v. Ferrier, 87 Ga. App. 666, 75 S.E.2d 284, 1953 Ga. App. LEXIS 826 (1953) (see O.C.G.A. § 9-10-160).

Where one of the eight statutory requirements for a continuance based upon the absence of a witness was not met, in that the absent witness resided outside the state, it was not error for the trial court to deny the request for a continuance. Surgijet, Inc. v. Hicks, 236 Ga. App. 80, 511 S.E.2d 194.

This section is not controlling where witness' absence is a result of trial notice inadequate in time to serve subpoenas. Siano v. Spindel, 136 Ga. App. 288, 220 S.E.2d 718, 1975 Ga. App. LEXIS 1325 (1975) (see O.C.G.A. § 9-10-160).

Continuance will not be granted where the evidence will be merely corroborative. Abbott v. Padrosa, 136 Ga. 278, 71 S.E. 419, 1911 Ga. LEXIS 516 (1911).

Denial of continuance where witness subpoenaed but prior deposition existed. — The trial court's sua sponte determination that the existence of a prior deposition rendered the presence of material witness subpoenaed by the plaintiff superfluous and that, hence, that witness would be excused, but no continuance would be granted, denied the plaintiff the right to present the plaintiff's case to the jury in the manner in which the plaintiff chose. Ricketson v. Blair, 171 Ga. App. 714, 320 S.E.2d 788, 1984 Ga. App. LEXIS 2324 (1984).

Absence of evidence which is merely cumulative will not be a ground for continuance. Fry v. Shechee, 55 Ga. 208, 1875 Ga. LEXIS 381 (1875); Maynard v. Cleveland, 76 Ga. 52, 1885 Ga. LEXIS 23 (1885).

No continuance for indefinite, inadmissible, and useless evidence. — Court will not grant a continuance if it appears that the evidence, if obtainable, would be indefinite, inadmissible, and useless. Brumby v. Barnard, 60 Ga. 292, 1878 Ga. LEXIS 443 (1878); Garlington v. Fletcher, 111 Ga. 861, 36 S.E. 920, 1900 Ga. LEXIS 843 (1900); Davis v. Blount, 137 Ga. 209, 73 S.E. 398, 1911 Ga. LEXIS 362 (1911).

Motion for continuance proper where necessary witness unable to attend. — If the presence of the general manager of a corporation which is a party to a cause is necessary to the corporation on the trial of the case, the manager should be subpoenaed as a witness, and, if the manager is providentially unable to attend court, a motion for a continuance on that account should be made under this section. Persons-Phillips-Oxford Co. v. Morris Fertilizer Co., 20 Ga. App. 100, 92 S.E. 545, 1917 Ga. App. LEXIS 737 (1917) (see O.C.G.A. § 9-10-160).

Failure to subpoena is ground for refusing continuance. Kirby Planing-

Mill Co. v. Hughes, 11 Ga. App. 645, 75 S.E. 1059, 1912 Ga. App. LEXIS 122 (1912).

Court did not err in refusing to continue the case because of the absence of a witness who had not been subpoenaed. Sheffield v. Sheffield, 38 Ga. App. 685, 145 S.E. 672, 1928 Ga. App. LEXIS 394 (1928).

Failure of service held excused for lack of opportunity due to rapid scheduling. — Failure to serve because of lack of opportunity arising from the fact that case is tried soon after it has been entered on the docket will be excused. Youngblood v. Youngblood, 76 Ga. 840, 1886 Ga. LEXIS 146 (1886).

Summons in a justice of the peace court will not be sufficient on appeal in superior court; a witness must be served with a subpoena to attend the trial in the latter court. Harrison v. Langston & Woodson, 100 Ga. 394, 28 S.E. 162, 1897 Ga. LEXIS 71 (1897).

Refusal proper absent showing that witness is resident of county where action is pending. — Where fact of witness' residence in county where action is pending does not appear, it is not error to refuse a continuance. Hathcock v. McGouirk, 119 Ga. 973, 47 S.E. 563, 1904 Ga. LEXIS 424 (1904); Mulling v. Kingery & Bland, 33 Ga. App. 581, 126 S.E. 882, 1925 Ga. App. LEXIS 610 (1925).

Where absent witnesses resided outside of Georgia, it was not error for the trial court to deny plaintiffs' request for a continuance. Tucker v. Signature Flight Support-Savannah, Inc., 219 Ga. App. 834, 466 S.E.2d 694.

Continuance properly denied where witness was serving overseas in the military. — A court does not abuse its discretion in overruling a motion for a continuance, based upon the absence of an alleged material witness, where it was not shown that such witness lived in the county or had been subpoenaed, and where it appeared that the witness was serving overseas in the United States Army, and there was no reason to expect that the witness would be present at the next term of court. Bowers v. Fred W. Amend Co., 72 Ga. App. 714, 35 S.E.2d 15, 1945 Ga. App. LEXIS 681 (1945).

Failure to allege that witness is not absent by permission of applicant renders motion defective. Simons v. Mathis, 17 Ga. App. 588, 87 S.E. 845, 1916 Ga. App. LEXIS 802 (1916); Persons-Phillips-Oxford Co. v. Morris Fertilizer Co., 20 Ga. App. 100, 92 S.E. 545, 1917 Ga. App. LEXIS 737 (1917).

Motion properly denied absent showing that movant insisted upon witness' attendance. — The court did not abuse its discretion in failing to continue case where it appeared that, although movant for continuance was put on notice of the uncertainty of attendance by the witness, the movant failed to show that the movant refused to take cognizance of this witness' predicament and to insist upon the attendance of the witness. Brazil v. Roberts, 198 Ga. 477, 32 S.E.2d 171, 1944 Ga. LEXIS 428 (1944).

Continuance properly denied where no showing of expectation of producing testimony at next term. — The trial court did not abuse its discretion in denying defendant's motion for a continuance in a criminal proceeding so as to secure the presence of witness subpoenaed by defendant where defendant made no affirmative showing that the defendant expected that the defendant would be able to procure the testimony of such absent witness at the next term of court. Bullard v. State, 157 Ga. App. 606, 278 S.E.2d 26, 1981 Ga. App. LEXIS 1930 (1981).

Given that the children of the deceased could not represent to the trial court that the children could have their expert available to testify at the next term of court, the record showed that the children failed to meet the requirements of O.C.G.A. § 9-10-160 and the trial court did not abuse the court's discretion in denying the children's application for a continuance in a wrongful death action. Davis v. Osinuga, 330 Ga. App. 278, 767 S.E.2d 37, 2014 Ga. App. LEXIS 827 (2014).

Motion failing to show expectation of procuring testimony at next term fatally defective. — Where expectation of procuring witness' testimony at next term is not shown in the motion, it is fatally defective. Simons v. Mathis, 17 Ga. App. 588, 87 S.E. 845, 1916 Ga. App. LEXIS 802 (1916). See also Thompkins v. American Land Co., 139 Ga. 377, 77 S.E. 623, 1913 Ga. LEXIS 441 (1913); Fudge v.

State, 18 Ga. App. 312, 89 S.E. 374, 1916 Ga. App. LEXIS 323 (1916); Persons-Phillips-Oxford Co. v. Morris Fertilizer Co., 20 Ga. App. 100, 92 S.E. 545, 1917 Ga. App. LEXIS 737 (1917).

Statement of counsel insufficient to show expectation of procuring testimony at next term. — Statement of counsel, that "it was their information that A would be allowed by his physicians to return home in the near future," did not meet the requirement of this section that the applicant "expects he will be able to procure the testimony of the witness at the next term of the court." J.L. Young Co. v. Minchew, 42 Ga. App. 228, 155 S.E. 356, 1930 Ga. App. LEXIS 304 (1930) (see O.C.G.A. § 9-10-160).

Continuance properly overruled absent movant's expectation of procuring testimony next term. — Where, on hearing of a motion for a continuance based on the absence of a witness, the applicant failed to testify that the applicant expected to be able to procure the testimony of the witness at the next term of the court, the motion was properly overruled by the court. Cumby v. New Albany Box & Basket Co., 58 Ga. App. 843, 200 S.E. 307, 1938 Ga. App. LEXIS 150 (1938).

Continuance properly denied absent showing of facts to be proved by absent witness. — The court did not err in overruling the motion for a continuance upon the ground of the absence of a witness, where it was not made to appear to the court what the movant expected to prove by the witness, and where it appeared that the witness lived in another county and had not been served with a subpoena. Western & A.R.R. v. Bennett, 47 Ga. App. 629, 171 S.E. 187, 1933 Ga. App. LEXIS 583 (1933).

Where the defendant made no showing whatever as to the facts expected to be proved by the absent witness, and did not otherwise fully comply with this section, the trial court did not abuse its discretion in refusing the request for a continuance. United Motor Freight Terms. v. Driver, 75 Ga. App. 571, 44 S.E.2d 156, 1947 Ga. App. LEXIS 582 (1947) (see O.C.G.A. § 9-10-160).

Continuance ought not to be refused simply because counter-affidavit states that witness claimed to know nothing about the matter or that the witness's testimony would do no good. Waldrup v. Maxwell, 84 Ga. 113, 10 S.E. 597, 1889 Ga. LEXIS 196 (1889).

Counter-showing as to previous testimony. Counter-showing as to what the witness would have testified to may bring out what the witness testified to at a former trial. Waldrup v. Maxwell, 84 Ga. 113, 10 S.E. 597, 1889 Ga. LEXIS 196 (1889).

Where it appears that absent witness is only disinterested person by whom facts can be proved, this need not be alleged in the motion. Macon & B. Ry. v. Anderson, 121 Ga. 666, 49 S.E. 791, 1905 Ga. LEXIS 37 (1905).

Burden on appeal to show facts to be proved by witness. — Under this section, the facts expected to be proved by missing witnesses are to be made to the court, and the burden is on the appellant when alleging error to show it affirmatively by the record; the brief cannot be used in lieu of the record or the transcript for adding evidence to support a claim of error. Finley v. Griswold, 149 Ga. App. 612, 255 S.E.2d 87, 1979 Ga. App. LEXIS 1956 (1979) (see O.C.G.A. § 9-10-160).

No error in overruling motion made for purpose of delay. — Where it appears that motion for continuance, made upon the ground of the absence of a witness, was made for the purpose of delay, no error appears in the overruling of the motion. Lovvorn v. Favor, 40 Ga. App. 386, 149 S.E. 721, 1929 Ga. App. LEXIS 172 (1929).

No error absent abuse of discretion. — A motion for continuance because of an absent witness is addressed to the sound legal discretion of the trial judge, and where it does not appear that the judge abused the judge's discretion in passing on the motion, the refusal to continue the case is not error. United Motor Freight Terms. v. Driver, 75 Ga. App. 571, 44 S.E.2d 156, 1947 Ga. App. LEXIS 582 (1947).

No abuse of discretion where requirements of section not met. — In order that the discretion of the trial judge be controlled, where a continuance is sought because of the absence of a wit-

ness, eight requirements as set out in this section must be shown; where the statutory requirements are not met, it is no abuse of the judge's discretion to deny a continuance. Carroll v. Crawford, 218 Ga. 635, 129 S.E.2d 865, 1963 Ga. LEXIS 284 (1963) (see O.C.G.A. § 9-10-160).

Appellate court limited to deciding whether ruling below was abuse of discretion. — In civil and criminal cases alike, there is some discretion on the part of the trial court, and the reviewing court is limited to deciding merely whether the decision as made constitutes an abuse of discretion. Keller v. State, 128 Ga. App. 129, 195 S.E.2d 767, 1973 Ga. App. LEXIS 1412 (1973).

RESEARCH REFERENCES

Am. Jur. 2d.

17 Am. Jur. 2d, Continuance, §§ 10 et seq., 80 et seq.

C.J.S.

17 C.J.S., Continuances, § 70.

ALR.

Prejudicial effect, in civil case, of denial of continuance to call nonappearing witness whom adversary had been expected to call, 39 A.L.R.2d 1445.

Admissions to prevent continuance sought to secure testimony of absent witness in civil case, 15 A.L.R.3d 1272.

9-10-161. Denial of continuance for absence of witness or testimony where opposite party makes admission.

No continuance shall be allowed in any court on account of the absence of a witness or for the purpose of procuring testimony when the opposite party is willing to admit and does not contest the truth of the facts expected to be proved by the testimony of the witness. The court shall order the admission to be reduced to writing.

History.

Ga. L. 1853-54, p. 52, § 1; Code 1863, § 3452; Code 1868, § 3472; Code 1873, § 3523; Code 1882, § 3523; Civil Code 1895, § 5130; Penal Code 1895, § 963; Civil Code 1910, § 5716; Penal Code 1910, § 989; Code 1933, § 81-1411.

Cross references.

Corresponding provision relating to criminal procedure, § 17-8-32.

JUDICIAL DECISIONS

Admission by opposite party must be reduced to writing. — An admission that the absent witness would testify to the facts stated is not sufficient to prevent a continuance; the opposite party must also admit in writing that the party does not contest the truth thereto. Cheney v. Smith & Alexander, 42 Ga. 50, 1871 Ga. LEXIS 8 (1871); Klugman v. Gammell, 43 Ga. 581, 1871 Ga. LEXIS 297 (1871).

Admission cannot be withdrawn after formerly absent witness comes into court. — When a party admits the truth of facts to which an absent witness will testify, the admission being made to avoid a continuance under this section, the party has no right, after the opposite party has closed the evidence, to withdraw the admission because the witness is no longer absent but has come into court. Harris & Mitchell v. McArthur, 90 Ga. 216, 15 S.E. 758, 1892 Ga. LEXIS 153 (1892) (see O.C.G.A. § 9-10-161).

RESEARCH REFERENCES

Am. Jur. 2d.
17 Am. Jur. 2d, Continuance, § 10 et seq.
C.J.S.
17 C.J.S., Continuances, §§ 62, 72.
ALR.
Admissions to prevent continuance sought to secure testimony of absent witness in civil case, 15 A.L.R.3d 1272.

9-10-162. Continuance after case sent back by appellate court.

When any case is sent back for trial by the Supreme Court or the Court of Appeals, the same shall be in order for trial; and, if the continuances of a party are exhausted, the trial court may grant one continuance to the party as the ends of justice may require.

History.
Ga. L. 1851-52, p. 216, § 6; Code 1863, § 3456; Code 1868, § 3476; Code 1873, § 3527; Code 1882, § 3527; Civil Code 1895, § 5134; Civil Code 1910, § 5720; Code 1933, § 81-1415.
Cross references.
Corresponding provision relating to criminal procedure, § 17-8-34.

JUDICIAL DECISIONS

Effect of judgment of reversal on appellant and trial judge. — The judgment of reversal, without more, operates only to vacate the orders and decree as therein stated, and to reinvest the trial court with jurisdiction, on the filing of the remittitur in the office of the clerk of the trial court; it neither serves as a substitute for findings for the appellant, nor enlarges the powers of the trial judge in reference thereto. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304, 1939 Ga. LEXIS 729 (1939).

Cases are "sent back" to trial court when remittitur of Court of Appeals is transmitted to and filed in the office of its clerk. Hagan v. Robert & Co. Assocs., 222 Ga. 469, 150 S.E.2d 663, 1966 Ga. LEXIS 521 (1966).

RESEARCH REFERENCES

Am. Jur. 2d.
17 Am. Jur. 2d, Continuance, § 10 et seq..
C.J.S.
17 C.J.S., Continuances, § 9.

9-10-163. Continuance of appeals case.

No appeal case shall be continued more than twice by the same party, except for providential cause, for which it may be continued as often as justice may require.

History.
Orig. Code 1863, § 3459; Code 1868, § 3479; Code 1873, § 3530; Code 1882, § 3530; Civil Code 1895, § 5137; Civil Code 1910, § 5723; Code 1933, § 81-1418.

JUDICIAL DECISIONS

Refusal of continuance of appeal to jury not abuse of discretion. — Continuances are always addressed to the sound discretion of the court, and where a justice refused a continuance of an appeal to a jury, there was no abuse of judicial discretion. Young v. Darien & W.R.R., 1 Ga. App. 317, 57 S.E. 921, 1907 Ga. App. LEXIS 227 (1907).

RESEARCH REFERENCES

Am. Jur. 2d.

17 Am. Jur. 2d, Continuance, § 10 et seq..

C.J.S.

17 C.J.S., Continuances, § 129.

ALR.

Effect of war on litigation pending at time of its outbreak, 36 A.L.R.2d 1018.

Amendment of pleading with respect to parties or their capacity as ground for continuance, 67 A.L.R.2d 477.

Continuance of civil case because of illness or death of party, 68 A.L.R.2d 470.

9-10-164. Continuances for one term only.

A continuance requested by a party in a pending case in any court shall not be granted for longer than one term.

History.

Laws 1799, Cobb's 1851 Digest, p. 486.; Code 1863, § 3448; Code 1868, § 3468; Code 1873, § 3519; Code 1882, § 3519; Civil Code 1895, § 5126; Civil Code 1910, § 5710; Code 1933, § 81-1401.

Cross references.

Corresponding provision relating to criminal procedure, § 17-8-37.

JUDICIAL DECISIONS

Discretion in refusing continuance was not abused where continuance had been granted at two previous terms and for one day at the third term. Camp v. Lanier, 36 Ga. App. 54, 135 S.E. 224, 1926 Ga. App. LEXIS 756 (1926).

No error for limiting continuances of defendant who had been granted five. — It was not error for the court to put the case on terms and limit the continuances of the defendant, where it appeared that the defendant had been granted five continuances. Alley v. Gormley, 181 Ga. 650, 183 S.E. 787, 1935 Ga. LEXIS 171 (1935).

No abuse of discretion for denying continuance due to illness of party. — Under the circumstances, no abuse of discretion of the judge in refusing to grant a continuance because of alleged providential absence of a party by sickness, was shown. Dyar v. Dyar, 55 Ga. App. 226, 189 S.E. 721, 1937 Ga. App. LEXIS 54 (1937).

9-10-165. Case not reached continued.

A case not reached at the trial term stands over as continued.

History.
Orig. Code 1863, § 3455; Code 1868, § 3475; Code 1873, § 3526; Code 1882, § 3526; Civil Code 1895, § 5133; Civil Code 1910, § 5719; Code 1933, § 81-1414.

Cross references.
Corresponding provision relating to criminal procedure, § 17-8-38.

JUDICIAL DECISIONS

Where action is not heard during trial term, it is automatically continued to succeeding term. Davenport v. Davenport, 218 Ga. 475, 128 S.E.2d 772, 1962 Ga. LEXIS 537 (1962).

Refusal to set aside order dismissing motion for new trial proper. — Where plaintiff fails to present a brief of evidence on the hearing of plaintiff's motion for new trial, and there is no merit to the plaintiff's allegations as to an agreement to postpone the hearing, the trial judge properly refuses to set aside the judge's order dismissing the plaintiff's motion for new trial. Davenport v. Davenport, 218 Ga. 475, 128 S.E.2d 772, 1962 Ga. LEXIS 537 (1962).

RESEARCH REFERENCES

Am. Jur. 2d.
17 Am. Jur. 2d, Continuance, § 1 et seq.

C.J.S.
17 C.J.S., Continuances, §§ 15, 23.

9-10-166. Diligence to be shown by applicant for continuance.

In all cases, the party making an application for a continuance must show that he has used due diligence.

History.
Orig. Code 1863, § 3457; Code 1868, § 3477; Code 1873, § 3528; Code 1882, § 3528; Civil Code 1895, § 5135; Penal Code 1895, § 965; Civil Code 1910, § 5721; Penal Code 1910, § 991; Code 1933, § 81-1416.

Cross references.
Corresponding provision relating to criminal procedure, § 17-8-20.

JUDICIAL DECISIONS

Conditions for continuance based on absence of counsel. — A showing of compliance with O.C.G.A. § 9-10-155 plus a showing of diligence under O.C.G.A. § 9-10-166 is required to obtain a continuance because of the absence of counsel. McKinnon v. Shoemaker, 166 Ga. App. 231, 303 S.E.2d 770, 1983 Ga. App. LEXIS 2113 (1983).

Proof that absent party providentially prevented from attending trial required for continuance. — To entitle a party to a continuance, evidence of some character under oath must be presented that the absent party was in fact providentially prevented from attending the trial. Stanley v. Amos, 79 Ga. App. 297, 53 S.E.2d 568, 1949 Ga. App. LEXIS 641 (1949).

The trial court erred in denying motion for continuance where lead counsel was involved in the trial of another case in another court and had with due diligence made the showings required by O.C.G.A. § 9-10-166 that the client could not go safely into trial without the attorney's services and that the continuance was not sought solely for the purposes of delay. Georgia Am. Ins. Co. v. Varnum, 179 Ga. App. 195, 345 S.E.2d 863, 1986 Ga. App. LEXIS 1878 (1986).

Discretion of trial judge not to be disturbed absent clear abuse. — The discretion of a trial judge in granting or

refusing a continuance will not be disturbed by the appellate court unless such discretion was manifestly and clearly abused. Stanley v. Amos, 79 Ga. App. 297, 53 S.E.2d 568, 1949 Ga. App. LEXIS 641 (1949).

In a deprivation action, given the fact that at the time a parent became ill and could no longer proceed, the hearing was nearly concluded, coupled with the fact that counsel did not intend to present any additional witnesses, the court's denial of a request to continue the hearing was not an abuse of discretion, particularly since the hearing had already been delayed two months after the Department of Children and Family Services had presented its evidence. In the Interest of S.P., 282 Ga. App. 82, 637 S.E.2d 802, 2006 Ga. App. LEXIS 1310 (2006).

Refusal to grant continuance not error where movant lacked due diligence. — Where a period of two hours and a half elapsed after the emergency involving a party seeking a continuance and before the case was called, during which time the party's counsel did not communicate with the client, nor the party with the attorney, or make any effort to make a legal showing for continuance in accordance with previous notice given them by the court requiring strict legal presentation at proof under oath for a continuance, it was not error to refuse to grant a continuance. Stanley v. Amos, 79 Ga. App. 297, 53 S.E.2d 568, 1949 Ga. App. LEXIS 641 (1949).

Where the defense counsel's moves for a continuance were based on the fact that the defense counsel did not receive a tape or transcript of the committal hearing until approximately 24 hours before the trial and as a consequence defense counsel was unable adequately to prepare to cross-examine or impeach the prosecution's witnesses, but defense counsel was informed some days earlier that defense counsel might pick up the tape and transcript at the defense counsel's convenience, and defense counsel did not do so until the day preceding the trial, and by the defense counsel's own admission defense counsel was present at the committal hearing and therefore can be presumed to know what took place there, the court does not abuse its discretion in denying the motion for continuance. Gaskin v. State, 166 Ga. App. 331, 303 S.E.2d 778, 1983 Ga. App. LEXIS 2157 (1983).

Trial court did not abuse its discretion in denying a subcontractor's motion for a continuance of a summary judgment hearing, as a surety raised a statute of limitations defense more than three months before the hearing and the subcontractor did not attempt to conduct further discovery after the defense was raised. Masonry Specialists of Ga., Inc. v. United States Fid. & Guar. Co., 273 Ga. App. 774, 616 S.E.2d 103, 2005 Ga. App. LEXIS 443 (2005).

Trial court did not abuse its discretion by denying a client's motion for a continuance because the client was not absent due to the providential cause contemplated by O.C.G.A. § 9-10-154 but for failing to maintain communication about a pending case; the client failed to maintain contact with counsel after having been personally served with notice that a law firm had terminated a stipulation to pursue alternative dispute resolution, and that demonstrated a lack of the due diligence required to obtain a continuance under O.C.G.A. § 9-10-166. McLellan v. Chilivis, 302 Ga. App. 562, 692 S.E.2d 26, 2010 Ga. App. LEXIS 181 (2010).

Continuance properly denied where intervenor claimed insufficient notice of action involving state. — All applications for a continuance are addressed to the sound legal discretion of the court, and in all cases the party making the application for a continuance must show that the party has exercised due diligence; accordingly, in a civil action to which the state is a party, and which is thus entitled to priority of hearing, the court did not err in failing to grant a continuance on motion of the intervenor, based on the sole ground that the intervenor had been absent from the state and had not heard of the case in time to make preparation for the hearing. Beazley v. De Kalb County, 87 Ga. App. 910, 75 S.E.2d 657, 1953 Ga. App. LEXIS 879, rev'd, 210 Ga. 41, 77 S.E.2d 740, 1953 Ga. LEXIS 479 (1953).

A continuance because of the absence of counsel is not favored. At-

lanta W. Enters., Inc. v. Cobb County Bank, 150 Ga. App. 577, 258 S.E.2d 193, 1979 Ga. App. LEXIS 2212 (1979).

Counsel's attempt to relay information to judge through third person at counsel's and client's peril. — Where counsel attempts to relay information to a trial judge through a third person, counsel does so at counsel's peril and at the peril of the client. Atlanta W. Enters., Inc. v. Cobb County Bank, 150 Ga. App. 577, 258 S.E.2d 193, 1979 Ga. App. LEXIS 2212 (1979).

Motion to extend discovery properly denied. — Trial court did not abuse its discretion in denying a property owner's motion to extend discovery as to a partnership because the motion was filed more than a year before the partnership joined the case and referred only to a developer; the motion was never amended to add the partnership and never applied to the partnership. Zywiciel v. Historic Westside Vill. Partners, LLC, 313 Ga. App. 397, 721 S.E.2d 617, 2011 Ga. App. LEXIS 1136 (2011).

RESEARCH REFERENCES

Am. Jur. 2d.

17 Am. Jur. 2d, Continuance, § 15 et seq.

C.J.S.

17 C.J.S., Continuances, § 54.

ALR.

Continuance of civil case because of illness or death of party, 68 A.L.R.2d 470.

9-10-167. Continuance in discretion of court; countershowing to motion for continuance.

(a) All applications for continuances are addressed to the sound legal discretion of the court and, if not expressly provided for, shall be granted or refused as the ends of justice may require.

(b) In all cases the presiding judge may, in his discretion, admit a countershowing to a motion for a continuance and, after a hearing, may decide whether the motion shall prevail.

History.

Orig. Code 1863, § 3460; Code 1868, § 3480; Ga. L. 1871-72, p. 49, § 1; Ga. L. 1872, p. 41, § 1; Code 1873, § 3531; Code 1882, § 3531; Civil Code 1895, § 5138; Penal Code 1895, § 966; Civil Code 1910, § 5724; Penal Code 1910, § 992; Code 1933, § 81-1419.

Cross references.

Corresponding provision relating to criminal procedure, § 17-8-22.

JUDICIAL DECISIONS

Order granting or denying continuance not reversible absent clear abuse of discretion. — Trial court has a right to exercise sound discretion in passing on motions for continuance, and an order granting or denying a continuance will not be reversed unless such discretion has been manifestly abused. Gaines v. Alexander, 69 Ga. App. 512, 26 S.E.2d 130, 1943 Ga. App. LEXIS 127 (1943); State Hwy. Dep't v. Peavy, 77 Ga. App. 308, 48 S.E.2d 478, 1948 Ga. App. LEXIS 542 (1948); Stanley v. Amos, 79 Ga. App. 297, 53 S.E.2d 568, 1949 Ga. App. LEXIS 641 (1949); Nichols v. Heffner, 222 Ga. 706, 152 S.E.2d 393, 1966 Ga. LEXIS 608 (1966); Smith v. Davis, 121 Ga. App. 704, 175 S.E.2d 28, 1970 Ga. App. LEXIS 1323

(1970); McCorquodale v. Stynchcombe, 239 Ga. 138, 236 S.E.2d 486, 1977 Ga. LEXIS 843, cert. denied, 434 U.S. 975, 98 S. Ct. 534, 54 L. Ed. 2d 467 (1977); Keno v. Alside, Inc., 148 Ga. App. 549, 251 S.E.2d 793, 1978 Ga. App. LEXIS 3215, 1978 Ga. App. LEXIS 3242 (1978).

The continuance or postponement of a case is a discretionary matter and will not be controlled unless manifestly abused. Davis v. Barnes, 158 Ga. App. 89, 279 S.E.2d 330, 1981 Ga. App. LEXIS 2085 (1981).

A motion for continuance is addressed to the sound discretion of the trial court. Absent a showing that it has been abused, that discretion will not be controlled. Clark v. State, 159 Ga. App. 438, 283 S.E.2d 666, 1981 Ga. App. LEXIS 2632 (1981); Turner v. City of Nashville, 177 Ga. App. 649, 340 S.E.2d 619, 1986 Ga. App. LEXIS 1505 (1986).

All continuances for which express provision has not been made are granted or denied in the discretion of the trial court, and an appellate court will not reverse such decisions absent a clear abuse of discretion. This rule holds true in situations where a person is both a criminal and civil defendant. Payton v. Green, 179 Ga. App. 438, 346 S.E.2d 884, 1986 Ga. App. LEXIS 1928 (1986).

In the absence of the transcript of the hearing on appellant's motion for a continuance or other showing by appellant that the trial court abused its discretion by denying the motion, the decision will not be reversed. Payton v. Green, 179 Ga. App. 438, 346 S.E.2d 884, 1986 Ga. App. LEXIS 1928 (1986); Matthews v. Dorsey, 218 Ga. App. 545, 462 S.E.2d 452, 1995 Ga. App. LEXIS 815 (1995).

In a proceeding to legitimate a child, the trial court did not abuse the court's discretion by denying the petitioning parent's motion for a continuance as seven continuances had already been granted in the case, five of which were attributable to the petitioning parent, and the trial court had scheduled the trial to accommodate the petitioning parent's surgery schedule, which was to have occurred after the trial. Appling v. Tatum, 295 Ga. App. 78, 670 S.E.2d 795, 2008 Ga. App. LEXIS 1146 (2008).

Trial court did not abuse the court's discretion by denying a defendant's motion for a continuance because the court instructed the plaintiff to ensure that the plaintiff's experts were made available to the defendant for interviewing, and the defendant indicated that the defendant would be able to accomplish the interviews on the evening of the first day of trial. LN West Paces Ferry Assocs., LLC v. McDonald, 306 Ga. App. 641, 703 S.E.2d 85, 2010 Ga. App. LEXIS 1016 (2010), cert. denied, No. S11C0454, 2011 Ga. LEXIS 237 (Ga. Mar. 7, 2011).

In a professional malpractice claim against a dentist, although the patient argued that the trial court should have recessed the trial until the following day because an expert witness was in route, the record showed that the expert was flying standby, and there was no evidence that the expert ever boarded a flight. Given the patient's inability to inform the court when or if the expert would arrive at trial, the trial court did not abuse its discretion in denying a motion for continuance. Cave v. Sachdeva, No. A21A1033, 2021 Ga. App. LEXIS 589 (Ga. Ct. App. Oct. 21, 2021), cert. denied, 143 S. Ct. 446, 214 L. Ed. 2d 254, 2022 U.S. LEXIS 5071 (2022).

Military orders. — Injured party did not attach the military orders to the motion, and the counsel's assertion that the injured party had received orders to report for military duty were not evidence of any service requirements. King v. Irvin, 273 Ga. App. 64, 614 S.E.2d 190, 2005 Ga. App. LEXIS 414 (2005), cert. denied, No. S05C1399, 2005 Ga. LEXIS 585 (Ga. Sept. 19, 2005).

Proof that absent party providentially prevented from attending trial required for continuance. — To entitle a party to a continuance, evidence of some character under oath must be presented that the absent party was in fact providentially prevented from attending the trial. Stanley v. Amos, 79 Ga. App. 297, 53 S.E.2d 568, 1949 Ga. App. LEXIS 641 (1949).

Denial of continuance for absent defendant after two verdicts in defendant's favor not error. — Where defendant, having had two verdicts rendered in

the defendant's favor, did not appear at the third (new) trial, even after a continuance had been granted, as the defendant had left the county and defense counsel was unable to locate the defendant, it was not error for the trial judge to deny another motion to continue and, after a verdict for the plaintiff, enter judgment in plaintiff's favor. Smith v. Randall, 52 Ga. App. 692, 184 S.E. 360, 1936 Ga. App. LEXIS 227 (1936).

Denial of motion not error where defendant's absence would not hurt defense. — Where defendant was very old and helpless on account of sickness, which was the defendant's last illness, would never be able to attend court or to give depositions, and would be of no help to defense counsel were the defendant present in court at the trial, the court did not err, in the exercise of sound discretion, in denying the defendant's motion to continue based on the ground of the absence of the defendant. Gaines v. Alexander, 69 Ga. App. 512, 26 S.E.2d 130, 1943 Ga. App. LEXIS 127 (1943).

Refusal to grant continuance not error where movant lacked due diligence. — Where a period of two hours and a half elapsed after the emergency involving a party seeking a continuance and before the case was called, during which time the party's counsel did not communicate with the client, nor the client with the attorney, or make any effort to make a legal showing for continuance in accordance with previous notice given them by the court requiring strict legal presentation at proof under oath for continuance, it was not error to refuse to grant a continuance. Stanley v. Amos, 79 Ga. App. 297, 53 S.E.2d 568, 1949 Ga. App. LEXIS 641 (1949).

Where the defense counsel's moves for a continuance were based on the fact that defense counsel did not receive a tape or transcript of the committal hearing until approximately 24 hours before the trial and as a consequence defense counsel was unable adequately to prepare to cross-examine or impeach the prosecution's witnesses, but defense counsel was informed some days earlier that defense counsel might pick up the tape and transcript at defense counsel's convenience, and defense counsel did not do so until the day preceding the trial, and by defense counsel's own admission defense counsel was present at the committal hearing and therefore can be presumed to know what took place there, the court did not abuse its discretion in denying the motion. Gaskin v. State, 166 Ga. App. 331, 303 S.E.2d 778, 1983 Ga. App. LEXIS 2157 (1983).

Trial court did not abuse its discretion in denying a subcontractor's motion for a continuance of a summary judgment hearing as a surety raised a statute of limitations defense more than three months before the hearing and the subcontractor did not attempt to conduct further discovery after the defense was raised. Masonry Specialists of Ga., Inc. v. United States Fid. & Guar. Co., 273 Ga. App. 774, 616 S.E.2d 103, 2005 Ga. App. LEXIS 443 (2005).

Continuance properly denied where sole ground was lack of opportunity for leading counsel to prepare. — Judge did not abuse judicial discretion in overruling a motion for a continuance of a contempt hearing based solely on an alleged lack of opportunity of leading counsel to prepare for trial, nothing being shown as to inability or lack of opportunity of other attorneys in the case to prepare for such trial. Alred v. Celanese Corp. of America, 205 Ga. 499, 54 S.E.2d 225, 1949 Ga. LEXIS 395 (1949), cert. denied, 338 U.S. 937, 70 S. Ct. 346, 94 L. Ed. 578 (1950).

Attorney's delay in going to wrong courthouse. — It was not an abuse of discretion to deny plaintiff's request for a continuance because plaintiff's attorney went to the wrong courthouse for a hearing on defendant's motion for summary judgment. Purvis v. Ballantine, 226 Ga. App. 246, 487 S.E.2d 14.

Continuance properly denied where intervenor claimed insufficient notice of action involving state. — All applications for a continuance are addressed to the sound legal discretion of the court, and in all cases the party making the application for a continuance must show that the party has exercised due diligence; accordingly, in a civil action to which the state is a party, and which is

thus entitled to priority of hearing, the court did not err in failing to grant a continuance on motion of the intervenor, based on the sole ground that the intervenor had been absent from the state and had not heard of the case in time to make preparation for the hearing. Beazley v. De Kalb County, 87 Ga. App. 910, 75 S.E.2d 657, 1953 Ga. App. LEXIS 879, rev'd, 210 Ga. 41, 77 S.E.2d 740, 1953 Ga. LEXIS 479 (1953).

Refusal to set aside order dismissing motion for new trial proper. — Where plaintiff fails to present a brief of evidence on the hearing of plaintiff's motion for a new trial, and there is no merit to plaintiff's allegations as to an agreement to postpone the hearing, the trial judge properly refuses to set aside an order dismissing the plaintiff's motion for new trial. Davenport v. Davenport, 218 Ga. 475, 128 S.E.2d 772, 1962 Ga. LEXIS 537 (1962).

Refusal to grant continuance for second attempt at arbitration. — Where an initial attempt at arbitration, as provided for by the lease agreement in question, was unsuccessful, the court was within its discretion to deny a motion for continuance which requested an opportunity for a second attempt at arbitration. Nunn v. Taylor, 177 Ga. App. 44, 338 S.E.2d 453, 1985 Ga. App. LEXIS 2467 (1985).

Continuance denied for lack of diligence. — Where appellants were not diligent in obtaining desired discovery, their failure to obtain discovery did not entitle them to a continuance of a hearing on a motion for summary judgment. Dobbs v. Cobb E.N.T. Assocs., 165 Ga. App. 238, 299 S.E.2d 141, 1983 Ga. App. LEXIS 1828 (1983).

Denial of continuation of parental rights termination proceeding proper. — Trial court's denial of a parent's motion for a continuance of a parental rights termination proceeding was not shown to be erroneous where the parent was served with a copy of the petition to terminate approximately four months before the termination hearing, an amended petition merely added the name of the paternal grandparent because the grandparent had legal custody of the child at the time, and the trial court indicated that it would not hear anything not included in the original petition; the parent was unable to show any harm suffered as a result of the trial court's failure to grant the continuance. In the Interest of A.S.R.H., 265 Ga. App. 30, 593 S.E.2d 59, 2004 Ga. App. LEXIS 3 (2004).

A father's motion for a continuance so that he could obtain the results of a paternity test was properly denied, as the father failed to show harm from the decision; this was particularly true in light of a holding affirming the termination of the father's parental rights. In the Interest of S.S.G.A., 285 Ga. App. 276, 645 S.E.2d 724, 2007 Ga. App. LEXIS 508 (2007).

A parent's potential for overcoming alcoholism, which had existed throughout the four years the children had been in foster care, was insufficient to require the grant of a continuance in a parental rights termination proceeding. In re C.M., 179 Ga. App. 508, 347 S.E.2d 328, 1986 Ga. App. LEXIS 1943 (1986).

Petitioner's attorney's motion to continue habeas corpus proceeding properly granted. — Where, in a habeas corpus action, petitioner's attorney has been unable to confer with the client and is unprepared for lack of time due to the unlawful transfer of and improper delay in returning the client to the proper prison, the attorney's request for a continuance should be granted. Hardwick v. Gooding, 233 Ga. 322, 210 S.E.2d 794, 1974 Ga. LEXIS 752 (1974).

RESEARCH REFERENCES

Am. Jur. 2d.

17 Am. Jur. 2d, Continuance, § 13.

C.J.S.

17 C.J.S., Continuances, § 6.

ALR.

Physical condition or conduct of party, his family, friends, or witnesses during trial, tending to arouse sympathy of jury, as ground for continuance or mistrial, 131 A.L.R. 323.

Appealability of order granting or refusing stay or continuance under federal civil

relief act because of litigant's military service, 34 A.L.R.2d 1149.

Party litigant's absence in civil case because of illness of relative or member of family, as ground for continuance, 47 A.L.R.2d 1058.

Stay of civil proceedings pending determinations of action in federal court in same state, 56 A.L.R.2d 335.

Amendment of pleading before trial with respect to amount or nature of relief sought as ground for continuance, 56 A.L.R.2d 650.

Continuance of civil case because of illness or death of party, 68 A.L.R.2d 470.

Hostile sentiment or prejudice as ground for continuance in civil case, 68 A.L.R.2d 540.

Admissions to prevent continuance sought to secure testimony of absent witness in civil case, 15 A.L.R.3d 1272.

Continuance of case because of illness of expert witness, 18 A.L.R.6th 509.

9-10-168. When postponement substituted for continuance.

No continuance shall be granted in any of the courts in this state which have a continuous session for 30 days or more, over the objection of the adverse party, where the cause for the same can be obviated by a postponement to a later day during the term. It shall be the duty of the presiding judge, whenever a motion and a proper showing for a continuance are made by either party at any time, to set the case down for a later day during the same term if it is practicable thereby to avoid the continuance of the case.

History.
Ga. L. 1893, p. 56, § 1; Civil Code 1895, § 5139; Civil Code 1910, § 5725; Code 1933, § 81-1420.

RESEARCH REFERENCES

Am. Jur. 2d.
17 Am. Jur. 2d, Continuance, § 1.
C.J.S.
17 C.J.S., Continuances, § 2.
ALR.
Time during or after civil trial at which court may entertain, or properly grant or deny, motion for continuance of trial, 112 A.L.R. 395.

9-10-169. Announcement and docketing of continuance.

Continuances of cases in the superior, state, county, and city courts and the dates thereof shall be entered on the docket. Upon the call of the calendar which includes such case, the judge shall announce the continuance.

History.
Ga. L. 1895, p. 41, § 1; Civil Code 1895, § 5140; Penal Code 1895, § 968; Civil Code 1910, § 5726; Penal Code 1910, § 994; Code 1933, § 81-1421.

Cross references.
Corresponding provision relating to criminal procedure, § 17-8-36.

JUDICIAL DECISIONS

Formal entries of continuances on docket not authority for second process issuance. — Formal entries of continuances made by the judge on the bench docket at and after the appearance term, do not import any leave or order to issue a second process or extend the time for service. Peck v. LaRoche & Son, 86 Ga. 314, 12 S.E. 638, 1890 Ga. LEXIS 238 (1890).

RESEARCH REFERENCES

C.J.S.
17 C.J.S., Continuances, § 106 et seq.

ARTICLE 8

ARGUMENT AND CONDUCT OF COUNSEL

Cross references.
Arguments in probate court, Uniform Rules for the Probate Courts, Rule 10.8.

RESEARCH REFERENCES

ALR.
Validity and application of state statute prohibiting judge from practicing law, 17 A.L.R.4th 829.

Propriety of attorney's communication with jurors after trial, 19 A.L.R.4th 1209.

9-10-180. Time limit for arguments.

Counsel shall be limited in their arguments to two hours on a side.

History.
Ga. L. 1924, p. 75, §§ 2, 3; Code 1933, § 81-1007; Ga. L. 1983, p. 884, § 3-4.

JUDICIAL DECISIONS

In cases where there are coplaintiffs or codefendants, O.C.G.A. § 9-10-180 provides for two hours of argument per side, not per party. Mansell v. Benson Chevrolet Co., 165 Ga. App. 568, 302 S.E.2d 114, 1983 Ga. App. LEXIS 1953 (1983).

Words, "shall be limited in their arguments to two hours on a side," mean that counsel shall not be limited to less than two hours on a side. Lovett v. Sandersville R.R., 199 Ga. 238, 33 S.E.2d 905, 1945 Ga. LEXIS 300 (1945).

No conflict with Superior Court Rule 13.1. — There is no conflict between Superior Court Rule 13.1, limiting argument to one hour per side, and O.C.G.A. § 9-10-180; the trial court could limit closing argument at trial to one hour per side where there was no request for additional time as authorized by Superior Court Rule 13.2. McIntyre v. Pope, 215 Ga. App. 600, 451 S.E.2d 110, 1994 Ga. App. LEXIS 1311 (1994), cert. denied, No. S95C0557, 1995 Ga. LEXIS 437 (Ga. Mar. 10, 1995).

There is an inconsistency between O.C.G.A. § 9-10-180 and Ga. Unif. Super. Ct. R. 13, regarding the time allowed for closing argument, and, to the extent that requirements of the rule conflict with the Georgia Code, the rule must yield, but there is no irreconcilable conflict between

the two because of the authority of a trial court to grant an extension of time under Ga. Unif. Super. Ct. R. 13.2. Rouse v. Polott, 274 Ga. App. 226, 617 S.E.2d 185, 2005 Ga. App. LEXIS 708 (2005).

Trial judge has no discretion to limit argument to one hour per side. — Under this section, counsel in civil actions originating in the superior court are entitled as a matter of right to two hours on a side in which to argue the case, and the trial judge has no discretion to limit the argument to one hour on a side. Lovett v. Sandersville R.R., 72 Ga. App. 692, 34 S.E.2d 664, 1945 Ga. App. LEXIS 675 (1945); Henry & Hutchinson, Inc. v. Slack, 91 Ga. App. 353, 85 S.E.2d 620, 1955 Ga. App. LEXIS 737 (1955) (see O.C.G.A. § 9-10-180).

Judge has no discretion to limit argument in capital felony case to less than two hours. — Counsel in a capital felony case are entitled, as a matter of right, to two hours on a side in which to argue their case, and the trial judge has no discretion in such a case to limit argument to a shorter period of time. Kittles v. State, 74 Ga. App. 383, 39 S.E.2d 766, 1946 Ga. App. LEXIS 541 (1946).

RESEARCH REFERENCES

Am. Jur. 2d.
75 Am. Jur. 2d, Trial, § 398 et seq.
C.J.S.
88 C.J.S., Trial, §§ 288 et seq., 292.
ALR.
Prejudicial effect of trial court's denial, or equivalent, of counsel's right to argue case, 38 A.L.R.2d 1396.

Propriety of trial court order limiting time for opening or closing argument in civil case—state cases, 71 A.L.R.4th 130.

Prejudicial effect, in civil case, of communications between court officials or attendants and jurors, 31 A.L.R.5th 572.

9-10-181. Extension of time limit for argument after application therefor.

If counsel on either side, before argument begins, applies to the court for extension of the time prescribed for argument and states in his place or on oath, in the discretion of the court, that he or they cannot do the case justice within the time prescribed and that it will require for that purpose additional time, stating how much additional time will be necessary, the court shall grant such extension of time as may seem reasonable and proper.

History.
Ga. L. 1924, p. 75, § 4; Code 1933, § 81-1008.

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Extension erroneously denied. — In a personal injury case, the trial court erred in denying, under Ga. Unif. Super. Ct. R. 13.2, the injured party's request for an extension of time for closing argument because the request was timely and was authorized by O.C.G.A. § 9-10-181, which took precedence over the rule. Rouse v. Polott, 274 Ga. App. 226, 617 S.E.2d 185, 2005 Ga. App. LEXIS 708 (2005).

RESEARCH REFERENCES

Am. Jur. 2d.
75 Am. Jur. 2d, Trial, § 398 et seq.
75A Am. Jur. 2d Trial, § 450 et seq.
C.J.S.
88 C.J.S., Trial, § 292.

ALR.
Prejudicial effect of trial court's denial, or equivalent, of counsel's right to argue case, 38 A.L.R.2d 1396.

9-10-182. Number of counsel who may argue case.

Not more than two counsel for each side shall be permitted to argue any case, except by express leave of the court; and in no case shall more than one counsel be heard in conclusion.

History.
Ga. L. 1924, p. 75, § 1; Code 1933, § 81-1004.

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One counsel per party in concluding arguments. — The phrase "in no case shall more than one counsel be heard in conclusion" limits argument to one counsel per party, not to one counsel per side. Southern Bell Tel. & Tel. Co. v. LaRoche, 173 Ga. App. 298, 325 S.E.2d 908, 1985 Ga. App. LEXIS 1513 (1985).

Court did not err in permitting two plaintiff's attorneys to give final argument, where one gave the opening argument and only one was heard in conclusion. Goforth v. Wigley, 178 Ga. App. 558, 343 S.E.2d 788, 1986 Ga. App. LEXIS 1701 (1986).

Court committed reversible error in denying plaintiff's second counsel opportunity to present argument to jury, even though other counsel conducted entire examination of witnesses. Heard, Leverette & Adams v. Stone, 167 Ga. App. 113, 306 S.E.2d 72, 1983 Ga. App. LEXIS 2413 (1983).

Double counsel procedure upheld. — Where both the plaintiff and the defendant employed double counsel, and one attorney for the plaintiff began closing argument, the two defense attorneys then argued, and the plaintiff's second attorney concluded the argument, this procedure did not violate O.C.G.A. § 9-10-182. Williams v. Greenfield Equip. Co., 184 Ga. App. 239, 361 S.E.2d 199, 1987 Ga. App. LEXIS 2196 (1987).

Although the trial court may have erred in permitting two members of the law firm representing a defendant to participate in the closing argument, the plaintiff has not suggested how the plaintiff was harmed, since the plaintiff's counsel had the concluding argument. Bridges v. Schier, 195 Ga. App. 583, 394 S.E.2d 408, 1990 Ga. App. LEXIS 620 (1990), overruled in part, Sheriff v. State, 277 Ga. 182, 587 S.E.2d 27, 2003 Ga. LEXIS 844 (2003); Parker v. Hospital Auth., 214 Ga. App. 113, 446 S.E.2d 766, 1994 Ga. App. LEXIS 787 (1994), cert. denied, No. S94C1784, No. S94A0525, 1994 Ga. LEXIS 1158 (Ga. Nov. 10, 1994), overruled in part, Sheriff v. State, 277 Ga. 182, 587 S.E.2d 27, 2003 Ga. LEXIS 844 (2003).

Two counsel can argue in middle argument. — Appellate court improperly overruled Limbrick v. State, 152 Ga. App. 615 (1979) as: (1) O.C.G.A. §§ 17-8-70 and 9-10-182 were to be construed under the substantive law in effect when the 1982 Code was enacted; (2) the statutory limitation of one counsel "heard in conclusion" applied to the party exercising the privilege of the final jury argument chronologically; (3) the construction harmonized all parts of the statutes and gave a sensible and intelligent effect to each part of the statutes; (4) the first parts of O.C.G.A. §§ 17-8-70 and 9-10-182 provided that two attorneys could present argument on

behalf of a party without leave of court; and (5) if the second parts of the statutes were construed as limiting the middle and concluding argument to one attorney, it rendered the first parts of the statutes meaningless. Sheriff v. State, 277 Ga. 182, 587 S.E.2d 27, 2003 Ga. LEXIS 844 (2003).

Presentation of closing arguments by two counsels representing two different entities. — In a negligence case stemming from a motor vehicle collision, O.C.G.A. § 9-10-182 did not apply because the defendant employer and the defendant employee had leave of court to present separate closing arguments; and the plaintiff's rebuttal was the final concluding argument. Smith v. Laney, 358 Ga. App. 754, 856 S.E.2d 355, 2021 Ga. App. LEXIS 126 (2021).

RESEARCH REFERENCES

ALR.

Prejudicial effect of trial court's denial, or equivalent, of counsel's right to argue case, 38 A.L.R.2d 1396.

9-10-183. Use of blackboard, models, or similar devices in argument.

In the trial of any civil action, counsel for either party shall be permitted to use a blackboard and models or similar devices in connection with his argument to the jury for the purpose of illustrating his contentions with respect to the issues which are to be decided by the jury, provided that counsel shall not in writing present any argument that could not properly be made orally.

History.

Ga. L. 1960, p. 1037, § 1; Ga. L. 1982, p. 3, § 9.

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Counsel permitted to use devices for illustrating contentions to be proved at trial. — Counsel for both parties in a civil case, preliminary to the introduction of evidence, may, under this section, state and use devices for illustrating counsel's contentions to the jury as to what each expects to prove on the trial. Lewyn v. Morris, 135 Ga. App. 289, 217 S.E.2d 642, 1975 Ga. App. LEXIS 1650 (1975) (see O.C.G.A. § 9-10-183).

Challenge not preserved for appeal. — Trial court did not abuse the court's discretion by permitting the plaintiffs to use trial boards during opening statement because trial boards were not included in the record on appeal nor did the defendant request that the issue be preserved for appeal. Vineyard Indus. v. Bailey, 343 Ga. App. 517, 806 S.E.2d 898, 2017 Ga. App. LEXIS 525 (2017), cert. denied, No. S18C0480, 2018 Ga. LEXIS 314 (Ga. May 7, 2018).

RESEARCH REFERENCES

Am. Jur. 2d.

75 Am. Jur. 2d, Trial, § 415 et seq.

C.J.S.

88 C.J.S., Trial, § 276 et seq.

ALR.

Conduct of jury in nature of demonstration, test, or experiment during authorized view, 150 A.L.R. 958.

Propriety, in trial of civil action, of use of model of object or instrumentality, or of site or premises, involved in the accident or incident, 69 A.L.R.2d 424.

Counsel's use, in trial of personal injury or wrongful death case, of blackboard, chart, diagram, or placard, not introduced in evidence, relating to damages, 86 A.L.R.2d 239.

9-10-184. Value of pain and suffering may be argued.

In the trial of a civil action for personal injuries, counsel shall be allowed to argue the worth or monetary value of pain and suffering to the jury; provided, however, that any such argument shall conform to the evidence or reasonable deductions from the evidence in the case.

History.
Ga. L. 1960, p. 174, § 1.

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Counsel may place unit value on pain and suffering. — Under this section, counsel is allowed to argue the value of pain and suffering, and it is not improper to place a unit value on such pain. Mullis v. Chaika, 118 Ga. App. 11, 162 S.E.2d 448, 1968 Ga. App. LEXIS 1291 (1968) (see O.C.G.A. § 9-10-184).

Counsel's argument of unit value of pain and suffering must be reasonable. — Although a witness may not express a witness's opinion as to the monetary value of damages for pain and suffering, it is not improper for counsel to argue to the jury the per diem, monthly, or yearly value of the plaintiff's pain and suffering, provided such argument is within the bounds of reasonable deduction from the evidence in the case. Hardwick v. Price, 114 Ga. App. 817, 152 S.E.2d 905, 1966 Ga. App. LEXIS 925 (1966).

Unit of time argument, allowed in Georgia, is nothing more than an effort to persuade the jury to evaluate a long period of pain and suffering in terms of its smaller time equivalents. Baron Tube Co. v. Transport Ins. Co., 365 F.2d 858, 1966 U.S. App. LEXIS 5276 (5th Cir. 1966).

Unit value not reducible to present cash value. — The fact that the plaintiff attempts to place a unit value upon pain and suffering does not require its reduction to present cash value since placing unit value is merely an attempt to evaluate a long period of pain and suffering in terms of its smaller time equivalents, and is not a reducible measurement. Goforth v. Wigley, 178 Ga. App. 558, 343 S.E.2d 788, 1986 Ga. App. LEXIS 1701 (1986).

RESEARCH REFERENCES

Am. Jur. 2d.
75 Am. Jur. 2d, Trial, § 415 et seq.

C.J.S.
88 C.J.S., Trial, § 276 et seq.

ALR.
Reduction of allowance for future pain and suffering to present worth, 28 A.L.R. 1177.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R.3d 10.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in farming, ranching, or agricultural labor, 46 A.L.R.3d 733.

Recovery for emotional distress or its physical consequences caused by attempts to collect debt owed by third party, 46 A.L.R.3d 772.

Recovery for mental anguish or emotional distress, absent independent physical injury, consequent upon breach of con-

tract or warranty in connection with construction of home or other building, 7 A.L.R.4th 1178.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in professional, white-collar, and nonmanual occupations, 50 A.L.R.4th 787.

Sufficiency of evidence to prove future medical expenses as result of injury to back, neck, or spine, 26 A.L.R.5th 401.

9-10-185. Prejudicial statements by counsel; prevention by court; rebuke of counsel and instruction to jury; mistrial.

Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same. On objection made, the court shall also rebuke counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds. In its discretion, the court may order a mistrial if the plaintiff's attorney is the offender.

History.

Civil Code 1895, § 4419; Civil Code 1910, § 4957; Code 1933, § 81-1009.

History of Section.

This Code section is derived from the decisions in Augusta & S.R.R. v. Randall, 85 Ga. 297, 11 S. E. 706 (1890); Croom v. State, 90 Ga. 430, 17 S. E. 1003 (1892); Metropolitan St. R.R. v. Johnson, 90 Ga. 501, 16 S. E. 49 (1892); and Farmer v. State, 91 Ga. 720, 18 S. E. 987 (1893).

Cross references.

Effect of judge's expression to jury of opinion of factual issue or expression of approval or disapproval of jury verdict, §§ 9-10-7, 9-10-8.

Similar provision pertaining to criminal actions, § 17-8-75.

Law reviews.

For note, "Argument of Counsel," see 1 Ga. L. Rev. No. 1 p. 44 (1927).

JUDICIAL DECISIONS

Analysis

General Consideration
Discretion
Objections
Application

General Consideration

Former Code 1933, § 81-1009 (see O.C.G.A. § 9-10-185) has not been repealed by Ga. L. 1966, p. 609, § 85 (see O.C.G.A. Ch. 11, T. 9); it is the law of this state. Moorehead v. Counts, 130 Ga. App. 453, 203 S.E.2d 553, 1973 Ga. App. LEXIS 1346 (1973), aff'd, 232 Ga. 220, 206 S.E.2d 40, 1974 Ga. LEXIS 913 (1974).

Former Code 1933, § 81-1009 (see O.C.G.A. § 9-10-185) has been modified by Ga. L. 1966, p. 609, § 46 (see O.C.G.A. § 9-11-46(b)); the trial court in a civil case may, upon the motion of either party, grant a mistrial for improper remarks of counsel. Counts v. Moorehead, 232 Ga. 220, 206 S.E.2d 40, 1974 Ga. LEXIS 913 (1974).

It is duty of trial court to control trial of the case and to ensure fair trial to both sides on the disputed issues in the case, thus sometimes requiring interference by the court with the conduct of counsel or with a witness in the trial, and the trial court has broad discretion in the handling of such matters. Stephen W. Brown Radiology Assocs. v. Gowers, 157

Ga. App. 770, 278 S.E.2d 653, 1981 Ga. App. LEXIS 2011 (1981).

This section makes it duty of trial judge to interpose and prevent making by counsel of statements of prejudicial matters not in evidence in the hearing of the jury; this rule likewise applies to the examination of witnesses by counsel. Johnson v. Cook, 123 Ga. App. 302, 180 S.E.2d 591, 1971 Ga. App. LEXIS 1203 (1971) (see O.C.G.A. § 9-10-185).

This section imposes duty on judge to rebuke prejudicial statements, when timely objection is made. Southern Marble Co. v. Pinyon, 144 Ga. 259, 86 S.E. 1086, 1915 Ga. LEXIS 161 (1915) (see O.C.G.A. § 9-10-185).

Improper conduct may be corrected by an open rebuke and instructions to the jury. Robinson & Co. v. Stevens, 93 Ga. 535, 21 S.E. 96, 1893 Ga. LEXIS 474 (1893).

Judge may rebuke prejudicial statements to prevent argument on facts not in evidence. Bulloch v. Smith, 15 Ga. 395, 1854 Ga. LEXIS 52 (1854); Doster v. Brown, 25 Ga. 24, 1858 Ga. LEXIS 2 (1858); Forsyth v. Cothran, 61 Ga. 278, 1878 Ga. LEXIS 102 (1878).

Flights of oratory and false logic do not call for mistrials or rebuke; it is the introduction of facts not in evidence that requires the application of such remedies. Georgia Power Co. v. Puckett, 181 Ga. 386, 182 S.E. 384, 1935 Ga. LEXIS 98 (1935); Miller v. Coleman, 213 Ga. 125, 97 S.E.2d 313, 1957 Ga. LEXIS 319 (1957).

Conduct of party or counsel subject to legitimate comment. — What has transpired in a case from its inception to its conclusion, and the conduct of the party or counsel with respect to the case, are the subject of legitimate comment. Miller v. Coleman, 213 Ga. 125, 97 S.E.2d 313, 1957 Ga. LEXIS 319 (1957).

Permissible to draw deductions from evidence regardless of their absurdity. — While counsel should not be permitted in argument to state facts which are not in evidence, it is permissible to draw deductions from the evidence, and the fact that the deductions may be illogical, unreasonable, or even absurd, is matter for reply by adverse counsel and not for rebuke by the court. Miller v. Coleman, 213 Ga. 125, 97 S.E.2d 313, 1957 Ga. LEXIS 319 (1957).

Fact that deductions are illogical is a matter for reply by adverse counsel, and not for rebuke by the court. Gray v. Cole, 20 Ga. 203, 1856 Ga. LEXIS 38 (1856); Seaboard Air-Line Ry. v. Horning, 18 Ga. App. 396, 89 S.E. 493, 1916 Ga. App. LEXIS 371 (1916).

Remarks not introducing facts undisclosed by the evidence not improper. — Remarks of counsel while addressing the jury which do not undertake to introduce any material fact not disclosed by the evidence do not constitute improper argument. Continental Cas. Co. v. Wilson-Avery, Inc., 115 Ga. App. 793, 156 S.E.2d 152, 1967 Ga. App. LEXIS 1260 (1967).

There is nothing wrong in counsel's reading the law of the case as adjudicated upon its previous appearance in the Court of Appeals. City of Commerce v. Bradford, 94 Ga. App. 284, 94 S.E.2d 160, 1956 Ga. App. LEXIS 525 (1956).

Inferences not warranted by evidence should not be indulged in by counsel in their arguments to the jury. McGhee v. Minor, 188 Ga. 635, 4 S.E.2d 565, 1939 Ga. LEXIS 590 (1939).

This section forbids the introduction, by way of argument, of facts not in the record and calculated to prejudice the accused. Miller v. Coleman, 213 Ga. 125, 97 S.E.2d 313, 1957 Ga. LEXIS 319 (1957) (see O.C.G.A. § 9-10-185).

Comment on facts not in evidence improper. — For counsel, in arguing case, to comment upon facts not in evidence before the jury is highly improper. Georgia & A. Ry. v. Pound, 111 Ga. 6, 36 S.E. 312, 1900 Ga. LEXIS 471 (1900). See also Georgia M. and G.R.R. v. Evans, 87 Ga. 673, 13 S.E. 580, 1891 Ga. LEXIS 259 (1891).

Improper argument not to be answered in kind. — Improper remark of counsel is no excuse for an improper reply thereto, where no objection was made against the latter. Higgins v. Cherokee R.R., 73 Ga. 149, 1884 Ga. LEXIS 94 (1884).

The fact that counsel for one party has used improper argument to the jury will not justify or authorize counsel for the

General Consideration (Cont'd)

opposing party to do likewise, under the principle of law that injuria non excusat injuriam. Banks v. Kilday, 88 Ga. App. 307, 76 S.E.2d 642, 1953 Ga. App. LEXIS 1071 (1953).

Improper remarks of counsel are subject to correction either by proper instruction to jury or a mistrial, according to the nature of the remarks and the circumstances under which they were made. Trammell v. Atlanta Coach Co., 51 Ga. App. 705, 181 S.E. 315, 1935 Ga. App. LEXIS 446 (1935).

Merely ruling out improper statements of counsel in argument to jury is insufficient to cure the injury; it is the duty of the court, on objection, to rebuke counsel. Georgia Power Co. v. Puckett, 181 Ga. 386, 182 S.E. 384, 1935 Ga. LEXIS 98 (1935).

Rebuke of counsel sufficient where misconduct not so gross as to require mistrial. — If the misconduct is not so gross, in the opinion of the court, as to require a mistrial, it is generally within the discretion of the court to rebuke counsel and to forbid counsel to persist therein; to instruct the jury not to allow the same to have any effect against the opposite party is an option of the court. Georgia Power Co. v. Puckett, 181 Ga. 386, 182 S.E. 384, 1935 Ga. LEXIS 98 (1935).

This section does not require one corrective action or the other — it requires both corrective actions by the court; the court shall rebuke counsel, and, in addition, shall by all needful and proper instructions to the jury endeavor to remove the improper impressions from the jury's mind. Moorehead v. Counts, 130 Ga. App. 453, 203 S.E.2d 553, 1973 Ga. App. LEXIS 1346 (1973), aff'd, 232 Ga. 220, 206 S.E.2d 40, 1974 Ga. LEXIS 913 (1974) (see O.C.G.A. § 9-10-185).

Proper instruction may amount to rebuke. — To rebuke counsel and endeavor to remove the improper impression from jurors' minds are not necessarily independent actions; where the instruction by the court to the jury to disregard the remarks was full, it in effect amounts to a rebuke of counsel. Counts v. Moorehead, 232 Ga. 220, 206 S.E.2d 40, 1974 Ga. LEXIS 913 (1974); A.W. Easter Constr. Co. v. White, 137 Ga. App. 465, 224 S.E.2d 112, 1976 Ga. App. LEXIS 2488 (1976).

Presumption is that court properly rebuked counsel absent contrary evidence in record. — Where counsel's remarks were grossly improper, it was the duty of the court to rebuke counsel and require counsel to desist and to warn the jury to disregard them, but if it does not appear from the record that the court failed to do this, the court cannot assume that there was any omission in this respect; the presumption is that the court did its duty. McCluskey v. AMOCO, 225 Ga. 63, 165 S.E.2d 830, 1969 Ga. LEXIS 381 (1969).

Rebuking counsel and properly instructing jury not discretionary. — While, under this section, where counsel is guilty of improper conduct and a motion for mistrial is made, the court should take corrective measures, whether or not the motion should be granted is largely in its discretion, but its failure to "rebuke counsel, and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds" is error. Atlantic Coast Line R.R. v. Coxwell, 93 Ga. App. 159, 91 S.E.2d 135, 1955 Ga. App. LEXIS 501 (1955) (see O.C.G.A. § 9-10-185).

Sufficiency of instructions to be determined under facts of each case. — No fixed rule may be laid down as to when conduct or improper remarks of counsel are or are not sufficiently corrected by instructions of the court to the jury to disregard them, as this must be determined under the particular facts and circumstances of each case. Interstate Life & Accident Co. v. Brewer, 56 Ga. App. 599, 193 S.E. 458, 1937 Ga. App. LEXIS 178 (1937).

Whether court takes sufficient steps to remove improper matters from minds of jury is frequently a question of degree to be decided under the circumstances of the case. Howard v. Renfroe, 93 Ga. App. 59, 90 S.E.2d 598, 1955 Ga. App. LEXIS 475 (1955).

While remark of counsel for plaintiff was improper, instructions of court to jury were sufficient to autho-

rize the holding, in the court's discretion, that the improper impression had been removed from the minds of the jury, and the court's denial of the motion for mistrial was not error. Banks v. Kilday, 88 Ga. App. 307, 76 S.E.2d 642, 1953 Ga. App. LEXIS 1071 (1953).

Appellant received proper relief where judge instructed jury per appellant's request. — Where the record shows that the appellant requested the court to instruct the jury to disregard a prejudicial remark, and the judge did so, the appellant is afforded the relief provided under this section. Wilhite v. Mays, 140 Ga. App. 816, 232 S.E.2d 141, 1976 Ga. App. LEXIS 1640 (1976), aff'd, 239 Ga. 31, 235 S.E.2d 532, 1977 Ga. LEXIS 800 (1977) (see O.C.G.A. § 9-10-185).

New trial will not generally be granted where court warns counsel to confine counsel's argument to the evidence and issues in the case, and instructs the jury to disregard the improper statements of counsel. Georgia Power Co. v. Puckett, 181 Ga. 386, 182 S.E. 384, 1935 Ga. LEXIS 98 (1935).

Some matter is so inflammatory that its effect cannot be removed, and mistrial must be granted. Howard v. Renfroe, 93 Ga. App. 59, 90 S.E.2d 598, 1955 Ga. App. LEXIS 475 (1955).

Mistrial proper only where other remedies insufficient. — Allusions to a matter extrinsic to the record by counsel in the argument of a case will not constrain the court to declare a mistrial in every instance; it is only when the foreign matter injected into the case by the argument is of such a prejudicial nature that a rebuke of the statement by counsel and an instruction to the jury will be insufficient to remove any improper impressions from the minds of the jurors that a mistrial should be declared. Chunn v. McRae, 43 Ga. App. 417, 159 S.E. 130, 1931 Ga. App. LEXIS 397 (1931).

Request for mistrial proper where remarks considered extremely prejudicial. — If the remarks are considered so prejudicial that their effect upon the jury cannot be counteracted, the party aggrieved may request that the case be withdrawn from the jury and a mistrial declared. Georgia Power Co. v. Puckett, 181 Ga. 386, 182 S.E. 384, 1935 Ga. LEXIS 98 (1935).

New trial granted where court fails to apply corrective measures on request. — If statements of fact or comments unjustified by the evidence are made by counsel, and it is apparent that the impropriety may be prejudicial to the opposite party, and yet the court takes no action to apply any corrective measure though requested to do so, a new trial will be granted. Georgia Power Co. v. Puckett, 181 Ga. 386, 182 S.E. 384, 1935 Ga. LEXIS 98 (1935).

Circumstances considered in reversing overruling of motion for mistrial. — Where instructions regarding improper statements by counsel are given, the overruling of the motion for mistrial will not be reversed unless (a) the instructions were insufficient for the purpose, or (b) the violation was so flagrant and the error so prejudicial that no instructions whatever would have been sufficient, and the judgment overruling the motion therefore constitutes an abuse of discretion. Collins v. Porterfield, 102 Ga. App. 294, 116 S.E.2d 105, 1960 Ga. App. LEXIS 603 (1960).

Party cannot during trial ignore what the party thinks to be an injustice, take the party's chance on a favorable verdict, and complain later. Wright v. Wright, 222 Ga. 777, 152 S.E.2d 363, 1966 Ga. LEXIS 626 (1966).

Discretion

Restraint and correction of improper argument by counsel is within the discretion of the court, and such discretion will not be controlled unless manifestly abused. Banks v. Kilday, 88 Ga. App. 307, 76 S.E.2d 642, 1953 Ga. App. LEXIS 1071 (1953).

In ruling on matters contemplated by this section, trial judge is vested with broad discretion and the judge's ruling will not be disturbed unless it appears that the judge's discretion was manifestly abused. McCluskey v. AMOCO, 225 Ga. 63, 165 S.E.2d 830, 1969 Ga. LEXIS 381 (1969).

Because defense counsel had completed closing argument, it would not have made sense to instruct counsel to desist from

Discretion (Cont'd)

further improper argument, but the court should have instructed the jury not to consider whether or how a damage award might affect the defendant. Dascombe v. Hanley, 270 Ga. App. 355, 606 S.E.2d 602, 2004 Ga. App. LEXIS 1438 (2004), overruled in part, Stolte v. Fagan, 291 Ga. 477, 731 S.E.2d 653, 2012 Ga. LEXIS 679 (2012).

Judge has very wide discretion in preventing placement by counsel before jury of inadmissible matter. — It is the duty of the trial judge to take such steps as are, in the judge's opinion, necessary to prevent the placing of inadmissible matter before the jury by plaintiff's counsel, and in such action the law vests in the judge a very wide discretion. Johnson v. Cook, 123 Ga. App. 302, 180 S.E.2d 591, 1971 Ga. App. LEXIS 1203 (1971).

Court has wide discretion in declaring or denying a mistrial. — Even where the conduct of counsel exceeds the bounds of propriety, the trial judge is vested with broad discretion in determining whether to grant a mistrial, and the judge's ruling will not be disturbed unless it appears that the judge's discretion was manifestly abused. Walker v. Bishop, 169 Ga. App. 236, 312 S.E.2d 349, 1983 Ga. App. LEXIS 3037 (1983).

Trial court's rulings on objections or motions concerning improper argument not disturbed absent abuse of discretion. — In passing upon objections or motions on account of improper argument, the judge is vested with broad discretion, and the judge's ruling thereon will not be disturbed unless it manifestly appears that the judge abused the judge's discretion. Georgia Power Co. v. Puckett, 181 Ga. 386, 182 S.E. 384, 1935 Ga. LEXIS 98 (1935); Malone Freight Lines v. Pridmore, 86 Ga. App. 578, 71 S.E.2d 877, 1952 Ga. App. LEXIS 1012 (1952); Central Container Corp. v. Westbrook, 105 Ga. App. 855, 126 S.E.2d 264, 1962 Ga. App. LEXIS 1064 (1962); Atlantic Coast Line R.R. v. Smith, 107 Ga. App. 384, 130 S.E.2d 355, 1963 Ga. App. LEXIS 851 (1963); City of Macon v. Smith, 117 Ga. App. 363, 160 S.E.2d 622, 1968 Ga. App. LEXIS 1090 (1968); American Employers Ins. Co. v. Johns, 122 Ga. App. 577, 178 S.E.2d 207, 1970 Ga. App. LEXIS 957 (1970); Intercompany Servs. Corp. v. Kleeb, 140 Ga. App. 512, 231 S.E.2d 505, 1976 Ga. App. LEXIS 1542 (1976).

Denial of sanctions held not abuse of discretion. — Denial of sanctions for defense counsel's improper remarks informing the jury that opposing counsel was representing plaintiffs on a contingent-fee basis was not an abuse of discretion, where issues as to the amount of damages, addressed by the improper remarks, were not reached by the jury, and therefore no harm resulted. Stoner v. Eden, 199 Ga. App. 135, 404 S.E.2d 283, 1991 Ga. App. LEXIS 386 (1991), cert. denied, No. S91C0904, 1991 Ga. LEXIS 703 (Ga. May 15, 1991).

Discretion in declaring mistrial to be liberally exercised in proper cases. — The matter of declaring a mistrial for improper argument of counsel is very important, and the discretion of the trial judge should be liberally exercised in all cases where counsel abuse their privilege of argument by prejudicing the case of the opposite party. Brown v. Wilson, 55 Ga. App. 262, 189 S.E. 860, 1937 Ga. App. LEXIS 63 (1937).

Objections

Duty to correct prejudicial statements absent objection. — In certain instances, a correction is required, even if no objection was made. Metropolitan St. R.R. v. Powell, 89 Ga. 601, 16 S.E. 118, 1892 Ga. LEXIS 412 (1892). See also Bazemore v. Davis, 55 Ga. 504, 1875 Ga. LEXIS 457 (1875).

It is, upon timely objection, error to decline to rebuke counsel and to give cautionary instructions to the jury; where the rebuke is not made or cautionary instructions given, the improper argument goes with the apparent sanction of the court. Howard v. Renfroe, 93 Ga. App. 59, 90 S.E.2d 598, 1955 Ga. App. LEXIS 475 (1955).

Duty of court upon timely objection to caution jury against improper argument. — It is the duty of the trial judge upon a timely and appropriate request of the party likely to be prejudiced thereby, to direct the attention of the jury to the

impropriety of the argument and caution them against it. Georgia Power Co. v. Puckett, 181 Ga. 386, 182 S.E. 384, 1935 Ga. LEXIS 98 (1935).

Trial court's obligation after objection made. — In a medical malpractice case, the appellate court erred by concluding that the plaintiff waived the plaintiff's objection to one instance of allegedly improper closing argument and had acquiesced in the trial court's response to the other, thereby foreclosing further review of those claims because once the trial court sustained plaintiff's objection, the trial court assumed an independent duty to take some remedial action, a curative instruction, or rebuke of counsel, for example, without any additional request from plaintiff's counsel. Stolte v. Fagan, 291 Ga. 477, 731 S.E.2d 653, 2012 Ga. LEXIS 679 (2012), overruled in part, Willis v. State, 304 Ga. 686, 820 S.E.2d 640, 2018 Ga. LEXIS 685 (2018), overruled in part, Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479, 2021 Ga. LEXIS 256 (2021).

As an objection was sustained to defense counsel's improper comments about a dentist's reputation during closing arguments in a dental malpractice action, but the trial court failed to take some remedial action and the comments could have affected the jury's verdict, a new trial was warranted. Stolte v. Fagan, 322 Ga. App. 775, 746 S.E.2d 255, 2013 Ga. App. LEXIS 608 (2013), overruled in part, Willis v. State, 304 Ga. 686, 820 S.E.2d 640, 2018 Ga. LEXIS 685 (2018).

New trial will not be required on account of improper argument, unless there is timely objection, motion, or request to charge, and will not then be required unless the court fails to rebuke counsel and to instruct or charge the jury not to consider the argument, or unless the circumstances of the case are such that the rebuke and instruction or charge of the court is insufficient to remove the improper impression from the minds of the jury. Georgia Power Co. v. Puckett, 181 Ga. 386, 182 S.E. 384, 1935 Ga. LEXIS 98 (1935).

Failure to rebuke no ground for mistrial absent motion. — Where the trial court gave proper instructions to the jury and no request for a reprimand or motion for a mistrial was made, the absence of a reprimand does not constitute grounds for a new trial. Shippen v. Thompson, 45 Ga. App. 736, 166 S.E. 41, 1932 Ga. App. LEXIS 679 (1932).

Equal latitude allowed both counsel regarding objectionable matter which resulted in no harm to either. — Where counsel for defendant, at the very moment of repeating defendant's objection, incorporated into defendant's objection a repetition of the original objectionable matter to which counsel for plaintiff was, equally erroneously, attempting to reply, the latitude allowed to each side was such that no harmful effect resulted to either; accordingly, a reversal was not granted on this ground. Georgia N. Ry. v. Hathcock, 93 Ga. App. 72, 91 S.E.2d 145, 1955 Ga. App. LEXIS 480 (1955).

Declaration of mistrial within court's discretion where ruling on objection indicated to jury to disregard argument. — While if objection is made to improper argument, it is not necessary that a mistrial be moved, where there was no motion for mistrial, the objection interposed was mild, and the withdrawal of the offending argument prompt, and from the court's ruling the jury must have understood that the matter objected to was not for their consideration, it would be within the discretion of the trial court whether it would declare a mistrial. City of Commerce v. Bradford, 94 Ga. App. 284, 94 S.E.2d 160, 1956 Ga. App. LEXIS 525 (1956).

Under this section, an objection and request for some form of corrective action are necessary to present reviewable error. Speagle v. Nationwide Mut. Fire Ins. Co., 138 Ga. App. 384, 226 S.E.2d 459, 1976 Ga. App. LEXIS 2172 (1976) (see O.C.G.A. § 9-10-185).

Necessity for opposing counsel to object or invoke ruling or instruction by court. — When improper argument to the jury is made by an attorney for one of the parties, it is necessary, in order to make such argument a basis for review, that opposing counsel object to such argument or invoke some ruling or instruction with reference thereto by the court. Ehrlich v. Mills, 203 Ga. 600, 48 S.E.2d 107,

Objections (Cont'd)

1948 Ga. LEXIS 496 (1948); Wright v. Wright, 222 Ga. 777, 152 S.E.2d 363, 1966 Ga. LEXIS 626 (1966).

Because an injured person failed to object when an improper argument was made by the defense counsel, failed to ask the trial court to further rebuke the defense counsel or give a curative instruction until after the jury retired for deliberations, and failed to object to the curative charge as given, that issue was waived on appeal. Booker v. Older Americans Council of Middle Ga., Inc., 278 Ga. App. 407, 629 S.E.2d 69, 2006 Ga. App. LEXIS 341 (2006).

O.C.G.A. § 9-10-185, imposing a duty on the trial court to interpose and prevent counsel from making statements of prejudicial matters not in evidence, did not apply in a case in which, although counsel objected to opposing counsel's improper argument regarding reaction times, counsel never obtained a ruling either sustaining or overruling counsel's objection. It is the duty of counsel to obtain a ruling on counsel's motions or objections. Young v. Griffin, 329 Ga. App. 413, 765 S.E.2d 625, 2014 Ga. App. LEXIS 697 (2014), overruled in part, Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479, 2021 Ga. LEXIS 256 (2021).

Timely objection necessary to justify curative instructions. — Objections to counsel's improper statements under O.C.G.A. § 9-10-185 are waived unless the objections are made contemporaneously; thus, a trial court did not err by failing to provide a curative instruction with regard to statements from plaintiff's counsel because the defendant was required to make a timely objection to counsel's statements that the defendant believed were improper. Pulte Home Corp. v. Simerly, 322 Ga. App. 699, 746 S.E.2d 173, 2013 Ga. App. LEXIS 597 (2013).

Counsel cannot demand new trial absent timely objection to improper argument. — It is as much the opposing counsel's duty to object to improper argument as it is to object to improper evidence, and, in the former case as well as in the latter, if opposing counsel permits it without objection, opposing counsel cannot demand a new trial on the ground that the jury may have been affected by it. Georgia Power Co. v. Puckett, 181 Ga. 386, 182 S.E. 384, 1935 Ga. LEXIS 98 (1935).

Verdict not to be set aside for improper remarks absent timely objection. — Although it is the duty of the trial judge, whether so requested or not, to check improper remarks of counsel to the jury, and to seek, by proper instructions to the jury, to remove any prejudicial effect the remarks may be calculated to have against the opposite party, a verdict will not be set aside because of such remarks or because of any omission of the judge to perform the judge's duty in the matter, unless objection be made at the trial. Georgia Power Co. v. Puckett, 181 Ga. 386, 182 S.E. 384, 1935 Ga. LEXIS 98 (1935).

Where there is objection to argument, the court may grant the following forms of relief: (1) an instruction or admonition to the jury to disregard the improper argument; or, if this is deemed inadequate to remove the harmful effect; (2) instruction or admonition to the jury plus a reprimand or rebuke of offending counsel; or, as a last resort, (3) mistrial. Averette v. Oliver, 128 Ga. App. 54, 195 S.E.2d 925, 1973 Ga. App. LEXIS 1383 (1973).

Application

Figurative speech has always been regarded as a legitimate weapon in forensic warfare, if there be evidence before the jury on which it may be founded. Georgia Power Co. v. Puckett, 181 Ga. 386, 182 S.E. 384, 1935 Ga. LEXIS 98 (1935).

Delay in filing a defense may be commented on. McBride & Co. v. Macon Tel. Publishing Co., 102 Ga. 422, 30 S.E. 999, 1897 Ga. LEXIS 513 (1897); Central of Ga. Ry. v. Hall, 124 Ga. 322, 52 S.E. 679, 1905 Ga. LEXIS 708 (1905).

Defendant's sworn plea may be compared with the defendant's testimony to disparage it. McLendon v. Frost, 57 Ga. 448, 1876 Ga. LEXIS 145 (1876); Rucker v. Brown Bros., 6 Ga. App. 361, 65 S.E. 55, 1909 Ga. App. LEXIS 297 (1909).

Method of conducting case may be commented upon by the other party.

Georgia, Fla. & Ala. Ry. v. Sasser, 4 Ga. App. 276, 61 S.E. 505, 1908 Ga. App. LEXIS 271 (1908).

Counsel may comment on failure of party to civil case to produce witnesses. Southern Ry. v. Acree, 9 Ga. App. 104, 70 S.E. 352, 1911 Ga. App. LEXIS 427 (1911).

Failure of employer to examine an employee may be commented upon. Western & A.R.R. v. Morrison, 102 Ga. 319, 29 S.E. 104, 1897 Ga. LEXIS 507 (1897).

History of the trial may be commented upon, subject to control by the discretion of the judge. Adkins v. Flagg, 147 Ga. 136, 93 S.E. 92, 1917 Ga. LEXIS 87 (1917).

Prosecutorial comment on defendant's failure to testify constitutes reversible error if: (1) there was a manifest intent to comment on the failure to testify; and (2) the remark was of such a character that the jury would naturally and necessarily take it to be a comment on defendant's failure to testify. Japhet v. State, 176 Ga. App. 189, 335 S.E.2d 425, 1985 Ga. App. LEXIS 2859 (1985).

Comment on failure of defendant's wife to testify not automatic reversible error. — Although the failure of a defendant's wife to testify is not a legitimate subject matter of argument for counsel for the state, it does not follow automatically that such a comment constitutes reversible error. Where the trial court rebukes the prosecuting attorney immediately in the presence of the jury, instructs the jury that it is not necessary for any defendant or his wife ever to take the stand, and that the burden is always upon the state to prove a defendant's guilt beyond a reasonable doubt, this corrective action is in compliance with this section and eliminates the possibility of prejudice to the defendant from such an improper remark. Casey v. State, 167 Ga. App. 437, 306 S.E.2d 683, 1983 Ga. App. LEXIS 3329 (1983).

State's cross-examination of the defendant's spouse does not put defendant's character in evidence. There is no prejudice to the defendant arising from such cross-examination; thus, no rebuke of the district attorney, instruction of the jury, or mistrial is required. Beasley v. State, 168 Ga. App. 255, 308 S.E.2d 560, 1983 Ga. App. LEXIS 2740 (1983).

Counsel may comment on erasures in account book. Robinson v. Woodmansee, 80 Ga. 249, 4 S.E. 497, 1887 Ga. LEXIS 372 (1887).

Statement that one defendant chose not to deny answer by codefendant not improper. — Statement by counsel for plaintiffs that one defendant had an opportunity to get on the stand and deny any inference from question the counsel had asked codefendant, but that the defendant had chosen not to do so, and that the jury had the right to take this into consideration, was not a statement of prejudicial matters which were not in evidence, but a statement as to matters which had transpired in the case and thus proper subject matter for comment by counsel. Miller v. Coleman, 213 Ga. 125, 97 S.E.2d 313, 1957 Ga. LEXIS 319 (1957).

Counsel should not state prejudicial facts not appearing from the evidence or fairly deducible therefrom in their arguments. Pelham & H.R.R. v. Elliott, 11 Ga. App. 621, 75 S.E. 1062, 1912 Ga. App. LEXIS 118 (1912).

Medical malpractice cases. — Curative instructions under O.C.G.A. § 9-10-185 should have been issued in a medical malpractice action against a doctor and a doctor's medical practice when the medical defendants' counsel improperly stated that the patients' expert had indicated that the fetus died within a few hours of the delivery, when in fact the expert had refused to specify a time of death. Steele v. Atlanta Maternal-Fetal Medicine, 271 Ga. App. 622, 610 S.E.2d 546, 2005 Ga. App. LEXIS 51 (2005), cert. denied, No. S05C1009, 2005 Ga. LEXIS 486 (Ga. June 30, 2005), overruled, Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147, 2009 Ga. LEXIS 395 (2009).

It is not proper for counsel to state counsel's personal belief or to answer improper argument with improper argument; counsel is confined in argument to the facts and circumstances of the case. Georgia Power Co. v. Puckett, 181 Ga.

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386, 182 S.E. 384, 1935 Ga. LEXIS 98 (1935).

Reading from opinion in another case critical of insurance companies improper. — Where an insurer contested the amount of damages, it was improper for counsel for plaintiff to read to the jury from the decision of the Supreme Court in another case a part of a charge to the grand jury, in which the judge criticized and attacked the practice of fire insurance companies in their methods of avoiding the payment of losses. Firemen's Ins. Co. v. Larsen, 52 Ga. App. 140, 182 S.E. 677, 1935 Ga. App. LEXIS 77 (1935).

Reference to wealth of insurance companies improper. — Reference by counsel to the wealth of insurance companies who are party litigants has been uniformly held to be improper by the appellate courts considering the matter. Travelers Indem. Co. v. Wilkes County, 102 Ga. App. 362, 116 S.E.2d 314, 1960 Ga. App. LEXIS 623 (1960).

Remark of plaintiff's counsel that defendant was one of world's richest insurance companies was grossly improper and comes within the purview of this section. Travelers Indem. Co. v. Wilkes County, 102 Ga. App. 362, 116 S.E.2d 314, 1960 Ga. App. LEXIS 623 (1960) (see O.C.G.A. § 9-10-185).

Natural or business relationship to a party may be commented upon. Central R.R. v. Mitchell, 63 Ga. 173, 1879 Ga. LEXIS 163 (1879).

Argument that jury may consider wealth of party's father improper. — In argument to jury, use of language from which the jury could infer that it may consider the wealth of husband's father is improper and could lead to a rather large alimony and child support verdict; a trial court should instruct the jury to disregard such arguments. Moore v. Moore, 240 Ga. 588, 242 S.E.2d 100, 1978 Ga. LEXIS 718 (1978).

Curative actions deemed sufficient. — The trial court's curative actions were sufficient so that a mistrial need not have been granted, where a statement concerning defendant's involvement in other crimes was made but once and the witness, a police officer, was merely responding in narrative form to questions asking the officer to explain the officer's actions regarding the fingerprints taken from the crime scene since it did not appear to be an attempt to interject evidence of other crimes to strengthen a weak case. Collins v. State, 180 Ga. App. 220, 348 S.E.2d 590, 1986 Ga. App. LEXIS 2114 (1986).

Court's instruction had same effect as rebuke. — It is not likely that, after the court told the jury in substance, "If I did not believe you would follow my instructions and forget this improper remark, I would grant a mistrial," the effect was less than it would be if the court had said to counsel instead, "You know the remark was improper, and I reprimand you for it;" the statements were certainly, in each case, an implied rebuke. Malone Freight Lines v. Pridmore, 86 Ga. App. 578, 71 S.E.2d 877, 1952 Ga. App. LEXIS 1012 (1952).

Counsel rebuked effectively by limiting instruction. — See Menningmann v. Independent Fire Ins. Co., 187 Ga. App. 118, 369 S.E.2d 295, 1988 Ga. App. LEXIS 529 (1988).

In a personal injury action arising from an automobile accident, the trial court did not err in declining to grant a mistrial after defense counsel asked the following question of a witness on direct examination: "It's not unusual for attorneys to send their clients to medical doctors to run up medical bills for a lawsuit, is it?", in light of the curative instructions given by the trial court. Banks v. Lewis, 187 Ga. App. 218, 369 S.E.2d 537, 1988 Ga. App. LEXIS 668 (1988).

Failure to charge jury did not contravene § 9-10-185. — Where at the beginning of trial, the court directed counsel that there would be no argument of fact on objections in the presence of the jury, and where after the jurors were seated, counsel for defendant stated that a statement was made by one of the jurors that if the juror got the chance, the juror was going to hang this doctor and asked that if that statement were made, the alternate juror be permitted to take the juror's place, the trial court's failure to affirmatively charge the jury, either when the incident occurred or in the final charge, that they

were not to hold the accusation against their fellow juror against the juror in their deliberations or in any way consider the juror predisposed against defendant, did not contravene O.C.G.A. § 9-10-185 or the cases applying it; the court's election to leave well enough alone in the absence of a carefully and clearly worded request to charge was not deemed in the circumstances to be contrary to law. Clemons v. Atlanta Neurological Inst., 192 Ga. App. 399, 384 S.E.2d 881, 1989 Ga. App. LEXIS 1041 (1989).

Failure to inquire whether comment heard by jury. — The trial court's failure to make a nonintrusive inquiry as to whether defense counsel's comment was heard by the jury constituted an abuse of discretion in granting a mistrial. Urban Medical Hosp. v. Seay, 179 Ga. App. 874, 348 S.E.2d 315, 1986 Ga. App. LEXIS 2045 (1986).

Counsel believing client's case damaged by court's rebuke must move for mistrial. — If counsel for plaintiff feels that the court has been unnecessarily harsh in reprimanding counsel, and that the client's case has been damaged thereby, it is incumbent upon plaintiff's counsel to move for a mistrial. Johnson v. Cook, 123 Ga. App. 302, 180 S.E.2d 591, 1971 Ga. App. LEXIS 1203 (1971).

Failure to charge jury reversible error. — Inasmuch as defense counsel's argument introduced facts which were not in the record and which were clearly prejudicial, the trial court had a duty to instruct the jury that it was to disregard defense counsel's argument, as soon as plaintiff interposed plaintiff's objection, if not before, and the trial court's breach of that duty required reversal. Williams v. Piggly Wiggly S., Inc., 209 Ga. App. 490, 433 S.E.2d 676, 1993 Ga. App. LEXIS 915 (1993), cert. denied, No. S93C1677, 1993 Ga. LEXIS 957 (Ga. Oct. 12, 1993).

Failure to rebuke counsel held reversible error. — Where the harm resulting from the inclusion of a wilful and false swearing instruction was exacerbated by an improper attack by plaintiff's counsel upon the character of defendant's sole witness, the trial court's failure to rebuke counsel or to endeavor to remove the improper impression left in the minds of the jurors was reversible error. All Risk Ins. Agency, Inc. v. Southern Bell Tel. & Tel. Co., 182 Ga. App. 190, 355 S.E.2d 465, 1987 Ga. App. LEXIS 1649 (1987).

Party denied right to open and conclude case entitled to new trial. — Ordinarily, the attorney for the party upon whom the burden of proof rests is entitled to open and conclude; where this right is denied, it will afford, unless the evidence demanded the verdict, ground for new trial, the presumption being that the party to whom it has been improperly denied has been injured. Georgia Power Co. v. Puckett, 181 Ga. 386, 182 S.E. 384, 1935 Ga. LEXIS 98 (1935).

Mistrial required where other remedies insufficient to remove prejudicial effect. — Where remarks of counsel were totally without basis, so far as the record disclosed, and were highly damaging to the defendant in representing the defendant as a criminal and leaving the jury to speculate as to the nature of the defendant's implied offense, despite the action taken by the court and the formal withdrawal of the remarks by counsel, it could not be said that the jury was not greatly prejudiced thereby; the court should have granted a mistrial and erred in overruling the ground of the defendant's motion for new trial complaining of its failure to do so. Brown v. Wilson, 55 Ga. App. 262, 189 S.E. 860, 1937 Ga. App. LEXIS 63 (1937).

Where the record showed a persistent violation of both O.C.G.A. § 9-10-185 and the trial court's order limiting the evidence admissible at trial and barring introduction of specific instances of a perpetrator's prior misconduct by the opposing counsel, when coupled with the trial court's failure to give appropriate correction, a new trial was warranted, as such failure contaminated the jury's deliberations and deprived the perpetrator a fair trial. Sangster v. Dujinski, 264 Ga. App. 213, 590 S.E.2d 202, 2003 Ga. App. LEXIS 1444 (2003).

Incorrect statement of holding of reviewing court in same case requires rebuke or mistrial. — If counsel reads the facts of the previous trial and appeal of the case to the jury, or incor-

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rectly states the effect of the holding of the reviewing court, the impropriety of such conduct would be so grave as to require a reprimand or declaration of a mistrial. City of Commerce v. Bradford, 94 Ga. App. 284, 94 S.E.2d 160, 1956 Ga. App. LEXIS 525 (1956).

No error to deny mistrial for remark that codefendant would not have to pay judgment. — Upon the trial of action against two defendants, a statement by counsel for the plaintiff in the presence of the jury that one of the defendants would not be called upon to pay any judgment which might be rendered for the plaintiff, is not of such a prejudicial nature as would authorize court to hold that the trial judge abused the judge's discretion in refusing to declare a mistrial upon motion of the defendants' counsel, where it does not appear from the assignment of error that the court did not rebuke counsel for the remark and did not by proper instructions endeavor to remove any improper impression that it might have made upon the minds of the jury. Chunn v. McRae, 43 Ga. App. 417, 159 S.E. 130, 1931 Ga. App. LEXIS 397 (1931).

Offer to submit evidence of prior conviction not ground for mistrial where court excluded it. — In action arising from automobile accident, the offer to submit as evidence a copy of the conviction of defendant's driver for reckless driving does not properly come within this section, and was not ground for a mistrial where the court not only excluded such evidence but emphatically instructed the jury to disregard it. City of Atlanta v. Blackmon, 51 Ga. App. 165, 179 S.E. 842, 1935 Ga. App. LEXIS 614 (1935) (see O.C.G.A. § 9-10-185).

Denial of mistrial not error where court properly rebuked counsel and instructed jury. — Where counsel for plaintiff, in counsel's concluding argument to the jury, referred to the defendant as a "Negro stealing society," and the court strongly rebuked the offending counsel and instructed the jury to disregard the incident and not be influenced thereby, the discretion of the court in refusing to grant a mistrial would not be disturbed, it not appearing that a mistrial was essential to preservation of the right of fair trial. Interstate Life & Accident Co. v. Brewer, 56 Ga. App. 599, 193 S.E. 458, 1937 Ga. App. LEXIS 178 (1937).

Mistrial properly denied where evidence supported counsel's unflattering comments on defendant. — The judge did not abuse the judge's discretion in denying a motion to declare a mistrial merely because counsel for the plaintiff in argument to the jury stated that the defendant was "educated in the underworld," where there was evidence that the defendant was a woman of lewd character, who by false representations as to the defendant's age and character induced the plaintiff, an elderly man, to become the defendant's guardian and to spend large sums of money upon the defendant and to convey valuable property to the defendant. McGhee v. Minor, 188 Ga. 635, 4 S.E.2d 565, 1939 Ga. LEXIS 590 (1939).

Mistrial properly refused where defendant objected to plaintiff's reading cross-examination withdrawn by defendant. — Where counsel for plaintiff, having read from certain depositions testimony which the witness had given on direct examination at the instance of the plaintiff, stated in substance that counsel wished to read part of the cross-examination which counsel for the defendant had "withdrawn," and counsel for the defendant thereupon moved that a mistrial be declared, the trial judge was not in error in refusing mistrial. Metropolitan Life Ins. Co. v. Saul, 189 Ga. 1, 5 S.E.2d 214, 1939 Ga. LEXIS 647 (1939).

Comment on party's failure to call expert not cause for mistrial. — Two patrons sued a bar owner after the patrons were shot by another customer, alleging the owner negligently failed to provide adequate security inside the bar. Defense counsel's comment in closing argument that in a long career, counsel had never defended a security negligence case where the plaintiff did not have a security expert was within the bounds of permissible argument, and neither a mistrial nor a curative instruction was required. Vega v. La Movida, Inc., 294 Ga. App. 311, 670

S.E.2d 116, 2008 Ga. App. LEXIS 1186 (2008).

Counsel may not complain that mistrial was not granted after unsuccessful use of other proper remedy. — If counsel, without asking for a mistrial, seeks to have the ill effect corrected by disabusing the minds of the jurors of any injurious impression received, counsel cannot by such procedure take counsel's chances of obtaining a verdict in counsel's favor, and, if unsuccessful, thereafter complain that a mistrial was not granted. Trammell v. Atlanta Coach Co., 51 Ga. App. 705, 181 S.E. 315, 1935 Ga. App. LEXIS 446 (1935).

RESEARCH REFERENCES

Am. Jur. 2d.

75A Am. Jur. 2d, Trial, § 581 et seq.

C.J.S.

88 C.J.S., Trial, § 320 et seq.

ALR.

Counsel's appeal to racial, religious, social, or political prejudices or prejudice against corporations as ground for a new trial or reversal, 78 A.L.R. 1438.

Motion for mistrial, or other similar motion, as condition of reviewing improper argument of counsel, 108 A.L.R. 756.

Offering improper evidence, or asking improper question, as ground for new trial or reversal, 109 A.L.R. 1089.

Reference by counsel in opening statement in civil case to matters which he does not attempt to prove as ground for new trial or reversal, 118 A.L.R. 543.

Statements, comments, or conduct of court or counsel regarding perjury, as ground for new trial or reversal in civil action or criminal prosecution other than for perjury, 127 A.L.R. 1385.

Prejudicial effect of argument or remark that adversary was attempting to suppress facts, 29 A.L.R.2d 996.

Counsel's appeal in civil case to wealth or poverty of litigants as ground for mistrial, new trial, or reversal, 32 A.L.R.2d 9.

Prejudicial effect in civil trial of counsel's misconduct in physically exhibiting to jury objects or items not introduced as evidence, 37 A.L.R.2d 662.

Prejudicial effect of trial court's denial, or equivalent, of counsel's right to argue case, 38 A.L.R.2d 1396.

Prejudicial effect of counsel's addressing individually or by name particular juror during argument, 55 A.L.R.2d 1198.

Counsel's right in civil case to argue law or to read law books to the jury, 66 A.L.R.2d 9.

Prejudicial effect of counsel's remarks, in opening statement in personal injury action, as to plaintiff's family circumstances, number of children, or the like, 68 A.L.R.2d 990.

Prejudicial effect in counsel's opening statement in civil case, of remarks disparaging opposing counsel, opponent, or opponent's case or witnesses, 68 A.L.R.2d 999.

Comment, in argument of civil case, on adversary's failure to call employee as witness, 68 A.L.R.2d 1072.

Prejudicial effect of counsel's argument, in civil case, urging jurors to place themselves in the position of litigant or to allow such recovery as they would wish if in the same position, 70 A.L.R.2d 935.

Prejudicial effect in civil trial of counsel's use during summation, of a litigant for a physical demonstration as to how the accident or incident happened, 74 A.L.R.2d 1094.

Counsel's use, in trial of condemnation proceeding, of chart, diagram or blackboard, not introduced in evidence, relating to damages or the value of the property condemned, 80 A.L.R.2d 1270.

Prejudicial effect of remarks of trial judge criticizing counsel in civil case, 94 A.L.R.2d 826.

Prejudicial effect, in argument or summation in civil case, of attacks upon opposing counsel, 96 A.L.R.2d 9.

Propriety and prejudicial effect of argument or comment by counsel as to settlement negotiations during trial of personal injury action, 99 A.L.R.2d 737.

Statement by counsel relating to race, nationality, or religion in civil action as prejudicial, 99 A.L.R.2d 1249.

Right to withdraw motion for mistrial, 100 A.L.R.2d 375.

Propriety and prejudicial effect of counsel's argument or comment as to trial

judge's refusal to direct verdict against him, 10 A.L.R.3d 1330.

Propriety and prejudicial effect of reference by plaintiff's counsel, in jury trial of personal injuries or death action, to amount of damages claimed or expected by his client, 14 A.L.R.3d 541.

Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein, 15 A.L.R.3d 1101.

Propriety and prejudicial effect of reference by counsel in civil case to amount of verdict in similar cases, 15 A.L.R.3d 1144.

Propriety and effect, in eminent domain proceedings, of argument or evidence as to source of funds to pay for property, 19 A.L.R.3d 694.

Admissibility of evidence of, or propriety of comment as to, plaintiff spouse's remarriage, or possibility thereof, in action for damages for death of other spouse, 88 A.L.R.3d 926.

Counsel's appeal in civil case to self-interest or prejudice of jurors as taxpayers, as ground for mistrial, new trial, or reversal, 93 A.L.R.3d 556.

Propriety and prejudicial effect of comments by counsel vouching for credibility of witness—state cases, 45 A.L.R.4th 602.

Use of plea bargain or grant of immunity as improper vouching for credibility of witness — state cases, 58 A.L.R.4th 1229.

Counsel's argument or comment stating or implying that defendant is not insured and will have to pay verdict himself as prejudicial error, 68 A.L.R.4th 954.

Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workers' compensation benefits, 69 A.L.R.4th 131.

Propriety and prejudicial effect of trial counsel's reference or suggestion in medical malpractice case that defendant is insured, 71 A.L.R.4th 1025.

Attorney's argument as to evidence previously ruled inadmissible as contempt, 82 A.L.R.4th 886.

Prejudicial effect, in civil case, of communications between judges and jurors, 33 A.L.R.5th 205.

9-10-186. Opening and closing arguments.

In civil actions, where the burden of proof rests with the plaintiff, the plaintiff is entitled to the opening and concluding arguments except that if the defendant introduces no evidence or admits a prima-facie case, the defendant shall be entitled to open and conclude. In civil actions for personal injuries, the defendant shall be deemed not to have admitted a prima-facie case if such defendant introduces any evidence as to the extent of damages, other than cross-examination of the plaintiff and witnesses called by the plaintiff.

History.

Code 1981, § 9-10-186, enacted by Ga. L. 1997, p. 951, § 1.

Law reviews.

For article commenting on the enactment of this Code section, see 14 Ga. L. Rev. 22 (1997).

JUDICIAL DECISIONS

Burden on trial counsel. — Even though O.C.G.A. § 9-10-186 gave plaintiff the right to opening and concluding closing arguments, it was incumbent on counsel for the plaintiff to assert the right to make the last argument at the trial level. Sykes v. Sin, 229 Ga. App. 155, 493 S.E.2d 571.

Right to open and conclude arguments to the jury. — In a divorce proceeding, where the only issues submitted to the jury were defendant's claim for

alimony and her claims for damages, on each of those issues, she bore the burden of proof and she was entitled to open and close arguments. Hussey v. Hussey, 273 Ga. 735, 545 S.E.2d 880, 2001 Ga. LEXIS 320 (2001).

In a divorce proceeding, defendant did not waive her right to open and close concluding arguments by waiting to assert the right until after plaintiff testified in opposition to her counterclaims for alimony and damages because, at the time plaintiff testified, he bore the burden of proof on the issues raised in his complaint. Hussey v. Hussey, 273 Ga. 735, 545 S.E.2d 880, 2001 Ga. LEXIS 320 (2001).

Georgia Pipe Co. v. Lawler, 262 Ga. App. 22, 584 S.E.2d 634 (2003), must be overruled to the extent it holds that a defendant who presents no evidence loses the right to open and close the final argument unless the defendant asserts the right before the plaintiff submits evidence. Kia Motors Am., Inc. v. Range, 276 Ga. App. 360, 623 S.E.2d 514, 2005 Ga. App. LEXIS 1092 (2005).

Because a manufacturer did not admit a customer's prima facie case for breach of warranty under O.C.G.A. § 11-2-714(2), the trial court erred in denying the manufacturer the right to open and close the final argument under Ga. Unif. Super. Ct. R. 13.4 and O.C.G.A. § 9-10-186. Kia Motors Am., Inc. v. Range, 276 Ga. App. 360, 623 S.E.2d 514, 2005 Ga. App. LEXIS 1092 (2005).

Trial court did not err under O.C.G.A. § 9-11-21 in realigning the parties to cause the husband, who initially filed the divorce action, to be the defendant and to cause the wife to be the plaintiff; the wife's burden of proof was significantly heavier than the husband's, as the wife had the burden of proof regarding fraudulent transfers, alimony, adultery, and attorney's fees, so the wife was entitled to the procedural rights of a plaintiff, such as those rights to opening and closing statements granted under O.C.G.A. § 9-10-186. Moore v. Moore, 281 Ga. 81, 635 S.E.2d 107, 2006 Ga. LEXIS 579 (2006).

Trial court did not err by readmitting the Defendant's Exhibit 1 as the Plaintiff's Exhibit 9, over the plaintiff's objection because the plaintiff waived the right to object as counsel did not object after the trial court readmitted the document; and, although counsel had previously stated that counsel wanted the exhibit attributed to the defendant so that the plaintiff would have the right to open and conclude closing argument, counsel stated that counsel would honor the trial court's decision either way, and did not object after the court ruled. Petrenko v. Moseri, 333 Ga. App. 14, 775 S.E.2d 272, 2015 Ga. App. LEXIS 424 (2015).

For purposes of the defendant's right to open and conclude closing arguments, the trial court did not err by not requiring the defendant to tender into evidence the Defendant's Exhibit 2 because the exhibit was neither read nor shown to the jury, and the plaintiff's testimony was limited to a recollection of information contained in the document. Petrenko v. Moseri, 333 Ga. App. 14, 775 S.E.2d 272, 2015 Ga. App. LEXIS 424 (2015).

Because the defendant never affirmatively offered the Defendant's Exhibit 1 into evidence on the defendant's behalf and, during the deposition, the doctor was shown the exhibit, but did not read from the deposition or disclose its contents other than to admit that the doctor's assistant had documented a telephone call from the plaintiff's counsel regarding questions about the medical narrative the doctor had prepared, the exhibit was not admitted as a defense exhibit and did not deprive the defendant of the right to open and conclude closing arguments. Petrenko v. Moseri, 333 Ga. App. 14, 775 S.E.2d 272, 2015 Ga. App. LEXIS 424 (2015).

Denying right to final argument within trial court's discretion. — In a child custody modification case brought by a father, the trial court did not abuse the court's discretion in refusing the father's request for more argument after both his counsel and the mother's counsel had given their closing arguments; the father was not completely denied closing argument contrary to O.C.G.A. § 9-10-186. Gordon v. Abrahams, 330 Ga. App. 795, 769 S.E.2d 544, 2015 Ga. App. LEXIS 74 (2015).

ARTICLE 9
GENERAL CIVIL FORMS

Cross references.

Standard forms for use in probate court proceedings, Uniform Rules for the Probate Courts, Standard Forms and General Instructions.

Editor's notes.

The forms contained in this article are an updated version of the "Jack Jones Forms," which continue to satisfy pleading requirements.

JUDICIAL DECISIONS

It was unquestionably the intention of legislature to authorize all actions of slander to be brought under the forms prescribed by this article and it is only necessary for the plaintiff to declare according to the form dictated by law, and everything else may be supplied by the proof. Dickey v. Brannon, 118 Ga. App. 33, 162 S.E.2d 827, 1968 Ga. App. LEXIS 1296 (1968).

Plaintiff in trover action not required to use forms. — While the "Jack Jones Forms" are statutory in origin, trover is not, and a plaintiff in an action in trover is not required to use the statutory or "Jack Jones Form." McCoy v. Romy Hammes Corp., 99 Ga. App. 513, 109 S.E.2d 807, 1959 Ga. App. LEXIS 893 (1959).

Prayer for process to issue requiring defendant to answer at time not required by law quashable. — Prayer in petition for process to issue requiring a defendant to answer at a time other than the time provided by law (in this case, that defendant answer at the next term of court, in accordance with the "Jack Jones Forms") is defective, and process issued thereon is subject to a motion to quash whether the process actually issued is in accordance with the law or in accordance with the prayer. McCoy v. Romy Hammes Corp., 99 Ga. App. 513, 109 S.E.2d 807, 1959 Ga. App. LEXIS 893 (1959).

The "Jack Jones Forms" which were enacted into law in 1847 can continue to be used because they meet the requirement of giving "a short and plain statement of the claim showing that the pleader is entitled to relief" as provided in Ga. L. 1967, p. 226, § 8 (see O.C.G.A. § 9-11-8(a)(2)(A)). Hunt v. Denby, 128 Ga. App. 523, 197 S.E.2d 489, 1973 Ga. App. LEXIS 1536 (1973).

9-10-200. Action for recovery of realty and mesne profits.

The form of an action for the recovery of real estate and mesne profits may be as follows:

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	(Clerk will insert
Defendant	)	number.)

COMPLAINT

The defendant herein named is a resident of _____ (street), _____ (city), _____ County, Georgia, and is subject to the jurisdiction of this court.

1.

Defendant C.D. of said county is in possession of a certain tract of land in said county (here describe the land) to which plaintiff claims title.

2.

Defendant has received the profits of said land since the _____ day of _____, _____, of the yearly value of $_____ and refuses to deliver said land to plaintiff or to pay him the profits thereof.

Wherefore, plaintiff demands judgment against defendant (here list the relief prayed for).

_____
Attorney for plaintiff

_____
Address

History. Orig. Code 1863, § 3301; Code 1868, § 3313; Code 1873, § 3389; Code 1882, § 3389; Ga. L. 1999, p. 81, § 9.

9-10-201. Action for recovery of personalty.

The form of an action for the recovery of personal property may be as follows:

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	(Clerk will insert
Defendant	)	number.)

COMPLAINT

The defendant herein named is a resident of _____ (street), _____ (city), _____ County, Georgia, and is subject to the jurisdiction of this court.

1.

Defendant C.D. is in possession of a certain (here describe the property) of the value of $_____, to which plaintiff claims title.

2.

Defendant refuses to deliver the said _____ to plaintiff or to pay plaintiff the profits thereof.

Wherefore, plaintiff demands judgment against defendant (here list the relief prayed for).

_____
Attorney for plaintiff

_____
Address

History. Orig. Code 1863, § 3302; Code 1868, § 3314; Code 1873, § 3390; Code 1882, § 3390.

9-10-202. Action to recover money on a judgment.

The form of an action to recover money on a judgment may be as follows:

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	(Clerk will insert
Defendant	)	number.)

COMPLAINT

The defendant herein named is a resident of _____ (street), _____ (city), _____ County, Georgia, and is subject to the jurisdiction of this court.

1.

Defendant C.D. is indebted to plaintiff in the sum of $_____, plus interest, on a judgment obtained by plaintiff against defendant.

2.

Said judgment was obtained in the (name of court) held on the _____ day of _____, _____, in (county, city, or town and state), as fully appears in the properly authenticated certified copies of the proceeding attached to this complaint as Exhibit A.

3.

Said judgment has not been satisfied and defendant C.D. has not paid the same.

Wherefore, plaintiff demands judgment against defendant (here list the relief prayed for).

_____

Attorney for plaintiff

_____

Address

History.

Orig. Code 1863, § 3305; Code 1868, § 3317; Code 1873, § 3394; Code 1882, § 3394; Ga. L. 1999, p. 81, § 9.

Code Commission notes.

Pursuant to Code Section 28-9-5, in 1999, a minor punctuation change was made in the last paragraph of the complaint.

9-10-203. Action for breach of warranty in deed.

The form of an action for a breach of warranty in a deed may be as follows:

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	(Clerk will insert
Defendant	)	number.)

COMPLAINT

The defendant herein named is a resident of _____ (street), _____ (city), _____ County, Georgia, and is subject to the jurisdiction of this court.

1.

On the _____ day of _____, _____, defendant C.D. executed to plaintiff a warranty deed to a certain tract of land (here

describe the land), for the sum of $_____, paid by plaintiff to defendant C.D.

2.

Plaintiff has been evicted from said lot of land and defendant refuses to indemnify plaintiff from his damages in that behalf.

3.

Because of said eviction, plaintiff has suffered damages in the amount of $_____, for which defendant is indebted to plaintiff.

Wherefore, plaintiff demands judgment against defendant (here list the relief prayed for).

_____

Attorney for plaintiff

_____

Address

History. Orig. Code 1863, § 3306; Code 1868, § 3318; Code 1873, § 3395; Code 1882, § 3394; Ga. L. 1999, p. 81, § 9.

9-10-204. Action for words.

The form of an action for words may be as follows:

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

A.B.,	)	
Plaintiff	)	
	)	
v.	)	Civil action
	)	File no. _____
C.D.,	)	(Clerk will insert
Defendant	)	number.)

COMPLAINT

The defendant herein named is a resident of _____ (street), _____ (city), _____ County, Georgia, and is subject to the jurisdiction of this court.

Defendant C.D. has injured and damaged plaintiff in the sum of $____, by falsely and maliciously saying of and concerning plaintiff, on the _____ day of _____, ____, the following false and malicious words to _____ (name of person): (here give the words).

Wherefore, plaintiff demands judgment against defendant (here list the relief prayed for).

_____

Attorney for plaintiff

_____

Address

History.
Orig. Code 1863, § 3307; Code 1868, § 3319; Code 1873, § 3396; Code 1882, § 3396; Ga. L. 1984, p. 22, § 9; Ga. L. 1999, p. 81, § 9.