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Unraveling Waiver by Default

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UNRAVELING WAIVER BY DEFAULT

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I. INTRODUCTION

Does a default judgment for nonappearance cut off a defendant's right to move later under section 60 of the Civil Practice Act (CPA)[1] to set aside the judgment because of a defect in service, lack of venue, or lack of personal jurisdiction? In recent years the Georgia Court of Appeals has repeatedly answered this most perplexing question by holding that a defendant who defaults waives his objections to venue[2] and lack of personal jurisdiction.[3] Defects in service, however, are not waived, even when the defendant receives actual notice of the lawsuit.[4] The court of appeals' approach is highly questionable, perhaps even demonstrably erroneous. It is certainly internally inconsistent and is arguably contrary at least in part to the legislative intent to broaden the availability of a motion to set aside based on lack of jurisdiction over the person evidenced in the 1974 amendment to section 60(d).[5]

The confusion has occurred primarily because the court of appeals has failed to recognize that although the waiver rules involved here are connected—indeed at times they become blurred and overlap—actually three different issues are involved. The clarity needed to unravel the problem of waiver by default can be gained by first considering each of the three kinds of waiver separately. The court of appeals' rules will also be compared to the position taken by the Georgia Supreme Court and examined in light of the legislative purpose of section 60(d).

II. IMPROPER VENUE

The leading Georgia case holding that objections to venue are

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[1] 1966 Ga. Laws 609 (codified at GA. CODE ANN. §§ 81A-101 to 186 (1972 & Supp. 1976)).

[2] Allen v. Alston, 141 Ga. App. 572, 234 S.E.2d 152 (1977); Echols v. Dyches, 140 Ga. App. 191, 230 S.E.2d 315 (1976); Aiken v. Bynum, 128 Ga. App. 212, 196 S.E.2d 180 (1973).

[3] Vanguard Diversified, Inc. v. Institutional Assocs., Inc., 141 Ga. App. 265, 233 S.E.2d 247 (1977); Thrift v. Vi-Vin Prods., Inc., 134 Ga. App. 717, 215 S.E.2d 709 (1975).

[4] Morgan v. Pacific Fin. Co., 142 Ga. App. 342, 236 S.E.2d 28 (1977); Mahone v. Marshall Furniture Co., 142 Ga. App. 242, 235 S.E.2d 672 (1977); Hardwick v. Fry, 137 Ga. App. 770, 225 S.E.2d 88 (1976).

[5] 1974 Ga. Laws 1138.

waived by default is *Aiken v. Bynum.*[6] There the defendant, actually a resident of Fulton County but alleged in the complaint to be a resident of Dekalb County, was sued in Dekalb County. Although duly served in the action, the defendant failed to appear, and the trial court entered a default judgment. When the defendant later moved to set aside the judgment, the court of appeals held that he had waived the defense of improper venue since he had not timely set forth that defense in a preanswer motion or in the answer as required by CPA section 12(h). The *Aiken* court considered and expressly rejected the argument that the waiver provisions in section 12(h) do not apply where the defendant fails to defend and accordingly defaults:

> Code Ann. § 81A-112(h)(i) provides that certain defenses, including improper venue, are waived if not made either by motion or responsive pleadings. Defendant contends that his total failure to appear cannot be considered a waiver. We disagree. He had actual notice of the suit and could have appeared for the limited purpose of challenging venue. Allowing a case to go to default judgment is no better than allowing a case to be tried on the merits before coming in with a technical defense.[7]

There is support in federal cases[8] and in a leading treatise[9] for the proposition that a party in default waives the defense of improper venue. The theory is that a defendant must assert this rule 12(b) defense seasonably either in a preanswer motion or in the responsive pleading or lose the right to raise it. A party with actual notice of the lawsuit cannot sit by passively but must object in accordance with the timetable set forth in rule 12;[10] failing to do what rule 12(h) says a party must do to avoid waiver is itself a waiver.[11]

Judged by the federal authorities, the result reached in *Aiken v. Bynum* is defensible. Parenthetically, however, there may be some

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[6] 128 Ga. App. 212, 196 S.E.2d 180 (1973).

[7] *Id.* at 213, 196 S.E.2d at 181.

[8] Cloverleaf Freight Lines v. Pacific Coast Wholesalers, 166 F.2d 626 (7th Cir. 1948); H & F Barge Co. v. Garber Bros., Inc., 65 F.R.D. 299 (E.D. La. 1974); Geo-Physical Maps, Inc. v. Toycraft Corp., 162 F. Supp. 141 (S.D.N.Y. 1958). *See* Commercial Cas. Ins. Co. v. Consolidated Stone Co., 278 U.S. 177 (1929) (lack of venue must be "seasonably" asserted, at the latest before the expiration of the period allotted for entering a general appearance and challenging the merits).

[9] 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1391, at 855-58 (1969) [hereinafter cited as WRIGHT & MILLER].

[10] *Id.* at 857-58.

[11] *Id.*

reason to wonder whether by fixing rules of venue the Georgia Constitution does not peculiarly accord venue some of the attributes normally associated with subject matter jurisdiction,[12] which is not waived by default.[13]

III. Lack of Personal Jurisdiction

It is entirely within the province of state law to decide whether a default judgment in a state court cuts off the defense of improper venue. However, to extend without further critical analysis the rule that venue may be waived to hold that the defense of lack of jurisdiction over the person by a nonresident party may also be waived is highly problematic. Nevertheless, the court of appeals took that faulty step in *Thrift v. Vi-Vin Products, Inc.*[14] The plaintiff in *Thrift* sued the nonresident defendant on open account in the state court of Dekalb County, and the trial court asserted personal jurisdiction over the defendant under Georgia's long-arm statute.[15] The defendant was served with process in New Jersey but did not appear or defend. Following the entry of a default judgment, the defendant moved in the rendering court to set aside the judgment for lack of personal jurisdiction. According to the court of appeals, the defendant had waived this defense by its failure to assert the lack of jurisdiction before default by answer or motion, citing CPA section 12(h) as authority:

> The defense of lack of jurisdiction over the person is waived if no motion to dismiss on this ground has been made nor included in a responsive pleading. CPA §12(h)(i) . . . . It appears that defendant was properly served with process in accordance with the Long Arm Statute. It was then incumbent on it to raise the defense of lack of personal jurisdiction by motion or by answer. Defendant did neither. Therefore, a waiver of this defense resulted. The trial court acquired jurisdiction over defendant's person and the resulting judgment by default was conclusive. *Aiken v. Bynum* . . . .[16]

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[12] *See generally* Ellington, *Current Problems with Venue in Georgia*, 12 Ga. St. B.J. 71 (1975).

[13] 10 Wright & Miller, § 2695, at 326 (1973).

[14] 134 Ga. App. 717, 215 S.E.2d 709 (1975).

[15] 1966 Ga. Laws 343-44 (amended 1968, 1970) (codified at Ga. Code Ann. §§ 24-113.1 to 118 (1971)).

[16] 134 Ga. App. at 718, 215 S.E.2d at 710.

Lack of jurisdiction over the person is, of course, listed along with improper venue as a section 12(b) defense which is subject to waiver under section 12(h). But this is merely a surface similarity. The due process clause of the United States Constitution limits a state's power to adjudicate in regard to nonresidents. It does not follow from section 12 that a court can force a nonresident to appear to challenge the jurisdiction of the court over him or else lose that defense.[17] In contrast to *Thrift*, it is well-settled that where "the defendant makes no appearance and the judgment goes by default, the defendant may defeat subsequent enforcement in *another* forum by demonstrating that the judgment issued from a court lacking personal jurisdiction."[18] If a defendant may collaterally attack a default judgment when a party seeks to enforce it against him in another forum because the rendering court lacked the requisite in personam jurisdiction, why should he be foreclosed from moving to set aside that judgment on that same ground in the rendering court?

Numerous federal cases have held that a default judgment may be vacated under Federal Rule of Civil Procedure 60(b)(4) on the ground of lack of personal jurisdiction of the court rendering the judgment if the defendant can show that he was served outside the jurisdiction of the court and no statute validly authorized such extraterritorial service[19] or that his contacts with the state were too minimal to satisfy the forum's long-arm statute.[20] It is not altogether

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[17] GA. CODE ANN. § 81A-182 (1972) expressly provides that "[t]his Title shall not be construed to extend or limit the jurisdiction of the courts or the venue of actions therein."

Should a defendant specially appear and unsuccessfully challenge the court's jurisdiction over his person and then default, a different result is produced. In that situation, a judgment rendered against the defendant is incontestably valid because his appearance conferred on the court jurisdiction to decide if it had jurisdiction over the defendant. The judgment that it had in personam jurisdiction becomes res judicata. *See* Baldwin v. Iowa State Traveling Men's Assn., 283 U.S. 522 (1931).

[18] Hazen Research, Inc. v. Omega Minerals, Inc., 497 F.2d 151, 152 (5th Cir. 1974) (emphasis added). *See* Pardo v. Wilson Line, Inc., 414 F.2d 1145 (D.C. Cir. 1969); Mooney Aircraft, Inc. v. Donnelly, 402 F.2d 400 (5th Cir. 1968); 7 J. MOORE, FEDERAL PRACTICE ¶ 60.25, at 307 (2d ed. 1975); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.22, at 647 (2d ed. 1977).

[19] Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871 (3d Cir.), *cert. denied*, 322 U.S. 740 (1944); Kadet-Kruger & Co. v. Celanese Corp., 216 F. Supp. 249 (N.D. Ill. 1963); Seman v. Pittsburgh Brewing Co., 25 F.R.D. 209 (N.D. Ohio 1960); Waters v. Waters, 28 Misc. 2d 869, 212 N.Y.S.2d 856 (Sup. Ct. 1961). *See* Butterworth v. Hill, 114 U.S. 128 (1885). *See generally* 6 J. MOORE, FEDERAL PRACTICE ¶ 55.09, at 55-201 to 202 (2d ed. 1976) (footnotes omitted):

> A judgment by default *for want of appearance* is void and subject to being vacated under Rule 60(b)(4) or collaterally attacked in another action if the rendering court lacks the requisite jurisdiction over the defendant that is needed for the type of judgment, i.e., in personam, quasi in rem, or in rem, that it renders.

[20] Misco Leasing, Inc. v. Vaughn, 450 F.2d 257 (10th Cir. 1971); Ruddies v. Auburn Spark

clear whether the defendant's ability to set aside the judgment in the rendering court simply follows from the acknowledged rule on collateral attack or whether, as some courts have explained it, the waiver provisions in rule 12(h) do not come into play unless the defendant appears.[21] In either case, under the prevailing view there can be no waiver of lack of personal jurisdiction where the party has defaulted and made no appearance before the court.

> [I]f the extraterritorial service upon the individual defendants was unauthorized and invalid it did not confer upon the district court the power to adjudicate the controversy between the parties . . . . The individual defendants were, therefore, entitled to ignore the whole proceeding and subsequently attack any default judgment which might result from it.[22]

The only authority cited by the court of appeals in *Thrift* to support the waiver was *Aiken v. Bynum*, a case involving waiver of venue, which in turn relied on a discussion of rule 12(h) in the *Wright & Miller* treatise:

> [W]hen the party has received actual notice of the suit there is no due process problem in requiring him to object to the ineffective service within the period prescribed by Rule 12(h)(1) and the defense is one that he certainly can waive if he wishes to do so.[23]

Plug Co., 261 F. Supp. 648 (S.D.N.Y. 1966); DiVechhio v. Gimbel Bros., 40 F.R.D. 311 (W.D. Pa. 1966).

[21] Berlanti Constr. Co. v. Republic of Cuba, 190 F. Supp. 126, 129 (S.D.N.Y. 1960).

[22] Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871, 873 (3d Cir.), *cert. denied*, 322 U.S. 740 (1944).

[23] 5 WRIGHT & MILLER, *supra* note 9, § 1391, at 857.

It is interesting to note Wright's personal evolution to the position that a default constitutes a waiver of the objection of lack of personal jurisdiction and defective service of process. As editor of the 1960 edition of *Barron & Holtzoff*, Wright concluded that if

> service of process is insufficient to confer jurisdiction of the person, the defendant does not waive this defense by failing to raise it by motion or pleading within the time for answer, since the court has no power over the defendant unless he submits to its jurisdiction by moving or pleading.

1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 370, at 513 (C. Wright ed. 1960). By 1968, however, Wright's position was unclear. The new edition stated that

> [u]nder Rule 12(h) the objection of insufficiency of service of process . . . and lack of jurisdiction over the person . . . are [*sic*] waived if not asserted in a timely answer or motion. . . . Of course if a party is never served at all, he cannot be held to have waived his objection to lack of jurisdiction over the person by non-assertion within 20 days; due process would preclude such a result and the rules themselves preclude it, by making the 20 day period run from the date of service. But where the party has received actual notice of the suit there is no due process objection to requiring him to

Legal researchers normally may rely on *Wright & Miller* with complete confidence; unfortunately, in this instance *Wright & Miller* adopts a position that is against the weight of authority and that is almost wholly unsupported. A single cited case, *Bavouset v. Shaw's of San Francisco,*[24] does state that a motion to dismiss for lack of jurisdiction over the person is not timely and is waived once the case is in default. *Bavouset,* however, denied entry of the default on other grounds. Even more significantly, the cases on which *Bavouset* relied are all cases involving the waiver of venue, not the waiver of personal jurisdiction.

Not only is *Bavouset* flimsy support for the proposition that the lack of personal jurisdiction may be waived by default, but *Wright & Miller* itself contradicts this position. Had the court of appeals in *Thrift* read further, it would have found that *Wright & Miller* qualifies its stance in discussing rule 55 and default:

> [A]n action will be dismissed despite the entry of a default when it appears that the court lacks subject matter jurisdiction. The same generally will be true if the court lacks jurisdiction over defendant; however, there may be some question whether allowing a default to be entered constitutes a waiver of his right to object to the lack of personal jurisdiction or venue.[25]

And in yet another passage the treatise, still relying on essentially the same cases, separates default waivers of venue from default waivers of personal jurisdiction. *Wright & Miller* notes that "proper venue is not essential to a valid judgment; therefore a venue defect will be waived by failing to appear and suffering a default judgment."[26] The treatise states, however, that "when the court fails to establish personal jurisdiction over defendant, any judgment rendered against him will be void."[27] In sum, *Wright & Miller,* taken

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object to the ineffective service . . ., and the objection is one which he certainly can waive if he wishes to do so.

1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 370, at 94 (C. Wright ed. 1968).

For a discussion of this change in Wright's position, see Zelson v. Thomforde, 412 F.2d 56, 58 n.8 (3d Cir. 1969).

[24] 43 F.R.D. 296 (S.D. Tex. 1967).

[25] 10 WRIGHT & MILLER, *supra* note 9, § 2696, at 339-40 (footnotes omitted).

[26] *Id.* § 2695, at 327.

[27] *Id.* at 326. Furthermore, in connection with rule 60(b), the treatise states that a judgment "is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties . . . ." 11 WRIGHT & MILLER, *supra* note 9, § 2862, at 198-200 (1973).

as a whole, hardly gives unqualified support to a doctrine of waiver of personal jurisdiction by default.

In fact, the court of appeals does not hold that all challenges to lack of jurisdiction over the person are waived by default. Where the defendant was not served at all, Georgia courts follow the general rule that a motion to set aside pursuant to section 60 should be allowed.[28] Quite plainly, due process forbids subjecting a defendant to a judgment in an action of which he is not given due notice.[29]

Put precisely, then, the question is whether giving a nonresident actual notice of the lawsuit is sufficient to force him to appear to challenge the court's jurisdiction over him. The United States Supreme Court long ago answered that question in the negative. In *Butterworth v. Hill,*[30] the Court held that process issuing from a federal court in Vermont and served personally on the Commissioner of Patents in Washington, D.C., could not compel the Commissioner's appearance in the Vermont action where the then-governing statute provided that a defendant could be sued only in the district where he resided or could be found. In allowing the Commissioner to challenge the personal jurisdiction of the court by appeal following his default, the Court observed:

> The Act of Congress exempts a defendant from suit in any district of which he is not an inhabitant, or in which he is not found at the time of the service of the writ. It is an exemption which he may waive, but unless waived he need not answer and will not be bound by anything which may be done against him in his absence.[31]

Butterworth v. Hill should lay to rest the notion that a nonresident waives his objection to the lack of personal jurisdiction by failing to respond to process and to assert his jurisdictional defense in the forum in which he is sued. Viewed properly, rule 12(h) operates to waive the defense of lack of personal jurisdiction by a defendant who *appears* but fails to assert that defense in timely fashion. The holding in *Thrift,* however, would compel a nonresident to appear in whatever forum the plaintiff chooses—no matter how ten-

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[28] *Compare* West v. Forehand, 128 Ga. App. 124, 195 S.E.2d 777 (1973), *with* Schwarz v. Thomas, 222 F.2d 305 (D.C. Cir. 1955).

[29] *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Wuchter v. Pizzutti, 276 U.S. 13 (1928); Allan v. Allan, 234 Ga. 620, 216 S.E.2d 862 (1975).

[30] 114 U.S. 128 (1885).

[31] *Id.* at 133.

uous the defendant's connection with that forum—or else lose the right to challenge the jurisdiction of the court over him. It does not undermine the proper scope and efficacy of rule 12(h) to insist that a defendant who has never submitted himself personally to the jurisdiction of the court does not lose his right to object by failing to contest such jurisdiction prior to the entry of a default judgment against him.

IV. Defective Service of Process

One way to test critically the result in *Thrift* is to compare the court of appeals' position there with other holdings for overall consistency. For example, the court of appeals has held recently that a defendant may move to set aside a default judgment because of *defects* in the service of process even though the defendant had actual notice of the lawsuit. Thus, in *Morgan v. Pacific Finance Co.*,[32] the court of appeals set aside a default judgment because process in the action had been left, contrary to section 4(d)(7), with the defendant's next door neighbor who nevertheless had faithfully and promptly delivered it to the defendant. And, in *Mahone v. Marshall Furniture Co.*,[33] the defendant successfully moved to set aside a default judgment because the summons and complaint had been left with a babysitter who did not reside in defendant's home, although the babysitter had in fact notified the defendant of the day's big event.

Defective service of process is another section 12(b) defense waived by the failure to assert it in a timely manner; yet, curiously, the court of appeals does not invoke the waiver provisions of section 12(h) when the defendant fails to appear or respond to process. Rather, defective service of process is said to render the judgment void because the court lacked jurisdiction over the defendant.[34] There seems to be far more reason to treat the resident defendant's failure to object to a defect in service as a waiver by allowing a default judgment to be entered against him than to apply a waiver rule to a nonresident whose objection goes to the very power of the court to adjudicate concerning his interests. *Wright & Miller* at one

[32] 142 Ga. App. 342, 236 S.E.2d 28 (1977).

[33] 142 Ga. App. 242, 235 S.E.2d 672 (1977).

[34] *Id.* at 243, 235 S.E.2d at 673. On the other hand, a defendant served in the state while in custody on criminal charges may waive his immunity from civil service of process by allowing the case to go into default without asserting that defense. King v. Phillips, 70 Ga. 409 (1883). *See* Schwarz v. Thomas, 222 F.2d 305 (D.C. Cir. 1955).

point contrasts an objection based on the court's failure to establish personal jurisdiction with an objection asserting mere defects in service: "[A] defect in the service of process may not render the proceedings void, which means that the court has personal jurisdiction over defendant and an objection to the service may be waived by allowing a default and judgment to be entered."[35] A plausible argument can be made that defects in service of process are waived by operation of rule 12, although the weight of authority is to the contrary.[36] It simply is impossible, however, to square a "no waiver" rule for defects in service with the waiver of the defense of lack of personal jurisdiction raised by nonresidents.

The line separating a case of defective service from one in which the defendant objects to service because the forum lacks a constitutionally sufficient basis to adjudicate concerning the defendant is not always easy to find. Suppose a nonresident moves to set aside a default because service was mailed to him under a long-arm statute calling for personal service outside the state. Or suppose a nonresident is duly served in conformity with a long-arm statute which by its terms does not apply to him because he was a resident of the state at the time the cause of action arose.[37] Or suppose service is duly perfected pursuant to the terms of the long-arm statute on a defendant who insists that the statute constitutionally could not apply to him in light of the quality and quantity of his contacts with the forum. Should only the first of these examples be characterized as a defect in service? Although that conclusion hardly seems reasonable, it seems to follow from the decisions rendered by the court of appeals. Yet each of these examples also seems to raise the fundamental issue of whether the rendering court had the requisite jurisdiction over the person necessary to support the default judgment.

V. THE GEORGIA SUPREME COURT

There is good reason to believe that the position of the court of

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[35] 10 WRIGHT & MILLER, *supra* note 9, § 2695, at 326-27.

[36] *See, e.g.*, Veeck v. Commodity Enterprises, Inc., 487 F.2d 423 (9th Cir. 1973); *In re* Eizen Furs, Inc., 10 F.R.D. 137 (E.D. Pa. 1950). Bruce v. Paxton, 31 F.R.D. 197 (E.D. Ark. 1962): "[A]s a matter of federal law, a default judgment rendered in an *in personam* action in which defendant has not entered his appearance and has not been validly served with process is absolutely void and will be set aside on motion. . . ." *Id.* at 200.

[37] Prior to its amendment by 1977 Ga. Laws, p. 586, the Georgia long-arm statute did not apply to parties who were residents of the state at the time the cause of action arose even if they had become nonresidents by the time service of process was attempted. *See* Thompson v. Abbott, 226 Ga. 353, 174 S.E.2d 904 (1970).

appeals on waiver of personal jurisdiction is contrary to the view of the Georgia Supreme Court. In *O.N. Jonas Co. v. B & P Sales Corp.*,[38] the nonresident defendant was duly served pursuant to the long-arm statute in an action on account brought by a Georgia manufacturer to recover a payment due from its out-of-state customer. Two days after default judgments were entered, the defendant sought to set them aside. The supreme court affirmed the order of the trial court setting aside the default judgments after determining that the nonresident's contacts with the state were not sufficient to constitute "transacting business" within the meaning of the long-arm statute. The supreme court did not even mention the possibility of waiver by default. Hence, *O.N. Jonas Co.* stands at least as "physical precedence" that such jurisdiction defects are not waived by nonappearance.

VI. The Legislative Purpose

Finally, there is a substantial question whether the waiver of personal jurisdiction by default is consistent with the purpose behind the 1974 amendment to section 60(d). Prior to the 1974 amendment, a motion to set aside a judgment could be granted only for "some nonamendable defect which does appear upon the face of the record or pleadings."[39] Using this standard, the court of appeals in *West v. Forehand*[40] set aside a default judgment entered against a nonresident executor who denied receiving notice of the suit and who had not been served either personally or in the alternative manner provided by statute for service upon nonresident executors. Thus, prior to the 1974 amendment, section 60(d) could be used to set aside a default judgment for lack of jurisdiction over the person only where the defect, as here, appeared on the face of the record.

In 1974 section 60(d) was amended to authorize "a motion to set aside . . . to attack a judgment based upon lack of jurisdiction over the person or subject matter, regardless of whether such lack of jurisdiction appears upon the face of the record or pleadings."[41] The section, as amended, certainly seems ideally designed to allow challenges to jurisdiction by a nonresident who, although duly served, wishes to contest the application of the long-arm statute to him

[38] 232 Ga. 256, 206 S.E.2d 437 (1974).
[39] *See* Ga. Code Ann. § 81A-160(d) (1972).
[40] 128 Ga. App. 124, 195 S.E.2d 777 (1973).
[41] 1974 Ga. Laws 1138.

based on his insufficient contacts with the state. It is in just this type of case that the lack of jurisdiction may not appear on the face of the record but can come to light only by sifting through and weighing the various facts to determine the connection between the defendant and the state.

The court of appeals in *Phillips v. Williams*[42] did once conclude that the 1974 amendment serves to prevent waiver of the defense of lack of jurisdiction under section 12(h) by allowing that defense to be raised in a motion to set aside under section 60. More recent decisions, however, have limited *Phillips v. Williams* to its facts[43] and reaffirmed that "[t]he 1974 amendment to CPA's 60(d) did not abolish the general rule of waiver by nonaction which exists where a defendant is properly served and elects not to respond to the process despite notice therein of its requirements."[44]

VII. CONCLUSION

The position adopted by the court of appeals that the defendant waives the defense of lack of jurisdiction by default for nonappearance is plainly contrary to the weight of authority. Moreover, it cannot be reconciled with the court's "no waiver" rule for mere defects in service. Finally, it is at odds with the position of the Georgia Supreme Court and the intent behind broadening the scope of jurisdictional challenges in the 1974 amendment to section 60(d).

The case development of the long-arm statute by the Georgia

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[42] 137 Ga. App. 578, 224 S.E.2d 515 (1976).

[43] In *Phillips v. Williams*, defendant Williams, a resident of Banks County, was sued in Fulton County as a joint tortfeasor with one who resided in Fulton County. Williams failed to answer, and the trial court entered a default judgment against him. Williams later moved to set aside the judgment under section 60(d) and was successful because the validity of the jurisdiction (venue) of the court as to him depended entirely on the residence of his co-defendant. Once judgment was entered in favor of the Fulton County co-defendant, jurisdiction (venue) over the Banks County defendant disappeared under well-settled rules. *See* Warren v. Rushing, 144 Ga. 612, 87 S.E. 775 (1916). Although the plaintiff argued that Williams had waived his objection to improper venue under section 12(h) by failing to assert the defense in a preanswer motion or answer, the court refused to find waiver here because the lack of jurisdiction (venue) defense was not available to Williams until the court returned its verdict in favor of his co-defendant. 137 Ga. App. at 580, 224 S.E.2d at 517.

The court then continued by observing that the effect of the 1974 amendment was "to prevent waiver of the defense of lack of jurisdiction under CPA § 12(h)(1) by allowing it to be raised in a motion to set aside under CPA § 60(d)." *Id.* It was this latter ruling that was disaffirmed in subsequent cases.

[44] Vanguard Diversified, Inc. v. Institutional Assocs., Inc., 141 Ga. App. 265, 266, 233 S.E.2d 247, 247 (1977). *See also* Allen v. Alston, 141 Ga. 572, 573-74, 234 S.E.2d 152, 153 (1977).

judiciary over the last five years has been truly excellent. The confusion surrounding waiver by default warrants equal judicial attention and correction.