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Current Problems with Venue in Georgia

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by C. Ronald Ellington

Georgia's first constitution, the Constitution of 1777, contained a section providing that "all matters in dispute between contending parties, residing in different counties, shall be tried in the county where the defendant resides, except in cases of real estate, which shall be tried in the county where such real estate lies." The practice of specifying rules of venue in the constitution thus dates from the very beginning of our state and has been repeated and expanded in subsequent constitutional revisions. The Constitution of 1798, for example, added the rule that joint obligors, residing in different counties, may be sued in the county where residence of either. The Constitution of 1861 included an explicit provision governing the place of venue for equitable actions, and with the adoption of the Constitution of 1868, all the present-day rules of venue had been fixed as part of the fundamental law of the state.

There were, notwithstanding the hierarchy of the venue rules in our structure of laws, some early objections from members of the Bar that these venue rules were being applied in an overly technical way that worked to defeat, rather than further, the cause of justice. These objections were met in 1906 by the firm rejoinder of Justice Lumpkin that "the right to be sued in the proper county is not merely technical, but is a substantial, constitutional right." This statement by Justice Lumpkin still aptly describes the prevailing judicial attitude toward Georgia's venue requirements.

On the other hand, over the years many of the rules governing trial practice and procedure in Georgia have been modernized and revised in keeping with contemporary needs and concerns. In 1966 the General Assembly adopted the Civil Practice Act, Rule 1 of which proclaims that its provisions "shall be construed to secure the just, speedy, and inexpensive determination of every action." Two important provisions in the CPA for promoting judicial economy and efficiency are Rule 14 governing impleader and Rule 13...
dealing with counterclaims.

Impleader, or third-party practice, is the procedure by which a defendant can bring into the action one that he claims is liable to him for all or part of plaintiff’s claim against him.

Similarly, Rule 13 seeks to promote the joinder of claims to expedite the resolution of all the controversies between the parties in one suit to avoid a circuity of actions and multiple litigation. To these ends Rule 13(h) authorizes the joinder of additional parties for the purpose of adjudicating a counterclaim that has been asserted to dispose of an action in its entirety and to grant complete relief to all the concerned parties.9

While the Georgia appellate courts have been receptive to the advantages offered by impleader and counterclaims,10 they have rigorously and unduly adhered to the constitutional mandate that in civil actions a defendant is entitled to be sued in the county of his residence, unless the venue for the action is controlled by one of the specified exceptions contained in the Constitution.

Viewed in the abstract, perhaps, this ancient rule of venue is easy to apply and seems to strike a sensible balance between the interests of plaintiffs and defendants, although the modern trend is to give the plaintiff a wider choice of places of venue by allowing civil actions to be brought as well where “a substantial part of the events or omissions giving rise to the claim occurred.”11 However, in practice the results dictated by venue concerns have often been less than sensible. The availability of obtaining venue for the action against the defendant is as important as securing the requisite personal jurisdiction. And, unfortunately, the strict application of Georgia’s constitutional venue rules has seriously undermined the effectiveness of the CPA rules allowing impleader and counterclaims. Given the scarcity of judicial resources and the often publicized backlog in trial court calendars, the time has come for a critical assessment of the interaction of venue and the rules authorizing impleader and counterclaims in the CPA.

**Impleader and the Legacy of Register v. Stone**

In the well-known case of *Register v. Stone’s Independent Oil Distributions, Inc.*12 the supreme court held that venue must be independently established before third-party defendants could be impleaded under Rule 14. The factual situation in *Register* illustrates and typifies the kind of case that impleader was devised to handle; yet, the Georgia venue requirements, as construed by the court, barred its use.

In *Register* the plaintiff, a Mrs. Bailey, commenced an action in the Dodge Superior Court seeking damages from various defendants who she alleged were jointly responsible for a multiple vehicle collision that injured her husband. Although some of the defendants resided in counties other than Dodge, venue was proper against all the co-defendants in the forum for the purpose of plaintiff’s original action because joint tortfeasors may be sued in the county of residence of any one defendant.13 However, after filing suit plaintiff amended her complaint to strike Register as a defendant. Stone, one of the originally named defendants, then sought to implead Register as a third-party defendant in the main action by contending that Register was liable through contribution to Stone for a pro rata share of any verdict and judgment returned in favor of the plaintiff against Stone. Register moved to dismiss the third-party complaint on the ground that as a resident of Laurens County, venue could not properly be had over him in Dodge County, the forum of the principal suit.

The supreme court upheld the third-party defendant's venue objections. Although recognizing that a joint tortfeasor’s right to contribution could be procedurally enforced through an impleader action, the supreme court ruled that such an action was in the nature of an independent suit that could be maintained only in the county of the residence of the alleged joint tortfeasor.14 This conclusion, reasoned the court, was demanded because under the constitution a defendant is entitled to be sued in the county of his residence and a procedural rule in the CPA could not expand the venue of such actions.15

The result in *Register* has been both criticized16 and defended as unavoidable.17 Certainly, it is unfortunate and should have been avoided if possible. And, Judge Eberhardt, writing for the court of appeals in the case below, believed that it could be avoided.18 The approach followed by the court of appeals was to view the impleader action as an ancillary proceeding closely connected with and arising out of the dispute in the main action. Hence, the need to establish venue independently was obviated. Under the approach adopted by the court of appeals, the venue for the third-party action was simply predicated on the venue established in the main action.

This, of course, is the approach followed in federal practice

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where both subject-matter jurisdiction and venue are treated as ancillary in third-party actions. To say, as the supreme court did in Register, that the federal cases are inapposite because the federal jurisdictional and venue standards are different misses the mark somewhat. Even in federal practice, impleader is not deemed to expand the court's jurisdiction. Rather, impleader is deemed to warrant the use of the court's powers of ancillary jurisdiction, i.e., a judicially developed concept based on the premise that a court which has jurisdiction over a case can, as an incident of disposing of the case in its entirety, decide other matters raised by the case over which it would not have jurisdiction or venue if they were independently presented. Thus, because the defendant's right of action against the third-party under Rule 14 must be based on the same aggregate core of facts that constitutes plaintiff's claim, the use of ancillary jurisdiction enables the court to determine jurisdiction over plaintiff's claim to determine the third-party claim springing out of the same core of facts without satisfying additional jurisdictional grounds. Therefore, by reversing the court of appeals and requiring that venue be independently established, the supreme court in Register appears to have renounced the judicial power to exercise ancillary jurisdiction, in the face of Georgia's constitutional venue rules.

Since 1971 when Register was decided, Georgia appellate courts have carried out both the letter and the spirit of its mandate. Two recent cases further underscore the current venue-related problems of impleader. In one, the court of appeals extended the principle of Register, bypassing an opportunity to ameliorate its harsh rigors. In the second case, however, the court of appeals sanctioned a sleight-of-hand method of avoiding the pitfalls of Register.

In Louisville & Nashville R.R. v. Bush, one Hogan, the driver of an automobile, and Bush, a guest passenger, were injured in a car-train collision in DeKalb County. Hogan, then a resident of DeKalb County, filed suit there against the railroad for her injuries. At the same time, Bush, the passenger, also filed suit in DeKalb County against the defendant railroad for her injuries. Since both the Hogan suit and the Bush suit arose out of the same collision, the cases were ordered consolidated for trial. Thereafter, the trial court entered an order in Bush's law suit granting leave to the defendant railroad to file and have served a third-party complaint against Hogan in which the railroad sought contribution alleging that Hogan as the driver of the automobile was jointly liable because of her gross negligence in driving into the path of the oncoming train. Hogan moved successfully to dismiss the third-party complaint against her since she had moved to Gwinnett County between the time of filing her complaint in DeKalb County and the time the railroad's third-party complaint was served on her. The cases continued to trial, and the jury found for the railroad in the Hogan suit and for the passenger in the Bush suit. The railroad appealed and enumerated as one error the dismissal for lack of venue of its third-party claim against Hogan.

The court of appeals held, rather woodenly, that since Hogan was a resident of Gwinnett County at the time the third-party complaint was served against her, the rule in Register precluded the impleader against her in DeKalb County. The court might have avoided this result by finding that Hogan had waived venue for the purpose of the Bush suit by filing her own complaint against the railroad in DeKalb County. Although it is well established that by filing suit a party does waive venue as to all matters arising out of the action brought by that party (such as counterclaims or separate actions to enjoin its prosecution), the court refused to hold that a party by filing suit in a county waives venue as to a separate law suit between different parties in that county even though both actions arise from the same events and have been consolidated for trial.

Although the railroad still presumably can institute an action in Gwinnett County against Hogan to seek contribution for the recovery against it in the Bush suit, it would have been far more economical and expeditious to have determined the rights of all the parties in one consolidated trial before one judge and jury in DeKalb County, the scene of the accident.

In Ogden Equipment Co. v. Talmadge Farms, Inc., the court of appeals sanctioned one ingenious way to circumvent the Register problem. Here, General Electric Credit Corporation filed suit in Fulton County against Talmadge Farms, Inc., a resident of Henry County. Talmadge Farms filed its answer without asserting its venue objections and then filed a third-party complaint against Ogden Equipment Co., a resident of Fulton County. Ogden moved to dismiss the third-party complaint contending that Talmadge Farms could not waive venue so as to prejudice the right of third parties in accordance with Ga. Code Ann. § 24-112.

The court held, however, that this statute only barred waivers that prejudiced the legal rights of third persons and was not violated by a party's mere inconvenience and expense in defending an impleader action expressly allowed by the CPA. Although General Electric and Talmadge Farms had orally agreed on Fulton County as the forum for the original action in order to allow Talmadge Farm's third-party complaint against Ogden, venue was proper as to the original defendant, Talmadge Farms, by consent and as to Ogden, the third-party defendant, because it was a resident of Fulton County. Thus, it seems that only if the plaintiff is cooperative and will (Continued on page 105)
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VENEU (Continued from page 73)
file suit by prearrangement in
the county of the residence of
the party sought to be im-
pleaded, can the economies of
third-party practice be had in
Georgia courts where the third-
party plaintiff and the third-
party defendant are residents of
different counties.

Counterclaims and the
"Next-Door" Plaintiff

When a plaintiff who resides
in another county files suit in
the county of the defendant's
residence, the plaintiff as a gen-
eral rule is deemed to waive his
venue objections to the forum
county so that the defendant can
assert counterclaims against him
there.28 A problem can arise,
however, when additional par-
ties must be brought in for the
purpose of deciding defendant's
counterclaim. In federal courts
the requirements of subject-mat-
ter jurisdiction and venue for
such additional parties are han-
dled by the concept of ancillary
jurisdiction.29 Thus, persons
brought into an action under
Rule 13(h) as parties to a com-
pulsory (but not a permissive)
counterclaim come within the an-
cillary jurisdiction of the court
because the compulsory counter-
claim involves the same transac-
tion or occurrence as the plain-
tiff's original action and is close-
ly connected with it. In this way
many related claims can be set-
tled within the scope of one ac-
tion.

In Georgia, however, venue
requirements loom large as the
case of Pemberton v. Purifoy30
shows. In Pemberton a resident
of Floyd County, injured in a
multiple automobile collision,
brought an action in the Superior
Court of Whitfield County
against the defendant, a resident
of Whitfield County. The de-
fendant then asserted a coun-
terclaim seeking damages arising
out of the same collision against
the plaintiff and two others, the
driver and the owner of a third
automobile, involved in the ac-
cident. These last two parties
were, like the plaintiff, residents
of Floyd County. Accordingly,
the court held that venue was
improper in the Whitfield Su-
perior Court as to the counter-
claim filed against the additional
two parties. While the plaintiff,
by voluntarily instituting the suit
in Whitfield County, consented
to the jurisdiction of that court
for the purposes of his suit, the
plaintiff's action could not waive
the venue objections of others;
nor, did instituting the suit in
Whitfield County make the plain-
tiff a "resident" of that county
so that the constitutional venue
rule that allows joint tort-
feasors to be sued in the county
of residence of either would be-
come applicable.

Moreover, the supreme court
has even found that venue pre-
vented the assertion of a coun-
terclaim against the plaintiff who
originally chose the forum for
the litigation. In Buford v. Bu-
ford31 a wife filed a complaint
against her husband in the Su-
perior Court of Jones County,
the county of his residence,
seeking custody of their minor
child, alimony, and other relief.
The husband then filed a coun-
terclaim in the same action seek-
ing divorce and custody of the
child. The wife moved to strike
the counterclaim for divorce for
lack of venue since the Georgia
Constitution, Ga. Code Ann. §
2-4901 (rev. 1973), fixes the ven-
ue of divorce cases in the county
in which the defendant resides,
if the defendant is a Georgia
resident. Because the wife was
a resident of Bibb County, the
court agreed that the counter-
claim for divorce could not be
asserted against her in Jones
County even though she had in-
stituted an action for alimony
and child custody there. Thus,
the supreme court ruled that the
venue requirements of the con-
stitution in divorce cases could
not be waived by a party's filing
suit outside the county of his
residence. Why the constitutio-
nal rule fixing venue in divorce
cases cannot be waived just like
the rule that a defendant must
be sued in the county of his resi-
dence was not explained.

Pemberton and Buford high-
lift the unfortunate restrictions
that venue has placed on the use
of counterclaims. Similar venue
constraints probably also sur-
round the use of cross-claims in
Rule 13 although no reported
case has yet dealt with this is-
tue. Thus, if A sues B and C as
joint tortfeasors in the county of
B's residence, venue is proper
as to the original claim. How-
ever, based on Register, Bush,
and Pemberton, it would appear
that B could not cross-claim
against C, if C were not a resi-
dent of the forum, even though
B's claim against C involved the
same transaction or occurrence
as the main claim.32

The Remedy:
Constitutional Revision

The obvious deficiencies in
Georgia practice and procedure
caused by the constitutional
venue requirements have not
gone unnoticed on the court. In
Buford, for example, Justice Jor-
dan joined by Justice Ingram de-
cried the uneconomical expen-
diture of judicial resources ne-
cessitated by that decision and
called for amending the consti-
tutional rules to allow counter-
claims in such cases.33 And, in
Smith v. Foster,34 a case in which
the defendant unsuccessfully
sought to use the Rule 19 joinder
of party provisions to overcome
the venue barrier to impleader,
Justice Jordan again warned that
"Georgia's hodge-podge constitu-
tional and statutory venue pro-
visions have long needed a re-
vision in light of modern day
requirements."35

Although a creditable argu-
ment could be made that all the
problems enumerated above
could be remedied simply by ju-
dicial acceptance of a concept
of ancillary jurisdiction, old atti-
dudes die hard and nothing short
of amending the constitution to
authorize the General Assembly
to prescribe new rules of venue
by statute may suffice. Without
a constitutional change it is
doubtful that the General As-
sembley acting by statute could
wholly cure the deficiencies al-

though it made at least a step in the right direction during the 1975 session in expanding the venue of actions at law against corporations. Ga. Code Ann. § 22-5301 which provided permissible places of venue for contract and tort actions against corporations in addition to the county where the registered office was located was repealed by 1975 Ga. Laws, p. 583. effective July 1, 1975. Basically, the amendment restated and consolidated the existing venue rules for corporations under Ga. Code Ann. § 22-404.\footnote{22} However, in connection with the rules for tort actions, a change was made. New section 22-404(d) now provides that a corporation, in addition to the county of its registered office, “shall be deemed to reside and may be sued for damages because of torts, wrong or injury done, in the county where the cause of action originated, if the corporation transacts business in that county.”\footnote{33} The former rule in § 22-5301 did not contain this “transacts business” proviso but rather required that the corporation have an agent, agency or place of business there before it could be served in the county where the cause of action arose. Although the measure of this change is unclear and must await future case-by-case development to determine the level of activities necessary to satisfy the “transacts business” test, the import of the change is presumably to expand the availability of venue in tort actions against corporations. Thus, it should be possible to show, for example, that a corporation was “transacting business” by operating a delivery truck in the county where the accident occurred even though it did not have an agent, agency or place of business in the county at the time process was attempted to be served.\footnote{38}

It has generally been thought that while the General Assembly could fix alternative places of venue for actions against corporations,\footnote{39} as the legislature did in enacting Ga. Code Ann. 22-404, it could not constitutionally expand the places of venue for individual natural persons.\footnote{40} Thus, the only certain method for expanding the places of venue for actions against individual defendants lies in amending the constitution.

Marshalling public concern and support to alter the fundamental law of the state to cure little-known problems of venue will not be easy. And, as Justice Cardozo’s famous aphorism puts it: “Not lightly to be vacated is the verdict of quiescent years.”\footnote{41}

Nevertheless, the Bar of Georgia needs to move now to bring about a general revision of our venue rules.\footnote{42}

FOOTNOTES

1. GA. CONST. art. XXXVIII (1777).
2. GA. CONST. art. III, § 1 (1798).
3. GA. CONST. art. IV, § 2 ¶ 5 (1861).
4. GA. CONST. V, § 12, ¶¶ 1-7 (1868).
14. 227 Ga. at 126.
15. 227 Ga. at 125: “This title shall not be construed to extend or limit the jurisdiction of the courts or the venues thereof.” See GA. CODE ANN. § 81A-182.
18. Register v. Stone’s Indepen-
588 (emphasis added). This provision is identical to the one contained in former GA. CODE ANN. § 22-5301.
42. The impediments caused by the rules of venue to the effective use of impleader and counterclaims represent only a few of the venue-related problems for Georgia practice and procedure. Statutes governing the venue of specific actions are scattered throughout the Code. See Note, Venue In Georgia: Problems and Proposals, 9 GA. ST. B.J. 254 (1972). Issues still arise over what constitutes a “case respecting title to land” for the purposes of GA. CODE ANN. § 2-4902. See Hawkins v. Pierotti, 232 Ga. 631 (1974). And, even the 1975 legislative change in GA. CODE ANN. § 22-404(d) did not go far enough and remove the distinction pointed out in Etowah Milling Co. v. Crenshaw, 116 Ga. 406 (1904), between alternative places of venue allowable in actions against corporations seeking money damages at law and those actions seeking equitable relief. Hence, a careful, thorough revision of the venue rules in Georgia is needed.

**THE BICENTENNIAL YEAR**

The Editorial Board will be meeting soon to plan for participation next year in the bicentennial celebration. We would like to have the benefit of your suggestions as to topics which you consider appropriate for inclusion in the *Journal*. If you recommend a topic, please let us know if you are willing to write the article yourself or can suggest someone else as the author. Write Editor, Georgia State Bar Journal, Fulton National Bank Bldg., Atlanta, GA 30303.

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**CALENDARS**

**STATE BAR MEETINGS**

**1975**

November 21 — Board of Governors, Lake Lanier Islands
December 3-5 — Midyear Meeting, Atlanta

**INSTITUTE OF CONTINUING LEGAL EDUCATION**

**PROGRAMS**

**1975**

October 16-17 — Civil Evidence with Emphasis on the New Federal Rules, Lake Lanier Islands
October 28-30 — 14th Workshop for Juvenile Court Judges, Athens
October 29-31 — 15th Seminar for District Attorneys, Athens
October 29-31 — 13th Seminar for Georgia Trial Judges, Athens
November 6-7 — Creditors’ Rights & Bankruptcy, Savannah
November 13-14 — Creditors’ Rights & Bankruptcy, Unicoi
December 11-12 — Creditors’ Rights & Bankruptcy, Atlanta

**1976**

January 8-10 — 12th Bridge-the-Gap, Atlanta
January 23 — Real Estate IV, Augusta
January 30 — Real Estate IV, Callaway Gardens
February 6 — Real Estate IV, Atlanta
February 27-28 — 21st Estate Planning Institute for Attorneys, Trust Officers, Life Underwriters & Accountants, Athens

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