# CONSTITUTIONAL LAW

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In the general election of November, 1956, forty-eight amendments were added to the Constitution of Georgia. This brings to 166 the total number of amendments to the Constitution of 1945. The following table gives some indication of the trend in amending the Constitution.

TABLE OF AMENDMENTS[1]

| Year | No. Proposed | | No. Ratified | | No. Rejected | |
|---|---|---|---|---|---|---|
| | General | Special | General | Special | General | Special |
| 1946 | 1 | 0 | 0 | 0 | 1 | 0 |
| 1948 | 0 | 17 | 0 | 15 | 0 | 2 |
| 1950 | 4 | 33 | 2 | 26 | 2 | 7 |
| 1952 | 10 | 36 | 9 | 31 | 1 | 5 |
| 1954 | 7 | 40 | 7 | 28 | 0 | 12 |
| 1956 | 7 | 51 | 7 | 41 | 0 | 10 |
| Totals | 29 | 177 | 25 | 141 | 4 | 36 |

The term "general" in the table refers to amendments of statewide application and the term "special" refers to amendments of local application only. In the past, there has been no exact standard for distinguishing between general and local amendments; hence there has been wide variation in designations of the number of general amendments. The amendment to the amending clause approved in 1956

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1. A detailed table with citation to the statutes proposing the amendments is given in the HANDBOOK ON THE CONSTITUTIONS OF THE UNITED STATES AND GEORGIA published by the University of Georgia Press, 5th edition, 1957.

directs the Governor, Attorney General, and Secretary of State to meet "and determine whether a proposed amendment is general, and if not general . . . what political subdivision or subdivisions are directly affected . . . " Local amendments are henceforth to be submitted for ratification only to the people of the political subdivision or subdivisions affected. This will reduce the size of the ballot and reduce by thousands of dollars the cost to the state in advertising proposed constitutional amendments. It will not, however, reduce the number of local amendments. This remains a pressing problem. Everyone recognizes the evil of cluttering up the fundamental law with a hodgepodge of local amendments; yet little is being done to remedy the evil.

Fifteen amendements to the Constitution passed the General Assembly in 1957, to be submitted for ratification or rejection in the general election of 1958. Three of these are general amendments and nine are of local application only. A comment is offered here on each of the proposed general amendments.

One of the amendments would grant an exemption from taxation to a disabled veteran on his homestead to the value of $10,000. The term "disabled veteran" is given a restricted definition, confining it to those disabled "by paraplegia or permanent paralysis of both legs and lower parts of the body resulting from traumatic injury to the spinal cord or brain, or by total blindness, or by the amputation of both legs or both arms."[2] Legal provisions of this nature are difficult to administer, especially in tax exemptions.

Under the second amendment proposed, the Board of Regents of the University System would be authorized to grant scholarships to students following any course of study, other than a program leading to the degree of Doctor of Medicine, and the General Assembly would be authorized to appropriate funds to the Regents for this purpose. The terms and conditions of scholarships "shall be prescribed and regulated by the Board of Regents but shall include the condition that recipients of such scholarships shall, upon the completion of their programs of study, reside in the State of Georgia and engage in activities for which they were prepared by the scholarships for a period of one year for each $1000 received." The objective seems to be to authorize scholarships in other fields of study along lines similar to the medical scholarships authorized in 1952. Despite the highest motives of its sponsors, what excuse can be offered for writing these statutory provisions into the Constitution? The courts of Georgia

2. Ga. Laws 1957, p. 73.

have never held scholarships to be forbidden by the prohibition against gratuities in Article VII. And a constitutional amendment of 1954 provides that "notwithstanding any other provision of this Constitution, the General Assembly may by law provide for grants of state, county or municipal funds to citizens of the state for educational purposes . . ." Funds and administrative action are the things needed to establish State supported scholarships in the University System, not further amendments to an already overly-amended Constitution.

The third proposed amendment begins, "State Departments and Agencies of the State Government of Georgia shall have the authority to disburse state funds to match federal funds in order to provide qualified employees with graduate or post graduate educational scholarships and for use in other federal educational programs." Each agency is to prescribe its own regulations, but one condition for receiving a scholarship shall be an agreement to work for the department or agency granting the scholarship at least two years for each year spent in study, or to refund the money received pro rata." The amendment provides further "that no additional appropriation shall be made by the General Assembly to finance such scholarships, but the same shall be financed from the regular appropriations to the various state departments and state agencies."

### Procedure in Raising Constitutional Questions

"Practice and Procedure" is the subject of another article in this *Review,* but constitutional issues and procedural rules are often intertwined, and a few comments on the procedure necessary to raise constitutional questions are offered here. Important constitutional issues involved in several cases covered by the period under review were not passed upon by the courts because of the failure of counsel to follow correct procedure in raising them. Two such cases are commented upon here, not because they establish new points, but because they illustrate errors frequently made.[3]

It is settled law in Georgia that "a constitutional attack upon an act or statute, which does not allege specifically how or wherein the act or statute violates the designated provision of the Constitution, is insufficient to present any question for review."[4] Applying this rule, in *Harper v. City Council of Augusta*[5] it was held that:

3. For other cases involving similar points, see Liner v. City of Rossville, 212 Ga. 664, 94 S.E.2d 862 (1956); Atterberry v. The State, 212 Ga. 778, 95 S.E.2d 787 (1956); Pate v. Brock, 212 Ga. 812, 96 S.E.2d 253 (1956); and Wofford v. City of Gainesville, 212 Ga. 818, 96 S.E.2d 490 (1956).
4. Persons v. Lea, 207 Ga. 384, 61 S.E.2d 832 (1950).
5. 212 Ga. 605, 94 S.E.2d 690 (1956).

> the demurrer which attacks Ga. L. 1956, p. 22, and Ga. L. 1956, p. 2406, as being violative of article 1, section 3, paragraph 2 of the Constitution of Georgia (Code, Ann., Par. 2-302), and article 1, section 10, paragraph 1 of the Constitution of the United States (Code Par. 1-134), but which does not allege how or wherein these constitutional provisions are violated by said acts, does not present any question for judicial determination.

*Richmond Concrete Co., Inc. v. Ward*[6] was a suit for damages based upon alleged acts of negligence. The plaintiff filed with the trial court 18 interrogatories to be answered by the president of the defendant company. The trial judge sustained a motion to reject them on grounds 2 and 4, as follows: "2. Defendant moves to reject plaintiff's interrogatories on the ground that Chapter 38-12 of the 1933 Code of the State of Georgia is unconstitutional insofar as it attempts to penalize corporations for failure of its officers to answer interrogatories or to sue out commissions directed to themselves, being unconstitutional in that it amounts to a deprivation of property without due process of law, thus violating the fourteenth amendment to the U. S. Constitution and Article 1, paragraph 1, paragraph 3 of the Constitution of the State of Georgia . . . 4. Defendant moves to reject plaintiff's interrogatories because the plaintiff has failed to comply with the laws in regard thereto."

Was defendant's attack sufficient to raise the constitutionality of Chapter 38-12 of the Code? In holding that it was not, the supreme court explained:

> In order to raise a question as to the constitutionality of a "law", at least three things must be shown: (1) the statute or the particular part or parts of the statute which the party would challenge must be stated or pointed out with fair precision; (2) the provisions of the Constitution, which it is claimed has been violated must be clearly designated; and (3) it must be shown wherein the statute, or some designated part of it, violates such constitutional provision . . . Tested by the foregoing rules, can it be here held that the defendant's attack on the constitutionality of Chapter 38-12 of the Code is sufficient to raise such a question? We are of the opinion that it is not. No particular part of Chapter 38-12 or the three acts from which it was codified is specifically pointed out by the pleader; and this being true, it would be necessary for this court to examine all of the attacked chapter to find out if there is in fact contained therein any provision about which complaint is made. The words "insofar as it attempts to penalize defendant corporations for failure of its officers to

6. 212 Ga. 773, 75 S.E.2d 677 (1956).

> answer interrogatories, or to sue out commissions directed to themselves," are not a definite and positive allegation by the pleader that any particular part of the chapter, or the acts from which it was codified, does in fact accomplish such invalid result. The words just quoted are not at all inconsistent with the legal presumption that the chapter, or the acts from which it was codified, does not to any extent undertake an accomplishment of the unlawful object complained of; and where an allegation is equivocal, doubtful, or subject to different interpretations, it will be construed most strongly against the pleader . . . Until a clear, definite, and specific attack is made upon the constitutionality of the act as a whole, or upon the constitutionality of a specifically pointed out part or parts of it, this court must and will decline to deal with its validity, such being a well settled rule of pleading, practice, and procedure in this State.

### Procedure in Criminal Cases

According to the decision in *Parks v. The State*,[7] the issue of failure on the part of the state to prove venue may be raised for the first time before the supreme court, and the general assembly has no authority to prevent this. Venue is a jurisdictional fact, and appellate courts in general permit greater liberality in raising questions of jurisdiction than they do in raising other questions. But the Supreme Court of Georgia went to an extreme in this case. A statute of 1911 read as follows: "No judgment of a trial court in a criminal case shall be reversed by either the supreme court or the court of appeals for lack of proof of venue or of the time of the commission of the offense, save where the particular point has been specifically raised by a ground of the original or amended motion for new trial." This statute had been applied several times by the court of appeals, but the supreme court "dealt with" the statute for the first time in the Parks Case and found it to be void.

And why, other than the fact that the supreme court says so, is the General Assembly devoid of power to regulate the procedure for raising the question of venue in an appeal? According to Justice Mobley, the General Assembly sought by the statute in question "to impose limitations and restrictions . . . which deprive the defendant of his constitutional right to be tried in a court that has jurisdiction of his case." This conclusion of the justice is highly debatable. To be sure, the Constitution provides that "All criminal cases shall be tried in the county where the crime was committed . . . ";[8] but it does not

7. 212 Ga. 433, 93 S.E.2d 663 (1956).
8. Art. VI, § 14, ¶ 6; Ga. Code Ann., § 2-4906 (1933).

say that a defendant shall have the right to raise the question of venue for the first time in an appellate court. If a defendant fails to raise specifically the question of venue in his original or amended motion for a new trial in the trial court, as required by the statute, why should he be able to raise it in the appellate courts? It is true that prior to 1911 the supreme court had "many times held that venue is a jurisdictional fact, that it must be proved, and that the lack of sufficient evidence of venue is covered by the exception that the verdict is contrary to law and without evidence to support it." The statute of 1911 appears to have been enacted as an effort to remedy the evil growing out of this practice. The question at issue is not covered by the Constitution. The basic issue in the *Parks case* was, then, who shall exercise the legislative power in Georgia, the General Assembly or the supreme court?

In *Hill v. Balkcom*[9] the plaintiff sought release from the state penitentiary through habeas corpus proceedings on the ground that he did not have benefit of competent counsel in the trial in which he was convicted of murder. This plea has been used successfully by many prisoners in recent years since the right of assistance by counsel has been emphasized by the United States Supreme Court; but it was of no avail here, for the record, in the opinion of the justices of the Georgia Supreme Court, showed Hill to have been adequately represented. The attorney who represented him was a member of the bar in good standing. This was prima facie proof of his competency. And the record showed that after he was appointed by the trial court, he was employed by Hill's father and paid a fee, and that he was assisted by a leading Augusta firm in preparing the appeal in the case and application for clemency to the State Board of Pardons and Paroles.

## Bill of Rights Cases

Protection of vested property rights was the basic doctrine of American constitutional law prior to 1936.[10] Since that date, however, the protection of human rights had become the dominant philosophy in the United States Supreme Court. The year covered by this review saw this new philosophy pushed even further, reaching extremes in such cases as *Jencks v. United States*,[11] *Watkins v. United States*,[12]

9. 213 Ga. 58, 96 S.E.2d 589 (1957).
10. Edward S. Corwin, The Basic Doctrine of American Constitutional Law, Mich. L. Rev., XII (February, 1914), 247, 276.
11. 353 U.S. 657, 77 S.Ct. 1007 I, I L.Ed. 1103 (1957).
12. 353 U.S., 77 S.Ct. 1173, I, I L. Ed.2d 1273 (1957).

and *Commonwealth of Pennsylvania v. Board of Directors of City Trusts* (the Girard Case).[13]

The constitutional law of Georgia has not been revolutionized along the line followed by the United States Supreme Court; and when compared to the national law, Georgia's law remains conservative. No landmark bill-of-rights cases were made in Georgia during the period of this review, but several cases are worthy of note.

*Williams v. The State*[14] demonstrates the futility of pleading the prohibition against ex post facto laws when the offense involved is of a continuing nature, in this case that of child abandonment. On January 24, 1955, Williams was convicted in a bastardy proceeding of failure to give security for the maintenance of his two illegitimate children. He was sentenced to serve twelve months on the public works, but was paroled on condition that he make semi-monthly payments of $15 during the year for the support of his children. After Williams had served this sentence, on March 17, 1956, the General Assembly passed an act[15] making it a crime for a father to abandon his illegitimate child. Abandonment was defined as a continuous offense, for which a former acquittal or conviction should not constitute a bar. In an accusation of May 16, 1956, Williams was charged with having abandoned his illegitimate children on May 1, 1956. He entered a "special plea" to the effect that the alleged crime was committed on January 17, 1955, and to prosecute him therefor under the 1956 statute would offend the ex post facto clause of the Georgia Constitution.[16] This plea was rejected by both the trial court and the supreme court. In a brief opinion, Justice Head stated: "Under our law as it presently stands, the father of a bastard child may be convicted for refusing to give bond for its support and maintenance, and after the expiration of his sentence in the bastardy case, be convicted for the separate case of abandonment . . . " This opinion suggests that the Justice was thinking in terms of the double jeopardy rather than the ex post facto clause. The real answer to a plea under either of these clauses in this case seems to lie in the continuing nature of the offense.

*Hansell v. Citizens and Southern National Bank*[17] was the most widely publicized and perhaps the most controversial case decided during the year under review. It involved the constitutionality of the

13. 353 U.S. 230, 77 S.Ct. 806 I L.Ed. 792 (1957).
14. 213 Ga. 221, 98 S.E.2d 373 (1957).
15. Ga. Laws 1956, p. 800; GA CODE ANN. § 74-9902 (1933).
16. ART. I, § 3, ¶ 2. The question of due process under the Fourteenth Amendment apparently was not raised in the case.
17. 213 Ga. 205, 98 S.E.2d 622 (1957).

last sentence in Section 3 of an act of 1956 entitled Voting Stock in Banks and Bank Holding Companies which read as follows: "Also in municipalities now having branches of a bank with a holding company relation, such banks may make branches of existing holding company banks; and in the future in cities of over 80,000 population, according to the 1950 and any subsequent census, now having branches of a bank, present branches will have the same privilege of additional branches as permitted to other banks." Upon first reading, one is inclined to judge the statute to be void as vague and meaningless. The fog clears somewhat when the cumbersome statutory language is placed in context and in historical perspective.

A general law passed in 1927[18] prohibited the establishment of new branch banks in Georgia. Exceptions to this general prohibition were made by two statutes passed in 1929.[19] Under one of them banks "having their principal office in a municipality now or hereafter having a population of not less than 200,000 . . . may establish branch banks in the municipality in which its principal office is located." Under the other banks "having their principal office in a city now or hereafter having a population of not less than eighty thousand or more than one hundred and twenty-five thousand, may establish branch banks in the city in which its principal office is located." The act of 1956 was principally a limitation on holding companies for banks, making it illegal for any company to own or control, "15% or more of the voting stock of each of two or more banks, except that it shall not be unlawful for a company to continue to own . . . such voting stock as it owns . . . on the effective date of this Act." But the act also made two exceptions to the general law of 1927 forbidding establishment of branch banks. For one thing, it provided that "in municipalities now having branches of a bank with a holding company relation, such banks may make branches of existing holding company banks." This would authorize "changing the name and organization of existing banks of a holding-company to branches of a bank with a holding company relation";[20] it would create no new banks, but it would bring into being banks by the name of branch banks not located in the city of the main office of the parent bank. Furthermore, under the 1956 act, a new branch bank thus brought into being would have the privilege of establishing additional branches in the city wherein it was located provided it be a city with a population of over 80,000.

While interesting jurisdictional and other questions were involved,

18. Ga. Laws 1927, p. 195 GA. CODE ANN. § 86-103 (1933).
19. Ga. Laws 1929, pp. 214, 215.
20. This explanation is adapted from the dissenting opinion by the Chief Justice.

the constitutional clause upon which the decision in the *Hansell case* was principally based was the provision in the Bill of Rights that "laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law. Justice Almand, speaking for the majority of the court, found the section of the 1956 act in question to offend this clause:

> The general law of 1927 (Ga. L. 1927, p. 195) prohibited the establishment of new or additional branch banks after the effective date of the act. This law was effective in every city in the state and applicable to all banks, whether they were banks with a holding-company relation or branches of such banks. Sec. 3 of the act of 1956, supra, applies only (a) to municipalities that on February 27, 1956, had branches of a bank with a holding-company relation, such banks being given the right to make other branches of existing holding-company banks; and (b) to cities which, in the future, attained a population of over 80,000 according to the 1950 or any subsequent census that on February 27, 1956, had branches of any bank, such branches being granted the privilege of making additional branches. Under this act, no bank could establish a branch bank in any city of less than 80,000 population unless, at the time of the passage of the act, it was a bank with a holding-company relation . . . The provision as to cities of over 80,000 population applies only to banks which, at the time of the passage of the act, had an existing branch bank. It thus seems clear that the act does not operate generally or uniformly throughout the state. The act can operate only upon a limited class of banks that had a status fixed at the time of the passage of the act and it makes no provision for banks not having such status at the time the act was passed to come under the provisions of the act in the future. The classification for the purpose of legislation as to existing banks—those having branches of a bank with a holding-company relation, and those in cities of over 80,000 population now having branches of a bank—has no reasonable relation to the purposes of the act declared in sec. 1, which states: "The maintenance of competitive services between banks has been found to be the best method of serving the public. There are dangers in the concentration of economic power through centralized control of banks. It is, therefore, held to be in the public interest to curtail such concentration of economic power by preventing the expansion of bank holding companies and similar organizations." The class is so circumscribed that the last sentence of sec. 3 of the act of 1956, supra, can apply only to those banks having branches in existence at the time of its passage, and thus, this portion of the act is a special and not a general law and is therefore unconstitutional . . .

Chief Justice Duckworth, together with Justices Candler and Hawkins, dissented. Their views, as expressed by the Chief Justice were in part as follows:

> With this situation we have for determination if a reasonable basis existed for classifying branch banks that were established in conformity with the law, and allowed to continue by the 1956 act although the future establishment of other such branch banks is forbidden by that act and the 1927 act cited above. Would it have been unconstitutional to have destroyed such lawful banks by the 1956 act? I think not. Then, since they were expressly allowed to continue, can it be seriously contended that they should have been rendered unable to serve the convenience of their customers, or meet the competition of other banks which, under the two 1929 acts above referred to, can lawfully establish additional branch banks in cities defined by population which is the method of identification used in sec. 3 of the 1956 act, here attacked? It would have been better for the branch banks to have simply been wiped out by the 1956 act, thus making their demise less painful than to have allowed them to continue under circumstances rendering their success impossible and subjecting them to the excruciating slow death by strangulation and starvation. Either treatment would have constituted an abandonment of the public policy of the State concerning banking as exemplified by the law establishing the Banking Department and empowering it to seek solvency and success in all banks.
>
> Coming now to the basis upon which sec. 3 classifies, I find the population part obviously related and pertinent to the number of banks. Also, the branch banks constitute all of a class and their success depends upon their ability to meet competition and serve the convenience of their customers. Therefore it can not be said that the relevant facts do not make the classification reasonable, since a classification is valid if it relates to the subject matter of the legislation and is not unreasonable or arbitrary.

*Holcomb v. Johnson*[21] sustained the issuance of an injunction against a dental technician for taking impressions and making false teeth. Holcomb admitted that he had no license to practice dentistry, but contended that the Georgia law defining the practice of dentistry as including all persons "who shall make or repair appliances usable on teeth or as teeth, unless said appliances are ordered by and returned to a licensed dentist" was contrary to due process of law. This argument was rejected by the supreme court which found the statute to be a valid regulation of a profession "affected with the public in-

21. 213 Ga. 249, 98 S.E.2d 561 (1957).

terest." The justices were impressed with the testimony of expert witnesses concerning the knowledge and skill required of dentists "to treat the peculiar ills of the body associated with the oral cavity known as the human mouth." Since the justices considered the statutory regulation to be reasonable, they sustained it as a regulation of a profession "affected with the public interest."

In *Atterbury v. The State*[22] the defendant in the trial court was convicted of usury under an indictment charging that he "did charge and take interest in the sum of $5.00 for the use of . . . $50.00 for a period of one week, which rate of interest amounts to forty-three per centum per month, contrary to the laws of said state . . . " He raised a number of constitutional objections, among them denial by the trial judge of his motion to suppress evidence claimed to have been illegally seized, contrary to due process and in violation of the guarantee against unreasonable searches and seizures. The factual background out of which this issue arose was briefly as follows: Atterbury was in a shotgun affray. He killed another person and was himself wounded. While in an emergency hospital, with his consent officers obtained Atterbury's automobile keys for the purpose of getting the pistol he had used in the shooting. The officers took from the car the pistol and also certain cards and records showing the money-lending transactions involved in the usury suit. Over objection, the state used these cards and records as evidence in the trial. The supreme court sustained the judgment of the trial court and gave only a head-note opinion. The rule of the *Weeks case*[23] applicable in federal courts has no counterpart in Georgia Law. In this state, as in a majority of the American states, the general rule is that pertinent evidence is admissible even though obtained by unreasonable search and seizure or other illegal means, unless the accused was forced to produce it. And under the doctrine of *Wolf v. Colorado*,[24] the United States Supreme Court has seen fit not to apply the rules of the *Weeks Case* to state criminal procedure. Only when the state procedure is shocking to the conscience will it be reversed when tested under the due process clause of the Fourteenth Amendment.

*Ellis v. Parks*[25] involved an injunction against peaceful picketing in conjunction with a labor strike. The strikers contended that freedom of speech was violated by the injunction. A federal district court

22. 212 Ga. 778, 95 S.E.2d 787 (1956).
23. Weeks v. United States, 232 U.S. 383; 34 S.Ct. 341, 58 L.Ed. 652 (1914). Briefly stated, the rule is that evidence obtained by federal officers through unreasonable searches and seizures is inadmissible in federal courts.
24. 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949).
25. 212 Ga. 540, 93 S.E.2d 708 (1956).

had granted a motion for summary judgment that the strike was illegal inasmuch as the union promoting it was not the bargaining representative of the plaintiff's workers, another union having been so certified, and retained jurisdiction of the case for the purpose of determining damages. Under this factual situation, the superior court of Fulton issued an injunction against the strike. Was this injunction justified? Chief Justice Duckworth, for the majority of the Georgia Supreme Court, held that it was. Justice Mobley dissented on the ground that there had been no "final judgment" in the federal district court upon which a decision by the Georgia court that the strike involved was illegal could be predicated. Here, as is often the case, the constitutional issue was submerged in the technicalities of pleadings; but aside from technicalities, the case is an application of the rule that picketing for an illegal purpose is not protected by the constitutional guaranty of freedom of speech, even though the statements made on the pickets may be true.[26]

*Fulton Bag and Cotton Mills v. Williams*[27] is one of three cases testing the constitutionality of the 1953 change in the Georgia income tax law forbidding deduction of income taxes paid to the Federal government. It is well established that the allowance of such a deduction is a privilege which the state is free to withdraw; but the claim involved in this case was that the 1953 act was void as retroactive. Under an act of 1952, a taxpayer was permitted to carry back a net operating loss to preceding taxable years. On March 25, 1953, the plaintiff filed with the Revenue Commissioner its income-tax return for the fiscal year ending November 30, 1952, showing a net operating loss, and applied for a refund of taxes paid for the fiscal year ending November 30, 1951. In its computation, the plaintiff deducted Federal income taxes for prior years paid during the fiscal year ending November 30, 1952. Under the law existing at the time its claim was filed, the plaintiff was entitled to the refund, but while the claim was pending before the Revenue Commissioner, the Act of December 18, 1953, was passed providing that "effective for all taxable years ending on or after February 15, 1952, no income taxes shall be allowed as a deduction in computing a net operating loss." Hence the Revenue Commissioner rejected the claim. In sustaining this action, the supreme court held that the plaintiff had no vested right to a refund. "The fact that the taxpayer had filed his petition for refund and the same was pending at the passage of the act of

26. See Giboney v. Empire Storage and Ice Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949).
27. 212 Ga. 783, 95 S.E.2d 848 (1956).

December 18, 1953, denying to the taxpayer the privilege of deducting the Federal income taxes paid in computing net operating loss for carry-back purposes for any taxable year ending subsequently to February 15, 1952, did not create any vested right, since the Revenue Commissioner was required to apply the law existing at the time he passed upon the application for refund. It has been held that the state, in authorizing the refund of taxes lawfully collected, may provide the conditions under which the refund may be made, and may repeal a statute authorizing such refund, taking away the right of the taxpayer's claim to a refund and the authority of public officers to make the same, and by such action terminate all pending actions."

### SCHOOLS

Under decisions rendered by the supreme court in 1953 and 1954, injunctions restraining county boards of education from proceeding with consolidation plans were sustained. These decisions were based upon a holding that the county boards had no authority to order the consolidations in question. The General Assembly intervened with legislation giving county boards broad power to reorganize the schools within their jurisdiction. In *Bedingfield v. Parkerson*[28] this legislation was sustained, and thus the effect of the narrow rulings in the prior consolidation cases was overcome.

In sustaining the power of a county board of education under the new legislation, Chief Justice Duckworth quoted with added emphasis the sentence in Art. VIII of the Constitution stating that "each county, exclusive of any independent school system now in existence in a county . . . *shall be confined to the control and management of a County Board of Education.*" "Any challenge of acts of the county board relating to control and operation of schools" said the Chief Justice, "must be weighed in the light of this sweeping power, which clearly manifests an intent to entrust the schools to the boards of education rather than the courts. Unless the act of a board violates some law, or is such a gross abuse of discretion as amounts to a violation of law, courts should not and can not interfere."

### ZONING ORDINANCES

Constitutional issues were raised during the year in half a dozen cases dealing with municipal zoning ordinances; but most of these cases were decided upon matters of pleading rather than upon the

28. 212 Ga. 654, 94 S.E.2d 714 (1956). The prior cases were Irwin v. Crawford, 210 Ga. 222, 78 S.E.2d 609 (1953), and Hobbs v. Bishop, 210 Ga. 818, 82 S.E.2d 839 (1954).

constitutional issues. Thus, in *Wofford v. City of Gainesville*[29] the plaintiff's petition for mandamus to compel city officials to grant him a permit was dismissed for failure to state a cause of action. No ordinance of the city was attached to the plaintiff's' petition, and he alleged no facts to show that he had been injured by the zoning ordinance that he mentioned; hence his petition was dismissed on general demurrer without reaching various constitutional issues raised in the petition. By contrast, in *Sikes v. Pierce*[30] the judgment of the trial judge in sustaining a general demurrer to a petition for mandamus was reversed. Sikes sought a mandamus to compel the city authorities to issue to him a permit for the construction of a gasoline service station in an area zoned for residential use only. He alleged that neither the charter of the City of Dublin authorizing administrative machinery for zoning nor any of the ordinances adopted pursuant thereto provided for notice or opportunity for a hearing to those having an interest in the property affected, and that the zoning ordinances were therefore void under the due process clause of the Constitution. He further alleged that he had met all legal requirements for the permit which he sought. It was clearly erroneous for the trial judge to have sustained a general demurrer to this petition. The right to notice and hearing is the very essence of due process in procedural matters.

In *Neal v. City of Atlanta*[31] a special permit to build a shopping center in the area known as the Ottley Home Place was held void. The supreme court held that the 1946 general act for zoning municipalities applied to the city of Atlanta, and that no authority was conferred by this act upon the City of Atlanta to adopt Article 21 of its zoning ordinance of 1954, under which the shopping center permit in question was granted. Hence the City's act in granting the permit was ultra vires.

*Orr v. Hapeville Realty Co.*[32] made its second appearance in the supreme court. In 1954 the court sustained the Act of 1952 making exceptions to the general act of 1946 on municipal zoning for cities with a population of more than 300,000. In the second appearance of the case, the court sustained the 1952 act against further constitutional attacks, as follows:

> The provision changing the 1946 act, so as to require that, in municipalities having more than 300,000 population, hearings may be held by a committee rather than by the entire governing board of such city, is not discriminatory, and hence

29. 212 Ga. 818, 96 S.E.2d 490 (1956).
30. 212 Ga. 567, 94 S.E.2d 427 (1956).
31. 212 Ga. 687, 94 S.E.2d 867 (1956).
32. 212 Ga. 649, 94 S.E.2d 682 (1956).

> is not offensive to the equal protection clause of the Constitution. Nor is due process as required by the Constitution denied by the terms of the act requiring that notice of hearings be published in the county where the land affected lies and in newspapers wherein sheriff's sales are advertised instead of the official organ of the municipality. Neither is the provision, requiring consent of the governing authority of a county in which the smallest portion of the city's population resides in any municipality that embraces parts of more than one county before property in such county can be zoned, discriminatory in violation of the Constitution. The act requires that two of the appointments to a joint planning board be made by the governing authorities of that county from residents of the city and county wherein the larger portion of the population resides. This will give owners of property in that county a voice in adopting zoning laws. Properties in two or more counties are so different as relates to the zoning law that classification and different means of affording a voice are justified.

*Gay v. Mayor of Lyons*[33] had its third appearance before the supreme court in 1956. The conclusion that one may draw from this extended litigation is, "three strikes and out" when the plaintiff's objection to a zoning ordinance is without legal basis. The factual background of the cases is as follows: On June 10, 1952, the Mayor and Council set up machinery to zone the City of Lyons. On July 1, Gay applied for a permit to build a filling station on a lot upon which he had an option to buy. On July 16, a zoning plan and map showing the lot in question to be in an area zoned for residential purposes was published by the Lyons' Planning Board. After a public hearing on August 22, the Mayor and Council adopted the proposed zoning ordinance. On September 30, Gay filed a petition in the superior court seeking a mandamus to force the city officials to grant him a building permit under the terms of a 1926 statute in effect at the time his application of July 1 was filed. The decision of the trial judge dismissing the petition was overruled by the supreme court which held that Gay had a right through mandamus proceedings to test the validity of the zoning ordinance, and was not limited to an appeal after exhausting administrative remedies.[34] In the second appearance of the case, the supreme court held that the trial judge had erred in excluding evidence proffered to show that the city officials acted arbitrarily.[35] In a subsequent trial, the issue of arbitrary action by the city offi-

33. 212 Ga. 438, 93 S.E.2d 352 (1956).
34. 209 Ga. 599, 74 S.E.2d 839 (1953).
35. 210 Ga. 761, 82 S.E.2d 817 (1954).

cials was decided against Gay by a jury. Thereupon the third decision of the trial judge refusing to grant the mandamus was upheld by the supreme court.

Two rulings of possible significance grow out of these cases. First, "where, as here, a mandamus proceeding was not instituted until after the adoption of the zoning ordinance prohibiting the contemplated structure, mandamus should be refused, for mandamus proceedings, when instituted, do not relate back to the time of the accrual of a 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." This is a new statement of law in Georgia, and it is apparently subject to notable exceptions. According to the holding in the first appearance of the *Gay case* before the supreme court, mandamus is the proper remedy to test the constitutionality of a zoning ordinance. According to the decision in the second appearance of the case, mandamus may be used to test the issue of arbitrary action on the part of officials in refusing to grant a permit, and relate back to a period prior to the institution of the action. With these sweeping exceptions, there appears to be little scope for the application of the new rule.

## TAXATION

*International Business Machines Corporation v. Evans*[36] sustained the levy of state and county taxes upon private property located on a rental basis at the Robins Air Force Base, a United States government installation, located at Warner Robins in Houston County. Acts of the General Assembly ceding "exclusive jurisdiction" to the United States over lands acquired in Georgia for military installations were held to be void as conflicting with the provision in the Georgia constitution prohibiting alienation of the sovereign right of taxation.

The federal constitution vests in Congress "exclusive legislation" over "all places purchased with the consent of the legislature of the state in which the same shall be, for the erection of forts . . . and other needful buildings," and all property on such places has traditionally been beyond the reach of the taxing power of a state. Yet the consent of the state has been necessary for the acquisition of exclusive jurisdiction by the United States, and Congress has provided that "the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall here-

36. 213 Ga. 333, 99 S.E.2d 220 (1957).

after be acquired by it shall not be required . . ."[37] The real question in the *IBM case* thus reduces itself to a factual one: Did the United States acquire exclusive jurisdiction when the land in question was acquired? The Georgia courts says "no", for the legislative acts ceding jurisdiction over the land must be read in pari materia with the state constitutional provision prohibiting alienation of the sovereign powers to tax.

The power of a state to restrict the power of state agencies to contract through constitutional reservations reduces itself to a matter of due process in many areas. Whether the United States Supreme Court will permit application of a reservation doctrine to the factual situation involved in this case is debatable. The trend, however, is toward sustaining the state taxing power where no intereference with federal functions is involved, and members of the Attorney General's office who handled this case and Chief Justice Duckworth who wrote the opinion for the Georgia court are to be complimented upon the exposition of a legal theory that will be difficult to rebut.

37. 40 U.S.C.A., § 255.