CONSTITUTIONAL LAW

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This article deals primarily with cases decided by the appellate courts, but by way of introduction some comments are offered on amendments to the Constitution of Georgia adopted on November 4, 1958. A total of 72 amendments proposed by the General Assembly were submitted to the people for ratification on that date. Fifty-six of these were local amendments affecting only a particular political subdivision, and 16 were general amendments. Thirty-eight of the local amendments and five of the general amendments were approved. This brings to 209 the total number of amendments to the Constitution of 1945. The fact that 11 of the 16 general amendments voted on in 1958 were defeated is significant.

No attempt will be made here to comment either upon the local amendments or upon the eleven general amendments that were defeated; but a summary statement is made on the five general amendments that were adopted.

The first of these amendments grants to each disabled veteran "an exemption of $10,000 on his homestead which he owns and which he actually occupies as a residence and homestead, such exemption being from all ad valorem taxation for State, county, municipal and school purposes." The scope of application of the amendment is narrow, for the term "disabled veteran" as used in the amendment is defined as including only veterans 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[1] of both legs or both arms."

Three of the amendments authorized scholarships. One of them authorizes the Board of Regents of the University System to grant "to qualified students who are citizens and bona fide residents of the State of Georgia and who would not otherwise have available the funds necessary to obtain an education, such scholarships as are necessary for them to complete programs of study offered by institutions of the University System of Georgia, with the exception of the program leading to the Degree of Doctor of Medicine." The recipient of such a scholarship must agree that upon the completion of his program of study he will reside in Georgia and engage in activities for

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1. Ga. Laws 1957, p. 72, GA. CODE ANN. § 2-5404 (1958).

which he was prepared by the scholarship one year for each $1,000 received.[2]

> Another amendment authorizes State departments and agencies . . . 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 Education Programs. The terms and conditions thereof shall be prescribed and regulated by the various departments and agencies granting the scholarships but shall include the condition that personnel to whom these scholarships are extended must . . . agree to work for the department or agency granting the scholarship for at least two years for each year spent in study or refund the money received for said scholarship pro rata.[3]

The last of the scholarship amendments authorizes the State Board of Education "to grant to citizens who are interested in becoming teachers . . . such scholarships as are necessary for them to complete programs of study in preparation for teaching." The recipient of such a scholarship must agree to teach in the public schools of Georgia for a period of one year for each $1,000 received, and for a period of at least three years in any event."[4]

The fifth and last of the amendments adopted deals with judges emeritus. An amendment ratified in 1956 made judges emeritus of the Supreme Court, Court of Appeals, and Superior Courts eligible to preside over the courts of which they were judges emeritus. The amendment of 1958 makes any of these judges emeritus eligible to serve in any of the courts listed.[5]

Rules of Procedure and Construction

(*a*) *Citation of official source necessary. Morgan v. Todd*[6] holds that an attack upon the constitutionality of a section in the Annotated Code which is not in the Code of 1933 is a futile gesture. The Annotated Code has never been enacted or adopted by the legislature, and any ruling upon the constitutionality of a section in this unofficial code would not affect the constitutionality of the act quoted, according to Chief Justice Duckworth. In effect this means that in attacking the constitutionality of an act passed since the Code of 1933 was adopted, reference must be made to the Georgia Laws and not to the Annotated Code.

2. Ga. Laws 1957, p. 358, Ga. Code Ann. § 2-5402 (1958).
3. Ga. Laws 1957, p. 528, Ga. Code Ann. § 2-5402 (1958).
4. Ga. Laws 1958, p. 432, Ga. Code Ann. § 2-5402 (1958).
5. Ga. Laws 1958, p. 491 Ga. Code Ann. § 2-4802 (1958).
6. 214 Ga. 497; 106 S.E.2d 37 (1958). Compare Bethke v. Taylor, 214 Ga. 679; 107 S.E.2d 217 (1959).

(*b*) *Standing to raise issue.* On March 29, 1957, the Georgia Public Service Commission granted a certificate of public convenience and necessity to Georgia Coastal Natural Gas Corporation authorizing it to construct and operate a gas pipeline system in a specified area of southeast Georgia. *South Georgia Natural Gas Company v. Ga. Public Service Commission*[7] was an attempt to enjoin and set aside the order granting the certificate on the grounds that the act under which it was granted was unconstitutional and that the evidence did not show a necessity for the order. Judgment of trial court in favor of the defendant Public Service Commission was affirmed by the Supreme Court. The record showed that "the plaintiff and its interstate gas business are strangers to the area involved in this case." They were not doing business in the area, and had no application pending to do business there; therefore they had no standing to sue.

In *Frankel v. Cone*[8] an act of 1955 was declared void. The act purported to make an automobile owner liable for damages arising from negligent operation of his car when the car was being used for his benefit. The basis for holding the act void was that it imposed liability upon the owner even though his car was operated without his knowledge or consent. But in the instant case, Mrs. Frankel, the defendant, turned her car over to the attendant of a parking lot and he was driving the car to the parking lot with Mrs. Frankel's knowledge and consent. How, then, did she have standing to attack the statute under the "knowledge and consent" doctrine? Justice Mobley answers in these words: "Prior to the enactment of this statute, there was, under the facts alleged, no liability upon the defendant. If she is now liable, it is by reason of the enactment of this statute, which creates the liability upon her. She is, therefore, adversely affected by it and in position to invoke its unconstitutionality."

(*c*) *Unanimous decision rule.* "The decisions of the Supreme Court shall bind the Court of Appeals as precedents" states the Constitution of Georgia.[9] But which decisions are binding? A student of American constitutional law would assume that the latest decision in point by the State Supreme Court would be the binding decision but apparently no judge of the Court of Appeals at present thinks that to be the rule in Georgia. Judge Townsend, speaking for the majority of the Court of Appeals in *State Highway Department v. Wilson*[10] makes this statement:

7. 214 Ga. 174, 104 S.E.2d 97 (1958).
8. 214 Ga. 733, 107 S.E.2d 819 (1959).
9. Art. VI, § II, Par. VIII.
10. 98 Ga. App. 619, 106 S.E.2d 544 (1958).

> It is well recognized by this court that it as well as the Supreme Court is bound by the oldest unanimous decisions of the Supreme Court on any question decided unless and until that case is overruled, modified, distinguished or declared obiter as authorized by law. Code Sec. 6-1611. And, if there are two conflicting decisions of the Supreme Court, neither of which is unanimous, this court will follow the older case.

In effect, under this theory the Court of Appeals is not bound by the latest decision of the Supreme Court unless that decision was unanimous. However, under Judge Townsend's theory, points made in unanimous decisions by the Supreme Court lose their force as law if in a subsequent Supreme Court decision, whether unanimous or not, these points are branded as obiter dictum. Judge Felton dissented from this proposition.

Does a departure by the Court of Appeals from the latest decision of the Supreme Court add stability or confusion to the law? In the *Wilson* case, the Court of Appeals actually followed the latest decision of the Supreme Court because, in the independent judgment of the judges of the Court of Appeals, the *Wilson* decision was not in conflict with any previous unanimous decision not branded as dictum in the opinion in the *Wilson* case.

The "unanimous decision" doctrine was introduced into Georgia law by an act of 1858, and the governing statute now appears in Code section 6-1611. Whether the doctrine has benefited the law in general is a debatable question. For the Court of Appeals to seek to apply the doctrine is a step away from uniformity and certainty in the law. It is no reflection on the personnel of the Court of Appeals to state that these judges are not in a position authorizing them to pass judgment upon the decisions of the State Supreme Court.

(*d*) *Survival of causes of action.* In *Complete Auto Transit Inc. v. Floyd*[11] an act of 1952 dealing with the survival of causes of actions was declared unconstitutional as applied in that case. The act[12] reads as follows: "Where death of a human being results from a crime or from criminal or other negligence, the personal representative of such deceased person shall be entitled to recover for the funeral, medical, and other necessary expenses resulting from the injury and death of the deceased person." In the instant case, the administrator of a wife's estate sought to recover damages for medical, hospital, and funeral expenses. Under the law existing before 1952, and still existing, for the act of 1952 made no change in it, a husband and not the wife is legally liable for these expenses. Hence the act of 1952 was held void

11. 214 Ga. 232, 104 S.E.2d 208 (1958).
12. Ga. Laws 1952, pp. 245-246, GA. CODE ANN. § 105-1310 (1958).

as subjecting the defendant "to a double liability for the same damages growing out of the same tort."

In the same case, another act of 1952[13] providing for the survival of causes of action for the recovery of damages for injuries to person or property was sustained against various attacks, and the defendant was held liable to suit by the wife's administrator for pain and suffering.

(*e*) *Effect of statute upon pending suit.* On December 18, 1957, Mrs. J. D. Boney brought an action in the Civil Court of Fulton County against the National Surety Corporation, surety on the bond of Carlus Gay, Sheriff of Laurens County. On March 4, 1958, the General Assembly passed an act providing that all suits on the bond of law enforcement officers should be instituted in the county of their residence. Did this statute have the effect of divesting the Civil Court of Fulton County of jurisdiction in the pending suit? In *National Surety Corporation v. Boney,*[14] the Court of Appeals answered, "No." The decision is based in part upon an interpretation of the intent of the General Assembly; but the opinion, by Judge Nichols, contains this significant statement:

> This court is of the opinion that once a right of action is reduced to a petition, filed as a law suit in a court of competent jurisdiction and parties litigant served, it then becomes a vested right in both the plaintiff and defendant to have said cause tried in that particular court, and such right is not subject to be divested by legislation enacted subsequently to the filing of said action in such court of competent jurisdiction to the detriment of either party.

Judge Quillian, dissenting, held that "There is no property right in a remedy, the remedy being merely the means of enforcing the right." Hence, "remedial statutes changing the mode of trial take effect upon their passage and are applicable to pending suits."

CONTEMPT OF COURT

The "inherent powers" of courts is a topic of boundless scope. *Garland v. Tanksley*[15] raises the question of the power of the Court of Appeals, on motion prior to the filing of a writ of error, to grant a supersedeas and release a prisoner held in jail for alleged contempt by a trial judge. Admitting that such power "is not spelled out to this court under existing statutory authority," the Court of Appeals nonetheless exercised the power. Many who would agree that the

13. Ga. Laws 1952, pp. 224-225, GA. CODE ANN. § 3-505 (1958).
14. 99 Ga. App. 280, 108 S.E.2d 342 (1959).
15. 99 Ga. App. 201, 107 S.E.2d 866 (1959).

Court of Appeals legally possesses such authority would doubt the wisdom of its exercise under the facts stated in the official record. The delicate nature of the issues involved necessitates leaving to the judges an area of discretion so that justice may prevail in individual cases. The Court of Appeals held that the "trial court abused its discretion." The evidence on this score in the per curiam opinion of the Court of Appeals is unimpressive.

CRIMINAL PROCEDURE

"Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel," states the Constitution of Georgia.[16] This has come to be a right secured by the due process clause of the Fourteenth Amendment to the Constitution of the United States and enforcement of the right in the courts has been vigorous in recent years.

Habeas corpus appears to be the most satisfactory remedy for a person confined in prison as the result of a trial in which he was not given the benefit of counsel. In *Grammer v. Balkcom*[17] the Georgia Supreme Court reaffirms the holding that "a complaint that the defendant was not given the benefit of counsel, if sustained, presents a good ground for issuance of the writ of habeas corpus." Grammer had entered a plea of guilty at his original trial in Cobb Superior Court. In the present proceeding, he insisted that he was insane at the time the plea of guilty was entered.

Balkcom, the warden, demurred on the ground that habeas corpus was not the proper remedy. It appearing that the prisoner was held under sentence of Cobb Superior Court imposed on a plea of guilty entered by the prisoner, a motion to withdraw such plea should be filed in Cobb Superior Court and Tattnall Superior Court had no jurisdiction in the case, alleged the warden. The trial court sustained this demurrer but was reversed by the Georgia Supreme Court.

If the Superior Court of Tattnall County becomes burdened with applications for writs of habeas corpus on the part of prisoners in the State Penitentiary, comparison of Georgia procedure with federal procedure may suggest a solution to the problem. Under 28 U.S.C. 2255 a prisoner in custody under sentence of a federal court, who claims the right to be released, may move the court which imposed the sentence to vacate or correct it; and no application for a writ of habeas corpus shall be entertained until the prisoner has exhausted his remedy in the sentencing court, unless it appears that the remedy

16. Art. I, § I, Par. V.
17. 214 Ga. 691, 107 S.E.2d 213 (1959).

by motion is inadequate. This provision was adopted in 1948 to relieve pressure upon the District Courts in the districts where federal penitentiaries were located. The present writer sees nothing contrary to due process of law in a statute which would require a prisoner to raise the issue of the legality of his sentence in the court which made the sentence.

The District Courts of the United States are empowered by statute to grant an application for a writ of habeas corpus to a person in custody pursuant to the judgment of a state court under designated circumstances;[18] and in recent years this power has been exercised with increasing frequency. The procedure, however, is not free of defects. The District Court, upon a hearing on the petition for habeas corpus, has no authority to order a new trial in the state court and an order setting the prisoner free might be a miscarriage of justice. In *Dowd v. United States ex. rel. Cock*[19] the United States Supreme Court faced this problem and adopted a solution, as follows:

> There remains the question of the disposition to be made of this case. Fortunately, we are not confronted with the dilemna envisoned by the State of having to choose between ordering an absolute discharge of the prisoner and denying him all relief. The District Court has power in a habeas corpus proceeding to 'dispose of the matter as law and justice require.' 28 U.S.C. § 2243 . . . on remand, the District Court should enter such orders as are appropriate to allow the State a reasonable time in which to afford respondent the full appellate review he would have received but for the suppression of his papers, failing which he shall be discharged.

Bailey v. State[20] reaffirms a previous decision that "bastardy" and "adandonment" are separate crimes and that conviction of one does not bar a prosecution for the other. Moreover, since the present statute makes the offense of abandonment a continuing offense, the ruling under an earlier case[21] that after an acquittal or conviction, before there could be a subsequent conviction, the father must resume the family relationship, is no longer the law.

TAXATION

The decision of the Supreme Court of Georgia in *Stockham Valves and Fittings, Inc. v. Williams*[22] was reversed by the Supreme Court of the United States. This important case, it will be recalled, dealt

18. 28 U.S.C. § 2254.
19. 340 U.S. 206, 71 S. Ct. 262, 95 L.Ed. 215 (1950).
20. 214 Ga. 409, 105 S.E.2d 320 (1958).
21. Gay v. State, 105 Ga. 599, 31 S.E. 569 (1898).
22. 213 Ga. 713, 101 S.E.2d 197 (1957).

with the power of the state to collect an income tax from a foreign corporation whose only business within the state was interstate in character. The United States Supreme Court concluded; "that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same."[23] A liberal policy in sustaining state taxes on interstate commerce has been notable in the decisions of the Supreme Court for years and the present decision is but a further step in implementing this policy. The Court has not yet sanctioned a tax on the privilege of engaging in interstate commerce, but it sees no objection to a tax upon net income derived from the profits of interstate commerce, provided the tax is nondiscriminatory and is fairly apportioned according to the business activities carried on within the taxing state.

The decision in *Oxford v. Nehi Corporation*[24] was somewhat of a contrast. Nehi, a Delaware corporation, maintains places of business in California and Alabama in addition to its principal office located in Columbus, Georgia; hence under Georgia law the apportionment of its income for determining income taxes due to Georgia is governed by a three-factor formula, including (1) average inventory ratio, (2) salaries and wages ratio, and (3) gross receipts ratio. The controversy in the present case involved the proper application of the gross receipts ratio. Under the wording of the statute[25] "receipts shall be deemed to have been derived from business done within this State only if received from products shipped to customers in this State or delivered within this State to consumers . . . " The Revenue Commissioner contended that "where products are produced, manufactured or stored in this State and shipped to customers outside this State, the gross receipts derived therefrom are to be included in the Georgia gross receipts unless the sales for such products were negotiated or effected through offices of the taxpayer outside the State." Chief Justice Duckworth and Justices Head and Hawkins were willing to accept the commissioner's interpretation. They relied upon what they conceived to be the principle intent of the legislature, namely to tax "that portion of the business income which is reasonably attributable to the property owned and business done within the State." The majority of the court refused to disregard the specific wording of apportionment formula in order to arrive at a better tax-raising result. The decision will no doubt lead to a rewording of the statute.

23. 358 U.S. 450, 452, 79 S. Ct. 357, 3 L.Ed.2d 421 (1959).
24. 215 Ga. 74, 109 S.E.2d 329 (1959).
25. Ga. Laws 1937, p. 129, GA. CODE ANN. § 92-3113.

Another significant tax case of the year was *State v. Coca-Cola Bottling Company*.[26] Coca-Cola Bottling Company holds the exclusive right from Coca-Cola Company to sell Coca-Cola syrup in Georgia and a number of other states. The Georgia Supreme Court held that the bottling company's entire income was subject to taxation under the income tax laws of Georgia. "Its business is done in Georgia and the destination or origin of its shipment in no wise alters this fact."

Sigman v. Brunswick Port Authority[27] marks another victory for state "authorities". Sigman and others, citizens and taxpayers, sought to restrain the Brunswick Port Authority from proceeding with the issuance of bonds not to exceed $3,500,000 to be used in constructing buildings and facilities to be leased by the authority to Bestwall Gypsum Company.

Among the constitutional attacks upon the laws under which the authority was acting was a claim that

> . . . the issuance of the revenue bonds pledges the credit of the State to the Authority and thence to the lessee of the proposed facilities in violation of article 7, section 3, paragraph 4 . . . which provides that 'The credit of the State shall not be pledged or loaned to any individual, company, corporation or association.'

This argument was met by citation of provisions of the act creating the authority which state clearly that the credit of neither the state nor its political subdivisions is pledged to pay debts of the authority. Such debts are corporate debts of the authority. This position is well established by previous decisions dealing with state corporations or authorities.

But what of the tax exemption of property leased by the authority to the Bestwall Gypsum Company? In previous cases the Georgia courts have upheld such exemptions on the ground that the property was public property. Members of the public "authorities" are forbidden to use property of the authorities for private gain and this property has been held to be public because title was held only for the benefit of the public. But does such property lose its character as public property when leased to a private corporation? The answer in the *Brunswick Port* case was, "No." As Justice Hawkins phrased it,

> Property used for the purpose of public convenience and welfare in the matter of public travel and transportation and to facilitate public transportation and as a dock or port operation, to provide buildings which the users of the port may

26. 214 Ga. 316, 104 S.E.2d 574 (1958).
27. 214 Ga. 332, 104 S.E.2d 467 (1958).

> lease, and in which to store and process commodities transported by water, is in the aid of commerce, and is for the promotion of public transportation, public commerce, and general welfare, and may properly be classified as public property and therefore exempt from taxation.

Chief Justice Duckworth dissented on the ground that such a tax exemption placed private enterprise at a disadvantage. "I fear," stated the Chief Justice, "that this case marks the first dangerous step toward placing the State of Georgia in open competition with private enterprise, which is the very lifeblood of a free democracy."

In *Agriculture Commodities Authority et al v. Ralph Balkcom*,[28] the court held invalid a tax to be collected from producers of peanuts grown and sold in the State of Georgia solely for the purpose of advertising and promoting this commodity. The General Assembly is without constitutional authority to create an instrumentality of the state and clothe it with power to impose a tax which it does not itself possess. A 1958 amendment to the Agricultural Commodities Authority Act of 1951 provided for such a tax. The amendment was declared void as a violation of Article 7, section 2, paragraph 1 of the Constitution, which provides that "The powers of taxation over the whole State shall be exercised by the General Assembly for the following purposes only: . . . 8. To advertise and promote the agricultural, industrial, historic, recreational and natural resources of the State of Georgia."

General v. Special Laws

It is well established that municipalities are liable for negligence in the maintenance and repair of streets. This is a "ministerial function." *City of Macon v. Harrison*[29] held that Macon could not avoid this liability by a charter provision limiting the power of the mayor and council over street maintenance to "legislative and judicial powers." The charter provision was held to be a special law in conflict with the general law[30] making municipalities liable for negligence in constructing or repairing streets.

A general law[31] provides that "Equity will not take cognizance of a plain legal right where an adequate and complete remedy is provided by law . . . " An act of 1949 authorized the Board of Dental Examiners of Georgia to bring an equitable petition to enjoin any person from engaging in the practice of dentistry without being licensed

28. 215 Ga. 107, 109 S.E.2d 276 (1959).
29. 98 Ga. App. 769, 106 S.E.2d 833 (1958).
30. Ga. Code § 69-303 (1933).
31. Ga. Code § 37-120 (1933).

to do so. An act of 1956 provided further that "it shall not be necessary in order to obtain the equitable relief herein provided for the Board of Dental Examiners to allege and prove there is no adequate remedy at law." Was the act of 1956 void as a special law in conflict with an existing general law? "No," said the Supreme Court in *Hortman v. Yarbrough*.[32] The act of 1956 was a general law, acting uniformly upon all persons who are brought within the circumstances provided by it.

> All persons, firms, or corporations which undertake to practice dentistry without a license may be enjoined upon equitable suit by the Board of Dental Examiners without regard to whether there may be some other legal remedy which might obtain the same result. The classification made by the legislature in this case is reasonably related to the purpose of the legislation and the method chosen to enforce this regulation of the dental profession is reasonably calculated to obtain the desired result. The law is, therefore, a general and not a special law . . .

Another decision helpful in clarifying the distinction between general and special laws related to electric membership corporations. The Electric Membership Corporation Act of 1937 authorized the formation of cooperative, nonprofit electric membership corporations for the purpose of engaging in electrification in "rural areas." It defined a rural area as "any area not included within the boundaries of any incorporated or unincorporated city, town, or village, having a population in excess of 1,500 inhabitants according to the last Federal census, and includes both farm and non-farm population." Was this a general or special law? If a special law, then an amendment of 1939 to the act setting 12 months from the date of the accrual of certain rights of action against such corporations as the time limit for bringing them was void. Limitations on actions for torts is governed by general law. In *Irwin County Electric Membership Corporation v. Haddock*[33] the Supreme Court held the Electric Membership Corporation Act to be a general law. According to Justice Head, speaking for a unanimous court,

> . . . a classification as to persons located in a rural area within the State, as defined by the General Assembly of Georgia and the act of Congress, is a natural classification. It is not arbitrary; it stands upon reason; it has regard to the character of the legislation of which it is a part (rural electrification); and it is coextensive with and may operate uniformly upon the entire class to which it is applicable . . . It follows that the . . . Act . . . is a general law.

32. 214 Ga. 693, 107 S.E.2d 202 (1959).
33. 214 Ga. 682, 107 S.E.2d 195 (1959).

LABOR UNIONS

International Association of Machinists v. Street[34] dealt with one of the most important questions of the present generation; and, in my judgment, the decision was the best one written by the Supreme Court of Georgia during the past year. The Supreme Court of the United States may reverse the decision, but that court will be put to task to overcome the force and validity of the argument advanced by our own Justice Bond Almand.

The issue involved is the right of unions, under a union shop agreement with an employer, to force workers to contribute funds for use in advancing political ideologies opposed by the workers. As Justice Almand puts it,

> The fundamental constitutional question is: Does the contract between the employers of the plaintiffs and the union defendants, which compels these plaintiffs, if they continue to work for the employers, to join the unions of their respective crafts, and pay dues, fees, and assessments to the unions, where a part of the same will be used to support political and economic programs and candidates for public office, which the plaintiffs not only do not approve but oppose, violate their rights of freedom of speech and deprive them of their property without due process of law under the First and Fifth Amendments to the Federal Constitution?

According to Justice Almand,

> One who is compelled to contribute the fruits of his labor to support or promote political or economic programs or support candidates for public office is just as much deprived of his freedom of speech as if he were compelled to give his vocal support to doctrines he opposes . . . . There is a common saying that 'Money talks—sometimes louder than the spoken word.' In the case at bar, the personal convictions of the plaintiffs on political and economic issues are being combatted by the use of their financial contributions to foster programs and ideologies which they oppose.

The issues here are both complex and far-reaching. The Constitution vests in Congress power to regulate commerce among the several states. By the Railway Labor Act, Congress has specifically authorized union shop contracts for railroad employees. At the same time, it should be remembered that Congress has made it illegal for any labor organization to make a contribution or expenditure in connection with an election of a federal officer, or a primary, convention, or caucus held

34. 215 Ga. 27, 108 S.E.2d 796 (1959).

to select a candidate for such office.[35] Enforcement of this provision against political activity by labor unions has been lax. We may anticipate more litigation and more legislation before the outcome of the issues involved in the *Street* case are resolved.

Cook v. Huckabee Transport Corporation[36] reaffirms the established concept that "Peaceful picketing is not unlawful, unless it is for an illegal purpose. On the contrary, it is authorized under the constitutional guarantee of free speech." Moreover,

> Where, as in this case, the petitioner seeks by another amendment to extend the force and effect of an injunction previously granted, facts should be alleged and proved that were unknown at the time the injunction was granted or new facts arising since the date the injunction was granted should be alleged and proved.

DUE PROCESS

(*a*) *Notice and hearing.* Can the legislature authorize a municipality to construct sewer lines along its streets and assess the cost against abutting property without notice to the property owner and without affording such property owners an opportunity to be heard respecting the reasonableness or lawfulness of the assessment? *Lockridge-Rogers Lumber Company v. City of East Point*[37] reaffirms the Georgia rule that this can be done, provided the landowner is permitted to file an affidavit of illegality and thereby contest the reasonableness or the lawfulness of the assessment before payment is finally required.

Murphy v. Murphy[38] deals with the dissolution and winding up of the affairs of a partnership. The firm T. W. Murphy & Sons, owned and operated by three brothers, was dissolved by the death of one of the brothers. Thereafter another of the brothers died. Representatives of the deceased partners sought the appointment of a receiver, an accounting, and an injunction restraining the surviving partner from operating the partnership's business. Among other things, the plaintiff's petition alleged that the surviving partner was insolvent and kept no accurate record of his dealings. This petition, filed in October 1956, was dismissed in August 1958. In the meantime, the trial judge had approved (1) an application of the surviving partner for leave to sell at private sale a tract of 582 acres and (2) a report by the surviving partner showing the disposition of partnership funds. This action was taken

35. 61 Stat. 136. See United States v. C.I.O., 335 U.S. 106, 68 S. Ct. 746, 92 L.Ed. 1849 (1948).
36. 215 Ga. 9, 108 S.E.2d 710 (1959).
37. 214 Ga. 255, 104 S.E.2d 228 (1958).
38. 214 Ga. 602, 106 S.E.2d 280 (1958).

without notice to the plaintiffs. The Supreme Court reversed the trial judge on all these points. It held that the facts in plaintiff's petition stated a cause of action for injunction, accounting, and receivership, and that the ex parte orders of the trial judge were void.

> Where, as here, a party is being divested of property rights by a proceeding instituted by an opposite party to the cause, nothing short of notice of the proceeding and an opportunity to be heard in opposition thereto will satisfy the due-process clauses of the Constitution of this State and of the United States.

In *Hill v. Johnson*[39] the Georgia Supreme Court sustained the decision of a trial judge refusing to enjoin the Board of Aldermen of the City of Nicholls from taking steps toward the removal of the city's mayor. The decision rested on application of "the general rule that a court of equity has no jurisdiction to enjoin the removal of a public officer." The section of the act incorporating the City of Nicholls which authorized the Board of Aldermen to remove the mayor for designated causes did not provide for notice and hearing.

(*b*) *Abuse of restraining orders.* Alleging the unconstitutionality of the act of 1903 creating the City Court of Jefferson, two petitioners, each with criminal charges pending against him in said court, sought injunctions in the Superior Court to prohibit operation of the City Court. Temporary restraining orders were issued in the two cases on July 3 and August 5, 1958, respectively, by Judge Maylon B. Clinkscales, and a hearing set for both on September 5. On September 2, Judge Clinkscales issued an ex parte order indefinitely postponing the hearing on the ground that one of the petitioners for injunction was ill. In the meanwhile, the "temporary" restraining orders against operating the City Court were continued in effect. In reversing Judge Clinkscales, the Supreme Court recognized the rule that "neither a temporary restraining order nor a continuance which is temporary of such order is reviewable." But, said the court, "such ex parte orders are not intended to serve the function of a permanent injunction. Indeed to indefinitely deprive one of freedom of action without notice and an opportunity to be heard would be the rankest sort of denial of due process . . . . " Under the circumstances of this case, the trial judge had abused his discretion in issuing the restraining orders, and the orders were therefore reversed.

(*c*) *Automobile liability.* An act of 1955[40] reads as follows:

39. 214 Ga. 417, 105 S.E.2d 309 (1958).
40. Ga. Laws 1955, pp. 454-455, GA. CODE ANN. § 68-301 (1958).

> Every owner of a motor vehicle operated upon the public highways, roads or streets of this State, shall be liable and responsible for the death, or injuries to person or property resulting from negligence in the operation of such motor vehicle, if said motor vehicle is being used in the prosecution of the business of such owner or if said motor vehicle is being operated for the benefit of such owner.

In *Frankel v. Cone*[41] this act was declared to be void on its face as a violation of due process of law. The fatal defect in this law, in the eyes of the court, was that it placed an absolute liability upon the owner if the motor vehicle were being used for her benefit,

> . . . even though operated without notice to her or without her knowledge and without her consent, express or implied. To hold this statute constitutional would be to hold a party liable for the negligent conduct of another, even though a trespasser were operating the vehicle against the express orders of the owner, and irrespective of how careful or free from negligence the owner was, the only condition being that it be operated for the benefit of the owner.

(*d*) *Vague Statutes.* In *Teague v. Keith*[42] an attack was made on the constitutionality of two provisions of the statutory regulations for motor vehicles. The provisions were assailed as too vague and uncertain to be enforceable or consistent with due process. The provisions in question read as follows:

> In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on entering the highway in compliance with legal requirements and the duty of all persons to use due care.
>
> The driver of every vehicle shall, consistent with the requirements of subdivisions (a), drive at an appropriate reduced speed when approaching and crossing an interscction . . . [43]

Justice Mobley, for the majority of the court, quoted with approval a holding in a previous case dealing with a similar statute. The holding there was that even though too vague to be enforced as a penal measure, the act was not too indefinite to furnish a rule of civil conduct. "Indeed, in most respects it is not greatly different from the rule of ordinary care which would apply in the absence of a statute. There was accordingly, no error in giving it in charge to the jury in a proper case." Chief Justice Duckworth dissented.

41. 214 Ga. 733, 107 S.E.2d 819 (1959).
42. 214 Ga. 853, 108 S.E.2d 489 (1959).
43. GA. CODE ANN. § 68-1626 (a) and (c) (1933).