ADMINISTRATIVE LAW

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There were no developments in this field of special significance during the survey period. The Georgia Supreme Court and the Court of Appeals have not yet been offered the opportunity to interpret the Georgia Administrative Procedure Act (hereinafter abbreviated G.A.P.A.)[1] on an important point. The legislative amendments experienced by the Act during this period have not been of special relevance. However, attention will be called to certain enactments of the General Assembly and to views of the courts which may be of interest to the reader.

LEGISLATION

The G.A.P.A. experienced two amendments during the survey period. An enactment[2] amended the G.A.P.A. by striking subsection (d) of section 7 in its entirety and inserting in lieu thereof a new subsection (d) so as to authorize the Secretary of State to make available the *Official Compilation, Rules and Regulations of the State of Georgia,* and bulletins, without charge to certain state and county officials and to other persons at a price fixed by the Secretary of State.

In accordance with section 7, subsection (a) of the G.A.P.A. the Secretary of State has compiled, indexed and published all agency rules remaining in effect filed in his office by each agency in compliance with section 5 of the Act. These rules have been published in a set of five loose-leaf binders entitled *Official Compilation, Rules and Regulations of the State of Georgia.* As the regulations are amended the new matter will be published in a monthly bulletin. Space is provided in the loose-leaf binder for insertion of this bulletin at the end of the regulation of the department so affected.

Another amendment[3] to the G.A.P.A. was the addition of a new section to be numbered 25 which allows the Fire Safety Department and the Insurance Department of the Office of the Comptroller General to comply with the filing requirements of the G.A.P.A. by filing regulations, standards and plans only by reference.[4] They may also satisfy the procedure for con-

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1. GA. CODE ANN. §3A-101 (1966 Rev.).
2. Ga. Laws 1967, p. 893.
3. Ga. Laws 1967, p. 618.
4. Although the *Official Compilation, Rules and Regulations of the State of Georgia* was originally intended to be a six-volume publication, the Secretary of State has announced that Volume III, which is reserved for the Safety Fire Commission has not been printed since the Comptroller General is not required by the 1967 Act (Ga. Laws 1967, p. 893) to file the regulations of the Fire Safety and Insurances Departments in the office of the Secretary of State. Volume III will be used for the filing of rules and regulations of future agencies.

duct of hearings in contested cases and rule making required under the G.A.P.A. by following the provisions of chapter 2 of the Georgia Insurance Code, GA. CODE ANN. §56-1 (1960 Rev.).

During the survey period the General Assembly enacted a statute[5] creating the Ocean Science Center of the Atlantic Commission within the executive branch of the state government to plan, promote and develop an oceanographic research complex. In addition to some specific powers such as to acquire or lease real and personal property, to make contracts, to construct and operate projects to be located on property owned by the Commission as lessor, to lease such projects and to enter into agreements with agencies of other states for participation in the complex, the new Commission shall exercise any power usually possessed by other departments of the executive branch of the government. The Commission shall also prescribe rules and regulations for the operation of and insure maximum use of each project constructed under the provision of the Act.

A detailed statute was enacted by the 1967 session[6] amending the CODE by inserting following title 79 a new chapter to be known as "Title 79-A-Pharmacist, Pharmacy and Drugs." The title is enacted for the purpose of safeguarding the public health, safety and welfare by controlling and regulating the manufacture, production, distribution and use of drugs, medicines, poisons, and other articles and devices used in the treatment of illness, and providing for the supervision and control of the individuals concerned with the same. Although title 79-A is not exhaustive of all laws on the matter, attention is called to the numerous chapters of the CODE repealed by this Act.

Of special interest are the powers given by the Act to the Georgia State Board of Pharmacy to regulate the practice of pharmacy and the sale and dispensing of drugs, to adopt a schedule of dangerous drugs, to regulate the sale of cosmetics, the employment and training of apprentices, interns, and other employees in pharmacies, to investigate violations of the statute, to prescribe the minimum professional and technical equipment and supplies for compounding and dispensing drugs, devices and prescriptions, to confine to prescription order of any drug found to be potentially dangerous to public safety if dispensed without prescription, to license all pharmacists who shall practice in this state and all pharmacies which shall dispense drugs in this state as well as certain manufacturers and wholesalers, and to suspend, revoke or cancel any such licenses and adopt rules of professional conduct for pharmacists. The statute expressly states that proceedings by the State Board of Pharmacy to make rules and regulations or in the exercise of its authority to issue, cancel, suspend or revoke any license shall be conducted in accordance with the G.A.P.A. The Board is authorized to obtain injunctions in order to prohibit violations of the statute. Exemptions

5. Ga. Laws 1967, p. 12.
6. Ga. Laws 1967, p. 298.

from the term of the Act as well as penalties for its violations are also provided.

CODE chapter 84-7, as amended, relating to the regulation, licensing and practicing of dentists and dental hygienists was amended by an Act[7] to provide for an additional classification of licenses to be known as "Conditional Licenses' for all holders of Georgia licenses who do not currently maintain residence and domicile in the state.

CODE chapter 84-9, relating to the creating of the State Board of Medical Examiners, was also amended[8] by the General Assembly so as to remove requirements that medical interns be licensed, to abolish fees for medical interning licenses, and to provide for the issuance of licenses by reciprocity.

Another act[9] establishing a roadside market incentive program within the Georgia Department of Agriculture and under the Supervision of the Commissioner of Agriculture provides that when an application for participation in the program is disapproved or when previously granted approval is revoked, the market owner shall be given written notice setting forth the reason for the action taken and shall, upon request, be afforded a hearing in accordance with the provisions of the G.A.P.A.

A statute[10] of general interest was enacted striking CODE chapter 88-9 in its entirety and substituting in lieu thereof a new CODE chapter 99-9 entitled Air Quality Control. This new chapter gives the Board of Health the power to promulgate after due notice and public hearings subject to the G.A.P.A., rules and regulations establishing standards for the prevention, control, and abatement of air pollution, requiring the registration of persons engaged in operations which may result in air pollution, requiring the filing of reports and information relative to the sources of air pollution, and implementing or effectuating the powers and duties of the Department under the Act. The Board shall exercise general supervision of the administration and enforcement of the Act and all rules and regulations and orders promulgated thereunder.

The Department of Public Health is charged by the new chapter with the administration and enforcement of the Act and all rules, regulations and orders promulgated thereunder. Among other powers and duties, it may issue, modify or revoke orders prohibiting, controlling or abating discharges of waste in the air and/or requiring compliance with standards or rules and regulations adopted or promulgated by the Board. The Board may also hold hearings, issue notice of hearings and issue subpoenas requiring attendance of witnesses and the production of evidence, administer oaths and take testimony. The hearings shall be governed by the procedure established by CODE section 88-304, subject to compliance with the applicable minimum requirements of the G.A.P.A.

7. Ga. Laws 1967, p. 417.
8. Ga. Laws 1967, p. 826.
9. Ga. Laws 1967, p. 476.
10. Ga. Laws 1967 p. 581.

Final orders or actions of the Board or the Department are subject to judicial review by an appeal as provided by CODE section 88-305 or, at the option of the aggrieved party, by an appeal as provided by section 20 of the G.A.P.A. In either case the Board, Department or any party to the proceeding may secure a review of the final judgment of the superior court by appeal in the manner and form provided by law for appeals from the superior court of this state. The Act contemplates penalties for violations, and those found guilty may be enjoined from continuing such violations.

For the purposes of encouraging and promoting the development of the Chattahoochee River and its tributaries, the General Assembly created[11] a new state agency to be known as the Georgia Commission for the Development of the Chattahoochee River Basin. In cooperation with federal agencies, other state agencies, citizens, and organizations, the Commission shall formulate a comprehensive program and plan for the development of the Chattahoochee River Basin.

CASES

In *Horton v. Huit*[12] the court of appeals states that it is elementary that if there is any evidence to support the findings of fact of an administrative body or other trier of fact, they will not be disturbed. The court ruled that there was evidence sustaining the findings of the unemployment compensation board of review as to the time the notice denying unemployment compensation was mailed for purposes of determining whether an appeal was timely filed.

Concerning agencies not excepted from the G.A.P.A., the G.A.P.A. provides that findings of fact shall be based exclusively on the evidence and on matters officially noticed,[13] and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. However, it goes on to authorize the court to reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings are clearly erroneous in view of reliable, probative and substantial evidence on the whole record.[14]

The "clearly erroneous" test has been considered imprecise by some writers,[15] permitting a broader or narrower review according to the interpretation given to the phrase by the court. It is to be expected that the courts will in practice follow what is believed to be the dominant tendency toward the middle position known as the substantial-evidence rule, using the test of reasonableness in reviewing finding of facts.[16] But even with respect to this test one should bear in mind the statement of the United

11. Ga. Laws 1967, p. 805.
12. 113 Ga. App. 166, 147 S.E.2d 669 (1966).
13. GA. CODE ANN. §3A-114(9) (1967 Rev.).
14. GA. CODE ANN. §3A-120(h) (1967 Rev.).
15. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, ch. 15 at 620 (1965).
16. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §29.01 (1958).

States Supreme Court in the *Universal Camera* case[17] that "[t]he precise way in which courts interfere with agency findings cannot be imprisoned within any form of words . . . ." Courts will apply this formula more or less strictly according to their conception of the needs of justice.

In an action by a discharged employee of the Department of Revenue seeking a declaratory judgment as to his rights under the state employee's retirement system, the court of appeals[18] referred to a previous decision[19] maintaining that a petition fails to state a cause of action for declaratory judgment when it shows that any rights the plaintiff has have already accrued, and does not show that the plaintiff is in danger of taking some future undirected action which, if taken without judicial direction, might reasonably jeopardize his rights. The opinion adds, that the Declaratory Judgments Act[20] makes no provision for a judgment which is merely advisory.

In *McCoy v. Sanders*[21] the court of appeals made some pertinent statements as to the police power, power of eminent domain and immunity of state and county officials in an action for property damage which resulted when law enforcement officers drained a pond in search for the body of a murder victim. The court held that the owner of realty could not maintain an action against state and county officers for damages resulting from an act performed under and pursuant to police power. It commented that police power is not to be confused with the power of eminent domain under which property is acquired for the purpose of making public improvements upon condition that the owner be compensated for the taking or damaging of his property. As to immunity from suit, the decision recalls that it is well settled that no action can be maintained against the state without its prior consent or by virtue of a constitutional provision allowing a suit without consent, nor against state officials in their official capacity without consent of the state since such is, in effect, a suit against the state. Furthermore, no suit can be maintained against a county unless there is a law which in express terms or by necessary implication so declares.

The court reminds us that it has long been recognized that a loss suffered from the exercise of police power is *damnum absque injuria,* and therefore the appeal for compensation must be to the public authority and not to the courts. However, the decision calls attention to the fact that to afford some remedy for this situation the General Assembly has created a Claims Advisory Board which, concurrently with the General Assembly, might authorize payment to one suffering the loss.[22] Recognizing the trend[23] in this field the court goes on to state:

17. Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951).
18. Scott v. Employee's Retirement Sys. of Ga., 113 Ga. App. 295, 147 S.E.2d 821 (1966).
19. Bryant v. Clark Glass & Mirror Co., 109 Ga. App. 606, 136 S.E.2d 915 (1964).
20. GA. CODE ANN. §110-1101 *et seq.* (1965 Rev.).
21. 113 Ga. App. 565, 148 S.E.2d 902 (1966).
22. *See* GA. CODE ANN. §§47-504 to 509 (1965 Rev.) and Ga. Laws 1967, p. 712.
23. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §2501 (1958).

> Perhaps the time has come when a State Tort Claims Act, somewhat similar to the Federal Tort Claim Act of 1945, affording a legal remedy against government for these and other losses should be adopted. State, as well as Federal, government is now big business, operating in so many ways and to such extent that there is hardly a time or place when the citizen is not exposed to the danger of injury and damage from the actions of its servants, agents and employees.[24]

Professor Davis points out[25] that only a small minority of states undertake no liability for state torts.[26]

In all interpretations of statutes, the court must "look diligently for the intention of the General Assembly, keeping in view, at all times, the old law, the evil, and the remedy."[27] Invoking that rule of construction, the supreme court declared in *Wall v. Youmans*[28] that the purpose of section 5, subsection (a) of the G.A.P.A. which requires that a certified copy of all rules adopted by administrative agencies prior to the effective date of the Act be filed with the Secretary of State within 20 days after such effective date, was to make them immediately known and available to the public. Therefore, the court reasoned, the General Assembly intended that the rules be filed not later than 20 days after the effective date of the Act. The decision concluded that the filing of the rules and regulations of the State Board of Examiners of Optometry one day ahead of the effective date was in keeping with the purpose of the Act, and did not render them invalid.

In *Gunther v. Gillis*[29] the court of appeals reiterated that it will not take judicial notice of rules and regulations of various state administrative agencies, and those relied upon as giving rise to a right of action should be pleaded and proved. As was pointed out in previous survey,[30] the above rule will not be applicable to agencies not excepted from coverage of the G.A.P.A. with respect to any rule which has become effective pursuant to the provisions of the Act.[31] In deciding another aspect of the case, the court applied the principle that the answer of an administrative agency which is not traversed must be accepted as true by the reviewing court.

In upholding the validity of the Motor Vehicle Act[32] the supreme court was of the opinion[33] that the duties and actions of the Department of Public Safety in exercising the powers conferred by the Act by suspending

24. McCoy v. Sanders, 113 Ga. App. 565, 569, 148 S.E.2d 902, 906 (1966).
25. 3 DAVIS, *supra* note 23, at §2503.
26. For a recent treatment of sovereign immunity and suits against governments and officers see L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTIONS, chs. 6 and 7 (1965).
27. GA. CODE ANN. §102-102(9) (1959 Rev.).
28. 223 Ga. 119, 154 S.E.2d 191 (1967).
29. 114 Ga. App. 54, 150 S.E.2d 309 (1966).
30. Sierk, *Administrative Law*, 18 MERCER L. REV. 1 (1966).
31. GA. CODE ANN. §3A-108 (1967 Rev.).
32. GA. CODE ANN. §92A-606 (1958 Rev.).
33. Turmon v. State Dep't of Pub. Safety, 222 Ga. 843, 152 S.E.2d 884 (1967).

drivers' licenses where there is neither insurance nor financial ability to compensate others for damages resulting from accidents are clearly administrative, and are not judicial in violation of the constitutional mandate on separation of powers.[34] Supporting the Department of Public Safety in the enforcement of the Act, the court held that the refusal of the agency to consider evidence as to who was responsible for the accident did not constitute a denial of due process, and no other violation of due process was shown in the judicial review of the administrative actions of the Department.

Statutory remedy, if adequate, must be exhausted before resort to equity will be allowed. Applying this rule of law, in *Carter v. Board of Education of Richmond County*,[35] the Supreme Court of Georgia decided that where the plaintiff sought to have the county board of education and school superintendent enjoined from continuing their practice of compulsory assessment and collection of fees based upon enrollment of children in schools, but the plaintiff had not resorted to the county board or the state board of education and it was not shown why resort to such remedy would not have been adequate, the plaintiff had failed to exhaust her legal remedy provided by GA. CODE ANN. §32-910 (1952 Rev.) and was therefore not entitled to the injunctive relief demanded.

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34. GA. CONST. art 1, §1, para. 23 (1945), GA. CODE ANN. §2-123 (1948 Rev.).
35. 221 Ga. 775, 147 S.E.2d 315 (1966).