CONSTITUTIONAL LAW

By ALBERT B. SAYE*

At its regular sessions in 1967 and 1968 the General Assembly proposed 130 amendments to the Constitution of Georgia to be submitted to the people for ratification or rejection in the general election in November, 1968. This is the largest number of amendments ever submitted in a single year with the exception of the year 1962 when 137 amendments were voted upon. Most of the 1968 amendments are local in character, applying to only a particular city, county, or other political subdivision. Twenty-three of them are general amendments of statewide application.[1] The extensive volume of these amendments makes it impractical to even summarize them here. Amendments that are ratified are included in the periodic revisions of the pocket part to volume I of the GA. CODE ANN. This article deals primarily with the growth of our constitutional law through judicial decisions.

AMENDING PROCESS

McLennan v. Aldredge[2] shows the growing complexity of the case law governing the procedure in advertising and ratifying constitutional amendments. It has long been the rule in Georgia that the question of whether an amendment to the constitution had been properly adopted is justiciable;[3] but it was not until 1952 that the Supreme Court of Georgia actually held void an amendment which the Governor had proclaimed ratified, and all told, there have been only three instances of judicial review of constitutional amendments. To understand these decisions and the present status of the law in the field, a rather detailed understanding of the history of the evolution of article XIII of the constitution is necessary. The reason for this lies in the fact that a case testing the validity of an amendment may not arise until years after the date of the alleged adoption of the amendment, and the court will test the validity of the procedure involved in ratifying the amendment by the constitutional provisions that governed that matter at the time involved. The *McLennan* case of 1968, for example, tested the validity of the procedure used in adopting a constitutional amendment in 1937.

The chief factors in this historical evolution may be summarized as fol-

*Professor of Political Science and of Law, University of Georgia. A.B., University of Georgia, 1934; M.A., 1935; LL.B., 1957; Ph.D., Harvard, 1941.

1. The amendments as proposed by the General Assembly are given in Ga. Laws 1967, pp. 901-971, and Ga. Laws 1968, pp. 1449-1889.
2. 223 Ga. 879, 159 S.E.2d 682 (1968).
3. Hammond v. Clark, 136 Ga. 313, 71 S.E. 479 (1911).

lows: Under the constitution of 1877, all amendments to the constitution had to be ratified by a majority vote of the people of the state as a whole voting thereon. The votes within particular political subdivisions were not considered separately. The constitution of 1945 added the proviso:

> . . . that if the proposed amendment is not one that directly affects the whole State, but only one or more subdivisions thereof, said amendment shall not become a part of this Constitution unless it receive both a majority of the electors qualified to vote voting thereon in the State as a whole, and also a majority of the electors qualified to vote voting thereon in the particular subdivision or subdivisions affected.[4]

An amendment of 1952 provided that proposed amendments that affected only one or more county or municipality should be submitted for ratification to the voters of the political subdivision or subdivisons affected. In case of an amendment affectng two or more subdivisions, the vote in them should be consolidated and a majority of the whole vote should be required.[5]

An amendment of 1956 further refined the procedure to be used in ratifying local constitutional amendments. Significantly, it provided that the votes in each political subdivision affected should be counted separately, and a majority of those voting on an amendment in each subdivision affected should be required.[6] No further amendment to article XIII has been made since 1956.

In two of the cases in which constitutional amendments proclaimed by the Governor have subsequently been held void by the court, the decisions were based upon failure to get the required vote or insurmountable uncertainty as to the vote on the amendment in a political subdivision affected.[7]

Seago v. Richmond County,[8] the last of the three decisions in which an amendment to the constitution proclaimed by the Governor was held void by the court, was based upon improper wording on the ballot concerning the amendment. A statute of 1939 provided that in preparing the form of the ballot, "the Governor shall use such language as will enable the voters to intelligently pass upon any such proposed amendment and intelligently register their votes concerning the same."[9] The court described the wording on the ballot concerning the amendment in question as ". . . insufficient to enable the voters to intelligently pass upon the proposed amendment. . . ."[10]

4. GA. CONST. art. XIII, §1 (1945).
5. Ga. Laws 1951, p. 681.
6. Ga. Laws 1956, p. 637.
7. Stinson v. Manning, 221 Ga. 487, 145 S.E.2d 541 (1965) *and* Towns v. Suttles, 208 Ga. 838, 69 S.E.2d 742 (1952).
8. 218 Ga. 151, 126 S.E.2d 657 (1962).
9. Ga. Laws 1939, p. 305.
10. 218 Ga. 156, 126 S.E.2d 661 (1962).

The *McLennan* case of 1968 held that the rule of the *Seago* case did not apply to constitutional amendments ratified prior to 1939. Thus, under the prevailing decisions, it would be difficult to attack successfully in the courts a constitutional amendment ratified prior to 1939 on the ground of the insufficiency of the language used on the ballot to identify the amendment. For amendments ratified in the period from 1939 to 1956, and there are more than a hundred such amendments, a different rule would prevail. The rule of the *Seago* case, if adherred to, would make suspect many of the amendments of the 1939-1956 period. And what is the rule governing amendments ratified since 1956? The amendment to article XIII adopted in 1956 altering the amending process states that in proposing an amendment "The General Assembly, in the resolution, shall state the language to be used in submitting the proposed amendment."[11] Apparently this curtails the use of the *Seago* rule for amendments ratified after 1956; hence, it would be applicable only for the period from 1940 to 1956. A strong argument can be made that the *Seago* case was itself improperly decided and the rule of the case should be abandoned.[12]

Freedom of Religion

Presbyterian Church in the U.S. v. Eastern Heights Presbyterian Church[13] and its companion case involving the Hull Presbyterian Church in Savannah presented questions of fundamental importance. The controlling question, as stated by the Supreme Court of Georgia, was:

> Are local Presbyterian churches which withdraw from the general church, charging abandonment by the general church of the tenets of faith and practice existing when the local churches affiliated with it, entitled to maintain an action in the civil courts for the possession and use of the local church properties, legal title to which is in the local churches?[14]

The court found that "the authorities are virtually unanimous in holding that because of the connective governmental structure of the Presbyterian Church, there is an implied trust upon the local church properties for the benefit of the general church."[15] Yet the court took the view "that such a trust is conditioned upon the church's adherence to its tenets of faith and practice existing when the local church affiliated with it and that an abandonment of, or departure from, such tenets is a diversion from the trust, which the civil courts will prevent."[16]

The trial court had submitted to a jury the question of whether the

11. Ga. Laws 1956, p. 637.
12. Saye, *Constitutional Law, Annual Survey of Georgia Law,* 15 Mercer L. Rev. 28 (1963).
13. 224 Ga. 61, 159 S.E.2d 690 (1968).
14. *Id.* at 67-68, 159 S.E.2d at 695.
15. *Id.* at 68, 159 S.E.2d at 695.
16. *Id.* at 68, 159 S.E.2d at 695.

national organization of the Presbyterian Church had substantially abandoned or departed from the tenets of faith and the practices existing when the two Savannah churches had affiliated with the national organization (in 1890 and 1930, respectively). The jury found in favor of the local churches, and the trial court granted a decree confirming the right of the local churches to use and control their property. Technically, the ruling of the Supreme Court of Georgia is that there was evidence to support the jury's verdict. But in cases of this kind, the relation between "law" and "fact" becomes so close that they tend to merge. Impressive evidence was presented in the trial court that the General Assembly of the Presbyterian Church had abandoned the doctrine of foreordination, that it had sponsored civil disobedience, and that it had opposed the government's policy in Vietnam.

Because the law and the facts in cases like this are amenable to varying interpretations by justices with differing points of view, it is not unlikely that the decisions of the Georgia court will be overruled by the Supreme Court of the United States. *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*[17] throws much doubt on the Georgia decision. Few Americans realize what is involved when they make a financial contribution to a church having a hierarchical organization.

A. Sunday Closing Laws

In the King James version of the *Bible* one of the Ten Commandments of Exodus XX is recorded thus: "Remember the Sabbath day, to keep it holy. Six days shalt thou labour, and do all thy work: But the seventh day is the Sabbath of the Lord thy God: in it thou shalt not do any work. . . ."[18] In keeping with this commandment, laws designed to preserve the Sabbath as a holy day have been a part of western civilization time out of mind. In recent years infractions of these laws have increased and considerable litigation has ensued. In 1960 the United States Supreme Court passed upon their constitutionality for the first time. The Court had gone to such extremes in the logic of its decisions banning devotional exercises in the public schools that it was hard pressed to find a basis upon which to refute the contention that the enforcement of Sunday closing laws did not amount to an advancement of religion. In a thirty-seven page opinion, Chief Justice Warren concluded that:

> In the light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently

17. 344 U.S. 94 (1952).
18. *Exodus* 20:8 (King James).

> they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.[19]

A Georgia statute of 1866, incorporated in the *Code* of 1933, makes it a misdemeanor for any person to "pursue his business or the work of his ordinary calling on the Lord's day, works of necessity or charity only excepted."[20] Apparently in an attempt to clarify and strengthen this Sunday closing law, in 1967 the General Assembly passed an act making it unlawful to engage on Sunday in the business of selling at retail clothing, furniture, hardware, and a large number of other "prohibted items". In *Hughes v. Reynolds*[21] the Supreme Court of Georgia found this act to be "patently discriminatory" and hence void under the equal protection clause of the constitution. The court took notice of the fact that the act did not prohibit sellers at wholesale from dealing in the prohibited items on Sunday, and that groceries, bicycles, motor boats, and many other items were not on the prohibited list. Moreover, the statute permitted a store primarily engaged in the retail sale of non-prohibited items to sell prohibited items on Sunday as long as the dollar value of sales of prohibited items constituted less than 50 percent of the total dollar volume of sales of the non-prohibited items.

Freedom of Speech

In *Corinth Publications, Inc. v. Wesberry*[22] the United States Supreme Court reversed the judgment of the Supreme Court of Georgia wherein that court had affirmed the judgment of the Superior Court of Muscogee County declaring the book entitled *Sin Whisper* to be obscene. The basis of the decision is obscure. The per curiam decision read: "The petition for a writ of certiorari is granted and the judgment of the Supreme Court of Georgia is reversed."[23] Justices Clark and Harlan would have affirmed the decision of the Georgia court. Chief Justice Warren would have set the case for oral argument.

Cragg v. State[24] involved an attack upon the constitutionality of the Georgia statute which makes it a felony to knowingly possess or exhibit "obscene matter" and states that "a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest. i.e., a shameful or morbid interest in nudity, sex or excretion."[25] Since most of the words of the Georgia statute are taken from the wording of a decision of the Supreme Court of the United

19. McGowan v. Maryland, 366 U.S. 420 (1961).
20. Ga Code Ann. §26-6905 (Rev. 1953).
21. 223 Ga. 727, 157 S.E.2d 746 (1967).
22. 388 U.S. 448 (1967).
23. *Id.*
24. 224 Ga. 196, 160 S.E.2d 817 (1968).
25. *Id.* at 196, 160 S.E.2d at 818.

States upholding a statute against obscenity,[26] Cragg made his attack under the Constitution of Georgia, in particular the clause which requires that "Laws of a general nature shall have uniform operation throughout the State. . . ."[27] Cragg argued that the obscenity statute "shows on its face that it is not intended to be uniformly interpreted or uniformly applied throughout the State."[28] Rejecting this argument, the Supreme Court of Georgia quoted from its past decisions as follows: "Uniformity does not mean universality. This constitutional provision is complied with when the law operates uniformly upon all persons who are brought within the circumstances provided by it."[29] This court is, of course, the highest authority on the meaning of the Constitution of Georgia, but I submit that if the interpretation used is intended to suggest that the standard of the local community involved is to be the test of obsceniy under the Georgia statute, the equal protection clause of the United States Constitution is violated. Mr. Justice Brennan, who introduced the phrase "contemporary community standards" in the *Roth*[30] case of 1957, subsequently explained that the phrase was used to refer not to local communities, but to communities in the sense of society at large, or people in general.[31]

Williams v. Maloof[32] sustained an injunction against the disruption of a business by picketing. The evidence showed that the operators of a grocery store in Atlanta were approached by a group of persons seeking information on their employment practices regarding Negroes. The inquirers were members of the Confederation of DeKalb's Community Organizations. Upon failure to gain the desired information, they organized a campaign to picket and cause a boycott of the store in question. "The picketing consisted at times of pickets so close together that customers could not enter the plaintiff's place of business. . . ."[33] The trial court granted a temporary injunction against the picketing, and the case came to the Georgia Supreme Court on appeal from the judgment granting the injunction. The court upheld the injunction as warranted by the facts shown. There is much similarity between this case and *N.A.A.C.P. v. Overstreet*,[34] a case decided in Chatham County two years ago wherein punitive damages were assigned against the NAACP and affirmed by the United States Supreme Court.

26. Roth v. United States, 354 U.S. 476 (1957).
27. GA. CONST. art. I, §4 (1945).
28. 224 Ga. 197, 160 S.E.2d 819 (1968).
29. *Id.*
30. 354 U.S. 476 (1957).
31. Jacobellis v. Ohio, 378 U.S. 184 (1964).
32. 223 Ga. 640, 157 S.E.2d 479 (1967).
33. *Id.* at 641, 157 S.E.2d at 480.
34. 221 Ga. 16, 142 S.E.2d 816 (1965).

CRIMINAL LAW

It has frequently been pointed out that the three chief areas of the law with which the Supreme Court of the United States has concerned itself during the era that Earl Warren has served as Chief Justice are (1) racial integration, (2) legislative reapportionment, and (3) protection to persons accused of crime. Basing its decisions nominally on the vague "equal protection" and "due process" clauses of the Constitution, for a quarter of a century a majority of the Justices on the Supreme Court have openly followed an activist policy of judicial legislation. It is not surprising that justices on state courts, accustomed to constitutional government, have had difficulty in adopting local practices to the new law fashioned by the national court.

A. Aftermath of the Whitus Case

On January 23, 1967, in the case of *Whitus v. Georgia*,[35] it will be recalled, the United States Supreme Court held as prima facie evidence of the exclusion of Negroes from the jury the fact that in compiling the jury list the commissioners had used tax returns where taxpayers' records were segregated by color. By an act approved March 30, 1967, the state remedied this defect in its procedure in selecting jurors. But what of the application of the "*Whitus* rule" in habeas corpus proceedings to convictions made prior to January 23, 1967?

Strauss v. Grimes[36] decided November 22, 1967, held that "The Supreme Court of the United States has not made retroactive application of the Whitus principle to a situation where the attack on the grand jury was made after conviction."[37] This is a debatable point. Justice Grice, writing for the court in the *Strauss* case, made out a good case against retroactive application in terms of the serious disruption to the application of our criminal law that would result from such a course. The weakness in this argument is that the "*Whitus* principle" was no new principle. As early as 1880 the United States Supreme Court held the exclusion of Negroes from jury service to be unconstitutional.[38] On the other hand, varying factual situations modify by degrees the application of a principle. During the year under review in this article, the *Whitus* case was cited in four per curiam decisions by the United States Supreme Court reversing decisions of the Supreme Court of Georgia.[39]

35. 385 U.S. 545 (1967).
36. 223 Ga. 834, 158 S.E.2d 404 (1967).
37. *Id.* at 835, 158 S.E.2d at 405.
38. Strauder v. West Virginia, 100 U.S. 303 (1879).
39. Cobb v. State, 389 U.S. 12 (1967); Jones v. State, 389 U.S. 24 (1967); Sims v. State,

B. Death Penalty

In *Clark v. Grimes*[40] the Supreme Court of Georgia was presented with a challenge to the law and practice of excluding from the jury in cases involving capital felonies persons opposed to inflicting the death penalty. Citing *Logan v. United States*[41] and other old decisions by the Supreme Court of the United States wherein this practice had been sustained, the Georgia court sustained the statute. But the decision by the United States Supreme Court in *Witherspoon v. Illinois*[42] makes it doubtful if any state will in the future be able to constitute a jury that will impose the death penalty in any case.

C. Right of Counsel

At what point in time does the right of counsel arise? Two years ago the Georgia Supreme Court ruled that the preliminary commitment hearing in this state "is not inherently a critical stage" of a criminal proceeding, and that the denial of counsel at the commitment hearing does not deny an accused person due process of law where his rights are in no way prejudiced by the lack of counsel at the time. In *Smith v. Fuller*[43] it reaffirmed this position.

Smith v. Fuller[44] raised the interesting question of the effect of a plea of guilty to a charge of murder entered by a court appointed attorney without the knowledge or consent of the accused. In an earlier case[45] the court had ruled that "It would be trifling with the court to allow the client, after keeping silent in the presence of the court while his attorney entered a plea of guilty in his behalf and the court acting thereon imposed sentence, to deny thereafter the authority of his attorney to enter the plea or to deny his approval of such action by his attorney."[46] This is well and good for the case where the accused understands what his attorney is doing. But is it consistent with due process for the attorney to enter a plea of guilty without the knowledge or consent of the accused? The court has not yet answered this question.

D. Confessions

The wisdom of the holding by the Supreme Court of the United States in *Jackson v. Denno*[47] that a positive ruling on the voluntariness of a con-

389 U.S. 404 (1967); Anderson v. Georgia, 390 U.S. 206 (1968).

40. 223 Ga. 461, 156 S.E.2d 91 (1967). *Compare* Arkwright v. State, 223 Ga. 768, 158 S.E.2d 370 (1967).
41. 144 U.S. 263 (1892).
42. 391 U.S. 510 (1968).
43. 223 Ga. 673, 157 S.E.2d 447 (1967).
44. *Id.*
45. Dutton v. Parker, 222 Ga. 532, 150 S.E.2d 833 (1966).
46. *Id.* at 533, 150 S.E.2d at 834.
47. 378 U.S. 368 (1964).

fession had to be made by an authority other than the trial jury has been the subject of much doubt. What has been the effect of the application of the new procedural rule in Georgia? Apparently it amounts to little more than a slight change in the wording of judicial records. No separate jury is used to pass on the matter of voluntariness. The trial judge under the procedure before *Denno* only admitted a confession when it appeared to have been made voluntarily. Practically the same thing is still done after *Denno*. Outside the presence of the jury, the trial judge passes on the voluntariness of a confession. If he finds it to have been voluntary, he permits the confession to be presented to the jury as evidence in the case; but the jury is still charged to consider whether the confession was voluntary. As explained in *James v. State*,[48] "The judge in the present case did not intimate any opinion to the jury trying the case as to what had been proved in regard to the voluntariness of the statements at the time the evidence was admitted, and he submitted the issue of voluntariness to them in his charge."[49]

Green v. State[50] shows the reluctance of the Georgia courts to give full application to the broad sweep against the use of confessions that lurks in recent decisions of the United States Supreme Court. In the *Green* case "an officer called to the scene was directed to the defendant who voluntarily turned over the gun to the officer and admitted that he had shot the deceased."[51] The Georgia Supreme Court denominated this an "incriminating admission and not a confession" and held that having been made voluntarily before arrest, it was admissible in evidence.

Mobley v. Smith[52] confirmed the admission in evidence of a confession made by the accused while in the custody of the Sheriff of Burke County and his deputy and being transported to a jail in an adjoining county following a commitment hearing. According to the court, "It . . . appears without dispute that the accused had conferred with his attorney at length just prior to the commitment hearing and had been advised to make no further statements to the investigating officers, and that he volunteered the statement admitted by the trial court in evidence contrary to the advice he had been given by his attorney."[53] Did this constitute an intelligent waiver of the right of counsel consistent with the *Miranda* guidelines?

In *Moody v. State*[54] wherein the accused was convicted of rape the trial judge permitted the introduction in evidence of a signed confession. Before making the confession, the accused signed a formal waiver of the

48. 223 Ga. 677, 157 S.E.2d 471 (1967).
49. *Id.* at 681, 157 S.E.2d at 475.
50. 223 Ga. 611, 157 S.E.2d 257 (1967).
51. *Id.* at 613, 157 S.E.2d at 259.
52. 224 Ga. 297, 161 S.E.2d 834 (1968).
53. *Id.* at 298, 161 S.E.2d at 835.
54. 224 Ga. 301, 161 S.E.2d 856 (1968).

right to counsel. Counsel for the defendant at the trial failed to introduce any evidence to rebut the evidence of the state that the confession was voluntary; hence the supreme court held that the evidence set forth in the record, being uncontradicted, warranted the admission in evidence of the confession.

E. Searches and Seizures

Tolbert v. State[55] presented a novel factual situation relating to searches and seizures in so far as Georgia precedents are concerned. In brief, the evidence was as follows: A girl and her escort were parked on Crown Mountain at night. Charles Tolbert drove up, and at the point of a pistol ordered the escort to leave the girl and sit in his car while he (Tolbert) talked to the girl. Tolbert in fact raped the girl. The escort while in Tolbert's car slipped a cough drop box with his name written thereon under the seat of Tolbert's automobile. When the incident was reported to the Sheriff of Lumpkin County he went to Tolbert's home. He talked to the defendant's father Clutch Tolbert, giving him the information he had, and told him he wanted to look in the automobile of his son Charles that was parked in the yard. Charles was in the house asleep. The father consented, and the Sheriff found the marked cough drop box. The rape victim and her escort both identified Charles Tolbert in a line-up the next day. Without the support of a valid search warrant, was the marked cough drop box admissible in evidence? Yes, answered the Georgia Supreme Court, the consent of the father was sufficient to authorize the search and seizure.

COURTS

Ward v. Big Apple Super Markets[56] contains the most revealing statements on the practice of the Georgia Supreme Court regarding adherence to precedent written in decades. The maxim *Stare decisis et non quieta movere* (Stand by the decisions and do not disturb settled points) is certainly deserving of respect, for stability is a highly desirable quality in the law; but it is possible to carry most things to an extreme.

The *Ward* case dealt wth the constitutionality of the price fixing provisions of the Milk Control Act as amended in 1952.[57] In *Harris v. Duncan*,[58] decided in 1951, the court held void the Milk Control Act as enacted in 1937. The decision of the court in the *Harris* case, written by Justice Atkinson, asserted that "We are also impressed by the sound view expressed by Mr. Justice McReynolds in his dissenting opinion in *Nebbia v. New*

55. 224 Ga. 291, 161 S.E.2d 279 (1968).
56. 223 Ga. 756, 158 S.E.2d 396 (1967).
57. *Id.*
58. 208 Ga. 561, 67 S.E.2d 692 (1951).

York. . . ."[59] Few students of American constitutional law would agree that McReynold's views in *Nebbia* were "sound." It was most unsound for the judiciary to seek to impose upon the country an economic policy of laissez-faire inconsistent with the facts of life in the 20th century. The United States Supreme Court has long since recognized that the extent of economic regulation is a matter to be decided by the legislature, and not by the judiciary under the guise of "due process."

The per curiam opinion in the *Ward* case gave no substantive reason for holding the revised milk control law to be void. It relied upon the "full bench decision" in *Harris v. Duncan* as binding. Justices Mobley and Undercofler dissented, both on the merits of the case and on the matter of *Harris v. Duncan* being binding upon the Court. But the really interesting statements in the *Ward* case came in the rulings on a motion for rehearing.

In an appended note Justice Grice stated:

> My view is that *Harris v. Duncan* . . . controls in the instant case. Insofar as the binding effect of that case is concerned, I agree with the opinion on motion for rehearing of Chief Justice Duckworth, Presiding Justice Almand, and Justices Nichols and Frankum. However, I do not agree with them that the price fixing provision of the Milk Control Act violates the due process clause of the State Constitution, and therefore I would overrule *Harris v. Duncan,* supra.[60]

Thus it is clear that, on the merits, at least three of the seven justices would vote to overrule *Harris v. Duncan.* Is it possible that some of the other justices shared the view expressed by Justice Grice? Just what is the present status of the "unanimous decision" rule?

The unanimous decision rule first appeared in Georgia law in 1858. In that year the General Assembly resolved that "the decisions of the Supreme Court . . . made by a full court, and in which all three of the Judges . . . concur . . . shall be considered . . . as the law of this state . . . as if the same had been enacted in terms by the General Assembly."[61] This unanimous decision rule found its way into the *Code* of 1863 and subsequent codes of Georgia. In the *Code* of 1933 it read as follows:

> A decision rendered by the Supreme Court prior to the first day of January, 1897, and concurred in by three Justices, cannot be reversed or materially changed except by the concurrence of at least five Justices. Unanimous decisions rendered after said date by a full bench of six shall not be overruled or materially modified except with the concurrence of six Justices, and then after argument had, in which the decision, by permission of the Court,

59. *Id.* at 564, 67 S.E.2d at 694.
60. 223 Ga. 756, 765, 158 S.E.2d 396, 402 (1967).
61. Ga. Laws 1858, pp. 74-75.

> is expressly questioned and reviewed; and after such argument, the Court in its decision shall state distinctly whether it affirms reverses, or changes such decision.[62]

In the *Ward* case the Supreme Court of Georgia announced that this code provision "has not had legal existence since the adoption of the 1945 Constitution because art. VI, section 12, para. vii of that Constitution expressly withdrew the power from the General Assembly to enact regulations governing the manner in which this court could hear and determine cases by providing the 'Supreme Court shall have power to hear and determine cases when sitting in a body, under such regulations as may be prescribed by it'."[63] But, continued the court, "This court since its creation in 1845 has considered itself bound by its unanimous decisions and will respect and follow such decisions, overruling them only by a unanimous court which can be done without legislative authority."[64]

For what it is worth, the present writer submits that excessive attention to the mythical unanimous decision rule does more harm than good, and that decisions of the supreme court should be by majority vote in theory and in fact.

Ward v. Ward[65] held that the superior court of a county in this state has jurisdiction of an action for alimony against a nonresident temporarily sojourning in the county if personal service is made upon him, and that such an action will not abate upon a showing that a divorce action by the husband is pending in his home state. The decision is in line with the broad sweep of jurisdiction traditionally exercised by the courts of Georgia.

TAXATION

Wright v. Absalom[66] held that the General Assembly could not appropriate funds derived from taxation to support a school lunch program. It is this type of decision that suggests the wisdom of omitting from the Constitution any attempt to list the purposes of taxation. In enumerating the purposes of state taxation, article VII currently includes the phrase, "For educational purposes." By what logic does the Supreme Court of Georgia find that a school lunch program is not an educational purpose? None. The decision is not based on reason; it rests on analogy to an old case holding that counties could not furnish liability insurance to their employees. This defect has subsequently been overcome by a constitutional amendment specifically authorizing counties to tax "to provide for workmen's compensation and retirement or pension funds for officers and employees." In November of 1968 we will vote on a constitutional amend-

62. GA. CODE ANN. §6-1611 (Rev. 1964).
63. 223 Ga. 764, 158 S.E.2d 402 (1967).
64. *Id.*
65. 223 Ga. 868, 159 S.E.2d 81 (1968). Contrast the decision in Hartsog v. Robinson, 115 Ga. App. 824, 156 S.E.2d 141 (1967).
66. 224 Ga. 6, 159 S.E.2d 413 (1968).

ment to permit the state to levy taxes "For school lunch purposes."

Campbell v. Farmer[67] held void the Agricultural Commodities Promotion Act[68] of 1961. The agricultural promotion program has had rough sailing in the courts. In 1959 the Supreme Court of Georgia held that the General Assembly could not levy a tax on a particular agricultural commodity to raise funds to be used in promoting and advertising that commodity. By a constitutional amendment of 1960 the General Assembly was granted this taxing authority.[69] The Act of 1961 provided for the creation of public corporations (commissions) to promote various agricultural commodities and authorized these corporations to make assessments to finance their operation. Thus, in the present case, an assessment or fee was levied on each bale of cotton ginned and this fee went to the cotton promotion commission. The Georgia Supreme Court held this to be an invalid delegation of legislative power. An attempt to amend the constitution to authorize the General Assembly to delegate power to commissions to levy assessments on agricultural commodities was defeated when submitted to a vote of the people in 1966. But the sponsors of the amendment succeeded in having the General Assembly propose the amendment again with slightly different wording and it is to be voted on again in November, 1968.

O'Quinn v. Ellis[70] held that a "tobacco allotment" may not be used as the basis to fix the value of real property for ad valorem tax purposes. The case arose in Tift County. The tax assessors there classified land for tax purposes as open cultivated, grazing, improved pasture, woodland, timber, cut over, swamp, and waste. However, on farms that had a tobacco allotment, a special classification was used which resulted in a considerably higher tax. The majority of the Georgia Supreme Court found this tax system to be void under the constitutional clauses requiring that taxation be "uniform upon the same class of subjects within the territorial limits of the authority levying the tax" and that "protection to person and property . . . be impartial and complete."[71] According to Justice Nichols, speaking for the majority of the court, "If there was no distinction in the land being assessed for tax purposes, it not being distinguishable from other cultivated land, the difference in valuation must of necessity have been based on the 'tobacco allotment.' To authorize such a distinction would permit the value of property to be based upon the volume of business done on such land."[72] The weakness in this argument lies in the fact that a tobacco allotment runs with the land and hence affects its market

67. 223 Ga. 605, 157 S.E.2d 276 (1967).
68. GA. CODE ANN. §5-2901 *et. seq.* (Rev. 1962).
69. GA. CONST. art. VII, §2, para. 1-A (Supp. 1967).
70. 224 Ga. 328, 161 S.E.2d 832 (1968).
71. GA. CONST. art. VII, §1, para. 3 (1945).
72. 224 Ga. 328, 330, 161 S.E.2d 832, 833 (1968).

value. Justice Mobley dissented, and Justices Undercofler and Frankum concurred specially.

ZONING

Norton Realty & Loan Co. v. City of Gainesville[73] is a debatable decision involving the extent of judicial action appropriate to protect vested property rights. The case presents a dilemma comparable to the clash between an irresistible force and an immovable object. The right of cities to pass zoning ordinances involves the right to zone and to rezone. This is the irresistible force. The right of property owners to protection of vested rights can be viewed as an immovable object. When a rezoning ordinance clashes with a property right existing under a former zoning ordinance, which is to prevail? In the *Norton* case the court sustained the property right by a five to two vote.

The realty company seeking judicial protection had purchased land in Rome in 1962. At that time the 18 acre tract involved was zoned R-II, which permitted the construction of apartments. Most of the area had been developed with single-family homes when in 1967 the City rezoned the area as R-I (single family residential). Claiming that it had spent over $75,000 on the development project, and that it had a vested right under the old rezoning ordinance to construct apartment buildings on the four lots it still retained, the realty company sought a decree permanently enjoining the city from applying the 1967 rezoning ordinance to its property. The trial court dismissed the petition. The Supreme Court reversed with the statement: "We . . . find an issue of material fact as to whether the plaintiffs . . . had a vested right to the continuation of R-II zoning of this property."[74]

In dissenting, Justice Grice remarked: "Expenditures in purchasing and developing land in reliance upon continuance of existing zoning, under the circumstances here, do not provide the owner with a vested right to such continuance. If they did, practically no rezoning could ever take place, because property owners, at some time or other, make expenditures on their property in geneal reliance upon the existing zoning classification."[75]

The precedents in Georgia have in general thus far been against judicial veto of zoning ordinances on substantive grounds. *Clairmont Development Co. v. Morgan*[76] decided in 1966 was an exception to the general practice, but the factual situation there, involving a radical change within a two month's period, was shocking to the conscience. If the judiciary chooses to venture further into this economic thicket, it is likely that some-

73. 224 Ga. 166, 160 S.E.2d 819 (1968).
74. *Id.* at 171, 160 S.E.2d at 822.
75. *Id.* at 172-173, 160 S.E.2d at 824.
76. 222 Ga. 255, 149 S.E.2d 489 (1966).

thing of a due process law of zoning will evolve, with the court being called upon to pass upon the wisdom of every significant change in zoning. Experience indicates that judicial errors in such debatable areas are more difficult to correct than errors by the openly-political branches of government. Historians will remember that in 1926 in *Smith v. City of Atlanta*[77] the supreme court held that the General Assembly could not authorize "municipal authorities" to zone property for residential purposes only. It took a constitutional amendment to overcome this unfortunate decision. This amendment, following the wording of the court decision it was designed to overcome, authorized the General Assembly to grant to the "governing authorities of the municipalities and counties authority to pass zoning and planning laws. . . ."[78] This language of 1937 was carried over into the Constitution of 1945. And in 1955 in *Humthlett v. Reeves*[79] the Supreme Court of Georgia held that a county planning board was not a "governing authority" capable of being vested with zoning authority. Only "a council or board performing legislation functions" can be vested with zoning authority under this decision.

Tuggle v. Manning[80] held that under the facts shown, it was unreasonable to apply a zoning ordinance of 1946 to the property in question. The 1946 zoning had restricted use of the property to residences. In the meanwhile the area concerned had been transformed into a commercial one. The gist of the holding was that "the determination of the reasonableness of zoning restrictions must be made in the light of facts presented in each case."[81]

MISCELLANEOUS

Freedman v. Scheer[82] presents the interesting question of the power of a person to devise by will his estate to a foreign state, in this case Israel. The court found that "A sovereign country unless prohibited by its laws is competent to accept a devise."[83] But what of the right of the testator to make the devise? On this the court found that "The right to devise property by will is not an inherent right but one which is in the exclusive jurisdiction of the State of Georgia to grant."[84] And the policy of Georgia, not very clearly spelled out in either statutes or prior decisions, was found by the court to permit a testator to devise his personal property to a friendly country. Real property could not be devised to a foreign country, but the

77. 161 Ga. 769, 132 S.E. 66 (1926).
78. GA. CONST. art. III, §7, para. 23 (1945).
79. 212 Ga. 8, 90 S.E.2d 14 (1955).
80. 224 Ga. 29, 159 S.E.2d 703 (1968).
81. *Id.*
82. 223 Ga. 705, 157 S.E.2d 875 (1967).
83. *Id.* at 705, 157 S.E.2d at 876.
84. *Id.*

intent of the testator would be approximated by sale of the real property and award of the proceeds to the State of Israel.

Griffith v. Merritt[85] held void a portion of a statute of 1967 amending the charter of the City of Macon on the ground that it violated the constitutional prohibition against the passage of a law "containing any matter different from what is expressed in the title thereof." The title of the act listed as one of its purposes "to provide that the mayor shall be eligible to succeed himself for one term."[86] The body of the act made the mayor eligible to succeed himself but ineligible for reelection after a second successive term until a lapse of four intervening years, provided that "the present mayor shall not be eligible to succeed himself for one four-year term in addition to the term he is now serving."[87] The defect in the statute, as viewed by Justice Almand for the majority of the Court, was that the title of the act dealt "specifically, not generally" with the election of the mayor and his term of office, and there was a conflict between the specific provision in the title and the proviso in the body of the act. Viewed on its merits, the case is clearly one in which the title and subject-matter clause was used as a technicality to defeat a valid legislative intent. The growing number of such cases makes a strong argument for repealing the constitutional provision regarding title and subject matter.

Chandler v. Wilkerson[88] held void a statute of 1966 providing for the termination of permanent alimony upon the remarriage of the wife, unless otherwise provided for in the decree, as applied retroactively to an alimony decree which incorporated an agreement of the parties for the payment of specified sums over a fixed period of time. The Court held that application of the statute to this prior agreement would violate the contract clauses of both the federal and state constitutions.

Richmond County v. McElmurray[89] held that a sophisticated contract whereby the county was to lease, under periodic renewals, a public building over a 10-year period and then purchase the building for a nominal fee was void. The contract created a debt without the approval of the voters as required by article VII, section 7, paragraph i of the constitution.

City of Gainesville v. Loggins[90] held that in a proceeding to acquire land under an eminent domain proceeding, when an appeal has been made to a jury and a judgment made based upon the jury's verdict, payment to the condemnee of the amount of the judgment by the condemnor does not prevent appeal of the judgment to an appellate court. The general rule that the voluntary payment of a judgment renders moot the issue in litigation does not apply in condemnation suits, says the Georgia Supreme Court

85. 223 Ga. 562, 157 S.E.2d 23 (1967).
86. Ga. Laws 1967, p. 2181.
87. *Id.* at 2183-4.
88. 223 Ga. 520, 156 S.E.2d 358 (1967).
89. 223 Ga. 440, 156 S.E.2d 53 (1967).
90. 224 Ga. 114, 160 S.E.2d 830 (1968).

(reversing the court of appeals) because of the constitutional provision that private property shall not be taken or damaged for public purposes without just compensation being "first paid." The unfortunate decision in *Woodside v. City of Atlanta*[91] that no appeal could be made in a condemnation case until the award made by the assessors had been made to the condemnee is the basis of this irregularity in the Georgia law. A constitutional amendment was added in 1960 to article I, section 3, paragraph i stating that:

> When private property is taken or damaged for public road and street purposes by the State and the counties and municipalities of the State, just and adequate compensation thereof need not be paid until the same has been finally fixed and determined as provided by law, but such just and adequate compensation shall then be paid in preference to all other obligations except bonded indebtedness.

This "finally fixed" provision gives the General Assembly miles of leeway in setting the date for payment in condemnation cases, but to date it has used not one inch of it. Statutes passed prior to the 1960 constitutional amendment still govern condemnation proceedings.

91. 214 Ga. 75, 103 S.E.2d 108 (1958).