CONSTITUTIONAL LAW

By JAMES C. QUARLES*

The following discussion aims at no more than generalized commentary upon the constitutional law cases that seem likely to be of more than ordinary interest and importance. The cases for the past year do not fall clearly into definite categories, although in general the following treatment will consider non-criminal cases first.

During the survey period the Georgia court was faced with two interesting constitutional challenges in the field of tort liability. The court struck down vicarious tort liability of a parent while upholding the doctrine of sovereign immunity. The two questions may seem somewhat remote from each other, but essentially they raise the question of the way the laws of the state regulate the shifting of loss sustained by an innocent person injured by the tortious conduct of another.

In *Corley v. Lewless*[1] the court reversed a judgment against the mother and uncle of a twelve-year-old boy who engaged in a skirmish with other boys that resulted in damages when the ten-year-old plaintiff was struck in the head by a thrown brick or stone. The action was based upon the statute which imposes liability upon the parent or other person *in loco parentis* for damages caused by the willful and wanton acts of a minor child under the age of seventeen and over whom the parent has custody and control.[2] This statute was held to deny due process, although the court does not make clear just what aspect of due process is denied.

Vicarious liability and strict liability have not been thought in themselves to be unconstitutional, and under the relevant statute the party responsible must stand *in loco parentis*; he must have custody and control over the child, and the child must be guilty of a willful and wanton act. It is apparent that the legislature was seeking to make effective its concern for the innocent victim of a willful tort who might otherwise lack an effective remedy. One wishes the court had articulated more precisely just why due process is a barrier to implementing this legislative judgment. The precedents and authorities upon which the court relies are not entirely convincing, as they are examples of liability imposed upon one for mere ownership of an article or where there was not necessarily any tort at all, much less a willful and wanton one. The cases

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1. 227 Ga. 745, 182 S.E.2d 766 (1971).
2. GA. CODE ANN. § 105-113 (1966).

from other jurisdictions upholding similar statutes against constitutional attack are distinguished by the Georgia Supreme Court through stressing differences in the statutes, such as limitations on the amount of recovery, or their application to only property damage, but it is not at all clear that the courts in those cases regarded such factors as significant.

The doctrine of sovereign immunity was rather summarily upheld in *Crowder v. Department of State Parks*[3] on the basis of history and of deference to the legislature's ability to make the policy decision of sovereign immunity *vel non.* Three separate dissenting opinions point out constitutional and other grounds for a contrary holding.

Marbury v. Madison,[4] which is usually cited for the establishment of the power of courts to strike down unconstitutional legislative enactments, was invoked by the Georgia Supreme Court as authority to protect an executive office-holder who had been appointed to a position carrying a stated term.[5] The issue was whether the Governor, by obtaining an undated letter of resignation from an appointee, had violated the provision of the state constitution[6] that established a seven-year term for the appointment. The court held this practice unconstitutional, pointing out that it would make the appointee an office-holder at the will of the Governor, rather than the holder of a seven-year term as the constitution contemplated.

Considerations of basic due process led the Supreme Court of Georgia to strike down the provisions of the Georgia Distress Warrant Law[7] that permitted a person to whom rent was due to obtain a distress warrant and have the property levied on and removed without giving the property owner any notice or opportunity to be heard.[8] The court pointed out that notice and hearing are requisite to due process, and relied heavily upon the United States Supreme Court holding[9] that Wisconsin's garnishment procedure was unconstitutional in permitting the wage-earner to be deprived of one-half of his earnings without notice or hearing. The concern that these cases show for due process protection has more recently been extended in cases coming from Florida and Pennsylvania and invalidating procedures under their prejudgment replevin statutes.[10]

3. 228 Ga. 436, 185 S.E.2d 908 (1971).
4. 5 U.S. (1 Cranch) 137 (1803).
5. Partain v. Maddox, 227 Ga. 623, 182 S.E.2d 450 (1971).
6. GA. CONST. art. V, § 1, ¶ XI.
7. GA. CODE ANN. §§ 61-401 to 407 (1966).
8. Blocker v. Blackburn, 228 Ga. 285, 185 S.E.2d 56 (1971).
9. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).
10. Fuentes v. Shevin, ___ U.S. ___, 92 S. Ct. 1983 (1972).

Procedural due process requirements were again stressed in *Reed v. State*,[11] where the court invalidated a juvenile court's order transmitting a case to the superior court having concurrent jurisdiction over the offense. A fatal error occurred when the notice of the hearing that was given to the child and his parents did not specify the purpose of the hearing.[12] In its stress upon the decision of the United States Supreme Court case of *Kent v. United States*[13] and the due process requirements stated there, the Georgia Court of Appeals suggests that the procedure it reviewed was constitutionally defective, but it may be noted that in *Kent* the transfer of the juvenile to the criminal court system was effected "without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons."[14] And the court there was concerned with protection of the child from arbitrary procedure and a decision reached by the juvenile court "in isolation and without the participation or any representation of the child. . . ."[15] In the instant case, on the other hand, there was service upon the child and his parents followed by two hearings at which the child was "competently represented by his attorney."[16] Although concern for the child's welfare is admirable, it may be suggested that the failure to follow the statute precisely did not amount to a denial of due process and that even if the error touched upon a constitutional right, the defect was harmless error.

The problem of giving retroactive effect to a statute and thus raising questions of due process and of impairing the obligation of contract was avoided in *Southern Railway Co. v. Insurance Co. of North America*[17] by giving the statute only prospective operation, the court giving as one of its reasons the desire to construe a statute to be constitutional if the statute's language permits that interpretation. In a criminal case[18] the question of retroactivity and hence of ex post facto would have arisen if the court of appeals had not held that a criminal statute that took effect July 1, 1969, was not applicable to an occurrence on November 1, 1967.

The provision of the Georgia Constitution[19] requiring county fiscal

11. 125 Ga. App. 568, 188 S.E.2d 392 (1972).

12. The notice also did not conform to the statutory requirements because it gave only two days notice instead of three, but the court did not regard this failure as significant.

13. 383 U.S. 541 (1966).

14. *Id.* at 554.

15. *Id.* at 553.

16. 125 Ga. App. at 569, 188 S.E. 2d at 393.

17. 228 Ga. 23, 183 S.E.2d 912 (1971).

18. Blankenship v. State, 123 Ga. App. 496, 181 S.E.2d 544 (1971).

19. GA. CONST. art. VIII, § XII, ¶ 1.

authorities to levy an annual ad valorem school tax was held to invalidate a population-based statute[20] requiring county commissioners of roads and revenues to pay $30,000 a month to the county board of education. The statute originally had application to Fulton County alone, but the 1970 census added Dekalb County to its ambit. The Supreme Court of Georgia found that the statute would require a county to increase its tax levy or to use other funds raised through taxation to meet the monthly payment, with the consequence that the county would have to do indirectly what the constitution forbade it to do directly.

The Georgia Supreme Court was faced with freedom of expression questions arising from the issuance of injunctions as to motion pictures found to be obscene within the meaning of Ga. Code Ann. § 26-2101 (1968), and in all of them the court affirmed with modification the issuance of the injunctions.[21] The court found that the trial judge had correctly concluded that the films in question were in fact obscene,[22] but also found that the injunctions could be in effect only until the determination of obscenity was confirmed by the finding of a jury. The Georgia statute is appropriately specific and clear in its definition of obscenity, and the procedure of a hearing before issuance of a temporary injunction, and a jury trial before the injunction becomes permanent, seems to afford adequate protection against government interference with first amendment freedoms. After all, obscenity itself is still not entitled to protection as free speech when it is disseminated to the public, although the determination of the question of obscenity is entitled to procedural safeguards.

Defendant in an alimony modification proceeding was held to have been properly given the benefit of the fifth amendment protection against self-incrimination when he declined to answer interrogatories as to his financial resources and transactions; and it is permissible to allow the defendant himself to make the determination whether answers might tend to incriminate him.[23]

A question of self-incrimination sharply split the court of appeals in *Johnson v. State*,[24] which held unconstitutional the admission of testimony that defendant had refused to take an intoximeter test. The ques-

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20. Ga. Laws, 1956, pp. 2764-65.

21. Peachtree Corp. v. Slaton, 228 Ga. 102, 184 S.E.2d 144 (1971); Walter v. Slaton, 227 Ga. 676, 182 S.E.2d 464 (1971); Evans Theatre Corp. v. Slaton, 227 Ga. 377, 180 S.E.2d 712 (1971).

22. On the other hand, the Georgia Supreme Court in Slaton v. Paris Adult Theatre I, 228 Ga. 343, 185 S.E.2d 768 (1971), set aside as erroneous the trial court's conclusion that the films there involved were not obscene.

23. Mallin v. Mallin, 227 Ga. 833, 183 S.E.2d 377 (1971).

24. 125 Ga. App. 607, 188 S.E.2d 416 (1972).

tion is a difficult one, and the dissenting opinion of Judge Eberhardt is carefully researched and reasoned. The majority relied heavily upon a Florida District Court of Appeals case,[25] which in turn relied upon dictum in the *Schmerber* decision of the United States Supreme Court.[26]

Chaffin v. State[27] upheld the imposition of a heavier sentence (life imprisonment) upon a defendant at his second trial after his first conviction, for which he received a lighter sentence (15 years), was set aside following habeas corpus proceedings. Of course *North Carolina v. Pearce*[28] does not hold that the second sentence may never be more severe, and the constitutional protections against double jeopardy and the denial of equal protection, upon which appellant relied, do not in themselves prevent the trial court from imposing a greater punishment on the second trial. But there is an important qualification, which the court in *Chaffin* did not mention. In an attempt to assure due process of law, the United States Supreme Court in *Pearce* held that "[V]indictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial[,]"[29] and therefore a judge's reasons for imposing a more severe sentence after the second trial must affirmatively appear, must be based upon conduct that has occurred after the first sentencing, and must be a part of the record. From a reading of the court's statement of the appellant's contentions it does not appear that the due process aspect of the case was brought to the attention of the court. It is not clear that appellant would have benefited from doing so, however, because in *Ladd v. State*,[30] the appellant more specifically articulated his objections in the terms of *Pearce* (*i.e.*, due process rather than double jeopardy or equal protection) and still lost. Both sentences on appellant were for twenty years imprisonment, but the first was to run concurrently with an earlier seven-year sentence, while the second time his twenty-year sentence was to run consecutively with the first. In *Ladd* the Georgia Supreme Court specifically referred to appellant's contention that the harsher sentence violated the due process clause "unless the record affirmatively reveals reasons of the trial judge for imposing a harsher sentence."[31] The court went on to say that this contention was substantially the same as that made in *Chaffin* and that the demonstra-

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25. Gay v. City of Orlando, 202 So.2d 896 (Fla. App. 1967).
26. Schmerber v. California, 384 U.S. 757, 765 (1966).
27. 227 Ga. 327, 180 S.E.2d 741 (1971).
28. 395 U.S. 711 (1969).
29. *Id.* at 725.
30. 228 Ga. 113, 184 S.E.2d 158 (1971).
31. *Id.* at 117.

tion of inapplicability to *Chaffin* was equally pertinent to *Ladd*. The cases are not distinguishable, and the same result should have been reached in both, notwithstanding appellant's failure in *Chaffin* to specify the due process clause as a basis.

Double jeopardy is clearly not applicable, whether one follows the theory that the second proceeding is but a continuation of the first, or the theory that the moving party is asking for further proceedings in order to correct an earlier error and hence is estopped from objecting to what he has sought. And the equal protection clause is only marginally relevant, if at all, because the same dangers are present for all who must be re-sentenced after an earlier sentence has been set aside. Thus these two appellants were in the same situation and they were treated the same way—they got heavier penalties after contesting the proceedings that led to the earlier sentence. This is the essence of equal protection. But due process is another idea, and the fear to be felt by one who has been improperly sentenced may well stifle his objections if he knows that the second sentence may be even harsher, whether that result may occur simply from a different appraisal of the punishment due or from the vindictiveness that the United States Supreme Court adverted to in *Pearce*.

It is interesting to speculate how these cases would have been decided if the sequence had been reversed and if *Ladd*, with its clear appeal for due process, had faced the court before *Chaffin*, with its unwise reliance upon equal protection and double jeopardy. As the cases in fact arose the court managed to ignore the substance of the due process argument because of the factual similarity between the two cases.

Habeas corpus is not a criminal proceeding, and an indigent petitioner for habeas corpus is not constitutionally entitled to have a lawyer appointed to represent him[32] or to be "furnished with a copy of his trial transcript in order to prepare a petition for habeas corpus."[33] The admissibility of evidence claimed to have been obtained under a void search warrant is to be determined at the trial, and not in a habeas corpus proceeding.[34]

The Georgia courts were again faced with the rule of *Boykin v. Alabama*[35] that an intelligent and voluntary entry of a plea of guilty will not be presumed from a silent record, but must affirmatively ap-

32. Dixon v. Caldwell, 228 Ga. 658, 187 S.E.2d 292 (1972); Hatton v. Smith, 228 Ga. 378, 185 S.E.2d 388 (1971); Chadwick v. Smith, 227 Ga. 753, 182 S.E.2d 896 (1971).

33. Johnson v. Smith, 227 Ga. 611, 182 S.E.2d 101 (1971).

34. Carlin v. Nevil, 227 Ga. 359, 180 S.E.2d 740 (1971).

35. 395 U.S. 238 (1969).

pear. Thus in *Purvis v. Connell*,[36] pleas of guilty and sentences were vacated because no more appeared to support voluntary and intelligent plea entry than the trial judge's statement that he had explained his rights to the petitioner. The duty of a state trial judge in accepting a guilty plea was said to be the same as that of a federal trial judge under Rule seven of the Federal Rules of Criminal Procedure.[37] On the other hand, *Boykin* will not be given retroactive effect, and thus will not avail a prisoner whose plea of guilty was accepted before the decision in that case.[38] Such a prisoner, in fact, not only does not have the benefit of the *Boykin* rule; he has the burden of overcoming the presumption in favor of the validity of the sentence.[39]

In line with the general rule that a defendant is not subjected to double jeopardy by successive prosecutions by different sovereigns even when the two prosecutions flow from the same transaction,[40] the court of appeals, in *Nance v. State*,[41] upheld the Georgia conviction of larceny of a defendant who had previously been sentenced for the federal offense of conspiracy and transporting in interstate commerce the property that was the subject of the larceny.

The court of appeals held unconstitutional a condition of probation that the probationer maintain a "short haircut" during the probation period.[42] The court does not make clear the precise basis for its holding, in that the probationer relied upon the first, eighth and fourteenth amendments. The court said "We . . . agree," presumably therefore basing its conclusion upon the cruel and unusual punishment prohibition of the eighth amendment, though that aspect of the case is not developed in the opinion, as well as upon the due process clause's requirement of reasonableness along with that clause's carryover of the first amendment's protection of freedom of expression. A defendant has not been put in jeopardy twice when the original verdict was rejected by the judge because it was not in proper form and the jury corrected the error following the trial judge's instructions.[43]

In *Todd v. State*,[44] the Supreme Court of Georgia, answering a ques-

36. 227 Ga. 764, 182 S.E.2d 892 (1971).

37. *See also* Mack v. Youmans, 228 Ga. 223, 184 S.E.2d 648 (1971).

38. Laidler v. Smith, 227 Ga. 759, 182 S.E.2d 891 (1971).

39. Calhoun v. Caldwell, 228 Ga. 804, 188 S.E.2d 498 (1972).

40. Bartkus v. United States, 359 U.S. 121 (1959).

41. 123 Ga. App. 410, 181 S.E.2d 295 (1971).

42. Inman v. State, 124 Ga. App. 190, 183 S.E.2d 413 (1971). Dunahoo v. State, 124 Ga. App. 471, 184 S.E.2d 359 (1971) on the basis of *Inman* set aside the revocation of probation for violation of a condition that probationer maintain a conventional haircut.

43. Perdue v. State, 228 Ga. 770, 187 S.E.2d 862 (1972).

44. 228 Ga. 746, 187 S.E.2d 831 (1972).

tion certified by the court of appeals, held that the statute[45] providing for separate jury determinations of guilt and of punishment, with prior convictions and guilty and nolo contendere pleas admissible against the defendant, could constitutionally apply to a trial for a crime committed prior to the new statute's effective date. Ex post facto provisions of the state and Federal Constitutions were not violated by applying the new provision to a defendant because the change was one merely of procedure without depriving him of any substantial personal right.

In *Baier v. State*,[46] the court of appeals ruled that a motion to suppress identification testimony should have been granted because of impermissibly suggestive photographic confrontation and a suggestive in-person confrontation without counsel. It was impossible to determine whether the witness' identification of defendant resulted independently from confrontation at the scene of the crime or was tainted by the later events. The result seems quite sound. It may be noted that the court refers to "a critical stage of the proceedings" and "critical pre-trial confrontation." A later decision by the Supreme Court of the United States[47] has taken the position that the sixth amendment right to counsel does not attach until "after the onset of formal prosecutorial proceedings,"[48] and therefore there is no per se exclusionary rule applicable to a routine police investigation. As the defendant in *Baier* was simply being held as a suspect when the pre-trial confrontation occurred, it seems that identification would not now be ruled inadmissible on the basis of the absence of the benefit of counsel at that time. In other words the area is not so broad as "pre-trial"; it is now more narrowly post-initiation of formal proceedings.

A recorder of a city court having the power to punish violators of city laws and ordinances by fine or by imprisonment for periods up to 60 days was held not to be required to appoint counsel to represent indigents coming before him, and thus the trial court should have enjoined the recorder from commanding an attorney to appear in behalf of indigent defendants.[49] The Supreme Court of Georgia does not cite authority for its position, but it should be noted that the Supreme Court of the United States in a decision handed down subsequent to the case under consideration has held[50] that no person may be imprisoned unless

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45. GA. CODE ANN. § 27-2534 (Rev. 1970).
46. 124 Ga. App. 334, 183 S.E.2d 622 (1971).
47. Kirby v. Illinois, ___ U.S. ___, 92 S.Ct. 1877 (1972).
48. *Id.* at 1882.
49. Hill v. Bartlett, 227 Ga. 385, 181 S.E.2d 88 (1971).
50. Argersinger v. Hamlin, ___ U.S. ___, 92 S. Ct. 2006 (1972).

he had counsel at his trial or knowingly and intelligently waived that right. It thus seems that indigent defendants will be immune from punishment by imprisonment after they are found guilty in the Police Court of the City of Albany.

The necessity of examining the facts of each case to determine whether the *Miranda* requirements have been satisfied was stressed in *Jenkins v. State*[51] where the court found that defendant's spontaneous statement made during the course of a leisurely booking procedure was not involuntary, although the court emphasized that the booking procedure is not in itself exempt from the requirements of custodial interrogation.

Statements received by authorities in violation of *Miranda* are inadmissible to prove the truth of the statements, and admission into evidence of such a statement for the purpose of impeaching the credibility of the defendant as a witness under the authority of *Harris v. New York*[52] is erroneous unless the trial court, whether requested or not, instructs the jury as to this limited purpose of the evidence.[53]

A defendant who has not been warned about his constitutional rights does not have the benefit of the *Miranda* doctrine when he makes statements before he has been taken into custody and before the investigation has focused on him.[54]

The *Miranda* warning is not defective just because it is in terms of "could" and "may" rather than "can and will be used" in reference to anything said by the defendant being used against him,[55] and it does not require questioning officers to tell defendant that he may at anytime withdraw his waiver of constitutional rights.[56]

The *Miranda* decision is applicable to the trial of a case that began one day after the decision.[57]

Due process and equal protection violations were charged in *Alexander v. State*[58] in defense to accusations of operating an overweight vehicle. The basis for the contention was that the statute contained provisions as to special permits and exceptions, but the court found these contentions not to have merit.

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51. 123 Ga. App. 822, 182 S.E.2d 542 (1971).
52. 401 U.S. 222 (1971).
53. Colbert v. State, 124 Ga. App. 283, 183 S.E.2d 476 (1971).
54. Hubbard v. State, 123 Ga. App. 597, 181 S.E.2d 890 (1971). *See also* Ansley v. State, 124 Ga. App. 670, 185 S.E.2d 562 (1971).
55. Morris v. State, 228 Ga. 39, 184 S.E.2d 82 (1971).
56. Katzensky v. State, 228 Ga. 6, 183 S.E.2d 749 (1971).
57. Clark v. Smith, 228 Ga. 205, 184 S.E.2d 822 (1971).
58. 228 Ga. 179, 184 S.E.2d 450 (1971).

In *Key v. Stewart*[59] the Supreme Court of Georgia held that a jury trial is not required when defendant is charged in a municipal court with violation of a municipal ordinance, even though the trial is for thirteen separate offenses carrying a possible total penalty of 780 days imprisonment and a $2,600 fine. The most recent case relied upon by the court was decided in 1910, and it may be suggested that recent trends in expanding the right to a jury trial make the opposite result more appealing.

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59. 228 Ga. 516, 186 S.E.2d 739 (1972).