Mercer Law Review

Volume 2
Number 1 *Annual Survey of Georgia Law*

Article 5

12-1950

Constitutional Law

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CONSTITUTIONAL LAW

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This has been a year of highly important constitutional decisions affecting Georgia. The federal courts have dealt with the County Unit System[1] and a municipal movie censorship statute.[2] The Georgia Supreme Court has had occasion to pass upon the recent Re-registration Law, in *Franklin v. Harper*,[3] and upon racial exclusion from juries in *Crumb v. State*.[4] A score of other interesting and important matters have been decided.

THE COUNTY UNIT CASE

The Supreme Court, in *South v. Peters*, made short shift of an appeal from a divided three judge District Court. The court in a 7-2 decision affirmed the lower court without a hearing. The majority decision apparently was based on the court's equity discretion and the operative opinion was contained in one sentence:

> " . . . Federal Courts consistently refuse to exercise their *equity* powers in [a] case posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." [Emphasis supplied.]

While citing the now famous *Colegrove v. Green*,[5] *MacDougall v. Green*,[6] and *Wood v. Broom*[7] cases, the court did not rule the county unit issue a non-justiciable political question, nor did it specifically find that a decree of relief in the county unit case would pose the practical problems mentioned in the *Colegrove and MacDougall* cases.

The court simply said that it consistently withheld its equitable powers in cases of a similar type to the county unit complaint.

The minority adopted the reasoning of the dissenting District Judge Andrews, issued a blistering indictment of the inequities of the system and reasoned carefully the believed distinctions between the county unit case and those authorities relied on by the majority.

Whatever the merits of *South v. Peters*, one thing is undeniable: In the *Colegrove, MacDougall* and all the other cases cited by the court, the relief prayed for was denied because the granting of it would have conflicted with some well-established legal or equitable principle. In each case the court announced *why* relief was denied. None of the "whys" announced in those cases were reasoned by the court to apply in *South v. Peters*.

Certainly the majority did not attempt to meet or answer the logic of

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1. South v. Peters, ... U.S. ....., 70 S.Ct. 641, 94 L. Ed. 559 (1950).
2. RD-DR Corp. and Film Classics, Inc. v. Smith, 89 F. Supp. 596 (N.D. Ga. 1950), *aff'd* 183 F.2d 562 (5th Cir. 1950).
3. 205 Ga. 771, 55 S.E.2d 221 (1949).
4. 205 Ga. 547, 54 S.E.2d 639 (1949).
5. 328 U.S. 549, 66 S.Ct. 1198, 90 L. Ed. 1432 (1946).
6. 335 U.S. 281, 69 S.Ct. 1, 93 L. Ed. 3 (1948).
7. 287 U.S. 1, 53 S.Ct. 1, 77 L. Ed. 131 (1932).

the minority. The one-sentence county unit decision is really a very sweeping pronouncement of equity discretion. It stands without any assistance from *Colegrove v. Green, MacDougall v. Green* and *Wood v. Broom.*

The one-sentence ruling is actually a statement of circumstance. The statement that X State has *never* electrocuted a woman is also a statement of circumstance. But that fact, however true, is no binding authority precluding the infliction of that punishment in the *appropriate* case.

Students of the county unit problem will no doubt continue to be plagued by that elusive constitutional phantom—the issue of the political (and thus non-justiciable) question.

In no related case has the Supreme Court ever held the county unit type of issue to pose a political question. Even if *South v. Peters* were not so easily distinguished from the *Colegrove* case, that earlier landmark (if it means anything) stands authentically, 4 to 3, for the proposition that the issue of congressional districting is justiciable and non-political.

The county unit problem is essentially a voter disfranchisement question. Disfranchisement may not be accomplished racially,[8] arbitrarily[9] nor fraudulently.[10] It has not been so far suggested, but altitude of residence would probably be no more arbitrary a test for franchisement than geography of residence.

> "Where constitutionality has been considered under the equal protection clause, the court has inquired whether, with reference to a *valid* legislative end, the statutory distinction had a rational basis in *genuine* differences between the groups affected. In each instance, the restriction or the classification must be reasonably related to a legitimate purpose."[11] [Emphasis supplied.]

As a voter disfranchisement issue, the county unit system is not a "political question." Political questions are really those matters of governmental wrongs which in a democracy can be and are dealt with by the voters to whom political authority is answerable. The judicial remedy is not available in those cases of alleged misrule, nor is the judicial remedy really necessary. Given the ballot, the citizen can take care of himself. But he must first have the free and equal ballot. And his right to that, though it pertains to politics, does not pose a "political question."[12]

It remains to be seen whether some future court will choose to exercise its equitable discretion to decide the substantive issues in the county unit system—or whether outside equity, less drastic relief may be granted in a case where the issue is made at law.

One must never forget that the Georgia County Unit System was grafted onto Tennessee political growth. But the Tennessee Supreme Court cut it down in an unanimous opinion very early after the transplantation.[13]

THE REGISTRATION ACT

Another franchisement case, *Franklin v. Harper,*[14] was decided recently

8. Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L. Ed. 987 (1943).
9. Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd* 336 U.S. 933, 69 S.Ct. 749, 93 L. Ed. 1093 (1949).
10. *Ex parte* Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L. Ed. 274 (1883).
11. 49 COL. L. REV. 629, 636 (1949).
12. Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1926).
13. Gates v. Long, 172 Tenn. 471, 113 S.W.2d 388 (1938).
14. 205 Ga. 779, 55 S.E.2d 221 (1949).

by the Supreme Court of Georgia. The issue arose in a mandamus action and posed in the Supreme Court the issue of the constitutionality of the Voters Registration Act of 1949[15] and whether this could be questioned in a mandamus proceeding. The court did not doubt the propriety of mandamus and this seemed scarcely questionable. The constitutionality of the Voters Registration Act is, however, a more complicated matter. The Supreme Court, under the rule of *Miller v. Head*,[16] considered only the question of whether the act was invalid *as a whole*, for the demurrers below did not attack specific provisions of the act as contravening specific requirements of the State and Federal Constitutions. The decision in the case carefully warned that the ruling as to the overall validity "is not to be taken as an intimation that other separate portions may or may not be unconstitutional."

Learned authors have previously written in this *Review* their opinion that the act was constitutional though they warned "that legislation which is constitutionally sound can be unconstitutionally administered."[17]

There is some reason to believe, however, that under an attack aimed at specific sections the act might encounter grave constitutional difficulties. This seems so for the following reasons:

The act requires that the *Registrar* select a section of the Constitutions of the United States or Georgia to be used in the literacy test,[18] whereas the Constitution of Georgia permits the *voter* seeking qualification by reason of literacy to qualify by reading and writing *any* paragraph of said Constitutions.[19] Thus, the act may deprive the voter of a right guaranteed him by the State Constitution.

The act seems to permit the registrar to require that an applicant to vote by reason of literacy do the following:

(1) Copy the section from the written test, which is a clear adding of the word "copy" to the statute;

(2) Take the section by dictation from the registrar and write the same without reference to the printed word; or

(3) Write the section from memory, without dictation or copying.

These are the possible interpretations which have been given to the act in actual administration. But the Constitution of the State[20] gives the applicant to vote by reason of literacy an absolute right to qualify by reason of writing a section selected by the applicant, "when read to him" by the registrar. Furthermore, the section, as written, permits the registrar to require of one applicnat that he write from dictation—a much harder test than the copying test, which is. as the court could judicially note, the present day requirement and practice in most places. This provision may be violative of vested rights under the equal protection clauses of the Constitutions of Georgia and of the United States.

15. Ga. Laws 1949, pp. 1204-1227.
16. 186 Ga. 694, 198 S.E. 680 (1938).
17. O'Neal and Quarles, *Some Significant Recent Georgia Legislation*, 1 MERCER L. REV. 27, 33 (1949).
18. Ga. Laws 1949, p. 1204 (§ 17).
19. GA. CONST. Art. II, § 1, ¶ 4, GA. CODE ANN. § 2-704 (1948 Rev.).
20. *Ibid.*

The act requires of an applicant to vote by reason of literacy that he demonstrate to the registrar that he can read "intelligibly."[21] The word "intelligibly" means, amongst other things, with comprehension and understanding. This introduces a subjective standard into the test, a standard such as proscribed by the Supreme Court of the United States in *Davis v. Schnell.*[22] Furthermore, this standard exceeds that required by the Constitution of the State[23] and is perhaps violative of the applicant's rights under that Constitution. The act also introduces the subjective standard of legibility, which could render the act void for similar reasons.

The statute[24] provides for notice under the act. Such notice is an integral part of the right of an applicant to qualify under the "understanding of the duties of citizenship" sections of the act. The section reads:

> "In cases arising under the preceding paragraph and in all cases arising under this Act where the applicant or the voter as the case may be is required to be served with a notice of a hearing, unless otherwise provided, *said notice shall specify a day not less than one, nor more than ten days after the date of the notice. The notice may be served by mailing same to applicant or voter at the address given on his application card.* In the case of an application for registration, the official may hand the applicant a copy of the notice in person at the time he applies for registration, and this service shall be sufficient. The registrars, if present or in session at the time an application is filed, may proceed to the examination of the applicant instanter and without notice." [Emphasis supplied.]

This notice section must be considered in conjunction with Sections 32, 36 and 27 of the act. These sections declare that a voter *already* qualified may upon motion of the registrars or upon challenge by a qualified voter, have his registration revoked. Notice under these cancellation provisions is the same as that provided in Section 20(3), *the one day minimum and the ten day maximum.*

Section 20(3) opens up large areas for the exercise of arbitrary discretion and it seems to run afoul of a decision of the United States Supreme Court, *Lane v. Wilson,*[25] which hit at "onerous procedural requirements" in registration.

The notice provision is an "onerous procedural requirement" even if the registrars in all 159 counties could invariably be relied upon to grant the ten day maximum notice *to all.* One will note that, under Section 20(3), a voter who fails to appear on the designated day loses his voting right for one whole calendar year. This may occur in a year of congressional or gubernatorial elections, which may mean the *qualified* voter may forfeit his right for four years to elect his governor or for six years to choose a senator.

No matter how fairly administered, the act may drastically affect one of the vital rights of citizenship.

One will also note that the sections concerned with notice absolutely bind the registrar to give no more than ten days' notice.

The notice sections invest registrars with enormous discretionary powers and these appear to violate the equal protection requirements of the

21. Ga. Laws 1949, p. 1204 (§§ 17, 30).
22. See note 9 *supra.*
23. See note 19 *supra.*
24. Ga. Laws 1949, p. 1204 (§ 20(3)).
25. 307 U.S. 268, 59 S.Ct. 872, 83 L. Ed. 1281 (1938).

Fourteenth Amendment. Under the act the registrars may give one man one day notice; another ten. This discretion was placed with the registrar presumably so that he may exercise the same. Yet the exercise of this discretion could result in a denial of equal protection.[26]

A court might note judicially that the state has a large agricultural population; that at certain seasons of the year and at certain times in the seasons, depending upon weather, rural people are required to stay on the job. Unfriendly registrars could absolutely disfranchise large segments of our country people by choosing to send notices on the first day of a long rainy spell. Such conduct, however reprehensible, is permitted and legal under the act.

The *Lane* case, which has been previously referred to, arose out of the following history: Oklahoma had tried a "grandfathers' clause" to keep the franchise on the same basis as it was prior to the Fifteenth Amendment. But the United States Supreme Court nullified the Oklahoma grandfathers' clause in *Guinn v. United States*,[27] which decision was rendered in 1915.

The legislature of Oklahoma resolved to circumvent this mandate of the Supreme Court. So it passed a statute. This statute gave to all who had voted in the last general election the right to vote thereafter. Then, the legislature permitted all others, white and black, without any apparent discrimination, to register. On its face, the statute looked fair. But it contained a grave fault—a defect on which it was to fall. In the language of the United States Supreme Court, the would-be new registrants:

> ". . . had to apply for registration between April 30, 1916, and May 11, 1916, if qualified at that time, with an extension to June 30, 1916, given only to those absent from the county . . . during such period of time, or . . . prevented by sickness or unavoidable misfortune from registering . . . within such time."

This act by its terms contained not one word of discrimination, applied equally to white and black, and involved no element of arbitrary discretion in any registrar, but it was held to violate the Fifteenth Amendment. The Supreme Court said:

> *"The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."* [Emphasis supplied.]

How did the Oklahoma statute compare with the Georgia Registration Act?

Oklahoma

1. Gave 12 days for compliance.
2. Registrars had no power to set time for compliance; this was accomplished in statute.
3. Registrars had no discretion to vary the 12 days given for compliance.
4. Registrars could not move to cancel registration with one to ten days' notice.

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26. See note 9 *supra*.
27. 328 U.S. 347, 35 S.Ct. 926, 59 L. Ed. 1340 (1915).

Georgia

1. Gives 10 days (maximum).
2. Registrars may send notice setting time for compliance at their pleasure.
3. Registrars may in their discretion allow one or ten days for compliance.
4. Registrars on their own motion or upon challenge made by a qualified voter may cancel a registration with one to ten days given for hearing.

The act, in setting up the requirement of answering ten of a series of thirty questions to qualify under the "understanding of the duties of citizenship" section, adopted a test which clearly had no relevance to the standard which the State Constitution has established. The answer to ten simple questions which can be successfully taught to an average four-year-old child does not establish that the applicant "understand[s]" the duties and obligations of citizenship under a republican form of government.[28] And, in view of the legislative history of this act and the contemporary historical scene which preceded its passage (all of which the court may note judically), it is apparent that these questions were not really enacted to test any duties or obligations of citizenship. This section falls under the language in the *Guinn* case, where Chief Justice White wrote an opinion striking down an Oklahoma constitutional section "embodying no exercise of judgment and resting upon no discernible reason other than that the purpose to disregard the prohibitions of the amendment [Fifteenth] by creating a standard of voting which on its face was in substance but a revitalization of conditions which when they prevailed in the past had been destroyed by the self-operative force of the Amendment."

Movie Censorship

A fascinating constitutional issue is now wending its way from Georgia towards a possible United States Supreme Court review in the case of *RD-DR Corp. and Film Classics v. Smith.*[29] It is a test case on movie censorship. The ultimate decision may not come, for the Supreme Court can very easily deny certiorari to the United States Fifth Circuit Court of Appeals where a scathing decision held that movies do not enjoy the constitutional guaranties of the First Amendment to the Federal Constitution. Appellants, the producer and the distributor of the film "Lost Boundaries," sought unsuccessfully there and in the District Court for the Northern District of Georgia to enjoin the ban of the Atlanta censorship on the movie. Appellants contended that a 1915 ruling of the Supreme Court, in *Mutual Film Corp. v. Industrial Commissioners of Ohio,*[30] that movies are not constitutionally protected is no longer the law and that the Supreme Court had recently said as much in *United States v. Paramount Pictures, Inc.*[31] They also contended that the specific grounds on which the *Mutual*

28. See note 19 *supra.*
29. 89 F. Supp. 596 (N.D. Ga. 1950), *aff'd* 183 F.2d 562 (5th Cir. 1950).
30. 236 U.S. 247, 35 S.Ct 393, 59 L. Ed. 561 (1915).
31. 334 U.S. 131, 68 S.Ct. 915, 92 L. Ed. 882 (1947).

case was based have all been overruled in the course of the last thirty-five years.

Appellants further contended that Justice McKenna's decision in the *Mutual* case was based on three considerations and that none of these are today constitutionally relevant. Justice McKenna's grounds were:

> (1) The exhibition of motion pictures is a business pure and simple, originated and conducted for profit. (But appellants show that in *Winters v. New York*[32] the distributor of a horror magazine, who was engaged in business purely for profit, prevailed in that case.)
>
> (2) That movies are shown to assembled audiences. (But, in *Terminiello v. Chicago*[33] the mischief in the speech was spread to a large and riotous audience.)
>
> (3) That there is "a possibility of evil employment of films." (But, in the *Winters* case, the court held invalid a statute prohibiting the destruction of magazines devoted principally to criminal deeds of blood, lust or crime.)

Primarily, appellants contended that movies in the thirty-five years since the *Mutual* case have advanced from pure shows and spectacles to a key position in public opinion formation and idea dissemination.

Negroes on Juries

The dubious status of movies under the First Amendment may be settled within the year. But the constitutional right of a Negro to a trial by a jury from which members of his own race have not been systematically excluded has been clear since 1880.

Last year, however, marked the first Georgia ruling based on the 1880 precedent of *Neal v. Delaware*.[34] In *Crumb v. State*[35] the court reversed a conviction of a Negro where a timely challenge to the array of petit jurors showed that although Negroes composed over half of the total population of the county, none had been summoned for at least forty years. The remarkable feature of the case was that although the State offered no evidence to justify such an exclusion, the defendant's challenge was overruled by the trial court.

Constitutionality of Code Section 110-706

Another criminal case brought into consideration Code Section 110-706. This section authorizes a new trial when a conviction is based on perjury, but *it requires proof thereof by conviction.* In *Burke v. State*[36] the defendant sought a new trial on the basis of an affidavit by a principal state witness, who swore he had been induced to perjury by two prosecuting attorneys. The attorneys countered this with their affidavit of denial. There

32. 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 664 (1945).
33. 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 865, 1 Mercer L. Rev. 114 (1949).
34. 103 U.S. 370, 26 L. Ed. 567 (1881).
35. 205 Ga. 738, 55 S.E.2d 125 (1949).
36. 205 Ga. 656, 54 S.E.2d 350 (1949).

is no question that a conviction by the state prosecutor's knowingly employing perjured testimony is a violation of due process.[37]

The question in the *Burke* case was whether Code Section 110-706 satisfied the requirements of due process, inasmuch as it set up an invariable requirement that conviction of perjury, and that alone, would be the basis of a new trial.

The Supreme Court upheld the Code Section on the ground that it was rooted in the state's power over rules of evidence. The court observed that the rule produced the best and purest evidence of perjury.

While the court's decision will no doubt shut the door on many mischievous and time-consuming attempts to retry well-tried cases, still it has some very serious flaws:

> (1) Changes of testimony are not too likely, as they always open the possibility of prosecution.
>
> (2) A person charged with a crime must be proved guilty beyond a reasonable doubt, yet his freedom and life may rest ultimately on a perjuring witness being proved so beyond a reasonable doubt.
>
> Can one be accorded due process when his life and liberty depend on the difficult criminal conviction of another? Suppose the witness is believed by civil standards (preponderance of evidence) to have perjured himself. Yet he will not be convicted and his testimony will stand and no new trial may be granted.
>
> (3) What if the perjurer flees and cannot be found for trial and conviction; or suppose he dies?
>
> (4) Actually, does a state have full power over its rules of evidence where vital federal rights are involved.[38]

Delegated Legislation

A number of cases have dealt with the delegation of legislative power; such was the issue in *Atkins v. Manning*,[39] *Briggs v. State*,[40] *City of Pearson v. Gliden Co.*,[41] and *Glustrom v. State*.[42]

The gist of these decisions is that administrative agencies must be allowed power to make rules and regulations which deal in a somewhat legislative way with matters too detailed for comprehensive treatment by the General Assembly, but which are, nonetheless, important for the proper operation of these state functions. This is not allowable when the delegation includes the right to make regulations, the violations of which are punishable as crimes. But one must distinguish between a criminal prosecution for the

37. Mooney v. Halohan, 294 U.S. 103, 55 S.Ct. 340, 79 L. Ed. 791 (1935); Whitman v. Wilson, 318 U.S. 688, 63 S.Ct. 840, 87 L. Ed. 1083 (1943); Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L. Ed. 214 (1942).
38. Western & Atlantic R. Co. v. Henderson, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884 (1929).
39. 206 Ga. 219, 56 S.E.2d 260 (1949).
40. 80 Ga. App. 664, 56 S.E.2d 802 (1949).
41. 205 Ga. 738, 55 S.E.2d 125 (1949).
42. 206 Ga. 734, 58 S.E.2d 534 (1950).

violation of an administrative regulation and a property condemnation proceeding under such regulations.[43]

EQUAL PROTECTION

The Supreme Court has, on several recent occasions, strongly supported the idea of competitive free enterprise against restrictive measures adopted by public authority.

In *Moultrie Milk Shed, Inc. v. City of Cairo*[44] the plaintiff sought injunctive relief against an ordinance which prohibited the sale of milk within the city unless it had been pasteurized in Grady County. The protection sought through equity was of property; so the court brushed aside the contention that it could not interfere with the enforcement of a criminal law.

The court vigorously asserted that the clear, and indeed only, purpose of the act was to restrict competition—that no public health purpose was served and no valid basis existed for classification and discrimination.

While one has much respect for this decision, it will serve as an example of the type of wide and specialized knowledge—some almost of legislative character—which our courts must possess if they are to distinguish between valid and invalid classification and discrimination. The Fourteenth Amendment, particularly the equal protection clause, is rapidly becoming what it was probably intended to be—"the most sweeping of the three" clauses of Section 1 of the Amendment.[45]

In *Redwine v. Southern Co.*[46] the court held that a domesticated corporation doing business in Georgia is entitled to the same exemptions as to its property as if it were a Georgia corporation. The touchstone of classification is that while different classes of property may be taxed differently, some classes belonging to different owners may not be

The court has obviously struck at the essence of discrimination—a tax based on who is the taxpayer.

THE TWENTY-FIRST AMENDMENT V. EQUAL PROTECTION

In two cases the Twenty-first Amendment was called into play. In *Capital Distributing Co. v. Redwine*[47] and again in *Atkins v. Manning*[48] the court gave overriding precedence to the Twenty-first Amendment. In the *Capital* case it was held that a tax substantially higher on Georgia-produced wine made of foreign fruits as compared to the same made from Georgia raw material is constitutional. The objection that the discrimination violated the equal protection clause and was a burden on commerce was met by the ruling that the Twenty-first Amendment conferred upon the state power sufficient to permit these circumstances. The decision is in line with other authority, but one wonders whether the framers of the Twenty-first Amendment intended that it be used to shield local liquor manufacturers or farmers from national competition.

43. *Compare* Glustrom v. State, *supra* note 42, *with* Atkins v. Manning, *supra* note 39.
44. 206 Ga. 348, 57 S.E.2d 199 (1950).
45. K.N. Llewellyn, *On Warranty of Quality, and Society: II*, 37 COL. L. REV. 341 (1937).
46. 206 Ga. 377, 57 S.E.2d 194 (1950).
47. 206 Ga. 477, 57 S.E.2d 578 (1950).
48. 206 Ga. 219, 56 S.E.2d 260 (1949).

SALARY RAISES DURING TERM OF COMMISSION

In several cases—*Houlihan v. Atkinson*[49] and *Houlihan v. Saussy*,[50] to name two—[51] the court dealt with the application of Article III, Section XI, Paragraph I of the State Constitution.[52] The court has consistently ruled that the constitutional restriction against changing salaries of elective officers does not apply to salaries paid other than from the state treasury.

One of these cases dealt with a judge's salary as supplemented by the county treasury. While one has the greatest sympathy with every move to increase judicial salaries, he cannot help but feel that it is dangerous to permit salaries to be changed during a currect commission. The constitution struck at an *evil*. This evil is present whether the salary is increased from one source or another. Salaries can also be decreased, let it be remembered.

CONCLUSION

There were other constitutional cases decided this past year. But no general theory could be developed by the discussion of them all.

In truth, Constitutional Law is merely a specialized field of statutory interpretation, but one highly mixed with tremendous political and social pressures.

Most cases decided in the past year were merely extensions of controlling precedents.

The Supreme Court of Georgia is far more careful and regardful of these precedents than the Supreme Court of the United States. But, of course, Georgia sentiment is more closely knit on public questions than is the national feeling, which is composed of diverse views over an area of three million square miles.

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49. 205 Ga. 720, 55 S.E.2d 203 (1949).
50. 206 Ga. 1, 54 S.E.2d 557 (1949).
51. Other cases on the subject are: Houlihan v. Heery, 205 Ga. 735, 55 S.E.2d 244 (1949); Houlihan v. MacDonell, 205 Ga. 731, 55 S.E.2d 241 (1949); Houlihan v. Mulling, 205 Ga. 735, 55 S.E.2d 244 (1949); and Houlihan v. Ryan, 205 Ga. 734, 55 S.E.2d 243 (1949).
52. GA. CODE ANN. § 2-2301 (1948 Rev.).