Mercer Law Review

Volume 3 | Number 1 Article 7

12-1951

Constitutional Law

Morris B. Abram

Robert B. McKay

CONSTITUTIONAL LAW

By MORRIS B. ABRAM* AND ROBERT B. MCKAY**

Georgia appellate courts did not in the year under discussion have the occasion to pass on as many interesting and complex constitutional situations as in the prior year. To a large extent the constitutional questions in the period related to matters of criminal law and procedure, and it was in this field, perhaps, more than any other that the principal decisions lay.

THE COMMERCE CLAUSE

One notable exception is the case of *Western Union Telegraph Co. v. State.*[1] In that case the Supreme Court had to decide whether since enactment by Congress in 1943[2] of an amendment to the Federal Communications Act of 1934,[3] the Congress of the United States had pre-empted the entire field and taken exclusive jurisdiction over matters concerned with the discontinuance, reduction or impairment of service to any community by telegraph companies. The case involved an interpretation and application of the commerce clause.[4] The case arose as a result of a penalty suit filed by the State under Section 93-416 of the Code of Georgia against the Western Union Telegraph Company because the company had, without the approval of the Georgia State Public Service Commission, but with the approval of the Federal Communications Commission, changed the character of telegraph service at Blakely, Georgia, from an independent office to a teleprinter-operated agency in a local drugstore.

The State, while conceding that Western Union operates as a single system for the handling of interstate and intrastate services and that separation of its facilities and employees on a basis of interstate and intrastate services was impracticable, nevertheless contended that Georgia Public Service Commission approval had to be first obtained before any change in the character of such service could be instituted at the Blakely office, even though it might affect that phase of the business indisputably under federal control. This class of contentions placed before the Georgia Supreme Court a fairly titanic question which had not been squarely decided since the case of *Colorado v. United States.*[5]

The reasoning of Mr. Justice Brandeis in the *Colorado* case was precisely adopted by the Supreme Court of Georgia in a decision by Judge Almand

*Member of the firm of Heyman & Abram, Atlanta; A.B., 1938, University of Georgia; J.D., 1940, University of Chicago; B.A., 1948, Oxford; Co-author, with Alexander F. Miller, *How to Stop Violence! Intimidation! in Your Community;* Member American and Georgia Bar Associations.

**Assistant Professor of Law, Emory University; B.S., 1940, University of Kansas; LL.B., 1947, Yale University; Member of the Bars of Kansas, District of Columbia and United States Supreme Court.

1. 207 Ga. 675, 63 S.E.2d 878 (1951).
2. 57 STAT. 11 (1943), 47 U.S.C. § 214 (1946).
3. 48 STAT. 1064 (1934), 47 U.S.C. § 151 *et seq.* (1946).
4. U.S. CONST. Art I, § 8, cl. 3.
5. 271 U.S. 153, 46 S.Ct. 452, 70 L. Ed. 878 (1926).

who stated the controlling question in the *Western Union* case to be: "Did Congress, by the enactment of the Communications Act of 1934 (as amended), . . . pre-empt the field as to the operation by Western Union of a local agency or office handling both interstate and intrastate messages, as shown by the facts in this case, so as to relieve the telegraph carrier from compliance with Rule No. 2 of the Georgia Public Service Commission in a change of the character of service at its office and agency at Blakely, Georgia?"[6] The court unanimously found that since interstate and intrastate services and facilities furnished by Western Union are "inextricably intertwined,"[7] under the authority of the *Colorado* case, the federal authority must of necessity control both the interstate and intrastate service in the pre-empted field. Therefore, the court found that to enforce the Public Service Commission ruling requiring authority before a change in the character of the service furnished "would be in direct conflict with the exerted power of the Congress of the United States under the commerce clause."[8]

It is interesting to note that certiorari from the Supreme Court of the United States was not requested in this case and the decision will probably stand as a precedent of nationwide application.

The Newspaper Libel Venue Bill

Much interest was created in a series of bills introduced at the last session of the General Assembly and aimed at the city newspapers, but these failed to pass. One of the most critized bills was Senate Bill No. 149, which would have fixed the residence of corporations engaged in publishing newspapers in each county in which the publication "is regularly delivered to one hundred subscribers," and would have placed the cause of action for libel in each county where published. The writers feel that, had this bill become law, it would have been violative of the provisions of the State Constitution,[9] which establish venue for tort actions and prohibit special legislation. Also, it probably would have necessitated change in Section 22-1102 of the Code so as to make all corporate defendants, including newspapers, subject to suit everywhere an agent can be found.

The Antimask Act

The Antimask Act,[10] enacted by the General Assembly during its 1951 session, was in fact a comprehensive anti-Klan statute. Though not so designated, the act, restricting the use of masks designed to conceal the identity of the wearer and curbing cross burning and the use of symbols for the purpose of intimidating, must certainly have been aimed at the Ku Klux Klan.

The act, insofar as it forbids acts which are designed to intimidate or which are trespasses on private property, is obviously merely a specific restatement of age-old principles of the common law. What is novel in the

6. 207 Ga. at 678, 63 S.E.2d at 881.
7. 207 Ga. at 684, 63 S.E.2d at 884.
8. *Ibid.*
9. Art. VI, § 14, ¶ 6, Ga. Code § 2-4906 (1948 Rev.).
10. Ga. Laws 1951, p. 9.

act is the legislative policy which finds certain conduct which was legal under the common law (unless proved to have been engaged in for the purpose of intimidating) to be per se illegal. Such action as wearing a mask or exhibiting a flaming cross in a public place is found by the General Assembly to be of a threatening nature and is accordingly prohibited. No proof of evil motive is necessary in prosecutions of these violations. The proscribed acts have become *mala prohibita.* The statute is realistic in recognizing what has been public knowledge for thirty years: Klan activity is intimidating to certain groups of the population, is intended and designed to be and is engaged in for that purpose. The legislative power to correct an evil of this nature under the state's police power is unquestioned. Indeed far more stringent anti-Klan legislation has United States Supreme Court sanction.[11]

Waiver of Constitutional Rights

The correctness on precedent of the decisions in *Patterson v. Balkcom*[12] and *Henderson v. State,*[13] which hold that constitutional rights were waived at the trial level and could not be raised in the Supreme Court is not questioned. However, a comparison of the issues in the two cases will serve to illustrate the following private opinion of the authors. The doctrine of waiver and estoppel as applied to constitutional rights of a defendant in a criminal proceeding may have been carried too far. The state ought not to be permitted to neglect its obligation to provide the defendant with an impartial forum and adequate legal tools for his defense, except in the instances of affirmative waiver by a defendant first advised of his rights. This rule was applied in *Gibbs v. Burke,*[14] where the United States Supreme Court seemed to say that the right to counsel is not waived by a prisoner who is not notified of the right. The rule in Georgia on this point is not clear,[15] but there is no sound reason why the principle of the federal rule on counsel should not be applied to the right to a properly composed panel of jurors. In *Patterson v. Balkcom*[16] a writ of habeas corpus was employed after conviction to raise the constitutional question under the Fourteenth Amendment that members of the colored race were systematically excluded from jury service. The question had not been previously raised on trial and the court properly (on the basis of precedents) held that the question could not then be raised. Since *Crumb v. State,*[17] it should not be necessary for a Negro defendant to insist on a trial by a jury from which members of his own race have not been systematically excluded, at that delicate period when to do so may prejudice his case in the public eye. The officials have a far better knowledge than the defendant of the procedures by which the juries are drawn. They know if they are complying with the *Crumb* case; the defendant honestly may not know, and a few reversals

11. People v. Zimmerman, 278 U.S. 63, 49 S.Ct. 61, 73 L. Ed. 184, 62 A.L.R. 785 (1928).
12. 207 Ga. 511, 63 S.E.2d 325 (1951).
13. 207 Ga. 206, 60 S.E.2d 345 (1950).
14. 337 U.S. 773, 69 S.Ct. 1247, 93 L. Ed. 1686 (1949).
15. Compare Stokes v. State, 73 Ga. 816 (1884), with Elam v. Rowland, 194 Ga. 58, 20 S.E.2d 572 (1942).
16. 207 Ga. 511, 63 S.E.2d 325 (1951).
17. 205 Ga. 547, 54 S.E.2d 639 (1949).

for failure to comply would soon end any strike against the spirit and intent of that decision.

In *Henderson v. State*[18] the question presented was whether the defendant had waived his right to a public trial by agreeing through counsel that the public could be excluded while a witness was examined on some delicate matters. The court held that the right then being insisted upon had been waived. This case is clearly one in which the defendant, *informed* of his right, had affirmatively released it. As such it is wholly different from the circumstance in the *Patterson* case where no disclosure was made to the prisoner of the right or of the failure of the state to provide for its enforcement.

Freedom of Speech

Loomis v. City of Atlanta[19] raised an issue which has much perplexed the United States Supreme Court—the reconciling of the right of free speech with the requirements of public order. Loomis was convicted under a "disorderly conduct"ordinance of the City of Atlanta. The City Code[20] provided: "In general—it shall be unlawful for any person to act in a violent, turbulent, quarrelsome, boisterous, indecent or disorderly manner, or to use profane, vulgar or obscene language, or to do anything tending to disturb the good order, morals, peace or dignity of the city." The court, in view of the state of the record, was able to pass only on the question whether the ordinance was void per se as contravening the Fourteenth Amendment of the United States Constitution. No issue was presented as to whether the ordinance was void *as applied to the facts of the particular case*. The court found the ordinance to be valid as challenged.

It would be interesting to see what the Georgia courts would decide in a case which clearly presented the right of the police to arrest under "disorderly conduct" statutes persons whose sole offense was shrill and violent language. This problem has caused great schisms in the United States Supreme Court and the unhappy result is (as it appears to the writers) entirely inconsistent opinions in cases[21] separated by but two years. In *Terminiello v. Chicago* the court reversed a disorderly conduct conviction based on the defendant's derisive fighting words because ". . . a function of free speech under our system of government is to invite dispute."[22] Yet in *Feiner v. New York* a conviction of disorderly conduct was upheld though the offense consisted in speaking in a "loud, high-pitched voice" and this "stirred up a little excitement."[23] And when the police asked the defendant to quit exercising a right which seemed assured under the *Terminiello* case, he refused.

---

18. 207 Ga. 206, 60 S.E.2d 345 (1950).
19. 82 Ga. App. 346, 60 S.E.2d 397 (1950).
20. Section 66-201 (1942).
21. Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L. Ed. 1131 (1949); Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303, 95 L. Ed. 253 (1951).
22. 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L. Ed. 1131, 1134 (1949).
23. 340 U.S. 315, 317, 71 S.Ct. 303, 305, 95 L. Ed. 253, 259 (1950).

DUE PROCESS

Due process was invoked several times during the past year in the Georgia courts and in federal courts sitting in Georgia. *Huff v. State*[24] required construction of identical provisions of the State and Federal Constitutions protecting against unreasonable searches and seizures.[25] Pointing out that the United States Supreme Court has recently held that "in a prosecution in a state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure,"[26] the Georgia Court of Appeals held that the rule in Georgia, as in a majority of states, permits the acceptance of such illegally obtained evidence, although such evidence would have been inadmissible in a prosectuion for a violation of a federal law in a court of the United States under the Fourth and Fifth Amendments.[27] The holding, consistent with previous Georgia cases to the same effect,[28] is directly contrary to the doctrine in the federal courts.[29] The case illustrates in dramatic fashion that even identical provisions in State and Federal Constitutions may be differently construed and applied by the courts of those separate governments.

In *Georgia Power Co. v. Brooks*[30] again a claim was made of violation of the due process clause under the Georgia Constitution. In that case petitioner, as condemnor of an easement for an electrical transmission line right-of-way, among other objections, challenged the constitutionality under the Georgia Constitution of Section 36-608 of the Georgia Code.[31] That section, enacted in 1945 and not previously construed by the Georgia Supreme Court, provided in substance that any real property condemnee could have admitted in evidence the value of comparable real property and could show the price paid by the condemnor for comparable preperty acquired within the previous two years. Citing as the general rule the proposition that in the absence of statute it is not incompetent in condemnation cases to prove what the condemnor paid others for similar leases, Chief Justice Duckworth stated that this general rule had been applied in Georgia until the enactment of the new statute. The soundness of the rule, he pointed out, was based on the consideration that in such transactions either party may be subject to compulsion, particularly the condemnee, who has no choice but to give up the claimed property. Thus was raised the constitutional question in testing the validity of the statutory variance from the principle previously adhered to. Chief Justice Duckworth, for a unanimous court, held that, "since the section allows the condemnee to prove such transactions, but does not allow the condemnor the same

---

24. 82 Ga. App. 545, 61 S.E.2d 787 (1950).
25. U.S. CONST. AMEND. XIV, § 1; GA. CONST. Art. I, § 1, ¶ 3, GA. CODE § 2-103 (1948 Rev.).
26. Wolf v. Colorado, 338 U.S. 25, 33, 69 S.Ct. 1359, 1364, 93 L. Ed. 1782, 1788 (1949).
27. 82 Ga. App. at 548, 61 S.E.2d at 789.
28. Johnson v. State, 152 Ga. 271, 109 S.E. 662 (1921); Kennemer v. State, 154 Ga. 139, 113 S.E. 551 (1922); Polite v. State, 80 Ga. App. 835, 57 S.E.2d 631 (1950).
29. Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L. Ed. 652 (1914).
30. 207 Ga. 406, 62 S.E.2d 183 (1950).
31. Ga. Laws 1945, p. 143.

right, it does not afford equal treatment, and, hence, is a denial of equal protection to the condemnor . . . and is void."[32]

While the surface validity of this proposition can scarcely be challenged, one might wonder whether the condemnor, who is not under the same compulsion to buy as is the condemnee to sell, needs this kind of protection. For the purpose of this section it might well be argued that the opposing parties are not so similarly situated as to require equal treatment. The court does not discuss this possibility.

In *Screws v. United States*[33] the United States Supreme Court, in a case which arose in Baker County, Georgia, and described as involving "a shocking and revolting episode in law enforcement," sustained a civil rights statute[34] against an attack of vagueness by a clear requirement that punishment could be imposed "only for an act knowingly done with the purpose of doing that which the statute prohibits. . ."[35]

The same statute has recently been construed again in a case arising in Georgia. In *Lynch v. United States*[36] appellants, sheriff and deputy sheriff of Dade County, Georgia, were found guilty of delivering Negro prisoners in their charge to a hooded mob of Ku Klux Klan followers "with a willful intent that the prisoners would be beaten by the mob."[37] The indictment in the *Screws* case, *supra,* was for affirmative acts (beating a prisoner to death), whereas in this case the indictment was premised on a failure to act. But this can make no difference. As the Court of Appeals pointed out, ". . . the officer's dereliction of his duties, whether of omission or commission, sprang from a willful intent to deprive his prisoner or prisoners"[38] of constitutional rights. It can be hoped that Section 242 of Title 18 will continue to be thus vigorously applied in such clearly appropriate cases.

EXTRADITION

The Federal Constitution[39] provides: "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." The simplicity of this language, plus a related federal statute since 1793[40] have not been effectual to obviate the extradition problems that soon arose thereunder[41] and have continued to the present day. The seriousness of the question is revealed by the fact that at least one federal appellate judge might even "turn loose a convicted murderer" rather than relinquish "an individual who not only has suffered cruel and unusual punishment but also *faces grave and im-*

32. 207 Ga. at 410, 62 S.E.2d at 186.
33. 325 U.S. 91, 65 S.Ct. 1091, 89 L. Ed. 1495 (1945).
34. 35 STAT. 1092 (1909), 18 U.S.C. § 52 (1946) (now 18 U.S.C. § 242 (Supp. 1951)).
35. 325 U.S. at 102, 65 S.Ct. at 1036, 89 L. Ed. at 1503.
36. 189 F.2d 476 (5th Cir. 1951), petition for writ of certiorari filed July 18, 1951.
37. 189 F.2d at 480.
38. *Ibid.*
39. Art. IV, § 2, cl. 2.
40. The earliest provision is found in 1 STAT. 302. It now appears at 18 U.S.C. § 3182 (Supp. 1951). Georgia adopted the Uniform Criminal Extradition Act in 1951, Ga. Laws 1951, p. 726.
41. See MOORE, EXTRADITION c. 2, § 2 (1891).

minent danger of like abuse and very possibly even death by extra-legal means, if he is retured to Georgia."[42]

The question of the extent to which a federal court may review the regularity of prospective state court proceedings in another state was raised, but not resolved in *Dye v. Johnson.*[43] Its holding,[44] that a fugitive must exhaust his state court remedies before filing his case in a federal district court, did not indicate whether the remedies to be exhausted were intended to be those of the demanding state or of the asylum state. It thus created more difficulties than it solved. Georgia, which has had more than its share of extradition problems, has vigorously argued that the state remedies required to be exhausted before resort to federal courts are those of the demanding state. In each of two cases, decided during the survey period by federal circuit courts in which the issue has been considered since the decision in *Dye v. Johnson, supra,* habeas corpus was denied and the Georgia contention has been upheld.[45] Perhaps within the next year one of these cases will make its way to the United States Supreme Court for final determination of the issue.

Full Faith and Credit

Sufficiency of domicile to sustain a Nevada divorce against collateral attack was discussed with singular clarity in *Patterson v. Patterson.*[46] The bona fides of the husband's removal to Nevada and alleged change of domicile thereto were sharply contested by the wife, who sought temporary and permanent alimony. The trial court refused to admit in evidence a duly exemplified copy of the Nevada proceedings granting the husband a divorce, and denied the husband an opportunity to present his evidence of the purported change of domicile in the presence of the jury. Stating "that this is a legal question for the court and not a question of fact for the jury," the trial court accordingly held the claimed divorce to be "null and void, and contrary to public policy."[47] In reversing, Justice Almand pointed out that the record of the proceedings and decree in the Nevada court showed on its face a valid divorce which was entitled to prima facie validity in the Georgia courts under the full faith and credit clause of the Federal Constitution, and that the evidence should have been admitted and the burden thereafter placed upon the plaintiff

42. Bazelon, C.J., dissenting in Johnson v. Matthews, 182 F.2d 677 (D.C. Cir. 1950).
43. 338 U.S. 864, 70 S.Ct. 146, 94 L. Ed. 530 (1949).
44. In a one sentence per curiam decision the United States Supreme Court reversed the United States Court of Appeals for the Third Circuit on the sole authority of *Ex parte Hawk,* 321 U.S. 114, 64 S.Ct. 448, 88 L. Ed. 572 (1944), which was not an extradition case.
45. Davis v. O'Connel, 185 F.2d 513 (8th Cir. 1950), rehearing denied 1951; Ross v. Middlebrooks, 188 F.2d 308 (9th Cir. 1951). *Accord,* Johnson v. Matthews, 182 F.2d 677 (D.C. Cir. 1950). Dye v. Johnson, note 43, *supra,* on remand to the United States District Court for the Western District of Pennsylvania at this writing is again being tried on the issues outlined above.
46. 208 Ga. 7, 64 S.E.2d 441 (1951). See, for examples of the confusion attendant upon this problem, Williams v. North Carolina, 317 U.S. 287, 63 S.Ct. 207, 87 L. Ed. 279, 143 A.L.R. 1273 (1942); Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L. Ed. 1577, 157 A.L.R. 1366 (1945); Esenwein v. Esenwein, 325 U.S. 279, 65 S.Ct. 118, 89 L. Ed. 1608, 157 A.L.R. 1396 (1945); Rice v. Rice, 336 U.S. 674, 69 S.Ct. 751, 93 L. Ed. 957 (1949).
47. 208 Ga. at 8, 64 S.E.2d at 443.

to show that it was not bindng upon her.[48] The correctness of this decision seems clear.

CONSTITUTIONAL ISSUES RAISED IN CRIMINAL CASES

The administration of criminal justice was challenged on constitutional grounds in a number of cases within the past year. Among the more interesting were the following:

In *McBurnett v. Balkcom*[49] petitioner was under sentence of death. On June 8, 1950, after appeals prevented carrying out the execution on the date originally set, a new date of July 28, 1950, was fixed. On July 25, 1950, he sought release by a writ of habeas corpus, alleging that at the time of this sentencing he was not present and had not waived his right to be present. On those facts he claimed violation of the Federal and State Constitutions.[50] Petitioner further argued that the restraint was illegal because the order fixing the date of execution was not set in accordance with the requirement of the Georgia Code that the time set shall be "not less than ten days nor more than 20 days from the date of such order."[51] On the authority of *Fowler v. Grimes*,[52] the Supreme Court denied an invasion of any constitutional rights, apparently on the theory that this was a re-sentencing which merely extended the date of execution. Moreover, even if the order fixing the date for execution was void for failure to comply with the statutory method, still no grounds for discharge from the original sentence were given so that respondent's only duty would be to surrender petitioner for the fixing of a new date for carrying out the original sentence.[53]

In 1903 the Georgia Legislature expressly divested the Georgia courts of all jurisdiction to determine the mental status of one alleged to have become insane after the date of conviction of a capital offense.[54] The validity of that provision was squarely challenged in *Solesbee v. Balkcom*,[55] and upheld. The same question, involving the same petitioner, previously was decided[56] and affirmed by the Supreme Court of the United States,[57] in which Mr. Justice Black said:

> We are unable to say that it offends due process for a state to deem its Governor an 'apt and special tribunal' to pass upon a question so closely related to powers that from the beginning have been entrusted to governors. And here the Governor had the aid of physicians specially trained in appraising the elusive and often deceptive symptoms of insanity. It is true that governors and physicians might make errors of judgment. But the search for truth in this field is always beset by difficulties that may beget error. Even judicial determination of sanity might be wrong.[58]

48. Esenwein v. Esenwein and Rice v. Rice, both *supra*, note 46.
49. 207 Ga. 452, 62 S.E.2d 180 (1950).
50. U.S. CONST. AMEND. XIV; GA. CONST. Art. I, § 1, ¶¶ 2 to 5, GA. CODE §§ 2-102 to 2-105 (1948 Rev.).
51. GA. CODE § 27-2518 (1933).
52. 198 Ga. 84, 31 S.E.2d 175 (1944).
53. Gore v. Humphries, 163 Ga. 106, 135 S.E. 481 (1926); Smith v. Henderson, 190 Ga. 886, 10 S.E.2d 921 (1940); McLendon v. Balkcom, 207 Ga. 100, 60 S.E.2d 753 (1950).
54. GA. CODE § 27-2601 (1933).
55. 208 Ga. 121, 65 S.E.2d 263 (1951).
56. Solesbee v. Balkcom, 205 Ga. 122, 52 S.E.2d 433 (1949).
57. 339 U.S. 9, 70 S.Ct. 457, 94 L. Ed. 604 (1950).
58. *Id.* at 12, 70 S.Ct. at 459, 94 L. Ed. at 607. See also Nobles v. Georgia, 168 U.S. 398, 18 S.Ct. 87, 42 L.Ed. 515 (1897).

The difference between the rights of the accused in a case such as this and during trial is the "necessary and inherent" difference between trial procedures and post-conviction procedures such as sentencing.

In *Key v. State*[59] petitioner was charged with illegal possession of liquor by indictment returned on January 17, 1950. By an accusation of July 2, 1948, charging the commission of a similar offense on June 12, 1948, petitioner had entered a plea of *nolo contendere*. His defense of double jeopardy in the instant case was upheld; the Supreme Court reversing the trial court. In a trial for a misdemeanor in Georgia the State may prove that the act was committed any time within two years preceding the finding of the indictment or the filing of the accusation.[60] Accordingly, since by statute in Georgia a plea of *nolo contendere* constitutes jeopardy of the defendant within the meaning of the Georgia Constitution,[61] it follows that the judgment was right.

Conviction of defendant for possession of liquor for sale, and for sale of liquor after revocation of his license was reversed in *Crummey v. State*.[62] The county governing authority, without hearing, revoked defendant's license to sell liquor for failure to comply with a condition of the original license that petitioner pay to the county five per cent of the gross receipts of his liquor sales. In Georgia the sale of liquor is a privilege and not a right. Thus, in the valid exercise of the inherent police power, city or county governments may revoke liquor licenses without hearing or notice,[63] but it is not a valid exercise of the police power to make, as a basis of the revocation, failure to pay a license imposed in any manner except as provided by law, namely, a flat sum payable annually in advance.[64]

In *Walker v. Whittle*,[65] an action against sheriffs of two counties and their sureties for the willful and wrongful invasion of plaintiff's privacy by an unlawful entry into her home to arrest her husband, whereby she suffered damages resulting from shock and fright, the petition was dismissed on procedural grounds. However, the court, by way of dictum, passed on the merits of the cause of action alleged, as follows:[66]

> The unlawful entry into the plaintiff's home for the purpose of committing a misdemeanor therein, *if the plaintiff* was present and suffered from shock and fright as a result thereof, is such a violation of her right of privacy within the confines of her home as to give her a right of action. . . . The right arises under the State Constitution and State Laws.[67]

Reid v. Perkerson[68] involved an application for the writ of habeas corpus to secure a prisoner's release. There were three issues: (1) a contention that a $500 bail bond for the Recorder's Court of Valdosta was excessive (held not excessive); (2) that a lottery ordinance of the City

59. 83 Ga. App. 839, 65 S.E.2d 278 (1951).
60. Webb v. State, 13 Ga. App. 733, 80 S.E. 14 (1913); Cole v. State, 120 Ga. 485, 48 S.E. 156 (1904).
61. Art. 1, § 1, ¶ 8, GA. CODE § 2-108 (1948 Rev.); GA. CODE ANN. § 27-1410 (Supp. 1947).
62. 83 Ga. App. 459, 64 S.E.2d 380 (1951).
63. Owens v. Rutherford, 200 Ga. 143, 36 S.E.2d 309 (1945).
64. See 83 Ga. App. at 463, 64 S.E.2d at 383.
65. 83 Ga. App. 445, 64 S.E.2d 87 (1951).
66. 83 Ga. App. at 450, 64 S.E.2d at 91.
67. GA. CONST. Art. I, § 1, ¶ 16, GA. CODE § 2-116 (1948 Rev.); GA. CODE § 26-1502 (1933).
68. 207 Ga. 27, 60 S.E.2d 151 (1950).

of Valdosta went further than the general law (held not unconstitutional inasmuch as the ordinance adds to and supplements the general law); (3) that the act making the possession of a lottery ticket prima facie evidence of violation of the law was unconstitutional as contravening the Federal and State Constitutions[69] (held not unconstitutional).

The decision of the court seems sound on grounds one and two, but the decision so far as ground three is conserned is less supportable. The dissent by Chief Justice Duckworth and Justices Atkinson and Head is not supported by a written opinion to indicate specific issues wherein they disagree with the majority. Abesence of a minority opinion is unfortunate, particularly in those cases in which the ruling relates not to one principle of law but to several. The majority based its decision upholding ground three above on the idea that lottery numbers are articles of unusual character and that they are unlikely to be found in the hands of innocent parties. Would a similarly drafted law making the possession of poker chips a prima facie evidence of a violation of the law be equally defensible? The injustice of any such law is easily apparent.

In *Barton v. State*[70] there was a sodomy conviction and a life sentence imposed. Subsequently the General Assembly reduced the penalty applicable to such crimes. Appellant contended that the *ex post facto* clause of the State and Federal Constitutions protected him against the imposition of the sentence accorded by the law existing at the time of his conviction. The court rightly held that the *ex post facto* provisions apply only to laws which aggravate the crime and increase the punishment or allow conviction on a less or different weight of evidence and not to those which reduce the penalty. In any event, it would not be *ex post facto* treatment to apply the punishment applicable at the time of one's conviction. This was a case for executive action and not for judicial relief.

In *Clarke v. State*[71] the defendant, convicted of violating Code Section 45-512, prohibiting the use of power driven nets for fishing in protected waters, asserted that the statute violated the due process clause of the State and Federal Constitutions. The court held otherwise on the authority of the recently decided *Williams v. State.*[72]

MISCELLANEOUS

Cole v. Foster[73] held constitutional the Peace Officers Annuity and Benefit Fund Act[74] there construed for the first time. It provides, among other things, for payment to the Treasurer of the Board of Commissioners of the Peace Officers Annuity and Benefit Fund the sum of $1.00 in each case wherein a fine of $5.00 or more is collected for violation of a state statute or municipal ordinance,[75] and for disbursement of annuities and benefits to peace officers eligible to participate thereunder. Affirming a

69. U.S. CONST. AMEND. XIV; GA. CONST. Art. I, § 1, ¶ 3, GA. CODE § 2-103 (1948 Rev.).
70. 81 Ga. App. 810, 60 S.E.2d 173 (1950).
71. 207 Ga. 116, 60 S.E.2d 333 (1950).
72. 206 Ga. 837, 59 S.E.2d 384 (1950).
73. 207 Ga. 416, 61 S.E.2d 814 (1950).
74. Ga. Laws 1950, p. 50.
75. *Id.* § 10.

mandamus absolute granted by the court below to compel a clerk of a recorder's court to pay over to the treasurer sums claimed under the act, the Supreme Court held that the act does not: (1) confer upon the board power to conduct an insurance business, (2) impose an unauthorized tax, (3) appropriate money of a municipality for other than purely charitable purposes,[76] (4) impose an occupation tax upon the clerk collecting the fines, (5) provide donations and gratuities to peace officers to whom benefits are paid,[77] all of which were urged as rendering the act unconstitutional. To the argument that the act would encourage prosecutions solely to build up the fund, the court answered that public officers are presumed to do their duty.

Since 1924 Georgia has had a firemen's pension fund law[78] under which each fireman was assessed a percentage of his pay, and in return was entitled to specified benefits. In 1935 the pension acts were amended[79] to reduce the payments available upon retirement. Petitioner in *Bender v. Anglin*[80] became a member of the fire department in 1915 and paid the assessments until his retirement in 1942, whereupon he was paid at the reduced rate until 1949 when he applied for adjustment of his pension, to be retroactively applied. Upon denial of his application he brought this action for mandamus against the Board of Trustees of the Firemen's Pension Fund of Atlanta, contending that the Act of 1935 as applied to him was an impairment of the obligation of the contract between him and the City of Atlanta.[81] This contention was upheld by the Supreme Court in its reversal of the court below.

Schneider v. Folkston[82] illustrates the rigidity with which the Georgia courts apply the provisions of the Georgia Constitution requiring no more than one subject matter to be contained in a bill and forbidding the inclusion of subject matter not expressed in the bill's title.[83] In that case the Town of Homeland brought this suit to enjoin the City of Folkston from exercising mnuicipal control over land alleged to be a part of Homeland. Respondent city claimed such right of control by virtue of a 1950 act of the General Assembly,[84] entitled "An Act to amend the Charter of the City of Folkston in the County of Charlton and State of Georgia; . . . and for other purposes." The act was held invalid both for seeking to amend the charters of two municipal corporations in the same bill, and for attempting to modify the charter of Homeland without its appropriate mention in the title. As to the first objection, however, it is difficult to understand why the expansion of Folkston at the expense of Homeland is more than a single subject. Is it possible to enlarge Folkston by inclusion

76. GA. CONST. Art. VII, § 5, ¶ 1, GA. CODE § 2-5801 (1948 Rev.).
77. GA. CONST. Art VII, § 1, ¶ 2, GA. CODE § 2-5402 (1948 Rev.). The claim of violation was that the act, in determining the amount of benefits due by reason of service does not fix the beginning date of the service at the date of the act, but from the time of entering on the duties.
78. Ga. Laws 1924, p. 167; see GA. CODE n. preceding c. 69-1 (Supp. 1947).
79. Ga. Laws 1935, p. 450; see GA. CODE n. preceding c. 69-1 (Supp. 1947).
80. 207 Ga. 108, 60 S.E.2d 756, *cert. denied*, 340 U.S. 811, 71 S.Ct. 125, 95 L. Ed. 49 (1950).
81. U.S. CONST. Art. I, § 10, c. 1; GA. CONST. Art. I, § 3, ¶ 2, GA. CODE § 2-302 (1948 Rev.).
82. 207 Ga. 434, 62 S.E.2d 177 (1950).
83. GA. CONST. Art. III, § 7, ¶ 8, GA. CODE § 2-1908 (1948 Rev.).
84. Ga. Laws 1950, p. 2373.

of area now within the geographical confines of Homeland without, by that very act, decreasing the area of Homeland? We think not. And if the first objection falls, it would seem that there should fall with it the second, since under that construction there would be but a single subject in the bill, and thus the identification sufficient. In any event, the problem raised in this particular case has since been resolved by the 1951 session of the General Assembly which enacted two separate bills to accomplish the result forbidden in the instant case.[85]

Telford v. Gainesville[86] involved a challenge to the constitutionality of the Housing Authorities Law of 1937, as amended.[87] By that act there was created in each county and in a defined class of cities a housing authority which, under the Housing Cooperation Law,[88] was designed to alleviate housing problems throughout the state and had broad authority to take the necessary steps toward that end. To the argument that this involved an unconstitutional delegation of authority to the governing body of a municipality without provision for notice and hearing the court held that it is "well understood that, while a legislature may not delegate the power to make laws, it may nevertheless delegate the power 'to determine some fact or state of things on which the law may depend'. "[89] In view of the fact-finding rather than judical nature of the authority's proceedings, notice and hearing upon the question of the necessity for activating the authority is not required by due process. A further argument that the act was unconstitutional in that it might have the effect of lessening competition or encouraging monopoly was dismissed by the court as unsupported in law or reason.

By way of supplement to this case it is interesting to note that the Redevelopment Law of 1946, as amended in 1951,[90] providing for an additional delegation to the housing authorities, has yet to be construed by the appellate courts of the state. The purpose of that act is ". . . to authorize housing authorities to clear slums and blighted areas . . ." By Section 3 of the act, as amended, the housing authorities may undertake redevelopment projects. For the accomplishment of this purpose they are empowered to acquire land in areas of the designated kinds, to clear the land, reconstruct streets and utilities, and thereafter to make such area available to private enterprise in fulfillment of the "redevelopment" purposes of the act. Recently a similar legislative program for slum clearance in Alabama was upheld in an advisory opinion rendered by the Alabama Supreme Court in response to a request from the Governer of that state.[91] In that opinion the court, citing cases from a number of other jurisdictions, held that such legislation was not a taking of private property for a private use without the consent of the owner. It would seem that the Georgia courts, when called upon to construe the Georgia Redevelopment Law, should have little difficulty in arriving at a similar result.

85. Ga. Laws 1951, pp. 2046, 2381.
86. 208 Ga. 56, 65 S.E.2d 246 (1951).
87. Ga. Laws 1937, p. 210, as amended, Ga. Laws 1939, p. 112, GA. CODE § 99-1101 *et seq.* (Supp. 1947).
88. Ga. Laws 1937, p. 697, as amended, Ga. Laws 1939, p. 127, GA. CODE § 99-1201
89. 208 Ga. at 63, 65 S.E.2d at 251.
90. Ga. Laws 1946, p. 157, as amended, Ga. Laws 1951, p. 683, GA. CODE § 99-1201a *et seq.* (Supp. 1947).
91. Opinion of the Justices, 254 Ala. 343, 48 So.2d 757 (1950).