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Codification and Consequences: The Georgian Motif

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I.

If sheer activity is the test for judging a jurisdiction's commitment to constitutional and statutory improvement, Georgia's performance should warp the achievement curve. The Georgia tradition for movement in these matters is a strong one: by most counts the state now functions under its ninth constitution, and the history of statutory study is massive. This is not to suggest a current energy crisis, however, for both constitution and statutes are presently the subjects of scrutiny and restructure in preparation of yet more modernized versions. Obviously and naturally, both lay and legal communities await the results with anticipation, if for different reasons.

The current study of the statutes is of particular interest; its proclaimed purpose is to produce a "code" for Georgia. This is by no means to infer that the state has been without a code; codifications, however, come in many colors. Although few jurisdictions can boast of a richer codification history than Georgia's, the products of that history have met with varying reactions from the Georgia General Assembly. Those codifications receiving the legislature's statutory stamp of approval became "official" codes; those bereft of such legislative blessings, no matter how useful or widely used, were mere "unofficial" codes.

For roughly the last 45 years, the Georgia statutory scene has featured both codification species—a statutorily sanctioned code of 1933, and a supplemented and "annotated" code of private publication. For many purposes this situation was of little interest or importance; on occasion, however, the point could become one of ominous significance, particularly for lawyers (and their clients).

Perhaps a brief account of a few of those occasions and a sum-

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mary description of the current codification effort—itself already the subject of litigation—will prove of general interest.

II.

In his inimitable fashion, Dean Roscoe Pound once traced the origin of the term "code" back to 290 B.C., discovering its derivation from the word "codex," referring to a book of parchment leaves as distinguished from a roll of papyrus.[1] Pound emphasized the indomitable persistence of the codification movement throughout legal history, highlighting such "modern" legislative events as the Roman "Penal Code of the Emperor Charles V (1552);"[2] Francis Bacon's proposal in 1614 to codify the English common law;[3] the twenty-three-year painstaking preparation of the "German Civil Code," effective in 1900;[4] David Dudley Field's legendary eighteen-year evolution of the New York Code, submitted in 1865;[5] and the 1860 "Civil Code of Georgia."[6]

The Georgia effort stemmed from an 1858 statute providing for the election of three commissioners to prepare a code embracing "the laws of Georgia, whether derived from the common law, the Constitutions, the Statutes of the State, the Decisions of the Supreme Court, or the Statutes of England in force in this State."[7] In 1860 the commissioners reported the result of their efforts—a code of four divisions—which became effective in 1863.[8] Dean Pound was not exuberant over the product: "It goes without saying," he insisted upon saying, "that codification of the common law by three commissioners in one year is a wholly impossible undertaking."[9]

In subsequent years Georgia experienced considerable additional codification activity. That activity yielded codes of 1868, 1873, 1882, 1895, 1910, and 1914.[10] In 1929 the General Assembly created

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[1] Pound, *Sources and Forms of Law*, 22 NOTRE DAME LAW. 1, 49 (1946).
[2] *Id.* at 52.
[3] *Id.* at 61.
[4] *Id.* at 56-57.
[5] *Id.* at 64-65.
[6] *Id.* at 66-67.
[7] 1858 Ga. Laws 95.
[8] 1861 Ga. Laws 28.
[9] Pound, *Sources and Forms of Law*, 22 NOTRE DAME LAW. 1, 67.
[10] Notations of these codes and references to them are included in the "Editorial Note" following GA. CODE ANN. § 102-101 (1968).

yet another "code commission,"[11] and this commission produced the subject of the following 1933 enactment: "This Code is hereby adopted and made of force as the Code of Georgia, having the effect of statutes enacted by the General Assembly. It shall go into effect on the proclamation of the Governor, and shall be known as the Code of Georgia of 1933."[12]

Since 1933 the General Assembly has adopted no further codification efforts, and the primary source of convenient statutory reference has been the private "Code of Georgia Annotated," first published in 1936.[13] Private codes are also of early evolution—Dean Pound dates them of B.C. origin[14]—and although "unofficial," they serve in many states to organize statutory law into usable form.[15]

III.

The ramifications of a jurisdiction's reliance upon private unofficial codification are diverse. The convenience of the source may be offset by the uncertainty of the results. There is the ever present potential for clerical conflict between the official statutory law and the unofficial presentation of the law. There is the gnawing insecurity kindled by knowledge that no portion of the private presentation has received either the scrutiny or the stamp of public approval. In short, no matter how perfect the product in fact, the distracting nuances are inevitable. Indeed, on occasion the difficulties may transcend the sphere of mere nuances.

A.

In 1958 the Georgia Supreme Court decided the case of *Morgan v. Todd*,[16] involving a statute dealing with the reversion of title to land conveyed by a security deed. As he concluded his opinion for a unanimous court, Chief Justice Duckworth, without citation to either authority or precedent, offered the following observation:

> There is an abortive attempt by the petitioner to raise a con-

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[11] 1929 Ga. Laws 1487.
[12] GA. CODE § 102-101 (1933).
[13] *See* "Editorial Note" following GA. CODE ANN. § 102-101 (1968).
[14] Pound, *Sources and Forms of Law*, 22 NOTRE DAME LAW. 1, 49.
[15] *See* 1A SUTHERLAND, STATUTORY CONSTRUCTION § 28.03 (4th Sands ed. 1972).
[16] 214 Ga. 497, 106 S.E.2d 37 (1958).

> stitutional question, but it is futile, since it attacks Code § 67-1308 and there is no such section in the official Code of 1933. Any ruling we would make upon the constitutionality of Code § 67-1308 of the Annotated Code, which has never been enacted or adopted by the legislature, an essential necessary for it to become law, would in no way affect the 1941 act . . . and the 1953 act . . . of the legislature, from which Code (Ann.) § 67-1308 is taken.[17]

Upon return of the case to the trial court, the plaintiff amended her petition by striking the reference to the code section and inserting instead "laws passed by the legislature of said State of Georgia approved March 27, 1941, and contained in the acts of the legislature of 1941 beginning at page 487 and as amended by the acts of the legislature of 1953, November session, pages 313, 314."[18] When the case again came to the supreme court, the court said the plaintiff's amendment had "changed her attack upon the constitutionality of the Code section to an attack upon the constitutionality of the act itself. The petition as amended properly raised the constitutional question."[19] Indeed, the court proceeded to hold that the statute was, as the plaintiff had originally contended, unconstitutional.[20]

By the time the *Morgan* sequence was concluded, therefore, the supreme court had posited several points on the statutory scale. A challenge to the constitutionality of a specified section of the annotated code did not serve to challenge the constitutionality of the post-1933 statutes encompassed by that section. Should the court rule upon the challenge to the code section, that ruling would not affect those statutes; hence, no ruling was forthcoming. It was immaterial that both the plaintiff and the court knew precisely which statutes were the intended targets of the constitutional challenge. At least one correct method of mounting the challenge was a specific reference to the pages of the official session laws in which the statutes were printed. The difference between a reference to the annotated code and a reference to the session laws was a difference

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[17] *Id.* at 499, 106 S.E.2d at 39. For other reasons, the court held that the trial judge had erred in dismissing the plaintiff's petition.

[18] Todd v. Morgan, 215 Ga. 220, 109 S.E.2d 803 (1959).

[19] *Id.*

[20] The statute was held unconstitutionally retroactive.

of distinction—in this case it was the distinction between a valid and an invalid statute.

In a flurry of decisions, touching upon a wide assortment of substantive issues, the court hastened to unleash the precepts of *Morgan*. One illustration was *Tomlinson v. Sadler*,[21] a negligence action arising from an automobile collision, in which the non-resident defendant argued the unconstitutionality of the jurisdictional statute.[22] Refusing consideration of that argument, the court declared that "[t]he attempt to attack the constitutionality of '§ 68-808' is futile since there is no such section in the official Code of 1933."[23] Thus, the defendant's plea was "insufficient to raise a constitutional question such as would bring the case within the jurisdiction of this court," and "the Court of Appeals and not this court has jurisdiction."[24] Similarly, *Bethke v. Taylor*[25] focused on basically the same point, although in the context of an alimony judgment controversy. There too the court spurned an attack upon the constitutionality of a jurisdictional statute,[26] because the challenger referred only to a section of the annotated code. "Any ruling we would make . . .," said the court, "would be a useless and futile gesture and would benefit no one. We therefore decline to rule upon the constitutionality of a purely private Code."[27]

The *Morgan* precepts also dominated disposition of numerous appeals from criminal prosecutions. In *Bowen v. State*,[28] the defendant appealed his conviction for violating a motor vehicle statute on the ground that "subparagraph (a) of Code (Ann.) § 68-1626"

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[21] 214 Ga. 671, 107 S.E.2d 215 (1959).

[22] The defendant's reference was to "the act of 1957 amending the act of 1937, being the Non-resident Motorist Act and of which said § 68-808 is a part." *Id.* at 673, 107 S.E.2d at 216.

[23] 214 Ga. at 673, 107 S.E.2d at 217.

[24] *Id.* The court transferred the case to the court of appeals.

[25] 214 Ga. 679, 107 S.E.2d 217 (1959).

[26] Aside from the issue of constitutionality, the court construed the statute to confer jurisdiction.

[27] 214 Ga. at 680, 107 S.E.2d at 218. Similarly, in Springstead v. Cook, 215 Ga. 154, 109 S.E.2d 508 (1959), involving the custody of a minor child, the court held as follows: "The attempts to attack the constitutionality of those portions of the Juvenile Court Act 'codified as 24-2408 (4), Georgia Code Ann.,' 'Title 24-2426, Ga. Code Annotated,' and 'Title 24-2427, Ga. Code Annotated,' are futile, and cannot be considered by this court." 215 Ga. at 155, 109 S.E.2d at 509.

[28] 215 Ga. 471, 111 S.E.2d 44 (1959).

was unconstitutional.[29] Again the supreme court characterized the effort as "futile," because neither the subparagraph nor the section appeared in the official code of 1933. "Such subparagraph and such section have never become law in consequence of any necessary and required adopting or enacting legislative action."[30] A decision upon the validity of the cited provisions, the court stated, "would in no way affect the act from which these provisions were taken and placed in an unofficial annotated Code, which a publishing company in the City of Atlanta compiled for distribution and sale."[31] The court then routinely employed its *Bowen* perspective in the later criminal cases of *Mack v. State*[32] and *Mallard v. State.*[33] In *Mack,* defendants appealed criminal trespass convictions by attacking the validity of "Code Ann. § 26-3005." "No reference was made to an Act of the legislature," reasoned the court, and "[t]here being no section 26-3005 in the Code of 1933, such abortive constitutional attack is futile."[34] *Mallard* was even more summary; there the court sustained the trial judge's rejection of defendant's special plea in bar as follows:[35] "This attempt to attack the constitutionality of *Code* § 68-1625 is futile since there is no such section in the official Code of 1933."[36]

Ten years after proclaiming the *Morgan* precepts, the supreme court continued their forceful perpetuation in *Holmes v. State,*[37] a defendant's 1968 appeal from his conviction for murder. One ground of the appeal alleged error in the trial judge's denial of the defendant's oral request for a ruling that a juror statute was un-

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[29] The court said that "the accused makes no constitutional attack on the validity of the cited motor vehicle act as a whole or any designated part of it." *Id.* at 472, 111 S.E.2d at 45.

[30] *Id.*

[31] *Id.* The court thus affirmed the trial judge's denial of the defendant's motion in arrest of judgment. In Underwood v. Atlanta & W. Point R.R., 217 Ga. 226, 122 S.E.2d 100 (1961), the defendant in a civil action employed plaintiff's alleged violation of a criminal statute as a defense, and plaintiff moved to strike on the ground that the code section was unconstitutional. Again, the court was emphatic: "Since the official Code of 1933 does not contain a section numbered 68-1663 (a), the plaintiff's motion to strike the averments in paragraph 6 (b) and (c) . . . raises no proper constitutional question for decision by this court."

[32] 219 Ga. 829, 136 S.E.2d 320 (1964).

[33] 220 Ga. 31, 136 S.E.2d 755 (1964).

[34] 219 Ga. at 829, 136 S.E.2d at 321.

[35] The criminal conviction was for driving under the influence of intoxicants.

[36] 220 Ga. at 31, 136 S.E.2d at 756.

[37] 224 Ga. 553, 163 S.E.2d 803 (1968).

constitutional.[38] The court treated that ground as follows:

> There is no precise designation of the statute sought to be attacked. It is identified as "the new Georgia law regarding the selection of jurors in Georgia," and as "section . . . 59-106 and 59-112," without specifying any code or statutes. If he meant sections 59-106 and 59-112 of our official code, they were superseded by a 1967 Act of the General Assembly. If he meant *Code Ann.* §§ 59-106 and 59-112, the attempted attack would be futile, as a ruling on them would not affect the Act of the General Assembly from which they were taken.[39]

B.

Not all the controversies litigated during the described period were quite as routine as those discussed thus far. Extra ingredients—either by way of factual details or judicial observations—rendered some of the cases, however they were decided, unsuited for generalization.

In launching their charge of unconstitutionality, the plaintiffs in *Adams v. Ray*[40] deftly avoided the pitfall of referring to enumerated code sections and instead designated the object of their attack as "The Structural Pest Control Act (Ga. Laws 1955, p. 564) as amended."[41] Still, a unanimous supreme court was not satisfied. "When," "where," and "how" had the statute been amended, the court wondered. "The petition does not attempt to provide any of this information."[42] True, the court conceded, "this court could very easily determine the law sought to be attacked by referring to

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[38] The court searched the transcript and could find no mention of a challenge to the constitutionality of the statute other than that contained in an oral motion to quash the indictment.

[39] 224 Ga. at 558, 163 S.E.2d at 808. Also in 1968, the court decided Widemon v. Burson, 224 Ga. 665, 164 S.E.2d 128 (1968), affirming denial of equitable relief prayed for on the grounds of an unconstitutional statute. Said the court: "Any ruling upon the constitutionality of a section of the Annotated Code, which has never been adopted by the General Assembly, an essential necessary for it to become law, would in no wise affect the Act of the General Assembly from which the section of the Annotated Code was taken."

[40] 215 Ga. 656, 113 S.E.2d 100 (1960).

[41] The plaintiffs sought an injunction upon the basis of the statute's alleged invalidity.

[42] 215 Ga. at 659, 113 S.E.2d at 102. "The petition shows that the act under consideration has at some time been amended in some way, and there is no attack upon any amendment that will meet the requirements of the decisions."

the annotated Code section."[43] However,

> This court has repeatedly held that an attack upon a section of the annotated Code which has been incorporated in the Code since the adoption of the Code of 1933 is not an attack upon the constitutionality of any law. . . . We therefore hold that the attack upon "The Structural Pest Control Act (Ga. Laws 1955, p. 564) as amended" is insufficient to raise any constitutional question as to any act of the General Assembly.[44]

Two decisions by the court of appeals during this period appropriately indicate the points at which that court would and would not afford serious consideration to the ramifications of unofficial codification. In the first, *Sparks Specialty Co. v. Moss*,[45] the trial judge had dismissed interrogatories which the plaintiff's attorney had expressly submitted "[p]ursuant to the provisions of Sections 38-2108 and 38-1201 of the Code of Georgia Annotated."[46] The judge viewed the interrogatories as "purportedly propounded on the basis of Code sections which had not been officially codified by the General Assembly."[47] Reversing, the court of appeals noted first that the plaintiff was not required to cite any authority for propounding interrogatories, for "[t]he courts are presumed to know the law. . . ."[48] Second, the court distinguished this case from those involving attacks of unconstitutionality: "What was done in this case amounts to no more than a citation of authority."[49] "If attorneys were prohibited from citing sections of the very valuable and almost indispensable Annotated Code," reasoned the court, "they would be put to unnecessary time and trouble to cite the Acts of the General Assembly, etc., which are shown in the sections of the Annotated Code to be the source of the laws stated in the sections of the Code."[50] Indeed, the court concluded, "a re-

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[43] 215 Ga. at 660, 113 S.E.2d at 103.

[44] *Id.*

[45] 110 Ga. App. 585, 139 S.E.2d 345 (1964).

[46] *Id.* The interrogatories sought information for purposes of collecting a judgment.

[47] 110 Ga. App. at 585-86, 139 S.E.2d at 346.

[48] *Id.* at 586, 139 S.E.2d at 346. In fact, the court observed, "the Code section cited correctly states what the true law is and cites its source."

[49] *Id.* at 586, 139 S.E.2d at 346.

[50] *Id.* The court thought the chances of a difference between the "true law" and an annotated code section were remote, but noted that a mistake on the part of the codifier would

fusal by the court to permit the Annotated Code citations would be carrying technicalities to a ridiculous absurdity."[51]

In the second of these two decisions, *Parrott v. Fletcher*,[52] the court sustained a trial judge's refusal to deliver a charge prefaced as follows: "I charge you, gentlemen of the jury, that we have under Code Section 105-108 of the Georgia Code Annotated, a statute which sets forth the liability for torts committed by wife, child or servant."[53] The court's rationale was that "[t]he Georgia Code Annotated is not the official law of the State of Georgia,"[54] and "[t]he refusal of a request to charge is not error unless the charge requested is itself correct and perfect."[55]

With its decisions in *Sparks Specialty Co.* and *Parrott*, therefore, the court of appeals appeared to arrive at an interesting juncture. Factually, the cases seemed somewhat similar—neither involved a constitutional challenge, and in both the references to the annotated code sections were simply citations of authority. In the context of submitting a jury charge, the citation was fatally defective because it was not "the official law of the State of Georgia." In the context of submitting interrogatories, the citation was unnecessary to the courts' presumed knowledge of Georgia law and to require more would be a "ridiculous absurdity."

Complementing this perplexity of positions, the court virtually ignored the issue on some occasions of similar vintage. For instance, *Anderson v. Wilson*[56] presented actions for personal injuries and wrongful death in which the plaintiffs alleged various acts of negligence on the part of the defendant and also alleged negligence per se in violating *"Code Ann.* § 68-1626(b)(2)" and other code sections.[57] Reversing the trial judge, a majority of the court of appeals declared that "[i]n an action founded upon negligence, mere general averments of negligence are sufficient as against a general demurrer."[58] It was left to a specially concurring opinion to

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not bind the court when it accepted such citations.

[51] *Id.* at 587, 139 S.E.2d at 346.

[52] 113 Ga. App. 45, 146 S.E.2d 923 (1966).

[53] *Id.* at 46, 146 S.E.2d at 924.

[54] *Id.*

[55] *Id.*

[56] 114 Ga. App. 19, 150 S.E.2d 172 (1966).

[57] *Id.* at 20, 150 S.E.2d at 173.

[58] *Id.*

point out that "[t]here are no such Georgia Code sections, nor are there any such sections of Georgia Law as *Code Ann.* §§ 68-1626(b)(2). . . ."[59]

Perhaps providing an appropriate culmination for the period, the supreme court forcefully reminded the General Assembly in *CTC Finance Corp. v. Holden*[60] that the legislature too was subject to the perils of unofficial codification. That case focused for the court's attention a statute which expressly repealed "Section 6-1608 of the Code of Georgia, Annotated," and "in lieu thereof" enacted another provision.[61] Denigrating the enactment as a "nullity,"[62] the court unanimously emphasized that the legislature, although urged to do so, "has refused to adopt the 'Annotated Code.' "[63] "Obviously," the court elaborated, "by repealing Section 6-1608 of the Annotated Code no existing law was thereby repealed, and since the other portion of the Act was expressly made in lieu thereof, it too became only a new section of the Annotated Code, and hence is not law."[64] Accordingly, advised the court, neither lawyers nor courts need again concern themselves with the legislative product.

C.

Upon entering the new decade, both Georgia appellate courts tendered firm and business-as-usual treatment to the unofficial codification quagmire. In January, 1970, the supreme court decided *Cox v. Burson*,[65] involving an attack upon the constitutionality of "Georgia Laws 1968, pages 448 to 455," praying that "Georgia

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[59] *Id.* at 21, 150 S.E.2d at 174. The writer of the opinion was able to concur with the decision, however, because the alleged conduct of the defendant was set forth in the allegations of negligence and the holding was only in regard to a general demurrer.

[60] 221 Ga. 809, 147 S.E.2d 427 (1966).

[61] 1959 Ga. Laws 353. The enactment appeared to restrict the power of a trial judge in granting a new trial.

[62] 221 Ga. at 811, 147 S.E.2d at 429. This designation appeared to be completely gratuitous, for the court had already conceded its lack of power to rule upon the constitutionality of the statute in this case and had indeed construed the statute to be merely "advisory" and thus constitutional.

[63] 221 Ga. at 811, 147 S.E.2d at 429.

[64] *Id.* The court analogized to an imagined instance in which the legislature had "repealed a designated chapter of a textbook on science and enacted something in lieu thereof. . . ." Clearly, the court observed, the product "would not have been law but science."

[65] 226 Ga. 13, 172 S.E.2d 406 (1970).

Code Ann. 68-1625.1" be declared void.[66] In abbreviated head-note fashion, and relying upon a two-pronged rationale, a unanimous court showered the attack with unrelenting aloofness.[67] First, if the challenge went to the entire statute printed in the noted pages of the session laws, then the challenge was excessively vague.[68] Second, "[i]f the attack be limited, as the prayer is limited, to an attack on 'Georgia Code Ann. § 68-1625.1' then the same must fail since there is no such section in the official Code of 1933."[69] In the same year, and in the same fashion, the court disposed of demurrers to criminal indictments.[70] "Though referred to as attacks on Code sections," proffered the court, "they must be deemed to refer to the annotated Code since no such sections appear in the official Code."[71] Accordingly, no constitutional challenge to any statute was presented, and the supreme court declared itself lacking in jurisdiction.[72]

Also in 1970 the court of appeals decided *Jenkins v. Board of Zoning Appeals*,[73] a decision affirming the trial judge's dismissal of an appeal from an order of a local zoning board.[74] In the course of its consideration, the court confronted a statement in the appeal itself which appeared somewhat at odds with the court's formulation of the source of the order.[75] Routinely and summarily, the court dissolved the tension as follows: "While the appeal also states it is made pursuant to the 'Georgia Code Annotated § 68-8,' the Georgia Code Annotated is a publication of a law book publisher and neither grants nor takes away any legal rights."[76]

The perfunctory nature of these modern judicial performances radiated little forewarning of the dramatic divisiveness which was

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[66] *Id.*

[67] The court thus affirmed the trial judge's action in overruling the challenger's motion to declare the statute unconstitutional.

[68] *I.e.*, it alleged no reasons why the entire statute was invalid.

[69] 226 Ga. at 13, 172 S.E.2d at 407.

[70] Cooper v. State, 226 Ga. 722, 177 S.E.2d 228 (1970).

[71] *Id.* at 722, 177 S.E.2d at 229.

[72] The court transferred jurisdiction of the case to the court of appeals.

[73] 122 Ga. App. 412, 177 S.E.2d 204 (1970).

[74] Dismissal was justified on the ground that the appellant had not provided bond as required by the material statute.

[75] The court formulated the source to be the board of zoning appeals, and the statement in the appeal could arguably be taken to indicate a board of adjustment.

[76] 122 Ga. App. at 413, 177 S.E.2d at 206. Moreover, the court noted, the cited chapter of the Code Annotated dealt with motor vehicles and not zoning.

about to surface within both appellate courts. Providing context for controversial occasion, *North Georgia Finishing, Inc. v. Di-Chem, Inc.* presented litigation arising from a garnishment proceeding. In the trial court the defendant moved to dismiss the garnishment, arguing that the authorizing statute, "Georgia Code Annotated § 46-101," was unconstitutional. The trial judge overruled the motion, the supreme court transferred the defendant's appeal to the court of appeals without opinion, and that court split five-to-four over whether a constitutional question was properly presented.[77] In its majority opinion the court articulated its position as follows:

> The record on appeal is insufficient to identify the statute attacked as unconstitutional. The statute is identified only as a Section of Ga. Code Annotated, published by the Harrison Company. This is not sufficient.[78]

As authority for this position, the majority cited the supreme court's decisions in *Morgan v. Todd*[79] and later cases, and explained that only that court "can change these rulings."[80] The majority rejected contentions that the legislature had changed the rule via the Civil Practice Act[81] and the Appellate Practice Act,[82] observing that "[a] goodly portion of the Supreme Court's decisions above cited were decided since passage of those Acts."[83] Moreover, the majority found nothing in those statutes pertaining to this issue.[84]

In forceful opposition, the four-judge dissenting opinion maintained that the entire thrust of the modern procedure statutes was that cases should be decided on their merits rather than avoided

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[77] North Georgia Finishing, Inc. v. Di-Chem, Inc., 127 Ga. App. 593, 194 S.E.2d 508 (1972). The defendant had argued that the statute was unconstitutional as a result of a decision by the United States Supreme Court.

[78] 127 Ga. App. at 594, 194 S.E.2d at 510.

[79] 214 Ga. 497, 106 S.E.2d 37 (1958). *See* the discussion *supra*.

[80] 127 Ga. App. at 594, 194 S.E.2d at 510.

[81] 1966 Ga. Laws 609.

[82] 1965 Ga. Laws 18.

[83] 127 Ga. App. at 594-95, 194 S.E.2d at 510.

[84] The majority identified the issue as failure to disclose a proper constitutional attack upon a specified statute rather than an "archaic form of pleading." It distinguished the motion in this case from the "notice pleadings" provided for by the Civil Practice Act. *Id.* at 595, 194 S.E.2d at 510.

by technicalities. One of the most prominent of the "old" technicalities, elaborated the dissent, was that "a statute could not be identified by citing a section of Ga. Code Annotated, published by the Harrison Company."[85] Such technicalities, the dissent continued, "are not only in direct conflict with the CPA and the Appellate Practice Act but are also anomalous."[86] Thus,

> [b]y what logic can an appellate court use the Ga. Code Annotated for formal citation in its printed opinions which are permanent, official State records and at the same time deny its use to a party litigant in typewritten papers under a system of "notice" pleading[?][87]

The dissent bested domination by supreme court decisions postdating the procedure statutes by designating those decisions "either memorandum decisions or summary opinions on the point. . . ."[88] Indeed, said the dissent, "[i]t appears that neither appellate court has ever squarely considered the question of the effect of the CPA on pleading a constitutional question."[89] Having finally engaged that issue, the dissent viewed the new test to be simply "whether the pleadings give fair notice to the opposite party and enable a 'reasonable' trial or appellate judge to understand the issue presented."[90]

At this juncture the Georgia Supreme Court issued certiorari in the case and, by a division of four justices to three, reversed the court of appeals.[91] Upon retransfer of the case for decision on the merits,[92] a majority of the supreme court, although proceeding to sustain the validity of the garnishment statute,[93] made preliminary

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[85] 127 Ga. App. at 599, 194 S.E.2d at 512.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 596, 194 S.E.2d at 511.

[89] *Id.* at 596-97, 194 S.E.2d at 511. "The question here is whether this archaic form of pleading is applicable under the CPA."

[90] *Id.* at 599-600, 194 S.E.2d at 513. "In my opinion, the appelant's motion to dismiss meets this test."

[91] North Georgia Finishing, Inc. v. Di-Chem, Inc., 230 Ga. 623, 198 S.E.2d 284 (1973). This was merely a *per curiam* opinion in which the court said that its original transfer of the case to the court of appeals was error, and that a constitutional issue had been sufficiently raised. It directed that the case be retransferred to the supreme court for decision on the merits.

[92] North Georgia Finishing, Inc. v. Di-Chem, Inc., 231 Ga. 260, 201 S.E.2d 321 (1973).

[93] This decision on the merits was later reversed by the United States Supreme Court in

reference to whether the constitutional question was properly presented. The majority's entire explication of the point was as follows:

> The Civil Practice Act of 1966 . . . has eliminated issue pleadings and has substituted notice pleadings. . . . Therefore, we find that the attack on Code Ann. § 46-101 and the argument of counsel made without objection sufficiently presented the constitutional question to the trial court.[94]

The three-justice minority took strong issue with that point.[95] Citing and quoting from prior cases,[96] the minority emphasized that "[t]hese unreversed unanimous decisions of this court are binding precedents which should have been adhered to in the disposition of this matter."[97] The minority then elaborated the following evaluation of both past and present:

> Reference to "Georgia Code Annotated" has been for mere convenience and aid in locating the law of this state and when it has been accompanied by citation to the statute enacted by the General Assembly there has been no problem. But here no such accompanying reference is made. The citation is only "Georgia Code Annotated § 46-101." With due regard for the high quality of the codal publication involved here, we must conclude that reference to it alone does not constitute a legal citation. We cannot take judicial notice of it.[98]

Responding to the majority, the minority purported to examine both the Civil Practice Act and the Appellate Practice Act for indications of a change.[99] It found none:

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). In its opinion, the Supreme Court made no mention of the dissension in the state courts on the code citation point, and continuously referred only to the "Code Annotated" in discussion of the merits.

[94] 231 Ga. at 262, 201 S.E.2d at 322. "The trial court specifically ruled on each and every ground thereof and this court can now consider its ruling."

[95] On the merits of constitutionality itself, the minority agreed with the majority; hence, its opinion was entitled a "special concurrence." 231 Ga. at 264, 201 S.E.2d at 324.

[96] *E.g.*, Widemon v. Burson, 224 Ga. 665, 164 S.E.2d 128 (1968); Bowen v. State, 215 Ga. 471, 111 S.E.2d 44 (1959); *See* the discussion of these cases *supra.*

[97] 231 Ga. at 266, 201 S.E.2d at 325.

[98] *Id.* at 266, 201 S.E.2d at 325.

[99] The Appellate Practice Act "has nothing to do with the requirements of making a proper attack upon the constitutionality of a statute," said the minority, and the Civil Practice Act's concept of notice pleading is immaterial "because a *motion* is not a pleading

> Rather, without exception, they [prior decisions] have been reaffirmed in many cases of this court decided after the passage of these Acts, as is shown in the cases cited hereinbefore. Significantly, in none of such cases are those Acts ever mentioned.[100]

Finally, the minority likewise found "no merit" in reliance upon the plaintiff's failure to object in the trial court to the defendant's argument for dismissal; its opinion expressly rejected the view that this failure "resulted in a waiver of its rights to challenge now the rules for attacking the validity of the garnishment statute."[101]

By 1973, when the smoke of *North Georgia Finishing, Inc. v. Di-Chem, Inc.* had cleared, little of judicial certainty remained standing. On the issue of raising a constitutional question by citation to the unofficial code, both the court of appeals and the supreme court were divided as closely as they could be divided. In the court of appeals, a bare majority of the judges adhered to the traditional view, relying upon unanimous supreme court decisions rendered after enactment of the "new" practice and procedure statutes, and maintained that in any event those statutes failed to deal with the issue. A forceful dissent perceived a direct conflict between the new statutes and this "old technicality," discounting the later decisions as failing to squarely consider the issue, and branded the traditional judicial treatment as "anomalous." In the supreme court, a bare majority of the justices thwarted operation of the traditional rule, but the majority's rationale appeared confusingly bifurcated: it employed both the "new" Civil Practice Act and the point that the constitutional challenge had been argued and decided in the trial court without objection. A forceful dissent countered both points: the new statutes indicated no change in the traditional rule, the court's later unanimous decisions confirmed that rule, and failure to object to the challenge in the trial court in no way waived application of the rule.

Following the confusion of the *North Georgia Finishing, Inc.* episode, both appellate courts assumed a posture of remarkably low

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within the purview of the Civil Practice Act." *Id.* at 267, 268, 201 S.E.2d at 326.

[100] *Id.* at 267, 201 S.E.2d at 325.

[101] *Id.* at 268, 201 S.E.2d at 326. The minority said that "these are well established requirements for making such attacks. The burden is upon the party making the attacks to do so properly. It was not carried here."

profile, one yielding a minimum of clarification on the matter. Indeed, the court of appeals appeared to contribute to the complexity. In 1974, the court decided *Security Management Co. v. King*,[102] involving yet another effort at challenging the constitutionality of Georgia's garnishment proceeding.[103] There the attack was leveled against "those provisions of *Georgia Code Annotated* Sections 46-101, 46-102, and 46-401, which permitted pre-judgment garnishment."[104] In the most summary of fashions, the court spurned the attack as failing to raise a constitutional issue and cited as authority the supreme court's *Morgan v. Todd* line of decisions.[105] The court's only deference to more recent developments on the issue was as follows: "Since the trial court refused to rule upon the motions, the constitutional issue is not raised within the ruling made in *North Georgia Finishing, Inc. v. Di-Chem, Inc.* . . ."[106]

Apparently, therefore, the court in *Security Management Co.* acknowledged only one prong of the supreme court's bifurcated rationale in *North Georgia Finishing, Inc.* Ignoring the "new" Civil Practice Act's alleged refutation of the "old" obstructionist technicality, *Security Management Co.* focused exclusively upon the "waiver" rationale.[107] In the absence of such waiver, the challenger's citation of the unofficial code doomed his constitutional attack. Whether the supreme court accepted this restriction of the holding in *North Georgia Finishing, Inc.* could be answered only to a degree: the challenger in *Security Management Co.* applied to the supreme court for certiorari and the court denied his application.

By 1979 the court of appeals indicated a return to its former ways, without even a nod to *North Georgia Finishing, Inc.*

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[102] 132 Ga. App. 618, 208 S.E.2d 576 (1974).

[103] This case arose prior to the United States Supreme Court's decision of invalidity in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

[104] 132 Ga. App. at 618, 208 S.E.2d at 577.

[105] "Consequently no constitutional issue is involved, and this court has jurisdiction of the appeal." *Id.* at 619, 208 S.E.2d at 577.

[106] *Id.* at 618, 208 S.E.2d at 577. The composition of this three-judge division of the court of appeals was interesting: one of the judges had been a member of the majority in *North Georgia Finishing, Inc.*; one had been in the minority; and one had not been on the court at the time of the prior decision.

[107] *I.e.*, whether the constitutional issue had been raised and decided in the trial court without objection.

Cochran v. State[108] presented an appeal from a conviction for aggravated assault, including a challenge to the constitutionality of "Code Ann. § 59-112(b) and § 59-501."[109] For two reasons, the court responded, it could not consider the challenge. First, "there is no indication that the constitutionality of either of these statutes was considered in the trial court."[110] Second, the court concluded,

> no official citation to the statutes has been provided. It has repeatedly been held that 'an attack upon a section of the annotated Code which has been incorporated in the Code since the adoption of the Code of 1933 is not an attack upon the constitutionality of any law.'[111]

The court then tendered a similar performance in *Grantham v. State*,[112] an appeal from a conviction for using vulgar language by telephone to a female. First, the court held the appellant's constitutional challenge precluded by a prior supreme court decision sustaining the statute.[113] Second, the court observed that "in any event the attack must fail since the matter Grantham challenges in his 'motion to quash and demurrer' is designated as 'Georgia Code Annotated Section 26-2610' and 'Code Annotated Section 26-2610.' "[114]

Finally, the supreme court reacted.[115] Granting certiorari to review only the court of appeals' "alternative holding" in *Grantham*, a unanimous supreme court explicated its disapproval as follows:[116]

> Under the Appellate Practice Act of 1965 . . ., pleadings and procedure shall be liberally construed so as to bring about a decision on the merits. . . . There is no requirement for cita-

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[108] 151 Ga. App. 478, 260 S.E.2d 391 (1979).

[109] *Id.* at 484, 260 S.E.2d at 396.

[110] *Id.*

[111] *Id.* at 484, 260 S.E.2d at 396-97, *quoting from* Adams v. Ray, 215 Ga. 656, 660, 113 S.E.2d 100, 103 (1960). *See* the discussion of the *Adams* case, *supra.*

[112] 151 Ga. App. 707, 261 S.E.2d 445 (1979).

[113] Breaux v. State, 230 Ga. 506, 197 S.E.2d 695 (1973).

[114] 151 Ga. App. at 708, 261 S.E.2d at 446. The court cited Widemon v. Burson, 224 Ga. 665, 164 S.E.2d 128 (1968); Cox v. Burson, 226 Ga. 13, 172 S.E.2d 406 (1970); and Cooper v. State, 226 Ga. 722, 177 S.E.2d 228 (1970). *See* the discussion of these cases, *supra.*

[115] Grantham v. State, 244 Ga. 775, 262 S.E.2d 777 (1979).

[116] Mr. Justice Hall wrote the court's opinion; it was his final opinion as a member of the Georgia Supreme Court.

> tion to the official code rather than to the Code Annotated, and the decisions of this court cited by the Court of Appeals are expressly overruled. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[117]

From its unanimous position encompassed by *Morgan v. Todd* in 1958 to its unanimous position encompassed by *Grantham v. State* in 1979, the Georgia Supreme Court had apparently come full circle. The intervening twenty-one year period of travail, it seemed, had been wiped from the judicial slate; and, for the purpose of mounting an attack of unconstitutionality, the "official" and "unofficial" codifications were declared as one.

IV.

In recent years, codification has resumed its traditional posture of high profile in the thinking of the Georgia General Assembly. A 1976 resolution cited some of the perceived results of the 43-year hiatus in "official" codes.[118] The resolution proclaimed that since 1933 the legislature and governor had enacted "thousands" of additional statutes, that a convenient ascertainment of the status of the law has become "impossible," and that the private annotated code can not be used as an "official" codification.[119] Deferring to those difficulties, the resolution created "the Code Revision Study Committee" and charged it as follows: "The Committee shall conduct a thorough study of the subject of code revision, including the need therefor, the time involved, the cost thereof, and all other matters relative thereto."[120] The committee was directed to report its "findings and recommendations" by December 31, 1976.[121]

The study committee's report recommended "a complete revision of the Code and laws of Georgia,"[122] and the 1977 General Assembly established "the Code Revision Commission" to proceed with administrative matters of the project.[123] Those matters

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[117] 244 Ga. at 775-76, 262 S.E.2d at 777. The supreme court disagreed with the court of appeals only in respect to this holding; it affirmed the court of appeals' judgment in the case.

[118] 1976 Ga. Laws 739.

[119] *Id.*

[120] *Id.* at 740.

[121] *Id.*

[122] 1977 Ga. Laws 922.

[123] *Id.*

proved time-consuming for in 1978 the legislature constituted the commission a continuing body until completion of the code revision project, and authorized the commission to select and contract with a code publisher.[124]

The commission considered presentations and estimates from several publishers and, in 1978, contracted with one of them (The Michie Company).[125] Pursuant to the contract, the publisher undertook to "codify, revise and annotate, index, print, bind and deliver according to the directions of the Commission . . . 500 sets of a revised and recodified Code of Georgia, which shall be designated 'Official Code of Georgia Annotated.' "[126] The statutes and federal and state constitutions are to be annotated with all construing court decisions, attorney general opinions, law review articles, and the like, and cross references and legislative histories are to be included. The contract calls for submission of the statutory portion of the code to the 1981 General Assembly, and awards the publisher the exclusive right to distribute and sell the code (and annual supplements) for a period of 10 years. The State is designated owner of the copyright of the finished product—the "Official Code of Georgia Annotated."[127]

No sooner had the commission contracted with one publisher than it found itself a defendant in litigation instituted by another. In *Harrison Co. v. Code Revision Commission*,[128] the plaintiff, publisher of the unofficial Code of Georgia Annotated, challenged the validity of both the 1978 authorizing resolution and the publication contract.[129] The plaintiff launched its attack in a barrage of counts and the Georgia Supreme Court, in a resounding display of modern unanimity, rebuffed each charge.

To the argument of statutorily required competitive bidding,[130] the court declared commissions of the General Assembly not sub-

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[124] 1978 Ga. Laws 230.

[125] This information, and the following description of terms of the contract, are taken from the Georgia Supreme Court's opinion in Harrison Co. v. Code Revision Comm'n, 244 Ga. 325, 260 S.E.2d 30 (1979).

[126] *Id.* at 326, 260 S.E.2d at 32. The publisher is also to identify for the commission statutes which have become obsolete, been held unconstitutional, or repealed by implication.

[127] *Id.* at 327, 260 S.E.2d at 33.

[128] 244 Ga. 325, 260 S.E.2d 30 (1979).

[129] The plaintiff named as defendants the commission, its individual members and The Michie Company.

[130] GA. CODE ANN. § 40-1910 (1975).

ject to statutes of the General Assembly unless named or clearly intended. Moreover, the court added, the "publishing services" covered by the contract were not the "supplies, materials or equipment" covered by the bidding statute. In a somewhat similar fashion, the court responded to the contention of an unconstitutional monopoly.[131] The "exclusive right" to distribute and sell the code, the court observed, "does not prevent Harrison from publishing a competitive product; *i.e.*, a Code with annotations by Harrison."[132] State laws are public records open to compilation by anyone, and the court did not view the contract to bar the plaintiff from the market or as intended to drive the plaintiff out of business.[133]

The plaintiff also tendered a separation-of-powers challenge,[134] *i.e.*, that the revision commission's "executive" function was being carried out by members of the legislative and judicial branches.[135] The court designated the commission's work "legislative," however, and thus within the purview of both legislators and lawyers. Even assuming the member judge and the member district attorney to be precluded from service on the commission, "the remaining members constituted a quorum which accomplished the purposes of Resolution 447."[136] In additional terms of the commission's function, the plaintiff maintained that authority to revise the code did not encompass the power to contract for an annotated code. The court's rejection of that theory was grounded upon two rationales. First, lawyers typically employ the word "code" in referring to the unofficial Code of Georgia Annotated[137] and the commission thus might have concluded that code revision encompassed preparation of annotations. Second, "if the General Assembly did not intend to authorize a contract for an *annotated* Code, it can simply refuse to fund the contract."[138]

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[131] GA. CONST. art. III, § VIII, ¶ VIII (1976), GA. CODE ANN. § 2-1409 (1977).

[132] 244 Ga. at 329, 260 S.E.2d at 34.

[133] *Id.* "Michie is not being given an exclusive franchise as to the publication of laws in Georgia."

[134] GA. CONST. art. I, § II, ¶ IV (1976), GA. CODE ANN. § 2-204 (1977).

[135] As composed by the resolution, the commission consisted of 10 legislators and 5 members of the State Bar; of the latter, one was a superior court judge and one was a district attorney.

[136] 244 Ga. at 330, 260 S.E.2d at 35.

[137] Indeed, noted the court, it has used citations to this unofficial code throughout this very opinion.

[138] 244 Ga. at 331, 260 S.E.2d at 35. The court emphasized that the inclusion of annota-

The court similarly relied upon the legislature's continuing control over the project in dealing with other counts of attack. To charges of abuse of discretion and waste of state funds,[139] the court said the General Assembly was the proper arbiter of the former and would determine the latter.[140] To the argument of unconstitutional delegation of legislative powers, the court responded that the legislature had authorized the making of a contract and not a "law,"[141] and "has retained complete control over the contract and its terms by making it contingent on approval by the General Assembly of an appropriation."[142] Finally, the court rejected the contention that the contract awarded invalid gratuities to the publisher:[143] "[t]he alleged 'gratuities' are, of course, the consideration provided by the contract to be paid by the state for the publishing services to be performed by Michie under the terms of the contract."[144]

Accordingly, the supreme court directed the trial judge to enter summary judgments on all counts in favor of the defendants.

V.

By way of benediction, it should be reemphasized that the movement for statutory codification has persisted throughout legal history. For better or worse, Georgia was an early American subscriber to the movement, prompting prolific activity and yielding a plethora of codes, both "official" and otherwise. In modern times, however, the absence of a current official codification has resulted in considerable reliance upon a private publication of Georgia's statutory law. Although this point was not always of crucial importance, sometimes it was.

Originally and predominantly, the difficulty surfaced in the context of mounting a challenge to a statute's constitutionality. In a

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tions in the official code will not give the annotations themselves any official weight.

[139] These charges went to the point that the commission had contracted to pay Michie almost twice the amount of Harrison's estimate.

[140] The court said that "the Commission, having no authority to fund the contract, was powerless to waste public funds in doing so." 244 Ga. at 332, 260 S.E.2d at 36.

[141] "We agree that the General Assembly cannot confer on any person or body the power to enact law (as opposed to rules and regulations)." 244 Ga. at 333, 260 S.E.2d at 36.

[142] *Id.*

[143] GA. CONST. art. III, § VIII, ¶ XII (1976), GA. CODE ANN. § 2-1413 (1977).

[144] 244 Ga. at 334, 260 S.E.2d at 36. "They are not gratuities."

multitude of unanimous decisions, both appellate courts refused to consider challenges which attacked only specified sections of the unofficial annotated code. In actuality, the courts steadfastly maintained, that code was not the statutory law of Georgia; a judicial ruling upon the validity of that code would thus have no effect upon the statutes that it purported to present. The courts routinely and summarily employed this approach in both civil and criminal litigation. Indeed, on occasion the courts extended the technicality even beyond the constitutional context. Thus, the court of appeals deemed legally infirm a proposed jury charge which cited only the unofficial code,[145] and the supreme court declared deficient the General Assembly's purported repeal of such a code section.[146]

This rather uniform course of judicial performance afforded little warning of the explosion of divisiveness triggered in both courts by *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[147] By a bare majority of its justices, the supreme court there eventually thwarted operation of the traditional rule, but in a confusingly bifurcated fashion. Although ensuing developments in both appellate courts complicated rather than clarified the matter, the court of appeals viewed reports of the rule's demise as greatly exaggerated. Finally, however, the supreme court achieved unanimity to publish the obituary notice and, in the name of modern procedure, denigrated this technical distinction between codifications.[148]

In any event, the General Assembly is currently submerged in orchestrating the production of a new "Official Code of Georgia Annotated." The legislature's creation, the Code Revision Commission, is proceeding apace with the project, having contracted for its preparation and publication, and having successfully defended the contract against challenge. Although it remains to be seen whether the 1981 submission deadline for the project will be met, one point in respect to Georgia codification activity is clear: The story continues.

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[145] Parrott v. Fletcher, 113 Ga. App. 45, 146 S.E.2d 923 (1966).
[146] CTC Finance Corporation v. Holden, 221 Ga. 809, 147 S.E.2d 427 (1966).
[147] 231 Ga. 260, 201 S.E.2d 321 (1973); 127 Ga. App. 593, 194 S.E.2d 508 (1972).
[148] Grantham v. State, 244 Ga. 775, 262 S.E.2d 777 (1979).

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