MUNICIPAL CORPORATIONS

By JAMES M. COLLIER*

During the survey year, June 1, 1953 to June 1, 1954, two important cases affecting the law of municipal corporations in Georgia have been adjudicated. One of these cases declared the Municipal Home Rule Act unconstitutional, and the other solved a problem in the relationship of a public utility to the city in which it is located. In this same year a decision of first impression was written regulating the disposition of municipal property, and several other cases were decided which reiterated old principles of law, simply applying them to new situations. One statute of general interest was enacted during the November-December, 1953 session of the General Assembly.[1] This new act amends Georgia Code Section 69-308 to the extent that money claims for damages against a municipality must be presented in writing to the governing authority within six months of the damage or accident upon which the claim is predicated.

STATE-MUNICIPAL RELATIONS

Home Rule—Without doubt the most far-reaching decision of the Georgia courts dealing with municipal corporations within the last year was *Phillips v. City of Atlanta*.[2] This case and its companion, *Town of Garden City v. Long*,[3] declared the Municipal Home Rule Act[4] unconstitutional. According to the Georgia Constitution, Article IV, Section I, Paragraph I, the General Assembly must provide for optional plans of municipal government and for a method by which municipalities may select one of these optional plans as its form of government. Although this Article is delineated by the Constitution as a "Home Rule" provision, it has little in common with genuine home rule. Under true home rule each municipality may (1) adopt *any* form of government it chooses, and (2) act in fields purely local on their own initiative without first gaining permission of the state legislature. Clearly the Georgia "Home Rule" Article of the Constitution does neither of these. However, the General Assembly attempted to give Georgia municipalities actual home

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1. Ga. Laws, Nov.-Dec. Sess. 1953, p. 338.
2. 210 Ga. 72, 77 S.E.2d 723 (1953).
3. 210 Ga. 78, 77 S.E.2d 727 (1953).
4. Ga. Laws, 1951, p. 116 and Ga. Laws, 1952, p. 46, GA. CODE ANN. c.69-10 (Supp. 1954).

rule on at least one score. By passing the Municipal Home Rule Act it allowed them to decide the form of city government under which they chose to live.[5]

According to the General Assembly, the Municipal Home Rule Act was passed under the provisions of Paragraph I, Section I, Article XV of the Georgia Constitution. This Act and its amendment[6] stated that the original charter for any new municipal corporation may be granted only by the General Assembly. However, once a municipality received a charter from the legislature, it became free, under Section 3 of the Act, to frame and adopt a new charter, provided such charter is consistent with the Constitution and general laws of the state. Section 3 of the Georgia Home Rule Act is the government-formation side of home rule in its purest form. Undoubtedly the Act was a forward step in the process of disseminating democracy to the grass roots. But the court was not confronted with the merits of the law as an advancement in the development of democracy. It was confronted with the question: Is the Act in conformity with the Constitution as it now stands? To this question the court felt compelled to answer "no." "The entire ['Home Rule' Article of the Constitution] shows unmistakably an intent that (1) legislation be enacted containing a number of comprehensive and complete systems of county and municipal governments, differing in some particulars . . . " and the municipalities being allowed to select under which one of these several legislatively-drawn plans of government they wish to operate. In other words, the court felt that the so-called Home Rule Article of the Constitution did not grant home rule at all. It merely gave municipalities an option of which of several plans drawn by the General Assembly they would choose as their form of government. According to this interpretation of the Home Rule provision of the Constitution, home rule can become a reality in Georgia only through an amendment to the Constitution. Such undoubtedly is the understanding of the members of the General Assembly, because during the November-December, 1953 session of that body it voted to submit to the people an amendment to the Constitution which would allow the General Assembly to provide for genuine self-government for the municipalities of this state.[7]

Classification—An act passed in 1953[8] provided for a special

5. Section 5 of the 1951 act granted to municipalities wide powers to regulate a generous variety of local affairs, indicating a legislative policy favorable to local self-government.
6. See note 4 *Supra.*
7. Ga. Laws, Nov.-Dec. Sess. 1953, p. 504.
8. Ga. Laws, Jan.-Feb. Sess. 1953, p. 360.

procedure for the condemnation of property by municipalities having a population of more than 250,000 inhabitants, or for counties having partly within their boundaries a municipality having a population of more than 250,000. A general law already was on the books regulating municipal condemnation procedures. In *City of Atlanta v. Sims*[9] the court pointed out that the terms of the act applied to DeKalb County with a population of only 136,395, but not to Chatham County with a population of 151,481," . . . thus demonstrating that the attempted classification because of population is purely arbitrary." As such, it was not classification but special legislation to amend a general law, a thing forbidden by Article I, Section IV, Paragraph I of the Constitution.

State Law-City Ordinance on the Same Subject—A defendant was arrested and convicted in the police court of Atlanta for being drunk on the street. He was operating a motor vehicle at the time of arrest. According to Ga. Code Section 58-608, it is a crime against the state to " . . . appear in an intoxicated condition on any public street . . . " In *Smith v. State*,[10] the State successfully prosecuted the same defendant for violating Ga. Code Section 68-307, which made it a criminal offense to drive while intoxicated. The defendant contended that this constituted double jeopardy. The Court of Appeals denied his plea on the ground that by the same act he had violated a city ordinance, for which he had been punished, and a State statute, for which he was now being punished. Although prior adjudication had established that a city ordinance against drunken driving would be invalid because the exclusive domain of the State,[11] Section 58-608 of the Code specifically states that "this section shall not be construed to affect the powers delegated to a municipal corporation to pass laws to punish drunkenness or disorderly conduct within their corporate limits." Thus the city had authority to enact an ordinance forbidding drunkenness on its streets and to punish those who ignore the prohibition. Since the state could have convicted the defendant under Sections 58-608 and 68-307, there is no objection to the city convicting him under an ordinance substantially like Section 58-608, and then the state convicting him under Section 68-307, although the same act on his part gave rise to the violation of both the ordinance and statute.[12]

9. 210 Ga. 605, 82 S.E.2d 130 (1954).
10. 88 Ga. App. 749, 77 S.E.2d 764 (1953).
11. The court cited Dodd v. State, 85 Ga. App. 589, 69 S.E.2d 784 (1952) on this point.
12. In Jenkins v. Jones, 209 Ga. 758, 75 S.E.2d 815 (1953) the Supreme Court, in ruling upon the legality of a conviction for violating a city ordinance dealing with exactly the same provisions as Ga. Code 68-307,

INTERNAL ORGANIZATION

Separation of Powers—In Shipman v. Johnson[13] one party to the litigation questioned the right of the city council of Atlanta to delegate to the city engineer the power to determine at which street intersections traffic control signals were needed. The argument was that such delegation violated Article I, Section I, Paragraph XXIII of the Constitution of Georgia which forbids the delegation of legislative powers to a non-legislative employee. The court pointed out that the constitutional provision under discussion applies only to the state and not to municipalities.

Discretionary Power of Council—During the course of a strike of drivers and mechanics of the Augusta Coach Company, a private concern operating buses on the streets of Augusta under a franchise from the city, violence flared, and considerable damage was done to the property of the transportation company. To protect the property of the utility, the city ordered large numbers of firemen and policemen to work overtime, and to ride the vehicles of the bus company or to follow them on motorcycles or patrol cars, all at a cost of $1,642 per day to the taxpayers. Several taxpayers asked the courts to enjoin the City of Augusta from spending such large sums of money to protect the property of the company. Such expenditures, the plaintiffs felt, constituted an unlawful and wrongful use of public money. In *Gulledge v. Augusta Coach Co.*[14] the court decided against the taxpayers. Ga. Code Section 69-203 was cited: "The council or other governing body of a municipality has a discretion in the management and disposition of its property, and where it is exercised in good faith, equity will not interfere therewith." Applying this statute to the case at hand, the court ruled that the city council had not abused its discretion to the point where equity would grant the requested injunctive relief.

Employees—In *Mayor and Council of City of Athens v. Wansley*,[15] the court ruled that the act creating a city Civil

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held that a city ordinance which covers the same subject as a law of the State violates Art. I, § IV, ¶ I of the Constitution. This provision is to the effect that no special law can change a general law. To reach the decision in the Jenkins case the court undoubtedly felt that a city ordinance was of the same nature as a special law, and that a special law could not supplement a general law. Query: Suppose Smith's lawyer had questioned the legality of the conviction under the city ordinance, using as his authority the principle of the Jenkins case, since the ordinance and the statute covered the same subject? If such an ordinance violates the "Special Law" provision of the Constitution, is the statutory permission to enact the ordinance itself unconstitutional?

13. 89 Ga. App. 620, 80 S.E.2d 717 (1954).
14. 210 Ga. 377, 80 S.E.2d 273 (1954).
15. 210 Ga. 174, 78 S.E.2d 478 (1953).

Service Commission for the City of Athens did not intend to divest the mayor and council of authority to prescribe the duties of its police officers. Hence, the Mayor of Athens, and not the members of the Athens Civil Service Commission, has jurisdiction and authority to direct and control the city's police officers in the performance of those official duties which the mayor and council are required to prescribe.

GOVERNMENTAL V. PROPRIETARY FUNCTIONS

Another function has been added to the growing list of Georgia municipal undertakings which are per se, neither governmental or proprietary in nature. In *Pollock v. City of Albany*,[16] the court added to the list municipal stadiums. Here it was pointed out that if the stadium was maintained primarily as a source of revenue for the city, the function would be proprietary in nature. But if it were used as a place of resort for pleasure and promotion of the health of the public at large, its operation would be governmental in nature. The City of Albany owned the stadium under question, and charged the general public fees to view football and baseball contests conducted therein. While attending an athletic contest the plaintiff was injured when he accidentally stepped in an excavation dug in one of the walkways which the city had negligently left unguarded. A demurrer to the plaintiff's petition was sustained. After stating the general rule that a municipality is liable for its torts only where the injury arose from engaging in a proprietary function, the court ruled that under the existing facts the operation and maintenance of the stadium was not an independent commercial venture but was owned by the city as a public recreational facility—thus a governmental function.

In *Kirkland v. Johnson*[17] several taxpayers asked the court to enjoin the City of Manchester from selling certain real estate which had been "formerly used for school purposes." In denying the taxpayers' prayer the court called attention to the rule that a municipality may not sell property held for governmental purposes without express legislative authority, but that property held for proprietary uses may be disposed of at will. Although the property in dispute originally had been acquired for governmental purposes, later it was abandoned as to such use. Property of this sort is no longer being used for governmental purposes. It may be sold by the municipal authorities without legislative sanction. Since no Georgia cases were cited to support these

16. 88 Ga. App. 737, 77 S.E.2d 579 (1953).
17. 209 Ga. 824, 76 S.E.2d 396 (1953).

rulings on disposing of municipal property, it can be assumed that this is a case of first impression in the state. However, the principles expounded are universally followed in other jurisdictions.[18]

FINANCES

Bonds—Georgia case law rules that municipal bonds authorized by popular vote for a particular purpose constitute a trust fund, and that the proceeds thereof cannot be diverted from such named undertaking and applied to some other project. Reaffirming this rule, the Supreme Court of Georgia in *Walker v. Wheeler, Mayor,*[19] held that funds realized from bonds issued for the purpose of constructing and equipping a city hall could not be used to purchase a tract of land on which to build the city hall.

Assessments—In the case of *Carter v. City of Toccoa,*[20] a private citizen objected to paying a street assessment. Her contention was that the paving included a ten-foot strip of property which she owned. She had failed to object to such paving until after the paving actually was done. The court ruled that the assessment was valid because the protestant raised no objection to the improvement even though she knew work was in progress on the project. She could not stand by and see the work completed, then ask equity to declare the assessment null and void. If she had valid objections to the project, she should have raised them at the proper time.

CONTRACTS

Contracts made by municipal officials without proper authority are nullities. Such was declared to be in the case in *Graves, Mayor v. Wall.*[21] In this case the City of Clarkesville contracted with the Public Administration Service to advise the city council concerning property values within the city for tax purposes. Certain taxpayers asked the court to cancel the contract on the ground that the charter of the city granted by the legislature established a system of property evaluation which was exclusive. The court agreed that the express mandatory provisions of the charter negatived the existence of any authority on the part of the city council to shift the obligation of assessing property for tax purposes to another. Thus the contract with the Public Administration Service to perform this duty was void.

18. 10 MCQUILLAN, MUNICIPAL CORPORATIONS § 28.37 (3d ed. 1950)
19. 210 Ga. 432, 80 S.E.2d 691 (1954).
20. 210 Ga. 167, 78 S.E.2d 487 (1953).
21. 210 Ga. 271, 79 S.E.2d 529 (1954).

In *J. E. Lewis Motor Company v. City of Savannah,*[22] a bidder who offered ten Ford automobiles to the city at a price $390 lower than his closest competitor, the Chevrolet agent, objected when the city passed over his bid and purchased the vehicles from the next lowest bidder. The city claimed the Police Department considered Chevrolets superior automobiles for its uses. In denying injunctive relief, the court called attention to the fact that no law compelled the city to accept the lowest bid offered, and that the business affairs of a municipality are committed to the corporate authorities and the courts will not interfere except in clear cases of mismanagement or fraud. No proof was offered that the city authorities had acted arbitrarily, fraudulently or corruptly, or that they had abused the discretion entrusted to them.

In *Tri-State Electric Cooperative v. City of Blue Ridge,*[23] the electric cooperative denied liability for a one per cent gross sales tax, due the city under the terms of the franchise, because of its non-profit cooperative status. The city answered that under its charter no franchise could be granted to utilities unless they were required to compensate the city one per cent of the utility's gross income. The court ruled that since the cooperative had accepted a franchise which included the tax provision, it was bound by the contract the same as the city. In fact, the court added, the city could not have granted the franchise contract without inserting the tax provision, which by law it was required to include in all contracts with public utilities. Without the mandatory tax provision the franchise would have been void.

EMINENT DOMAIN

The second far-reaching decision of the past year was the *City of Macon v. Southern Bell Telephone and Telegraph Company.*[24] Under proper legislative authority, the City of Macon closed part of New Street, a public way, to provide a satisfactory site, extending over two blocks, for the construction of a city hospital. Telephone cables lay under New Street. The telephone company was forced to move these conduits because of the excavations for the new building. The utility demanded compensation from the city for the cost of relocating the underground cables. Argument for the telephone company contended that the city had granted permission to lay the cables under that portion of New Street being closed, and that through this

22. 210 Ga. 591, 82 S.E.2d 132 (1954).
23. 88 Ga. App. 717, 77 S.E.2d 547 (1953).
24. 89 Ga. App. 252, 79 S.E.2d 265 (1953). This case is discussed in a note, 5 MERCER L. REV. 323 (1954).

grant the utility had acquired a contract right for the use of this specific location.[25] The telephone company felt the city was "taking" their right arising out of this contract without paying just compensation. Evidently the position of the public utility was that upon granting the franchise the city gave permission to use public streets for telephone purposes, that as soon as an agreement was reached between the utility and the city which allowed cables to be laid under New Street, the utility acquired an irrevocable easement to that portion of ground which bore the cables. Thus to disturb that easement was to take property, and just compensation must be paid. The court denied the telephone company relief on the ground that there was no taking or damaging of the telephone company's property. The decision reasoned that the telephone company acquired no indefeasible right to any particular street or part of a street by acquiring a franchise, and that it was privileged to use the public ways subject to the right of the city to require a change of location of its lines, if good reasons existed for requesting the change. According to the court, a public utility uses the public streets at its own risk as to location and is bound to make such changes as the public convenience and security require at its own expense. For good measure, the court added that the municipality lacked the authority to contract away its governmental powers. Thus no binding contract could be made divesting the city of control over its streets. By way of summary, the telephone case decided that there is no irrevocable grant to a public utility to use a particular street simply because the utility holds a franchise—in fact, a municipality could not make such an irrevocable grant even if it so desired. Since there was no franchise or contract right to use a particular street, there was nothing which the city had taken or destroyed in the present case.

Another case having eminent domain overtones, decided during the period of the present survey, is *City of Macon v. Cannon*.[26] Mrs. Cannon owned a house under which ran a ditch. After the city paved a section of road with drains emptying into this ditch, the increased flow of water during rainy seasons overtaxed the capacity of the drainway. During these periods of heavy rainfall water spilled over the banks of the ditch and washed holes in the foundation of her house. Mrs. Cannon claimed that her property had been damaged by the city's drainage system to the extent of $1,500. A verdict in her behalf for

25. Also, the utility claimed that the hospital would be a proprietary undertaking. The court ruled that the operation of this hospital would be a governmental function since its primary purpose would be to protect the public health rather than to bring revenue to the city treasury

26. 89 Ga. App. 484, 79 S.E.2d 816 (1954).

this amount was reached by the jury, and the Court of Appeals affirmed the judgment. *Mayor and Council of Americus v. Brightwell,*[27] is to the same effect.

STREETS

No startling cases have been decided within the year involving municipal streets. In *City of Atlanta v. Turner,*[28] the court emphasized again that a city is bound to keep its streets reasonably safe for persons using them in the usual way, otherwise the municipality is liable in a tort action for damages. Here the court added that keeping the streets free of impediments meant keeping the space to a reasonable height above the roadbed free of obstacles as well as the surface of the street. *City of Sylvania v. Miller*[29] involved determining whether a strip of land had been dedicated as a public alley, and *City of East Point v. Henry Chanin Corp.*[30] raised the question of what procedure a private party should pursue to abate a nuisance created by a city erecting a barricade in a public way. *State of Georgia v. State Toll Bridge Authority,*[31] pointed out that the General Assembly has the power to legislate concerning municipal streets, and that such legislation binds the municipal corporation and its citizens absolutely.

27. 90 Ga. App. 341, 82 S.E.2d 732 (1954).
28. 89 Ga. App. 785, 81 S.E.2d 291 (1954).
29. 210 Ga. 290, 79 S.E.2d 808 (1954).
30. 210 Ga. 628, 81 S.E.2d 812 (1954).
31. 210 Ga. 690, 82 S.E.2d 626 (1954).