MUNICIPAL CORPORATIONS

By HENRY N. WILLIAMS*

Decisions of the Georgia appellate courts in the field of municipal corporations during the year under review were comparatively few and were chiefly concerned with problems that have received the attention of the courts for years. No departure from earlier rulings in these fields occurred. In the relatively small number of instances in which problems of first impression in Georgia arose during the year the appellate courts followed principals generally accepted in other jurisdictions.

MUNICIPAL PROPERTY

The supreme court had to consider the nature of the interest which the city of Atlanta secured in certain real property which had been condemned "for water works purposes."[1] The charter section under which condemnation proceedings were conducted provided that the sum allowed in payment would be "in full compensation for property so acquired, or for the damages sustained, as the case may be. . . ."[2] The supreme court held that the charter provision should be construed as to limit the interest acquired by the city of Atlanta to such estate as was necessary for the purpose for which the land was acquired. The court in its reasoning relied upon its earlier decision in a case involving the acquisition of property for use by a railroad company.[3] The court also drew analogies to the provisions in the code [4] relative to the acquisition of property by private water works companies.

It is suggested that language in the opinion may be unfortunately broad. Certainly if a city were to engage in condemning land ostensibly for a purpose authorized by its charter when in fact the land was intended for resale, an abuse of municipal power would occur. The language of this decision suggests that were land condemned for water works purposes which later became unnecessary or unsuitable for those purposes, such land could not be used for other municipal purposes without additional condemnation proceedings, even though

*Associate Professor of Law, Walter F. George School of Law, Mercer University. B.S., Middle Tennessee State College; M.A., University of Tennesssee; Ph.D., University of Chicago; LL.B., Vanderbilt University; LL.M., Columbia University. Member American, Federal, Georgia and Tennessee Bar Associations.

1. Atlanta v. Fulton County, 210 Ga. 784, 82 S.E.2d 850 (1954).
2. Ga. Laws 1874, p. 113, § 44.
3. Georgia Granite Railroad Co. v. Venable, 129 Ga. 341, 58 S.E. 864 (1907).
4. GA. CODE ANN., Tit. 36 (1936).

the city had authority to condemn land for the alternative purpose. Certainly the analogizing from the authority of public utility corporations to condemn land for their purposes does not recognize the essential difference between a municipal corporation and a public utility.

A rather interesting problem was presented to the supreme court in a suit to enjoin a municipality and its park board from carrying out a contract with a local civic club for the construction and operation of a miniature railroad in the city park. The civic club was to construct the railroad, and one-half of the profits derived from the operation of the railroad would go to the park board to be used for recreational purposes; the remaining one-half of the profits were to go to the civic club to be utilized for charitable purposes.[5] The proposed contract was attacked on the ground that it would be ultra vires in that the use of public property for the intended purpose was not authorized. The court held that the use of park property in the proposed manner would be illegal. Some of the language in reaching that result can only be characterized as unfortunate. The court stated "the weight of authority is that a municipal park is a public utility and a portion thereof cannot be leased for a period of years for purpose of gain."[6] The difficulty in citing the authority upon which the court relied is that McQuillin prefaced his statement that a municipay park is a public utility with the words "it has been said" for which was cited only one Oklahoma case[7] that construed a provision of the Oklahoma constitution. To talk of a public park in terms of its being a public utility can only lead to confusion and certainly an abundance of well-reasoned decisions were cited by McQuillin in support of the opposite position from that taken by the Georgia Supreme Court.

ZONING

The appellate courts of Georgia again considered several problems in the area of municipal zoning during the year under review.

The question arose as to whether or not population might be a basis for classifying municipalities for the purpose of differentiating their powers in the field of zoning.[8] The constitutional prohibition relative to special legislation[9] was alleged to forbid defining zoning

5. Norton v. City of Gainesville, 211 Ga. 387, 86 S.E.2d 234 (1955).
6. *Id.* at 390, 86 S.E.2d at 237, citing 10 MCQUILLIN, MUNICIPAL CORPORATIONS § 28.53 (3rd ed. 1950).
7. Derr v. Fairview, 121 Okla. 23, 247 P. 45 (1926).
8. Orr v. Hapeville Realty Investments, Inc., 211 Ga. 235, 85 S.E.2d 20 (1954).
9. GA. CONST. art. I, § 4, ¶ 1, provides "Laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an existing general law."

authority of municipalities on a population basis. The supreme court reiterated the rule that population is a suitable basis for classification where it is reasonably related to the purpose or subject matter of the statute.[10] Zoning power was held to be appropriately related to population.

The supreme court again upheld the authority of a city through appropriate administrative machinery to make reasonable exceptions to its zoning restrictions.[11]

During the past year the supreme court gave some additional light as to the meaning of "spot zoning." This is an important matter because of the rule in Georgia that the reasonableness or unreasonableness of spot zoning is a question of law for the court to decide.[12] The court held that where re-zoned property is entirely segregated from property of other owners by three public streets and other property of its owner the re-zoning cannot be classified as spot zoning.[13]

The problem of the permissible continuing non-conforming use which arises when a zoning ordinance is first enacted was again considered by the supreme court. The court held that a house which had been used continuously as a single family unit could be considered only as a single family unit for purposes of zoning regulation even though it was suitable for conversion into a multiple dwelling unit.[14]

The question sometimes arises as to whether a city in its own construction program is bound by the city's zoning regulation. The supreme court held that a city may erect a fire station in an area zone for other uses.[15] The court reached its decision for the reason that to construe a zoning statute otherwise would violate the state constitutional provision relative to the power of eminent domain.[16] This case appears to be one of first impression in the appellate courts of Georgia.

10. Abbott v. Com'rs of Fulton County, 160 Ga. 657, 129 S.E. 38 (1925) gives a good review of the cases involving population as a basis for classification.
11. Brown v. City of Brunswick, 210 Ga. 738, 83 S.E.2d 12 (1954). The court followed the well-known case of McCord v. Ed Bond & Condon Co., 175 Ga. 667, 165 S.E. 590, 86 A.L.R. 703 (1932).
12. This position was most recently stated in Orr v. Hapeville Realty Investments, Inc., 211 Ga. 235, 85 S.E.2d 20 (1954).
13. Birdsey v. Wesleyan College, 211 Ga. 583, 87 S.E.2d 378 (1955). The court noted that the area to be rezoned was not extensive in that it contained only approximately 100,000 square feet. The court relied upon the fact that it was "segregated" in the manner described in the text.
14. Tucker v. Atlanta, 211 Ga. 157, 84 S.E.2d 362 (1954).
15. Mayor of Savannah v. Collins, 211 Ga. 191, 84 S.E.2d 454 (1954).
16. GA. CONST. art IV, § 2, ¶ 1, provides: "The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking property and franchises, and subjecting them to public use."

The question arose as to whether a housing authority which was required to conform to a municipal zoning ordinance could condemn land for its use prior to securing permission from the zoning authority to utilize the land for the intended purpose. The supreme court, relying on an earlier case involving the power of a railroad to condemn land prior to securing municipal authorization to use the land,[17] held that compliance with the zoning ordinance was not a condition precedent to condemning land by the housing authority.[17a]

The Urban Redevelopment Law enacted by the 1955 General Assembly[18] may have far-reaching effects in the field of municipal zoning and planning.

TAXATION

The city of McCaysville apparently attempted to avoid the constitutional prohibition upon municipal taxation of electric membership corporations[19] by the device of levying an annual revenue producing license fee for the privilege of selling and distributing electric power to customers within the city. The supreme court had no difficulty in holding this subterfuge to be invalid.[20] The court relied upon its earlier decision in the field of automobile taxation.[21]

REGULATION

Municipal efforts to regulate private activity received the attention of the appellate courts on several occasions during the year.

The continued attacks upon the Atlanta barbering ordinance reached both appellate courts during the year. The supreme court declined to permit the interference by injunction with enforcement of the ordinance regulating barbering for the reason that other remedies were available and indeed noted that one of the petitioners in the injunction case was also a party to the other attack.[22] The court of appeals held that the Atlanta ordinance requiring an annual license

17. Tift v. Atlantic Coastline Railroad Co., 161 Ga. 432, 131 S.E. 46 (1925).
17a. West v. Housing Authority of Atlanta, 211 Ga. 133, 84 S.E.2d 30 (1954).
18. Ga. Laws Jan.-Feb. Sess. 1955, p. 354.
19. GA. CONST., art VIII § 1, ¶ 4, provides: "All cooperative, non-profit, membership corporations organized under the laws of this State for the purpose of engaging in rural electrification, as defined in subsection I of Section 3 of the Act approved March 30, 1937, providing for their incorporation, and all the real and personal property owned or held by such corpoations for such purpose, are hereby exempted from all taxation, state, county, municipal, school, district and political or territorial subdivision of the State having authority to levy taxes."
20. City of McCaysville v. Tri-state Electric Cooperative, 211 Ga. 5, 83 S.E.2d 598 (1954).
21. City of Waycross v. Bell, 169 Ga. 57, 149 S.E. 641 (1929).
22. Baker v. Atlanta, 211 Ga. 34, 83 S.E.2d 682 (1954).

for barbers violated the constitutional provision relative to the prohibition on special legislation[23] in view of state regulation of barbering.[23a]

The court of appeals was presented with the problem raised by an effort of a person whose slaughter house license had been allegedly illegally revoked to secure damages. The theory of the plaintiff was that the municipality had taken his property by reason of the revocation of the license. The court had no difficulty in finding that a license revocation did not constitute taking of property, and furthermore, since, for procedural reasons, the revocation was void, the licensee need not have paid any attention to the revocation unless he might have been subjected to penal action in which instance an injunction would have been available.[24]

One of the more interesting but not particularly earthshaking decisions concerned the authority of a municipality to prohibit fortune-telling. The attack upon the ordinance was predicated upon the due process and the free speech clauses of the state constitution and the due process clause of the federal Constitution. The court held that the fortune-teller had not overcome the presumption of the validity of the ordinance.[25] The opinion is far from satisfactory and one is prompted to suggest that attorneys with fortune-tellers (with assets!) for clients might well consider re-litigating the question of the authority of municipalities in this field.

TORT LIABILITY[26]

The appellate courts were concerned during the year under review with only traditionally found types of problem in this area. In a case involving an action for damages caused by the flooding of lands which resulted from the negligent and careless manner in which a municipality had graded its streets, the court of appeals assumed liability of the municipality without discussion.[27] In an action for damages sustained by reason of injuries which resulted from the improper maintenance of streets the court of appeals stated "[A]fter the exercise of a governmental function has ended, the ministerial duty of keeping streets and sidewalks free from obstructions becomes obligatory, and also that the latter duty includes guarding or warn-

23. Quoted *supra,* note 9.
23a. Beard v. Atlanta, 91 Ga. App. 584 86 S.E.2d 672 (1955).
24. City of Thomaston v. Davis, 92 Ga. App. 216, 88 S.E.2d 300 (1955).
25. Williams v. Jenkins, 211 Ga. 10, 83 S.E.2d 614 (1954).
26. Georgia law in this field has been summarized by Saye, *The Tort Liability of Municipalities in Georgia,* 17 GA. B. J. 456 (1955).
27. Mayor and Council of Americus v. Brightwell, 90 Ga. App. 341, 82 S.E.2d 732 (1954).

ing against the obstructions erected or maintained by the city in the exercise of its governmental functions."[28]

The court of appeals held[29] that the allegation of improper maintenance of a sewage disposal plant with the resulting injury to health and property would withstand a general demurrer. The court pointed out that the construction and operation of a sewage disposal plant was a governmental function but that fact would not bar an action for damages resulting from a nuisance which might thereby be created.

In an action for damages for injuries resulting from a fall caused by a water meter box being maintained at a level lower than that of the surrounding area the court of appeals reiterated the well-established rule in Georgia that a city in operating a water works system and furnishing its residents with water for domestic and commercial purposes and charging therefor is engaged in a private, non-governmental business and is liable to one injured because of its negligence.[30]

The confused picture of municipal tort liability in Georgia is not reflected in the cases decided by the appellate courts during the year under review.[31] Legislation is indicated. A step in the right direction, perhaps, was taken by the General Assembly in 1955 in authorizing municipalities and other units of local government to purchase liability insurance on motor vehicles operated by them.[32] Governmental immunity would be waived to the extent of the amount of the insurance in force.

Violations of Ordinances

The court of appeals was again confronted with the problem raised by a single act being of the kind prohibited both by state statute and municipal ordinance. The court stated that a single act could not be both a state offense and a violation of a municipal ordinance and spoke as if the rule on the subject were well recognized generally.[33] The rule referred to by the court seems to be well settled in Georgia, but the reasoning has been alternatively that of avoiding double

28. Hodges v. City Council of Augusta, 90 Ga. App. 306, 310, 83 S.E.2d 36, 38 (1954). The court cites in support of its decision City Council of Augusta v. Tharpe, 113 Ga. 152, 38 S.E. 389 (1901) and announced that it would not follow its decision in Atlanta v. Key, 42 Ga. App. 214, 155 S.E. 499 (1930).
29. Ingram v. City of Acworth, 90 Ga. App. 719, 84 S.E.2d 99 (1954).
30. Mayor of Savannah v. Palefsky, 91 Ga. App. 392, 85 S.E.2d 817 (1955). The Georgia rule seems to have been established in City Council of Augusta v. Mackey, 113 Ga. 64, 38 S.E. 339 (1901) and Brown v. Atlanta, 66 Ga. 71 (1880).
31. See Saye *op. cit. supra*, note 26.
32. Ga. Laws Jan.-Feb. Sess. 1955, p. 448.
33. Trowbridge v. Dominy, 92 Ga. App. 177, 88 S.E.2d 161 (1955).

jeopardy and the constitutional prohibition of special laws on the subject covered by general laws.[34]

In applying the Georgia rule that violation of a city ordinance is negligence *per se* the court of appeals in a case of first impression in Georgia had to determine whether a police officer while driving a police vehicle in performance of emergency duty was required to stop at a traffic light displaying the red color toward him.[35] The court held that absent a specific exception in the traffic ordinance for police vehicles the police officer was required to obey the traffic light.[36]

Nature of Municipal Powers

The court had occasion to emphasize the fact that municipal corporations have only such power as its given to them by the state constitution or General Assembly. The supreme court held that a municipal charter provision which required the publication of proposed ordinances before final passage is mandatory as a condition precedent to the adoption of such ordinances and the failure to comply with the charter provision renders the attempted ordinance invalid.[37] The supreme court also held that where the municipal charter provides that suits are to be brought in the name of "Town of Flowery Branch," a suit brought by named individuals as "Mayor and Council of the Town of Flowery Branch" is not an action pursuant to charter authority.[38]

34. Jenkins v. Jones, 209 Ga. 758, 75 S.E.2d 815 (1953) gives a good collection of the Georgia cases in this area. For an informative treatment of one phase of the problem generally see Kneier, *Prosecutions under State Law and Municipal Ordinances as Double Jeopardy*, 16 CORN. L. Q. 201 (1931).
35. Tribble v. Georgia Power Co., 91 Ga. App. 528, 86 S.E.2d 355 (1955).
36. The court followed the recent Virginia case of Virginia Transit Co. v. Tidd, 194 Va. 418, 73 S.E.2d 405 (1952).
37. Mid-Georgia Natural Gas Co. v. City of Covington, 211 Ga. 163, 84 S.E.2d 451 (1954).
38. State Highway Department v. Reed, 211 Ga. 197, 84 S.E.2d 561 (1954).