# LOCAL GOVERNMENT

*By* POWELL GLASS, JR.*

At least two cases decided by the Supreme Court of Georgia during the past year, and involving local governing bodies, may have far-reaching effects. In *IBM Corp. v. Evans, et al.*, 213 Ga. 333, 99 S.E.2d 220 (1957), petitioner owned a considerable number of business machines which it rented to the United States government and which were located on an Air Force base, exclusive jurisdiction to which purportedly was transferred to the United States by acts of the legislature.[1] In an action for an injunction to restrain the collection of county and state ad valorem taxes on this property, the trial court held the legislative acts unconstitutional insofar as they attempted to exempt this property from property taxation since it was not specified in art. 7, §1, par. 4, of the Constitution of Georgia, which paragraph concludes: "All laws exempting property from taxation, other than the property herein enumerated, shall be void." On appeal to the supreme court this conclusion was affirmed, the court stating: "Therefore, the attempt to surrender it ( the state's sovereignty) is effective only to the extent of allowing the United States to own and use land free from state interference by taxes or otherwise. But individuals cannot be given such privileges."

The result in this case in making available additional property for local, and state, taxation may well be counter-balanced by increased tort liability occasioned by the decision of the court in *Knowles v. Housing Authority of the City of Columbus,* 212 Ga. 729, 95 S.E.2d 659 (1956). This was a suit by a lessee against his landlord, the Housing Authority of the City of Columbus, for damages due to personal injuries allegedly caused by the negligence of the defendant. The court of appeals had affirmed the trial court's action in sustaining defendant's demurrer on the ground that the Housing Authority was carrying on a governmental function connected with the preservation of the public health, and as such was not subject to this type of suit.[2] The supreme court granted certiorari and reversed, apparently using as its only basis the

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1. GA. CODE ANN. §§ 15-301, 15-302, 15-303.

2. Knowles v. Housing Authority of the City of Columbus, 94 Ga. App. 192, 94 S.E.2d 55 (1956).

provision of the housing authorities law[3] which grants to a housing authority the power "to sue and be sued."[4]

The result of this case may well be "justice", and it should please those who advocate extending the liability of municipal corporations and governmental agencies, but aside from any objection based on "legislative intent", the opinion, to which there was no dissent, leaves much to be desired. The cases cited in support of the decision, all from other jurisdictions, do not support a conclusion that the phrase "to sue and be sued" authorizes a suit based on personal injuries resulting from the negligence of a governmental agency acting in a governmental, as distinguished from proprietary, capacity. Two of the cited cases[5] do not deal with a true tort, two cases[6] permitted suit on the ground the defendant was engaged in a proprietary act, while the remaining case[7] turned in this respect on the responsibility imposed by the statute creating the defendant to "to provide for the . . . repair of any housing project and part thereof." Yet the opinion carefully avoids referring to the defendant's acts as being in a proprietary capacity, although, in distinguishing three earlier Georgia[8] cases where legislative authority "to sue or be sued" existed, it relied on the fact that in those cases the defendants were "performing a purely governmental function for which it made no charge and from which it received no income" while in the instant case the defendant was "engaged in the performance of a remunerative business transaction with the public pursuant to the consent statute". Perhaps this language, without specifically reversing the court of appeals on the point, implies a conclusion of proprietary action, but it could be construed to mean that where one pays for a service, irrespective of its nature, liability for simple negligence attaches to a governmental agency or municipal corporation if it is authorized "to sue or be sued", but not otherwise. Query: would a paying patient of a municipally operated hospital,

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3. Ga. Laws 1937, p. 210 and amendments thereto.
4. *Supra*, n. 3, § 8 (a).
5. Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784 (1939) is a suit for damages against a bailee, basically a contract action; while, Federal Housing Administration v. Burr, 309 U.S. 242, 60 S.Ct. 488, 84 L.Ed. 724 (1940) deals with a garnishment proceeding.
6. Zins v. Justus and McDonald, as administrator of the Federal Housing Administration, 211 Minn. 1, 299 N.W. 685 (1941); Muses v. Housing Authority of City and County of San Francisco. 83 Cal. App. 2d 489. 180 P.2d 305 (1948).
7. Housing Authority of Birmingham District v. Morris, 244 Ala. 557, 14 So.2d 527 (1943).
8. Tounsel v. State Highway Dept., 180 Ga. 112, 178 S.E. 285 (1939); Millwood v. DeKalb County, 106 Ga. 743, 32 S.E.2d 577 (1899); and Collins v. Mayor, etc. of Macon, 69 Ga. 542 (1882).

authorized to sue and be sued, be able to maintain a suit based on negligence, while a charity patient could not?

In this connection the case of *Hospital Authority of Hall County et al. v. Shubert, Administrator,* 96 Ga. App. 223, 99 S.E.2d 708 (1957), is partially in point. In that case the court of appeals followed the "sue and be sued" concept of *Knowles v. Housing Authority of the City of Columbus, supra,* and overruled a demurrer based on the governmental vs. proprietary concept, meanwhile overruling a prior decision.[9] However, the plaintiff had paid for the hospital services rendered, just as the plaintiff in the Knowles case had paid rent.

## TORTS

In another case the classic distinction between governmental functions, wherein a municipality is not liable for negligent torts, and ministerial or proprietary functions, where liability attaches, was made by the court in holding the operation of a traffic light a governmental function, *Stanley v. City of Macon,* 95 Ga. App. 108, 97 S.E.2d 330 (1957). This case, lost by the plaintiff, also held that the maintaining of a defective traffic light fifteen (15) feet above the street could not be considered a defective maintenance of the streets and sidewalks and therefore ministerial in nature, but the most interesting point decided by the court was the application of the common law rule of nuisance, which requires that a nuisance be injurious to the plaintiff's home or property, a fact not here present. And in *Kesot v. City of Dalton,* 94 Ga. App. 194, 94 S.E.2d 90 (1946), where the plaintiff alleged injuries due to the negligence of the defendant in maintaining a sidewalk, it was ruled that the mere use by members of the public strip of land paralleling a street is not sufficient to constitute "implied" acceptance by the municipal corporation of the land as a sidewalk, and consequently the motion for nonsuit was properly granted.

The result to the municipal corporation involved was not so fortunate in some other cases. Where the defendant by regrading a street effected a change in the street's level resulting in the accumulation of water on the plaintiff's property, and plaintiff had given the notice required by GA. CODE ANN. § 69-308 (1933) within six months of the time the damage was done to the property but not within six months of the regrading of the street, the notice was held to *be* timely since the nuisance complained of was a continuing one and

9. Hall v. Hospital Authority of Floyd County, 93 Ga. App. 319, 91 S.E.2d 530 (1956).

the notice was given within six months of the events upon which the action was predicated.[10] In another case the holding was to the effect that whether a defect in a street had existed for a sufficient length of time to charge a municipal corporation with notice was a question for the jury, as was the question of plaintiff's negligence in watching traffic rather than looking for the defect.[11] And a judgment for damages against a municipality was affirmed where the facts showed that the damages resulted from the vibration caused by the pounding of the street by a wrecking ball used by a contractor who was engaged in resurfacing a public street under the supervision of the city's engineering department.[12] However, when the size of the community is considered, the most dramatic decision in this area was one which affirmed a judgment of $60,000.00 for personal injuries suffered when the plaintiff fell into a ditch 3 feet deep as a result of defendant's negligence in the manner of replacing three planks regularly used for crossing the ditch.[13]

## Municipal Charters

In 1955 the City of Augusta was temporarily enjoined from disposing of certain property dedicated to public use on the grounds that it was not authorized to do so under its charter.[14] Subsequently, by acts of the General Assembly[15] the city was empowered and authorized to sell such property, and it amended its answers. On demurrer to the amended answer the trial court found the defendants authorized to sell the property and dissolved the injunction. In *Harper v. City Council of Augusta,* 212 Ga. 605, 94 S.E.2d 690 (1956), the supreme court affirmed, holding that the prior adjudication was res judicata only as to the issues then existing and that the plaintiff's attack on the statutes as unconstitutional failed to allege how or wherein the statutes violated the designated provisions of the constitution.

A more controversial case, at least as to result, is *City of Griffin v. Crossfield,* 95 Ga. App. 289, 97 S.E.2d 619 (1957). By a strict construction of the power granted the City of Griffin under its charter "To provide by ordinance and requiring the paving of any street . . . and for the grading of such street . . . and the manner in which the paving

10. Nimmons v. City of LaGrange, 94 Ga. App. 511, 95 S.E.2d 314 (1956).
11. City Council of Augusta v. Hood, 95 Ga. App. 259, 97 S.E.2d 639 (1957).
12. Savannah Asphalt Co. v. Blackburn, 96 Ga. App. 113, 99 S.E.2d 511 (1957).
13. City of Commerce v. Bradford, 94 Ga. App. 284, 94 S.E.2d 160 (1956). The population of Commerce is given by Martindale-Hubbard Law Directory as 3,351.
14. City Council of Augusta v. Newsome, 211 Ga. 899, 89 S.E.2d 485 (1955).
15. Ga. Laws 1956, p. 2406; Ga. Laws 1956, p. 22.

shall be laid" and to apportion equably the costs therefor against abutting property owners,[16] the court held that no part of the costs of "widening" a street, already paved, could be assessed against abutting property owners, although, as a matter of law it found that the abutting property owners would obtain special benefits from such "widening." Prior cases[17] involving the cities of Savannah and Atlanta were distinguished because of the broader language in their charters. While this case relies on the rule that "legislation claimed to confer the power is to be construed strictly against the municipality and liberally in favor of the property owner", it seems to travel this road to its end, if not beyond, and in the process to lose sight of the reason for such assessments: i.e., the special benefit to the property owners.

## COUNTIES

In addition to *IBM Corp. v. Evans, supra,* counties were successful in at least two other important cases. In *Bedingfield v. Parkerson,* 212 Ga. 654, 94 S.E.2d 714 (1956), the constitutionality of the 1953 School Reorganization Act[18] and the reorganization of the schools of Laurens County thereunder were involved. After apparently holding that the act did not unconstitutionally delegate power to the school board and that the board acted properly thereunder, the opinion muddies the water by ending on the point that the petitioners had failed to exhaust their statutory remedy of appeal to the State Board of Education and had alleged no reason for a resort to equity rather than use of the remedy provided by statute. The case of *Merritt v. State,* 95 Ga. App. 612, 98 S.E.2d 242 (1957), was a proceeding seeking validation of certain revenue-anticipation certificates by Gwinnett County, in which Merritt and others intervened and demurred to the petition on five grounds: the first two attacking the reasonableness of the financing and construction plan, while the other three complained of speculativeness because a co-contracting municipality had not first completed its preparations. As to the first two grounds the court held that they failed to point out wherein the proposed plans were impracticable or unreasonable and were nothing more than conclusions themselves, while as to the others it was pointed

16. Ga. Laws 1921, pp. 959, 967.
17. Mayor and Aldermen of Savannah v. Weed, 96 Ga. 670, 23 S.E. 900 (1895), "and otherwise improving" and assess two-thirds of the cost; Bacon v. Mayor and Aldermen of Savannah, 86 Ga. 301, 12 S.E. 900 (1890), "to improve . . . any portion of the width"; and Avery and Sons, Inc. v. City of Atlanta, 163 Ga. 591, 136 S.E. 789 (1927), "widening".
18. Ga. Laws 1953, Nov.Dec. Sess., pp. 282, 283.

out that to sustain any objection based on the failure of a co-contracting municipality to act first would of necessity lead to a stalemate.

The clerk of the Superior Court of Floyd County, pursuant to an act of the general assembly,[19] effective in 1953 and purporting to change her remuneration from a fee basis to a salary basis, paid the fees collected to the county and collected her salary. In 1955 the Supreme Court of Georgia held the act of the general assembly unconstitutional,[20] and shortly thereafter the clerk brought suit to collect the difference between her salary and the fees she had paid over to Floyd County. In *Owens v. Floyd County*, 96 Ga. App. 25, 95 S.E.2d 389 (1957), the court of appeals sustained plaintiff's claim over the objection that the suit was not based on a contract or statute, holding that the action was for money held and received and that under the facts "the county cannot, in equity and good conscious, retain the amount from the plaintiff." Somewhat more startling was the result in *Chadwick v. Stewart*, 94 Ga. App. 329, 94 S.E.2d 502 (1956), where, on the basis of a statute[21] passed in 1799 the sheriff of Chattooga County was held liable for personal injuries suffered by a prisoner and allegedly caused by a deputy sheriff while in the exercise of his office.

In other cases perhaps worth noting in a survey, an employee whose sole cause of retirement was due to the fact that he had reached the mandatory retirement age was held to be able to retire only under the provisions of the statute relating to retirement for that cause and not under a statute relating to retirement because of ill health;[22] the Board of Road and Revenue Commissioners of Candler County was found not to constitute such a legal entity as to permit it to appeal;[23] and in a factually interesting case the majority of a board of education was held to have the power to withdraw an appeal before such appeal had been decided.[24]

## ZONING

While most of the zoning cases involved primarily a matter of pro-

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19. Ga. Laws 1950, p. 2389 et seq. as amended by Ga. Laws 1953, Nov.Dec. Sess. p. 2547.
20. Walden v. Owens, 211 Ga. 884, 89 S.E.2d 492 (1955).
21. GA. CODE ANN. § 24-201 (1933).
22. Fulton County Employees Pension Board v. Askea, 95 Ga. App. 77, 97 S.E.2d 389 (1957).
23. Board of Road and Revenue Commissioners of Candler County v. Collins, 94 Ga. App. 562, 95 S.E.2d 758 (1956).
24. Styles v. Waters, 212 Ga. 644, 94 S.E.2d 702 (1956).

cedure[25] or a principle of real property,[26] a demurrer to one action was sustained when the court found that "due process" was being denied since neither the municipal charter nor the ordinances adopted thereunder provided for a public hearing,[27] and another case affirmed the rule that an illegal prior noncomforming use does not require the issuance of a permit because of the prior nonconforming use.[28]

### MISCELLANEOUS

In *Cruise v. City of Rome,* 94 Ga. App. 373, 94 S.E.2d 617 (1956), an issue involved the constitutionality of a municipal ordinance prohibiting the blowing within the city of the whistle of a locomotive. The municipality,, as a political subdivision of the state, was held to have a paramount duty to protect the person and property of a citizen as provided in art. 1, § 1, par. 2 of the Constitution of Georgia, GA. CODE ANN. § 2-102 (1933) and an ordinance constituting a safety device a "nuisance" under all conditions and circumstances was "so unreasonable and arbitrary as to be void."

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25. Wofford v. City of Gainesville, 212 Ga. 818, 96 S.E.2d 490 (1957); Scott v. Minnix, 95 Ga. App. 589, 98 S.E.2d 196 (1957); Ledbetter v. Roberts, 95 Ga. App. 652, 98 S.E.2d 654 (1957).
26. For example: Arlington Cemetery Corp. v. Bindig, 212 Ga. 698, 95 S.E.2d 378 (1956).
27. Sikes v. Pierce, 212 Ga. 567, 94 S.E.2d 427 (1956).
28. Troutman v. Aiken, 213 Ga. 55, 96 S.E.2d 585 (1957).