LOCAL GOVERNMENT

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After a year's absence, the Local Government section is re-appearing in this journal. Therefore, no apology is made for any liberties taken in deviating from formats used by past authors of this section. Some 28 to 30 cases were decided during the survey period which might be properly noted here, but most of them represent applications of well-established legal principles. The outline followed here is adopted more for its convenient nature than any other reason:

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MUNICIPAL CORPORATIONS

(a) *Claims*

Several decisions involved the sufficiency and nature of the notice required under GA. CODE ANN. §69-308 (Supp. 1958). The pre-requisite claim notice to a municipality need not be drawn with formality and

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technical nicety of a petition, substantial compliance being sufficient. A written claim setting forth the time, place, extent of injury and nature of negligence is sufficient compliance. The Court of Appeals in the *Aldred* case,[1] involving damages to an automobile from a tipping manhole cover, held that the notice given did not sufficiently advise the municipality of the negligence claimed. However, the Supreme Court[2] reversed the decision holding the notice legally sufficient. In the final appearance of the case before the Court of Appeals[3] the lower court's ruling on certain special demurrers were reversed.

The *Jones* case[4] held that where a claim presented for adjustment to a municipality pursuant to GA. CODE ANN. §69-308 (Supp. 1958) addressed itself only to the parents' claim for medical and other expenses, it did not constitute a claim on behalf of the injured minor and, therefore, the minor's petition, failing to allege presentation of any claim on her behalf, was subject to general demurrer. However, the court expressly refrained from ruling on whether the six-month's notice provision is binding on a minor who does not have the capacity to give the requisite notice.

In the *Humber* case,[5] plaintiff's heel caught in a hole in a sidewalk causing her to be thrown to the ground. It was held that plaintiff had failed to exercise ordinary care for her own safety merely because her attention had been diverted by more obvious defects in the sidewalk.

In an action to recover for damages caused by fire spreading to plaintiff's property from the city dump,[6] recovery was denied both from the standpoint of nuisance and negligence. From the standpoint of nuisance, the damage resulted from tort or treaspass by a single act rather than from the maintenance of a nuisance. From the standpoint of negligence, removal and disposal of garbage by a municipality is a governmental function in which no liability is incurred for negligence.

(b) *Public Finance and Taxation*

In *Bradford v. Bolton, Mayor,*[7] plaintiff brought mandamus proceedings to compel payment of an unsatisfied portion of a valid judgment in her favor. Her petition prayed that the judgment be paid from present funds or, if such funds were not available, that a tax be levied on property within the city limits to make funds available.

1. 100 Ga. App. 66, 110 S.E.2d 73 (1959).
2. 215 Ga. 651, 113 S.E.2d 108 (1960).
3. 101 Ga. App. 286, 113 S.E.2d 463 (1960).
4. 100 Ga. App. 268, 110 S.E.2d 691 (1959).
5. 101 Ga. App. 276, 113 S.E.2d 635 (1960).
6. Etheridge v. City of Lavonia, 101 Ga. App. 190, 112 S.E.2d 822 (1960).
7. 215 Ga. 188, 109 S.E.2d 751 (1959).

The Supreme Court held that mandamus would lie and that the city's power to levy a tax of 1% upon value of property as authorized by its charter was not restricted by GA. CODE ANN. §92-4101 providing that no municipal corporation shall levy an *ad valorem* tax exceeding one-half of 1%.

Mayor of Carrollton v. Chambers[8] involved an injunction by a property owner contesting the validity of an assessment against her property for improvements to a road adjacent to her property. In construing the City Charter of Carrollton, the Supreme Court held that since the charter expressly authorized the remedy of affidavit of illegality, injunction was not the proper remedy to test the validity of the assessment.

In *Lewis v. City Council of Augusta*[9] plaintiff attacked an ordinance of the City of Augusta and a statute,[10] under which certain paving assessments were levied, on the ground that the ordinance and statute violated the due process clauses of the state and federal constitutions. This attack was unsuccessful since both the statute and the ordinance provided for contesting assessments by affidavits of illegality.

(c) *Municipal Legislation*

Merwell Developers, Inc. v. City of Marietta, Board of Adjustments,[11] reiterated the proposition that where a municipal ordinance is passed with the requisite formalities and is sufficient in form, the presumption is that the ordinance is legal and the burden is upon the party urging its invalidity. It was held further that the City Board of Adjustments properly declared itself without authority to pass on the validity of an ordinance passed by the City Council.

(d) *Pensions*

In a contest concerning the retirement of a city policeman,[12] the court held, *inter alia,* that the failure of the policeman to co-operate with the chief of police constituted an "inaptitude for duties of employment," within the meaning of the statute providing that a city employee may be pensioned on those grounds if he has 25 or more years of service.

8. 215 Ga. 193, 109 S.E.2d 755 (1959).
9. 215 Ga. 427, 110 S.E.2d 665 (1959).
10. Ga. Laws 1916, p. 549-551.
11. 100 Ga. App. 60, 109 S.E.2d 926 (1959).
12. Fitzgerald v. Mayor of Savannah, 100 Ga. App. 372, 111 S.E.2d 257 (1959).

(e) *Powers*

In *Ingalls Iron Works Company v. City of Forest Park*,[13] plaintiff sought to recover on an express contract for the sale of personal property. The contract in question was properly executed by the plaintiff and was executed by the city manager on behalf of the city. The charter provided that the mayor and council should constitute the government and be capable of making contracts. The charter provisions relating to the city manager stated that he should be assigned no duty "which devolves by law upon officers of said city elected by the people." Under these facts it was held that the city manager had no authority to make the contract on behalf of the city for the purchase of goods and, accordingly, the defendants' demurrers were properly sustained.

City of Carrollton v. Walker[14] grew out of condemnation proceedings and was a suit to enjoin the State Highway Department, the City, its Mayor and Councilmen from condemning certain lands for highway purposes. The court held, *inter alia*, that the question of whether it is better business and governmental policy for the city to participate in the selection of the route for a highway through the city, procuring of rights of way and the cost thereof, is a question for determination by the mayor and council and is not a question wherein a court of equity is authorized to substitute its judgment and discretion for that of the duly elected officials of the city.

(f) *Streets*

The Court of Appeals applied the proposition that a municipality must keep its streets in reasonably safe condition for travel by the ordinary modes, and will be liable for damages for injuries sustained in consequence of its derelictions in that regard.[15] This result obtains regardless of what may have caused the street to become defective and unsafe, where the city knew or should have known of the defect in time to repair it or give warning of its existence.

One case[16] originated in a court of ordinary as summary proceedings for removal of obstructions in in an alley. The prime question was whether a certain alley was a private way or a public way. The court held that proof that an owner of land divided the property into lots, streets and alleys, and sells land with reference to the recorded plat is sufficient proof of the owner's offer to dedicate the indicated streets

13. 99 Ga. App. 706, 109 S.E.2d 835 (1959).
14. 215 Ga. 505, 111 S.E.2d 79 (1959).
15. City of Summerville v. Aldred, 101 Ga. App. 286, 113 S.E.2d 463 (1960).
16. Moon v. Jones, 101 Ga. App. 79, 113 S.E.2d 159 (1960).

and alleys to public use. The use of those streets and alleys by the general public for more than 20 years is sufficient to show implied acceptance by the public of the offer to dedicate so as to constitute the alley a public way. Therefore, the court concluded, the summary remedy afforded by GA. CODE ANN. §83-119, giving ordinaries jurisdiction of cases seeking removal of obstructions in a private way, did not apply here.

(g) *Zoning*

Three cases[17] involved appeals from local zoning bodies or their equivalents. The *Merwell* case held that there was no error in denying an application for permission to construct an entrance sign over a gateway to a proposed cemetery where the city council has previously passed an ordinance prohibiting use of the premises as a cemetery.

The *Alexander* case involved a purported re-hearing by the zoning board of adjustment. Since there was no provision for such a re-hearing, the attempted re-hearing proceedings were nugatory and, no appeal having been filed in the superior court within 30 days of the final determination, the superior court was without jurisdiction to review the decision of the board.

The *Victoria* case required construction of the phrase "substantial interest" within the statute allowing a party having a "substantial interest" to appeal from a decision of the board granting variances from zoning ordinances of the City of Atlanta. Defendant had been granted a variance by the board, whereupon the plaintiff, who owned a building about 1/4 mile from the building proposed to be erected by the defendant, objected on the ground that increased traffic and congestion of streets would be induced or generated by the presence of the building. In construing the phrase "substantial interest", the court said that the appellant must show his property will suffer some special damages which result from the board's decision and which are not common to other property owners similarly situated. In ruling that a property owner has no strictly private right in the enforcement of zoning ordinances in the absence of a statute to that effect, the court, following a New York decision,[18] stated that a property owner "may not assume the role of champion of a community to challenge public officers to meet him in courts of justice to defend their official acts."

17. Merwell Developers, Inc. v. City of Marietta, Board of Adjustments, 100 Ga. App. 60, 109 S.E.2d 926 (1959); Alexander v. Muscogee County Board of Adjustments, 101 Ga. App. 10, 112 S.E.2d 690 (1960); Victoria Corporation v. Atlanta Merchandise Mart, Inc., 101 Ga. App. 163, 112 S.E.2d 793 (1960).

18. Blumberg v. Hill, 119 N.Y.S.2d 855 (1953).

COUNTIES

While there were many cases decided during the survey period which could propertly be considered at this point, only five[19] are noted here. The remainder of these cases are noted under other headings.[20]

(a) *County Legislation*

The *Commissioners of Chatham County* cases[21] were companion cases in which several plaintiffs contested an ordinance adopted by the commissioners levying a tax on electricity consumers, gas consumers, and users of services of a telephone company for support of public schools in Chatham County and the City of Savannah. The ordinance was attacked as being violative of the state constitution[22] which sets forth the manner in which taxes for support of the public schools may be levied and increased. Generally, that section authorizes any county not having an independent school system to levy *ad valorem* taxes exceeding 15 mills upon all taxable property in the county where such excess is approved by the voters of the county in an election called for the purpose of increasing the millage rate. In voiding the ordinance, the court held that a county can only exercise the power of taxation as conferred either directly by the Constitution or by the General Assembly when authorized by the Constitution, and if there is any doubt as to the power of the county to tax in a particular instance, it must be resolved in the negative.

The *Kellet* case,[23] a condemnation matter, held that the ultimate determination to condemn was that of the county acting through its Board of Commissioners, and there was nothing illegal or unconstitutional in the board's seeking advice and recommendations from various department heads, advisory committees and general public prior to taking official action, and no unlawful delegation of legislative power was involved.

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19. Commissioners of Chatham County v. Savannah Electric and Power Company, 215 Ga. 636, 112 S.E.2d 655 (1960); Commissioners of Chatham County v. South Atlantic Gas Company, 215 Ga. 641, 112 S.E.2d 659 (1960); Commissioners of Chatham County v. Southern Bell Telephone & Telegraph Company, 215 Ga. 642, 112 S.E.2d 660 (1960); Kellet v. Fulton County, 215 Ga. 551, 111 S.E.2d 364 (1959); Vulcan Materials Co. v. Griffith, 215 Ga. 811, 114 S.E.2d 29 (1960).
20. See, particularly, Eminent Domain, *infra*.
21. See note 19, *supra*.
22. GA. CONST., art. 8 §12, GA. CODE ANN. §2-7501.
23. *Supra* note 19.

(b) *Zoning*

In reaffirming the proposition that the Supreme Court cannot disapprove zoning because it is spot zoning or done by special use permit, the court held that action of the Board of Commissioners of Fulton County in allowing a single particular tract of land to have the use of mining, in addition to agricultural and residential uses to which the surrounding lands were confined, was valid.[24] However, zoning to authorize a use of property which is entirely lawful does not entitle the user to escape liability for damage to persons or property resulting from such use.

Schools and School Districts

In an action to recover for damages to a school building sustained in the process of repairing same,[25] the court held that although the State School Building Authority, to which title to premises had been conveyed under a lease-back contract, had a right of action in conjunction with the school board, the petition as laid was insufficient to bring the case within any of the statutory exceptions to the general rule absolving prime contractors of liability for torts of independent subcontractors and, therefore, an *ex contractu* action was improperly joined with *ex delicto* causes against subcontractor and its employee.

Westberry v. Taylor[26] was a mandamus action brought by a teacher against the county board of education. Restating the principle that mandamus does not lie where a specific legal remedy is available, the court pointed out that a teacher who had been advised that he would not be re-employed had a legal right to file his objections with the county board of education and have his objections heard by the board while sitting as a court and, if the board decided against the teacher, he had a right to appeal to the State Board of Education as a reviewing tribunal.

To a petition to validate schoolhouse bonds for county school districts, an intervenor brought error.[27] The Supreme Court affirmed the lower court's ruling that the statute authorizing county boards of education to call elections for school bonds and prescribing the procedure is not unconstitutional as containing more than one subject matter and containing matter different from that expressed in the title.

24. Vulcan Materials Co. v. Griffith, *supra* note 19.
25. Rodgers v. Styles, 110 Ga. App. 124, 110 S.E.2d 582 (1959).
26. 215 Ga. 464, 111 S.E.2d 77 (1959).
27. Posey v. Dooly County School District, 215 Ga. 712, 113 S.E.2d 120 (1960).

In *Cotton States Mutual Insurance Co. v. Keefe*,[28] the Supreme Court held that school districts are political subdivisions of the state and that each school district is a body corporate and may be sued where it has incurred liability under the law. The court held further that where the county board of education procures liability insurance to protect school children (under provisions of GA. CODE ANN. §32-429, §32-431) and the general public (under provisions of GA. CODE ANN. §56-1013), and the policy so procured provides that no action shall lie against insurer unless amount of insured's obligation to pay shall have been finally determined either by judgment after actual trial or by written agreement, an injured person cannot bring direct action against insurer but must first obtain judgment or written agreement.

ELECTIONS

An election manager was tried under provisions of GA. CODE ANN. §34-9924 and found guilty of fraud and corruption in the management of an election.[29] In reversing the conviction, the court of appeals held that in a cause of this nature, where it appears that the defendant did not personally count the ballots but obtained information as to what was on the ballots from others, it was incumbent upon the state to affirmatively show that the defendant knowingly and fraudulently prepared a fasle certificate. Therefore, it was necessary for the state to show that none of the information given defendant on the cards handed to him was incorrect.

In *McNair v. Achord*[30] plaintiff brought an equitable petition to enjoin a county election for board of education members. Plaintiff was a member of the board and desired to succeed himself. However, the ordinary failed to publish a notice of election in terms of the statute. Plaintiff discovered that the election was going to be held on the date prescribed by the statute but was not allowed to qualify because the deadline was past. The court sustained general demurrers to the petition which ruling was affirmed on the ground that the constitutional amendment creating the election of board members having provided for the time of the election, the notice required to be given is merely directory and the failure to publish such notice does not invalidate the election. The court, distinguishing the types of notice in elections, said that where the time and place for the election are fixed by law the requirement of notice is directory only. However,

28. 215 Ga. 830, 113 S.E.2d 774 (1960), *reversing* 100 Ga. App. 715, 112 S.E.2d 435 (1959).
29. Hendricks v. State, 100 Ga. App. 722, 112 S.E.2d 419 (1959).
30. 215 Ga. 540, 111 S.E.2d 236 (1959).

where the time and place are not so fixed and the duty of fixing them are committed to an officer vested with authority to call the election the requirement of giving notice is mandatory.

Crow v. Bryan[31] grew out of an election for mayor. Prior to the election some 113 names (more than enough to elect plaintiff) were stricken from the city voters' list for the reason that the concerned individuals were not registered on the county books. The defeated candidate brought *quo warranto* against the successful candidate after he had taken office. The court relied on the old case of *Davis v. City Council of Dawson*[32] in holding that an election will be avoided when there is injected into it the insurmountable uncertainty incident to the rejection of the votes of electors in a sufficient number to overcome the apparent and announced result of the election, if they had all voted against the result reached. Neither fraud nor corruption is necessary where enough votes to change the result of the election have been disfranchised. Where notice of disfranchisement is published, the effected electors are not required to make the useless gesture of going to the polls and asking for a ballot in order to insure judicial protection of election requirements. That the defeated candidate had knowledge, prior to the election, that the affected electors would not be permitted to vote would not estop him from questioning the validity of the election.

EMINENT DOMAIN

In spite of the consistent flow of condemnation cases presently before the appellate courts, it appears that only two of any significance were decided during the survey period. Even so, the cases involved application of well settled principles of law to particular facts rather than any new or novel points of law.

City of Carrollton v. Walker[33] held that condemning authorities have very broad discretion as to the necessity for the taking of property for public purposes, that matters material to the rights of condemnees may be determined under proper pleadings, that equity will not interfere with discretionary action of state highway department unless the action is arbitrary and amounts to an abuse of discretion, and that the state highway department may construct a public highway through a municipality without its consent. General demurrers to the petition were sustained in the instant case.

31. 215 Ga. 661, 113 S.E.2d 104 (1960).
32. 90 Ga. 817, 17 S.E. 110 (1893).
33. 215 Ga. 505, 111 S.E.2d 79 (1959).

Kellett v. Fulton County[34] held that the statutes[35] provided adequate methods for determining just and adequate compensation for property sought to be condemned, and that, in absence of bad faith, exercise of the right of eminent domain rests in the discretion of the condemning authority as to the necessity and what and how much land shall be taken. Again, general demurrers to the petition were sustained in that it failed to allege sufficient facts to establish an abuse of discretion.

NUISANCE

Three nuisance cases were decided during the survey period. One case[36] held that a public nuisance or violation of a penal statute will not be enjoined at the instance of a private citizen unless he has sustained special injury, but the illegal sale of intoxicating liquor is a public nuisance which may be abated by process instituted in the name of the state. Another case[37] and its companion case[38] held that the Solicitor General's petition alleging that defendants operated a lewd house and a gaming house, sold beer, whiskey and other alcoholic beverages to minors, maintained a loud playing juke box which disturbed the neighborhood and people passing by on the highway, and provided a gathering place for minors and the general public to drink, dance and carouse, sufficiently stated a cause of action for an injunction against the operation of the respective businesses as public nuisances. The final case[39] held that in an action to enjoin a public nuisance under the statute[40] authorizing abatement of the use of property for the purpose of lewdness, assignation, and prostitution, evidence of prostitution on defendant's property was sufficient to support a verdict abating the nuisance.

MANDAMUS

The Supreme Court held,[41] in a mandamus proceeding by a city fire marshal against members of the board of commissioners of the peace officers annuity and benefit fund to require his reinstatment as a member of the fund, that mandamus would not lie. This result was based on the fact that a city ordinance investing fire department offi-

34. 215 Ga. 551, 111 S.E.2d 364 (1959).
35. GA. CODE §36-502 to §36-506, §36-612a, §36-614a (1933).
36. Head v. Browning, 215 Ga. 263, 109 S.E.2d 798 (1959).
37. Lee v. Hayes, 215 Ga. 330, 110 S.E.2d 624 (1959).
38. Turner v. Hayes, 215 Ga. 332, 110 S.E.2d 626 (1959).
39. Crews v. Hayes, 215 Ga. 698, 113 S.E.2d 116 (1960).
40. GA. CODE ANN. §72-301 et seq (1933).
41. Vandiver v. Endicott, 215 Ga. 250, 109 S.E.2d 775 (1959).

cers with police officers' powers did not constitute them "peace officers" within the Peace Officers Annuity and Benefit Act.

STATUTES

As sure as the General Assembly will sit every January, a vast amount of legislation will be enacted affecting local governmental units. Needless to say, the great bulk of such legislation is purely local and no effort is made here to note those provisions. It is probably safe to assume that all purely local legislation is well known by attorneys in the affected areas; however, a suggestion to that end would not be inappropriate at this point.

A segregation law[42] amends GA. CODE ANN. §92-4110 to provide that no municipal corporation allowing integrated school shall have the power or authority to levy any tax, *ad valorem* or otherwise, for the support and maintenance of public schools.

The Minimum Foundation Program of Education Act[43] was amended to provide that school bus drivers shall be compensated at the rate of $100 per month for twelve months in lieu of the same minimum over a ten month period. Ownership of the bus is immaterial.[44]

County primaries in which members of the General Assembly are candidates may be conducted, beginning in 1961, prior to March 1 of any year.[45] However, this act does not apply to counties having population of more than 115,000 according to the 1950 or any subsequent census.

Where voting machines are used, the ordinary or official in charge of the election or primary, shall have authority to designate one machine upon which all absentee ballots of the county shall be tabulated.[46]

The Voter's Registration Act of 1958[47] was amended to allow retention of elector on the voters list who works in another county if his name would be retained except for the question of residence. However, the voter must make affidavit to registrar that he does not intend to move his legal residence from the county and desires that his name be retained on the voting list there.[48] The act was further amended[49] to provide that in the event an applicant is refused voter

42. Ga. Laws 1960, p. 147, GA. CODE ANN. §92-4110.
43. Ga. Laws 1949, p. 1406, GA. CODE ANN. §32-611 (Supp. 1958).
44. Ga. Laws 1960, p. 770, GA. CODE ANN. §32-611.
45. Ga. Laws 1960, p. 115, *amending* GA. CODE ANN. §34-1307 (Supp. 1958).
46. Ga. Laws 1960, p. 203, GA. CODE ANN. §34-3316.
47. Ga. Laws 1958, p. 269, GA. CODE ANN. §34-1.
48. Ga. Laws 1960, p. 257, *amending* GA. CODE ANN. §34-136.
49. Ga. Laws 1960, p. 955, GA. CODE ANN. §34-116.1.

registration by the Board of Registrars, the application of such person and other material and records relative thereto shall be stored, or disposed of, as the board may direct. However, such application shall be retained at least 30 days from the date of refusal.

There is no longer a minimum or maximum number of members who may serve on planning commissions created by municipal ordinance. The number is now discretionary with the local government unit.[50]

By special permission of the ordinary, the superior court clerk may keep records for which he is responsible at any approved place not more than three miles from the court house, of which public notice is given.[51] Formerly, the limit was one mile.

GA. CODE ANN. §87-201, concerning the notice a local governmental unit must give before incurring any bonded debt, was amended[52] by the addition of two provisos. First, the notice may state that the bonds when issued will not bear interest at a rate in excess of a specified maximum rather specifying the rate which the bonds will bear. Second, nothing contained in the act shall be construed as prohibiting or restraining the right of the issuing body to sell bonds at a discount, even if in doing so, the effective interest cost resulting therefrom would exceed the maximum per annum interest rate specified in the election notice.

GA. CODE ANN. §87-302 was amended[53] to change the elements which the solicitor general, or in his absence, the attorney general, must set forth in his petition to have the bonds confirmed and validated by the superior court judge. This change was in order to conform with the requirements of GA. CODE ANN. §87-201, *supra*.

GA. CODE ANN. §87-805 was amended[54] by striking the provision that bonds issued by a local governmental unit shall not be sold at less than par.

The state highway department may expend surplus funds for use on municipal streets and bridges, under such conditions as the state highway board may provide.[55] Previously, such expenditures could be made only in emergencies or unusual situations as shown by appropriate resolutions entered on the minutes of the state highway board.

The Urban Renewal Act of 1955 was amended[56] to provide an ad-

50. Ga. Laws 1960, p. 1037, *amending* GA. CODE ANN. §69-1201.
51. Ga. Laws 1960, p. 120, *amending* GA. CODE ANN. §24-2714 (1).
52. Ga. Laws 1960, p. 1032, GA. CODE ANN. §87-201.
53. Ga. Laws 1960, p. 1034, GA. CODE ANN. §87-302.
54. Ga. Laws 1960, p. 1050, GA. CODE ANN. §87-805.
55. Ga. Laws 1960, p. 1109, GA. CODE ANN. §95-1616.
56. Ga. Laws 1960, p. 1052, *amending* GA. CODE ANN. §69-1118.

ditional element which may be included in ordinances relating to repair, closing and demolition of dwellings unfit for human habitation or which may imperil the health, safety or morals of the occupants thereof or surrounding areas. This element makes provision for the posting of notices on dwellings and other structures intended for human habitation indicating the action taken by enforcement officials or courts with respect thereto, and for fixing of penalties for the defacing, destruction or removal of such notices. However, no such notice shall be posted on any property then designated by proper authority for acquisition by eminent domain.