CITIES AND TOWNS IN GEORGIA: A DISTINCTION WITH A DIFFERENCE?

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I. INTRODUCTION

Through the years, the Georgia General Assembly, by local enactments,[1] has breathed life into Georgia's many municipalities.[2] In doing so, it has, with complete discretion,[3] designated some of these municipalities as "cities" and some as "towns."[4] These designations would appear to have been applied to particular municipalities with little deliberate forethought—indeed with scant cognizance that the use of one term over the other might constitute the formulation of a distinction with a real difference.

Likewise over a period of time, the legislature has enacted various general statutes applying to Georgia's municipalities. Again, some of these statutes have been made applicable to happenings within "cities" while others are directed toward "towns." Here also one wonders whether the General Assembly, in enacting these statutes, was consciously intending to provide for matters transpiring in only a portion of the municipalities in the State.

From these two poles, the problem here analyzed—if it is a problem—and the questions emerging from it, is drawn. Is there in actuality, and in law, a distinction of consequence in a "city" and a "town" in Georgia? If so, how does this distinction arise? Would provisions of the Georgia Constitution and statutes, should they contain only the

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1. Although at one time a statutory procedure existed by which Georgia municipalities could be incorporated by the superior courts of the State, see Ga. Laws 1872, p. 16; Ga. Laws 1874, p. 44. This procedure was entirely abolished in 1939, Ga. Laws 1939, p. 329, and was little used even when in existence. Thus today municipal incorporation in Georgia must come about by a local enactment of the General Assembly, providing a charter for the particular municipality. See, generally, the discussion in City of Chamblee v. Village of North Atlanta, 217 Ga. 517, 123 S.E.2d 663 (1962).
2. The term "municipality" or "municipal corporation" as used in this analysis includes both "cities" and "towns." See I MCQUILLIN, MUNICIPAL CORPORATIONS §2.07 (1949).
3. "[I]t was left entirely to the General Assembly to say what community of persons should be declard to be a city, and the General Assembly may arbitrarily determine this question." Heard v. State, 113 Ga. 444, 445, 39 S.E. 118 (1901).
4. As indicated, this designation is made in the form of a charter enactment incorporating the municipality as "the Town of X" or "the City of X," and proceeding to provide for the governmental organization and powers of the municipality. In addition to "cities" and "towns," a few Georgia municipalities have been incorporated as "villages."

term "city" or the term "town," legally apply only to those municipalities which when incorporated were designated by that term?

Even if it can be determined that the distinction does exist and that constitutional and statutory provisions so phrased would have only limited application, the question remains whether this determination would present a problem in Georgia municipal corporation law today. That is to ask, to what extent has this creation of both "cities" and "towns" actually been carried by the legislature? Should both entities exist in abaundance, there would still be the question of how many constitutional or statutory provisions, by their terms, actually apply to only one classification or the other. Obviously, the answers to these questions could indicate that the legal distinctions, if present, result in no practical consequences.

And always, the question of judicial interpretation remains. Have the Georgia courts found a distinction in "cities" and "towns," or have provisions referring to "cities," for example, been held adequately broad to cover all municipalities in Georgia?

These are the primary questions around which this brief analysis revolves. They are as important as they are basic. The attempt here is to meaningfully frame the questions rather than to hazard definitive answers to them. In providing this frame, perhaps the problem—if found to exist—can at least be finally labeled either academic or practical for the future guidance of those working in the area of municipal corporations in Georgia.

II. The Heading of the Problem: Spence v. Rowell

The questions here raised, although lurking in the wings, were not projected full center until 1957. Then, the opinions written by the justices of the Supreme Court of Georgia in the case of *Spence v. Rowell*[5]—especially the holding of the majority of the court—cast these inquiries in bold relief. And so they have hung, suspended in uncertainty, since that time. Thus an appropriate first step for this analysis is a consideration of this decision which brings at least the formulation of these questions to a head.

The question presented by the case, as limited by the court,[6] was whether a statute[7] requiring ratification of a local law repealing the charter of a "city" with a population of less than 50,000 inhabitants by the qualified voters of the municipality, applied to a municipality with a population of less than 50,000 which had been incorporated

5. 213 Ga. 145, 97 S.E.2d 350 (1957).
6. *Id.* at 148, 97 S.E.2d at 353.
7. Ga. Laws 1925, p. 136, as amended by Ga. Laws 1927, p. 244, codified as Ga. Code Ann. §§69-101, 69-102 (1957 Rev.)

as a "town." The plaintiffs, alleging themselves to be residents and taxpayers, contended that a local law enacted in 1939, purporting to repeal the town's charter, had never become effective because of the absence of a ratification election. In answering this question, the Supreme Court split four to three, with the majority of the court rejecting the plaintiffs' contentions and holding that the statute applied only to "cities," but not "towns," having the requisite population.

The majority opinion,[8] written by Justice Candler, approached the problem by placing it in an appropriate setting. This setting was constructed of the doctrines to the effect that a municipal corporation is a creature of the General Assembly, and that statutes limiting the legislature's control over its creature will be strictly construed. The stage thus set, the majority concluded that the legislature, when it enacted the statute in 1925, was presumed to know of the distinction in the words "city" and "town" which had been drawn by the court in prior cases[9] holding that a "city court," within the meaning of the Constitution, could not be created in a "town." With this knowledge, said the majority, the legislature had here used the term "city" to the exclusion of municipalities incorporated as "towns."

Two dissenting opinions were written in the case.[10] Chief Justice Duckworth, referring to the court's distinction between "cities" and "towns" as "mere judicial gymnastics,"[11] saw each type of municipality as serving the same purposes and having the same relationship with its citizens. Similar to the majority, he looked to the purpose of the statute in question; and instead of casting it in the negative as a detraction from the legislature's powers, he framed it in the positive as insuring the citizens a voice in their local government.

The other dissenting opinion[12] was written by Justice Head. His opinion was directed not toward questioning the distinction per se of "cities" and "towns" in Georgia, but rather toward doubting the wisdom of drawing the distinction in this case. He pointed out that the term "municipality"—broad enough to include both "cities" and "towns"—appeared in the statute, and in related statutes, more frequently than did the term "city." He further urged that the "city

8. 213 Ga. 145, 97 S.E.2d 350 (1957).
9. The cases cited by the court here were Wight & Weslosky Co. v. Wolff, 112 Ga. 169, 37 S.E. 395 (1900); Atkinson v. State, 112 Ga. 402, 37 S.E. 746 (1900); Savannah, F. & W. Ry. v. Jordan, 113 Ga. 687, 39 S.E. 511 (1901). These cases will be discussed later in this analysis.
10. The three dissenting justices were listed as Chief Justice Duckworth and Justices Head and Hawkins; but it was not stated in which dissenting opinion Justice Hawkins concurred, if either.
11. 213 Ga. 145, 151, 97 S.E.2d 350, 355 (1957) (dissenting opinion of Justice Duckworth).
12. 213 Ga. 145, 151, 97 S.E.2d 350, 355 (1957) (dissenting opinion of Justice Head).

court" decisions, utilized by the majority, were wholly unrelated to the subject matter of this case. Finally, he asserted that the statute in question had in a prior case been applied by the court to a municipality incorporated as a "town."

This then was *Spence v. Rowell.* Had it not arisen—according to the output of the Georgia courts since then—the judicial distinction between "cities" and "towns" in Georgia, previously applied in an extremely limited subject matter area and in repose for a considerable time, might have been permitted an unnoticed demise. With the decision of this case, however, it would appear that a majority of Georgia's highest judges were willing to apply the distinction generally in the State's municipal corporation law.

Looking at the professed foundations of the majority's opinion, one might wonder whether the "creature of the State" doctrine was required in this situation. Conceding that the litigated statute modified power of the General Assembly, instead of giving that power to its own creature, so as to promote an inferior governmental entity in opposition to a superior one, this statute actually vested that power in the people. Was strict construction a necessity in this situation?

One might also wonder just how realistic the court was being in presuming that the legislature, in enacting this statute in 1925, on the basis of the court's decisions at that time, consciously desired to draw a distinction in "cities" and "towns."

Further judicial interpretation of the statute in issue in the *Spence* case was foreclosed by its express repeal by the General Assembly in the following year.[13] To the dissenting assertion that the statute had previously been held applicable by the court to a "town," it is to be observed that in the cited case, although the court did not question the statute's applicability on this ground, it did hold the statute inapplicable for another and unrelated reason.[14] This would appear something less than the dissent's positive assertion indicated.

Thus with the decision of the *Spence* case, various projections might have been advanced. Was the question of a distinction in Georgia "cities" and "towns" now a settled one? Did this mean that any and all statutes or provisions of the Constitution containing reference only to one classification of municipality automatically exclude the other? Must each municipality in the State now make certain that it had been incorporated by a designation which would enable it to exercise powers under appropriate statutes? What if a municipality, created as a "town," was exercising powers under some statutes applying only

13. Ga. Laws 1958, p. 200.
14. Savannah Beach, Tybee Island v. Bergman, 202 Ga. 670, 44 S.E.2d 245 (1947).

to "cities" and others applying only to "towns"? One who resigned himself to wait and see exactly what the decision meant has now witnessed the passage of six years without further word from the court. Any projections or expectations still hang unsatisfied and unfulfilled. The crossing signal has been flashing but the track has remained clear.

III. Municipal Classification—Generally

Accepting the fact that the Supreme Court of Georgia, in the *Spence* case, placed unquestioned reliance upon the State legislature's incorporation of the municipality involved as a "town," (hence the statute referring to "cities" was inapplicable), the logical reaction is to inquire how the legislature makes this designation. When a Georgia municipality is incorporated, what factors dictate its classification by the General Assembly as a "city" or as a "town"? Does the size of the area to be included within the boundaries of the municipality bear on this determination? Does the fact that the municipality will possess many or few inhabitants require the General Assembly to place it in one classification or the other? If this classification by the legislature is to control what statutes and constitutional provisions will thereafter govern the municipality, then these questions would appear crucial.

At the turn of the century, Justice Lumpkin, speaking for the Supreme Court, answered the above questions:

> While . . . there is, according to lexicographers, a marked distinction between a city and town—the former being "more important" than the latter—we are driven to the conclusion that from the standpoint of legislation in this State the distinction has ever been purely arbitrary, and the test of population has never been observed. Our General Assembly has time and again . . . incorporated as cities places whose inhabitants were counted by mere hundreds. . . . [15]

Until 1963, the unfettered power to be "purely arbitrary" in the incorporation of municipalities, generally, remained with the General Assembly. At that time the legislature moved to impose the first restriction upon its general incorporation powers which should be noted here although it does not relate to classification. This restriction required that henceforth a municipality, to be eligible for original incorporation, must meet the following minimum standards: (1) its boundary must be more than three miles from the boundaries of an existing municipality; (2) it must have a total resident population of at least 200 inhabitants and an average of at least 200 inhabitants

15. Heard v. State, 113 Ga. 444, 445, 39 S.E. 118 (1901).

for each square mile of its total area.[16] These are standards, of course, only for the original incorporation of a "municipality" and restrict not at all the legislature's power to classify that municipality as a "city" or a "town." Thus, Justice Lumpkin's answer remains valid.

In some of the states of this country, certain factors, primarily population, do dictate a municipality's classification.[17] For example, in the state of Virginia statutory law defines "first class cities" as those with 10,000 or more inhabitants; "second class cities" as those with from 5,000 to 10,000 inhabitants; and "towns" as possessing less than 5,000 but more than 300 inhabitants.[18] In Mississippi, municipalities having from 300 to 2,000 inhabitants are "towns" and those having over 2,000 inhabitants are "cities."[19] In these states then, when a statute is drafted for the government of municipalities, it can be enacted with the immediate knowledge of which municipalities it will cover; and its terms can be geared to the needs of a large or small municipality according to the classification at which it is directed.

IV. 'GEORGIA MUNICIPAL CLASSIFICATION—THE TREND

That the Georgia General Assembly has the power to act arbitrarily in classifying municipalities as "cities" or "towns" prompts the immediate question of just how arbitrarily it has acted. Was creation of the "town" involved in the *Spence* case an exception to the general tendency? Has such a majority of municipalities been incorporated as "cities" as to render the question of a distinction merely an academic one? Perhaps at least some general answers can be formulated for these inquires.

Through the years and currently, it appears that both "cities" and "towns" have existed and do exist in abundance in Georgia. Even a cursory glance at the local laws indicates that well over 400 "towns"

16. Ga. Laws 1963, p. 251. An additional requirement is that the area embraced within the municipality be developed so that at least 60% of the total number of lots and tracts in the area at the time of incorporation are used for residential, commercial, industrial, institutional, or governmental purposes, and is subdivided into lots and tracts such that at least 60% of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental, or institutional purposes, consists of lots and tracts five acres or less in size.

17. McQuillin's observation was that "the distinction between 'cities,' 'towns,' and 'villages,' is usually made by statute and is ordinarily based on population or method of incorporation." I MCQUILLIN, MUNICIPAL CORPORATIONS §2.34 (1949).

18. VA. CODE §§15-67, 15-78, 15-110 (Rep. Vol. 1956).

19. MISS. CODE ANN. §3374-01 (Rec. Vol. 1956). Some of the other states having similar classifications: Montana—first class cities (10,000 or more), second class cities (5,000 to 10,000), third class cities (1,000 to 5,000), towns (300 to 1,000), MONT. REV. CODES ANN. §11-201 (Rev. 1957); Alabama—cities (2,000 or more), towns (75 to 2,000), ALA. CODE Title 37, §§5, 10 (Rec. Vol. 1958); Colorado—first class cities (70,000 or more), second class cities (2,000 to 70,000), towns (less than 2,000), COLO. REV. STAT. ch. 139-2-2 (Supp. 1960).

have been incorporated; and the United States Bureau of the Census report of 1960 listed over 250 "cities" and over 300 "towns" in existence in Georgia at that time.[20]

Perhaps more enlightening than the matter of how many municipalities were originally incorporated in one classification or the other is the question whether any kind of trend in current classification can be discerned. And this question can be answered in the affirmative. Out of approximately 22 original municipal incorporations since 1950, approximately 17 municipalities were expressly created as "cities."[21] But even more indicative of this trend is the fact that over 60 local laws have been enacted by the legislature since 1950 expressly changing the classification of particular municipalities from "towns" to "cities."[22] If searching for a trend in municipal classification, certainly little more could be desired.

The fact of this indicated trend, however, does not erase the fact of the continued existence of many "towns" in Georgia. The problem of a distinction between "cities" and "towns" then, at least from this approach, would seem much more than merely academic in nature.

V. Georgia Statutes and Constitutional Provisions Applying to Municipalities

Now established are two legs of the tripod necessary to show that this matter of a distinction in "cities" and "towns" presents a problem in Georgia municipal corporation law. First, the discussion of *Spence v. Rowell*[23] has pointed up at least one instance where the Supreme Court has held that statutes expressly applying to "cities" do not govern "towns." Second, later discussion has indicated that Georgia does indeed possess many municipalities in each of these classifications.

But the third leg yet remains. That is to say, it must also be determined, at least in general, whether statutes or constitutional provisions applying only to one classification of municipalities do in fact exist in Georgia. Or, was the statute involved in the *Spence* case an exceptional one? Although no complete survey of statutory and constitutional provisions will here be presented, perhaps some notions regarding the general situation can be formed.

Even a summary search through the statutory law of the State

20. U. S. Bureau of the Census, *U. S. Census of Population*: 1960. *Number of Inhabitants, Georgia.*
21. This information was obtained from a search of the Georgia local laws since 1950. At least two municipalities, during this period, were incorporated as "towns"; and at least two were incorporated as "municipalities."
22. This information was obtained from a search of the Georgia local laws since 1950. No changes from "cities" to "towns" were discovered.
23. 213 Ga. 145, 97 S.E.2d 350 (1957).

reveals that Georgia statutes relating to municipalities are by no means uniform in their terminology. There are statutes applying to "municipalities,"[24] to "municipal corporations,"[25] and to "incorporated cities and towns."[26] Of six general statutes dealing with municipalities enacted during the 1962 regular legislative session, three apply to "incorporated municipalities"[27]; one applies to "municipal corporations"[28]; one applies to "cities and municipalities"[29]; and one applies to "cities, towns and villages."[30] Was the General Assembly, in enacting these statutes, making a conscious distinction?

More specifically in point here is the statute declaring it illegal for a member of a "city council" to vote upon a question in which he is personally interested.[31] Similarly noteworthy is the statute authorizing the municipal authorities of any "incorporated city" to permit the enclosure of lanes or alleys upon certain conditions.[32]

In the other classification is the statute conferring upon "incorporated towns and villages" the power to organize work gangs for the confinement of persons convicted of ordinance violations.[33]

Should the question be squarely presented, would the Georgia courts hold that these statutes govern only one of the classifications of municipalities in this State?

Probably the most prominent example of a statutory distinction between "cities" and "towns" is that found in the Georgia Housing Authorities Law,[34] the statute authorizing cooperation between local entities and the federal government for the purpose of providing low rent housing. This statute creates[35] within each "city" in Georgia a housing authority and defines a "city" to mean "any city in the State."[36] That this definition was intended to receive literal interpretation is pointed up later in the same statute where two or more "municipalities"—defined to mean "any city, town, village, or other municipality

24. *E.g.*, GA. CODE ANN. §69-201 (1957 Rev.); GA. CODE ANN. §69-203 (1957 Rev.); GA. CODE ANN. §69-304 (1957 Rev.).
25. *E.g.*, GA. CODE ANN. §69-206 (1957 Rev.); GA. CODE ANN. §69-208 (1957 Rev.); GA. CODE ANN. §69-305 (1957 Rev.).
26. *E.g.*, GA. CODE ANN. §69-105 (1957 Rev.); GA. CODE ANN. §69-601 (1957 Rev.); GA. CODE ANN. §69-501 (1957 Rev.).
27. Ga. Laws 1962, p. 119; Ga. Laws 1962, p. 140; Ga. Laws 1962, p. 641.
28. Ga. Laws 1962, p. 596.
29. Ga. Laws 1962, p. 473.
30. Ga. Laws 1962, p. 469.
31. GA. CODE ANN. §69-204 (1957 Rev.).
32. GA. CODE ANN. §69-207 (1957 Rev.).
33. GA. CODE ANN. §69-205 (1957 Rev.).
34. GA. CODE ANN. ch. 99-11 (1955 Rev.).
35. GA. CODE ANN. §99-1104 (1955 Rev.). A resolution by the governing body of the city is necessary to activate the authority.
36. GA. CODE ANN. §99-1103 (1961 Supp.). The original definition was "any city with a population of more than 5,000," but this was changed in 1943. See Ga. Laws 1943, p. 146.

in the State"—are authorized to form a consolidated housing authority.[37] Thus, for a single Georgia municipality to be eligible for a housing authority which can derive financial assistance from the federal government in the construction of low rent housing projects, the statute requires that this municipality be incorporated as a "city." Although no litigation on the point is reported, this is the interpretation placed upon the statutes by the Regional Counsel of the U. S. Public Housing Administration who reports that the requirement makes it necessary for a "town" desiring to establish a housing authority to secure a charter amendment from the legislature changing it to a "city."[38] This not being a federal requirement, Georgia is listed as the only state, at least in Region III,[39] which imposes this particular limitation upon its municipalities in establishing housing authorities.[40] In this instance then, a distinction between Georgia "cities" and "towns" is in active operation.[41]

In contrast to the Housing Authorities Law, the Georgia Urban Redevelopment Law is made applicable to "municipalities" which are defined as "any incorporated city or town in the State."[42] Still another example of a less restrictive definition is contained in the Revenue Bond Law of 1937 which defines "municipality" as "any county, city or town of the State."[43]

One who follows the literal wording of such statutes in all situations, however, encounters difficulties. For example, the public libraries statute[44] authorizes any "city" to raise revenue to establish and maintain a public library.[45] The same statute later provides for public libraries in political subdivisions "other than municipal corporations."[46] Did the legislature mean by the latter provision that "towns" also could establish public libraries; did it take for granted that "towns" were already included under "cities" and thus attempt to provide for other political subdivisions; or did it mean, by the two

37. GA. CODE ANN. §99-1153 (1955 Rev.).
38. Letter from Regional Counsel, Public Housing Administration, to Writer, April 5, 1963.
39. Region III includes the states of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.
40. Letter from Regional Counsel, Public Housing Administration, to Writer, April 5, 1963.
41. Periodically, the General Assembly has enacted statutes declaring that housing authorities which were created purportedly pursuant to the Housing Authorities Law are legal, notwithstanding any want of statutory authority. See Ga. Laws 1951, p. 137; Ga. Laws 1959, p. 141; Ga. Laws 1962, p. 734.
42. GA. CODE ANN. §69-1103 (1957 Rev.).
43. Ga. Laws 1937, p. 761, 762.
44. GA. CODE ANN. ch. 32-27 (1952 Rev.).
45. GA. CODE ANN. §32-2701 (1952 Rev.).
46. GA. CODE ANN. §32-2706 (1952 Rev.).

provisions, to authorize only "cities" and political subdivisions not including "towns" to have libraries?

In most instances, provisions of the Georgia Constitution refer to "municipal corporations."[47] An exception to this general tendency however, authorizing direct appeal from "city courts" to Georgia's appellate courts,[48] has resulted in considerable litigation. It will be recalled that the Supreme Court relied upon some of these "city court" decisions in the *Spence* case. These cases will be discussed in detail in the following section.

In summary, it must be concluded that this third leg is the weakest in the tripod. It would appear that the majority of Georgia's statutes and constitutional provisions do refer to classifications sufficiently broad to include all municipalities in the State. On the other hand, the exceptions which have here been noted may indicate that the discussion is still not entirely academic.

VI. Other Court Decisions

In reaching its decision in *Spence v. Rowell*,[49] the majority of the Supreme Court presumed that when in 1925 the General Assembly enacted the statute there in question, it had been aware of a judicial distinction in "cities" and "towns" as pronounced in previous court decisions. This analysis, therefore, would be incomplete without an examination of the other court decisions in this subject area, both before and after 1925. Only in this manner can the *Spence* decision be placed in proper perspective.

In what appears to be one of the earliest Georgia Supreme Court decisions on this point of distinction, the question was whether a local law authorizing the establishment of a water works and sewerage system in the "City of Waycross" was a valid authorization to the municipality created as the "Town of Waycross." In *Murphy v. Mayor & Council of Waycross*,[50] the court, in a headnote opinion, held the authorization to the "town" valid. The court based its decision on the theory of legislative intent, saying there could be no doubt which municipality the local act covered and that both the words "city" and "town" had been used in the act.

Fourteen years later, in the case of *Mayor & Council of Smithville*

47. *E.g.*, Ga. Const. art. VII, §5, par. I (1945), Ga. Code Ann. §2-5801 (1948 Rev.); Ga. Const. art. VIII, §7, par. I (1945), Ga. Code Ann. §2-7001 (1948 Rev.). The designation "city, town, municipality" is also used, Ga. Const. art. VII, §6, par. I (1945), Ga. Code Ann. §2-5901 (1948 Rev.).
48. Ga. Const. art. VI, §2, par. IV (1945), Ga. Code Ann. §2-3704 (1948 Rev); Ga. Const. art. VI, §2, par. VIII (1945), Ga. Code Ann. §2-3708 (1948 Rev.).
49. 213 Ga. 145, 97 S.E.2d 350 (1957).
50. 90 Ga. 36, 15 S.E. 817 (1892).

v. Dispensary Commissioners of Lee County,[51] the court faced a similar question. Here the issue was whether a local law authorizing the establishment of dispensaries in the "incorporated towns" in Lee County included as well municipalities in the county which had been incorporated as "cities." Saying that the words "city" and "town" were not synonymous, the Supreme Court nevertheless sustained the validity of a dispensary which had been created in a "city." The court could not here see a reason, it said, for holding that the word "town," a generic term, did not include a "city," a species under that genus. Referring to the *Murphy* holding that "city" could mean "town" where necessary to give effect to clear legislative intent, the court saw an a fortiori necessity to here allow "town" to include "city." Finally, it was noted that both the words "city" and "town" appeared throughout the act in question.

In the case of *Lee v. Tucker,*[52] the court treated somewhat incidentally the question whether a local law purporting to remove the county site of Irwin County from the "town of Irwinville" to the "town of Ocilla" was invalid on the ground that Ocilla had been incorporated as a "city." Relying upon both the *Smithville* and the *Murphy* cases, the court held that the word "town" in the act could be treated as a generic term, and that the act's other provisions rendered the legislative intent clear. Thus, the law was upheld.

A case which did draw a distinction in the terms "city" and "towns" was *Storey v. Town of Summerville.*[53] In that case it was held that the lower court had been correct in dismissing a suit directed against the "Town of Summerville" where that municipality had been incorporated as the "City of Summerville." But instead of relying upon any particular distinction between a "city" and a "town" in Georgia, the court was here only following the technical rule that "a municipal corporation can be sued only in the corporate name set forth in the charter."[54] Indicative of the fact that this rule can be generally invoked in any situation where there is technical disagreement between the wording of the suit and the municipal charter are the holdings that the "Town of Jackson" could not be sued as "the Mayor and Council of Jackson"[55]; the "Mayor and Aldermen of Dexter" could not be sued as the "Town of Dexter"[56]; and the "Town of Flowery Branch" could not be sued as the "Mayor and Council of

51. 125 Ga. 559, 54 S.E. 539 (1906).
52. 130 Ga. 43, 60 S.E. 164 (1907).
53. 158 Ga. 182, 123 S.E. 139 (1924).
54. 158 Ga. at 184, 123 S.E. at 140 (1924), quoting from Town of Dexter v. Gay, 115 Ga. 765, 42 S.E. 94 (1902).
55. Boon v. Mayor & Council of Jackson, 98 Ga. 490, 25 S.E. 518 (1896).
56. Town of Dexter v. Gay, 115 Ga. 765, 42 S.E. 94 (1902).

Town of Flowery Branch."[57] Hence, the "city"-"town" distinction here was of no other particular significance.[58]

As noted, the majority of the court in the *Spence* case bottomed its presumption of the legislature's distinction in "cities" and "towns" on various pre-1925 cases involving "city courts." This "city court" litigation enjoys a lengthy history in Georgia and was initiated by a provision of the Constitution of 1877. This constitutional provision directed that the Georgia Supreme Court had no original jurisdiction but was "a court alone for the trial and correction of errors from the Superior Courts and from the City Courts of Atlanta and Savannah and such other like Courts as may be hereafter established in other cities."[59] Thus the question early arose as to which other "city courts" in this State were allowed by this provision to have their decisions reviewed by direct writ of error to the Supreme Court.

One of the first cases in which the Supreme Court considered this question was *Western Union Tel. Co. v. Jackson.*[60] There specifically considered was whether a writ of error would lie to the Supreme Court from the "city court of Spalding County." Observing that the general act under which this "city court" was established did not require the authorized courts to be located within the corporate limits of "cities," but permitted their location at any point within the county, the Supreme Court held that the writ of error would not lie. The mere fact that this particular court happened to be located in the "city of Griffin" did not constitute it one of the "city courts" so as to come within the constitutionally confined appellate jurisdiction of the Supreme Court.[61]

Wight & Weslosky Co. v. Wolff[62] was a case even more in point with the question here being examined. There the legislature had

57. State Highway Dept. v. Reed, 211 Ga. 197, 84 S.E.2d 561 (1954). For similar holdings, see Town of East Rome v. City of Rome, 129 Ga. 290, 58 S.E. 854 (1907); Augusta Southern Ry. v. City of Tennille, 119 Ga. 804, 47 S.E. 179 (1904); Mayfield v. City of College Park, 19 Ga. App. 823, 92 S.E. 289 (1917).

58. Inter-City Coach Lines, Inc. v. Harrison, 172 Ga. 390, 157 S.E. 673 (1930), held that the 1929 Motor Carrier Act's exclusion of motor vehicles operating exclusively within "cities" or "towns" did not exclude those vehicles operated within the "municipality of Atlanta"; but here again the distinction was rather insignificant because the "municipality" was actually a kind of association of incorporated and unincorporated areas around the "City of Atlanta" and not a typical municipal corporation.

59. GA. CONST. art. VI, §2, par. V (1877), GA. CODE ANN. §2-3005 (1948 Rev.).

60. 98 Ga. 207, 25 S.E. 264 (1896).

61. The court pointed out that decisions of this court would have to be reviewed by writ of certiorari to the superior court. For similar holdings of about the same date, see Comer v. Rynehart, 99 Ga. 128, 24 S.E. 871 (1896); Brown v. Cleveland, 99 Ga. 306, 25 S.E. 655 (1896); Clay v. Houk, 102 Ga. 549, 26 S.E. 769 (1897).

62. 112 Ga. 169, 37 S.E. 395 (1900).

purported to establish a "city court" in the "Town of Camilla" and had expressly stated that for this particular purpose Camilla was to be considered a "city" so as to come within the constitutional provision. The Supreme Court was unanimous in holding that a writ of error would not lie from the Camilla court, but was divided upon the reasons for its decision. The majority of the court[63] thought the essential differences in a "city" and a "town" to be size and population and thus that the legislature could not declare a small "town"—not similar to the "cities" of Atlanta and Savannah—to be a "city" for this one purpose. It further argued that the urban needs for streamlining litigation processes did not exist in small rural areas. The minority concurring opinion[64] argued that whether a particular municipality was a "city" or a "town" depended not upon its size and population but solely upon how it had been incorporated by the General Assembly. As long as the incorporating act declaring Camilla to be a "town" stood unrepealed, the legislature could not declare Camilla a "city" only for the purpose of creating a "city court" there. Thus the philosophies within the court on distinguishing Georgia's "cities" and "towns" were in conflict.[65]

Less than one year later, in the case of *Heard v. State*,[66] the tables were turned. Here again the question was whether a direct writ of error lay to the Supreme Court from a "city court" which had been established in a small municipality. But here the municipality involved had been incorporated as a "city." Justice Lumpkin, writing the opinion for the majority of the court, found himself forced to agree with the philosophy of the minority in *Wight*. Although believing that permitting a constitutional "city court" to function in a small municipality violated the spirit of the Constitution, he was convinced that the General Assembly possessed the absolute power to declare what municipalities were "cities" and could do so arbitrarily. The test of population, he said, had never been followed. Starting with this premise, his conclusion could only be that the writ of error from the "city court" in the small "city" here involved was within the jurisdiction of the Supreme Court.

63. The majority opinion was written by Justice Little.
64. 112 Ga. at 174, 37 S.E. at 397 (1900). The minority opinion was written by Justice Cobb and was concurred in by Justice Fish.
65. Less than one month later, the court decided Atkinson v. State, 112 Ga. 402, 37 S.E. 746 (1900), and simply declared in a headnote opinion that as the municipality of Eastman had been incorporated as a "town," a legislative act establishing a "city court" there did not permit direct writs of error to the Supreme Court. The opinion made no mention of the elements of size and population.
66. 113 Ga. 444, 39 S.E. 118 (1901). See also Sellers v. Mann, 113 Ga. 643, 39 S.E. 11 (1901); Mattox v. State, 115 Ga. 212, 41 S.E. 709 (1902).

Justice Little alone, the writer of the majority opinion in *Wight,* dissented in the *Heard* case.[67] He remained of the opinion that the General Assembly could create a small municipality as a "city" only in name, and that this was insufficient to permit establishment in that municipality of a constitutional "city court."

Although forced into a position which it professed to believe not spiritually in line with the Constitution, the majority of the court could at least require clear evidence in these "city court" cases that the municipality involved had in fact been expressly incorporated as a "city." Thus, in *Savannah, F. & W. Ry. v. Jordan,*[68] the court rejected an argument that the "town of Valdosta" had been reincorporated as a "city" by a legislative act[69] amending the charter and declaring that the government of the "city of Valdosta" would be vested in a mayor and six councilmen. The court stated that throughout the amending act the municipality was referred to as "city" and "town" interchangeably and there was no express declaration that the "town" was to become a "city."[70]

In the years that followed, the Supreme Court continued to refine the various characteristics of constitutional "city courts" in Georgia.[71] In doing so, it consistently adhered to its requirement that these courts, for their decisions to be reviewable directly by the Supreme Court, must be established in incorporated "cities" in the State.[72] In *White v. State,*[73] the court followed this requirement to the point of holding that an act establishing a "city court" in a municipality did not come within the constitutional provision where the municipality was not reincorporated as a "city" until two days after the court-establishing act went into effect.

In 1906, the Georgia Court of Appeals came into existence, and in 1907 jurisdiction over writs of error from "city courts" was conferred on that court.[74] In exercising this jurisdiction, the Court of Appeals continued to make certain that the particular "city court"

67. 113 Ga. at 451, 39 S.E. at 121 (1901) (dissenting opinion).
68. 113 Ga. 687, 139 S.E. 511 (1901). This case was actually decided prior to *Heard,* but the application for rehearing was not denied until later.
69. Ga. Laws 1887, p. 595.
70. For a reincorporation which was clear enough to constitute the municipality involved a "city," see Sessions v. State, 115 Ga. 18, 41 S.E. 259 (1902).
71. See, *e.g.,* Welborne v. State, 114 Ga. 793, 40 S.E. 857 (1902), containing a lengthy discussion of the 1877 constitutional provision and its meaning.
72. See, *e.g.,* Lampkin v. Pike, 115 Ga. 827, 42 S.E. 213 (1902), for a strict construction of the requirement.
73. 121 Ga. 592, 49 S.E. 715 (1904).
74. See Durant Lumber Co. v. Sinclair & Simmons Lumber Co., 2 Ga. App. 209, 58 S.E. 485 (1907).

in question had in fact and in law been established in an incorporated "city."[75]

In the Constitution of 1945, the Supreme Court was given appellate jurisdiction for the "trial and correction of errors of law from the superior courts and the city courts of Atlanta and Savannah, as existed on August 16, 1916, and such other like courts as have been or may hereafter be established in other cities," in cases involving the construction of the Georgia or United States Constitutions or treaties.[76] The Court of Appeals was given appellate jurisdiction over these same courts "in all cases in which such jurisdiction has not been conferred by this Constitution upon the Supreme Court, and in such other cases as may hereafter be prescribed by law. . . ."[77]

VII. In Summary

Perhaps the most appropriate conclusion for this brief analysis would be simply a restatement of the question here postulated: Is there a distinction of consequence in a "city" and a "town" in Georgia? The attempt here has been to frame this question by analyzing three other inquiries: First, do both "cities" and "towns" exist in Georgia? Second, are there statutes and constitutional provisions applying to one of these municipal classifications exclusively? Third, how do the Georgia courts interpret these statutes and provisions?

Although the trend, both in original incorporations and in reincorporations, appears to be toward an increasing number of "cities" in Georgia, the fact remains that at present "towns" too fluorish throughout the State.

Although the majority of general statutes and provisions of the Constitution appear to be phrased with terms adequately broad to cover all municipalities in Georgia, examination indicates the existence of some exceptions. In addition, population and local laws too may contain exclusive references.

Although the number of court decisions on the particular point are limited, those discussed reveal the recurring nature of this "city"-"town" distinction problem in Georgia. Prior to the *Spence* case, and with the exception of the "city court" decisions, the Supreme Court of Georgia appeared reluctant to positively find this distinction. In considering only local laws, the court held that the reference to

75. See, *e.g.*, Daniels v. State, 5 Ga. App. 472, 63 S.E. 583 (1908); Neill v. State, 36 Ga. App. 292, 136 S.E. 470 (1927).
76. Ga. Const. art. VI, §2, par. IV (1945), Ga. Code Ann. §2-3704 (1948 Rev.).
77. Ga. Const. art. VI, §2, par. VIII (1945), Ga. Code Ann. §2-3708 (1948 Rev.). It will be recalled that each of the "city court" decisions relied upon by the Supreme Court in the *Spence* case was decided under the Constitution of 1877.

"city" could mean "town," and that the reference to "town" could mean "city." In these cases, the court relied generally upon the doctrine of clear legislative intent, upon the appearance of both the terms "town" and "city" in the laws, and upon the idea that "town" was a generic term broad enough to cover "city" as well.

When it came to a provision of the Constitution, however, the court did declare a distinction by holding that a reference to "cities" precluded "towns" from having "city courts." Although the court was split for a time on the reasons for this distinction, it was consistent as to result.

The arrival of *Spence v. Rowell* before the court in 1957 then presented a unique situation: a general law referring to "cities." Would the court see this general law in the light of its local law holdings or in the light of its holdings on the constitutional provision? Obviously, the majority of the court thought the general laws more like the constitutional provision. Instead of clear legislative intent, the majority was here satisfied with presumed legislative intent. It was left to the dissent to point out that the statute contained the term "municipality" as well as "town."

Since the *Spence* case, no further word from the court on this distinction has been forthcoming. Accepting that decision as definitely establishing a distinction, the question arises whether the situation should be left status quo. One answer might be that if indeed this distinction between "cities" and "towns" is to exist in Georgia, then the legislature should make it a distinction of meaning—possibly, by setting up population classifications for the two entities and gearing the various statutes in accordance. If no distinction is desired, then perhaps a general statute making that declaration and providing that the use of one term in a statute will be held to include the other might be in order. Certainly, these are by no means the only answers and perhaps not even the best ones. At the least, however, they do serve to complete the frame for the problem here discussed.