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Review of Recent California Decisions on Municipal Law

IT HAS been the policy of this REVIEW to submit to its readers from time to time, by way of supplement to critical notes and comments more general reviews of the recent decisions affecting particular branches of the law. Such a discussion is thought to have served its purpose if it indicates the general trend of the subject. Accordingly, the recent California cases on municipal law have been gathered together and an analysis thereof attempted. Entering upon the effort, I am reminded of the legend of "The Old Woman who Lived in a Shoe"—who, tradition informs us, "Had so many children she didn't know what to do." For we have been presented with over two hundred and twenty-five cases touching upon this subject in the past three years. It will therefore be readily seen that nothing more than a general review is possible within the scope of this article and on that ground any sketchiness in treatment may be forgiven, including the omission of the technical field of street law. There is no room for it in this "shoe." But we have crowded over a bit to entertain certain county problems felt to be of general interest. An arbitrary classification and division has been established, primarily for the convenience of the reader, and, it may be added, also for the convenience of the writer. In the hope that this article may be of some value to students and general readers of municipal law as well as practitioners, the treatment is general and not technical.

TAXATION AND LICENSE

This phase of municipal law has had some interesting developments, especially where revenue questions are concerned. In this field certain cases have arisen because of attempts by municipalities to tax leasehold interests and improvements on tide lands, the fee of which has been granted to them by the state. The interest of the problem warrants greater discussion than space permits, but the trend of the decisions may be pointed out.

First, a private party has a leasehold interest in lands belonging to the municipality. Under the express provisions of Section 1 of Article XIII of the Constitution and also Section 3607 of the Political Code, the property of a municipal corporation in this state is not the subject of taxation. Is the leasehold interest in the realty taxable? Second, suppose that the party builds permanently fixed improvements thereon under the agreement that such are to become and remain the property of the municipality, subject to the lessee's use thereof; are they taxable to the lessee? Or again, suppose there is no agreement as to the ownership; is the question materially different? And, last, suppose the tax is assessed on the lessee's possessory interest or lease of such improvements; is this valid?

Considering the first question, it has been held in *San Pedro. Los Angeles, and Salt Lake Railroad Co. v. City of Los Angeles*,¹ adopting the decision of Justice Sloss at a former hearing, that a municipality is authorized by state laws to tax leasehold interests in the tide lands of the state, the fee being in such municipality. And it is said, "Upon the views thus expressed, it follows that the decision in 167 Cal. 425, 139 Pac. 1071, 52 L. R. A. (N. S.) 991 must be deemed overruled."²

Regarding the second, the case of *City of Oakland v. Albers Bros. Milling Co.*³ decides that the value of such improvements owned by the city is not taxable to the lessee. In view of our answer to the fourth question, it seems that the city might have validly taxed the lessee's possessory interest, however, if a proper valuation could be ascertained. But now comes more difficult reasoning. If the improvements are permanent, in the absence of agreement they become part of the realty.⁴ And "if the entire title to the improvements belongs to the state, they are not taxable, at all, any more than is the land itself."⁵ Yet in *Outer Harbor Dock and Wharf Co. v. County of Los Angeles*,⁶ the Court of Appeal speaking through Justice Burnett, expressly decides that on the authority of *San Francisco v. McGinn*⁷ a wharf and two ware-

¹ (1919) 180 Cal. 18, 179 Pac. 393.

² Melvin, J., dissented, feeling that it would upset our fiscal system, and disturb a rule which now secured property interests.

³ (1919) 43 Cal. App. 191, 184 Pac. 868.

⁴ Cal. Civ. Code § 1013.

⁵ *City of Oakland v. Albers Bros. Milling Co.*, 43 Cal. App. 191, 184 Pac. 868.

⁶ (April 21, 1920) 32 Cal. App. Dec. 13, 193 Pac. 142.

⁷ (1885) 67 Cal. 110, 7 Pac. 187.

houses built by the appellant for its own use were taxable, not restricting the decision to a mere possessory interest. It is noteworthy that the same Justice, in the companion case of *Outer Harbor Dock and Wharf Co. v. City of Los Angeles*,⁸ dealing with the same improvements, says, in speaking of the Oakland Albers Case, "It is true that in the lease therein it was expressly provided that the improvements should be the property of the city, while herein a similar result is affected by operation of the statute." But if the ownership is in the city or county, how may the user thereof be taxed for the full value? We would not quarrel with a tax upon the amount of his possessory interest, and such a tax has been sustained in *Outer Harbor Dock & Wharf Co. v. City of Los Angeles*. But a possessory interest would rarely equal the full value of the improvements. One may wonder if the logic of the situation is not to sustain the tax whenever possible, by rule of law or otherwise.

In connection with these cases an error that may lead the trusting practitioner astray should be pointed out. In the Oakland Albers case the learned Justice cited the case of *San Pedro, Los Angeles and Salt Lake Railroad Co. v. City of Los Angeles*,⁹ as follows: "The Supreme Court declared void an attempted assessment of a breakwater built by a lessee of submerged public lands, as 'improvements' holding that while, as conceded by the parties in that case, the breakwater was not an 'improvement' within the meaning of section 3617 of the Political Code, even if it were so considered to be, it would be such an improvement as would become fixed to the realty itself 'the fee of which was in the state and hence not subject to assessment.'" Now as a matter of fact, the court in the case cited was speaking of a fill of land in using the language set forth, and regarding the breakwater it said, "Therefore, conceding the breakwater to be assessable (refusing, however, to determine the point), the assessment thereof, as shown by the record, is so blended with the assessment of the fill that it renders the entire assessment void."

Taxation of utilities furnishes a goodly amount of revenue; it also furnishes some complex situations. For example, let us suppose a gas and electric corporation, operating in one county, but serving, in addition to that county, certain surrounding counties.

⁸ (April 21, 1920) 32 Cal. App. Dec. 7, 193 Pac. 137. Note in 9 California Law Review, 151.

⁹ (1919) 180 Cal. 18, 179 Pac. 390.

On what basis should the county regulate taxation thereof? We may quote from *County of Tulare v. City of Dinuba and San Joaquin Light and Power Co.*,¹⁰ deciding the question: "The county of Tulare may collect its two per centum of all receipts of the electric company arising wholly from franchise easements within the county, and of the receipts contributed to by all other parts of the system a proportion based upon the relative mileage of such franchises within the county to the entire mileage of the rights of way contributing to such gross receipts." It was earnestly contended that the section of the Broughton Act authorizing this two per cent franchise revenue, arising from its "use, operation, or possession" had been repealed by Section 14 of Article XIII of the Constitution, providing a method of taxation "which shall be in lieu of all other taxes and licenses, state, county or municipal." But the court got around this, saying that this franchise charge of the Broughton Act was not a tax or a license within the above-quoted constitutional provision, but rather a toll or charge upon the holder of a franchise for the privilege of using the avenues and highways, "purely a matter of contract." The court distinguishes this decision from that in *Oakland v. Great Western Power Co.*,¹¹ wherein it was held that the city could not collect percentages on power sold outside the municipal limits, by reason of an express charter provision limiting the charge to the sale of electric energy delivered within the limits of the City of Oakland. The latter case also makes it doubtful whether the business of furnishing steam heat is a separate utility and subject to local taxation. The Court of Appeal decided that it was, but the case has been recently reversed by the Supreme Court on a more technical point, the court refusing to decide the principal contention. The opinion of the Supreme Court on the more technical point was as follows: "In harmony with these views (*Pacific Electric Railway Co. v. Rolkin*, 164 Cal. 154) we now hold that the failure of the City of Oakland to file with the State Board of Equalization the required notice of his claim that the property in question was non-operative property of the plaintiff was jurisdictional in so far as his right to thereafter claim that said property was non-operative property or to assess the same locally as such was concerned."¹²

¹⁰ (May 4, 1922) 63 Cal. Dec. 525, 206 Pac. 983, modifying the decision in 35 Cal. App. Dec. 406.

¹¹ (1921) 186 Cal. 570, 200 Pac. 395.

¹² *Great Western Power Co. of California v. City of Oakland* (Sept. 22, 1922) 64 Cal. Dec. 329. Section 10 of Stats. 1915 p. 530 provides for assessor's claim to the Board of Equalization.

How may the ordinary citizen recover an excess or illegal tax paid the taxing authority? He may recover an excess tax paid by virtue of an ordinance suspending the dollar rate in San Francisco if the necessity recited for such suspension is not in reality present.¹³ Taxation must be uniform, all property must be valued at the same proportionate rate; a tax on certain property assessed at twice the value of other property surrounding it, is "fraudulent" as that term was used in *Green v. Louisville Railway Co.*,¹⁴ and *Los Angeles Gas and Electric Co. v. County of Los Angeles*.¹⁵ The Board of Equalization, having full possession of the facts is under the duty of equalizing the tax.¹⁶ The proceeding by the taxpayer in a case where he has been over-assessed is to make complaint to the Board of Equalization, pay the tax under protest, and then bring action to recover under Section 3819 of the Political Code. Oral complaint to the board is sufficient to give it jurisdiction.¹⁷ The time limitation applying to the bringing of the action has occasioned some doubt, the section just mentioned specifying six months, while *Stewart Law and Collection Co. v. Alameda County*,¹⁸ states that there are concurrent remedies provided by Sections 3819 and 3804 of the Political Code, to recover a tax paid under protest, one limited to six months, the latter to three years.

A brief review of the license tax cases may be instructive as well as interesting, to show the recent tendencies of our courts. The following license tax ordinances have been sustained: license tax of \$10 per day on auctioneers of real estate, livestock, and second-hand goods;¹⁹ license fee on the profession of law;²⁰ on retail grocers;²¹ on a collection agency;²² \$50 per quarter on the business of selling second-hand automobiles;²³ a license tax on

¹³ *Burr v. San Francisco* (1921) 186 Cal. 508, 199 Pac. 1034.

¹⁴ (1917) 244 U. S. 499, 61 L. Ed. 1280, 37 Sup. Ct. Rep. 673.

¹⁵ (1912) 162 Cal. 164, 168, 121 Pac. 384. See also *Finn v. Chiappari* (July 25, 1922), 38 Cal. App. Dec. 387.

¹⁶ *S. P. Land Co. v. San Diego County* (1920) 183 Cal. 543, 191 Pac. 931.

¹⁷ *Rickard v. City Council of Santa Barbara* (Aug. 14, 1920) 33 Cal. App. Dec. 7, 192 Pac. 726.

¹⁸ (1904) 142 Cal. 660, 76 Pac. 481.

¹⁹ *In re Bruce* (Sept. 21, 1921) 36 Cal. App. Dec. 221, 201 Pac. 789.

²⁰ *In re Johnson* (May 13, 1920) 32 Cal. App. Dec. 218, 190 Pac. 852. *In re Galusha* (1921) 184 Cal. 697, 195 Pac. 406. Note in 9 California Law Review, 350.

²¹ *In re Nowak* (1921) 184 Cal. 101, 195 Pac. 402. Note in 9 California Law Review, 350. The power of a charter city to impose license tax for revenue purposes only, as a "municipal affair" is set forth in this case; the charter only can deprive the municipality of such power.

²² *Cuthbert v. Woodman* (1921) 185 Cal. 43, 195 Pac. 673.

²³ *Ex parte Higgins* (Dec. 22, 1920) 34 Cal. App. Dec. 59, 195 Pac. 740.

physicians;²⁴ and a license tax on second-hand book sellers. An ordinance imposing a license tax of \$300 per month on those who carried on the business of re-selling theatre tickets was held void, both as a police and as a revenue measure, as being an arbitrary and unreasonable imposition by the governmental authorities.²⁵

Second-hand businesses are definitely subject to police regulation, and to a regulatory license tax therefor, and such a tax was sustained in *Ex parte Higgins*,²⁶ and in *Re Holmes*.²⁷ In the latter case, authority was given the Board of Police Commissioners to grant or deny the permits. The majority, quoting from Dillon's work on Municipal Corporations, held that the power in a board to issue or deny permits to conduct a business could be upheld. Justice Wilbur, in dissenting, while saying that he did not consider the question involved in this case, stated that the rule in this state was clearly settled the other way. After a review of the cases mentioned in the majority opinion, on page eleven, and the cases cited therein, I find that all the California cases, at least, have to do with the regulation of acts or businesses which are sufficiently menacing to the social welfare to justify extreme regulation, and in some instances, total prohibition. For example: beating of drums,²⁸ regulation of dangerous electrical apparatus,²⁹ regulation of alteration and repair of wooden buildings within certain fire limits,³⁰ regulation of liquor sales,³¹ and regulation of laundries where both health and fire risks are involved.³² It seems, therefore, that as to this point, the opinion of Justice Wilbur is sound, and that the delegation of an arbitrary power to issue or refuse the permits to deal in second-hand merchandise should have been held void.

MUNICIPAL LIABILITIES

This division has been extended to cover several sorts of liability. The municipality by virtue of its two capacities, governmental and proprietary, may be liable in different capacities. This

²⁴ *Redding v. Dozier* (Feb. 28, 1922) 37 Cal. App. Dec. 488, 206 Pac. 465.

²⁵ *In re Dees* (Nov. 13, 1920) 33 Cal. App. Dec. 500, 194 Pac. 717. This business has been adjudged a lawful one in *Ex parte Quarg* (1906) 149 Cal. 79, 74 Pac. 766, 117 Am. St. Rep. 115, 5 L. R. A. (N. S.) 183 and *In re Dees* (March 19, 1920) 31 Cal. App. Dec. 815, 189 Pac. 1050. See note in 8 California Law Review, 429.

²⁶ (Dec. 22, 1920) 34 Cal. App. Dec. 59, 195 Pac. 740.

²⁷ (Dec. 28, 1921) 63 Cal. Dec. 7, 203 Pac. 398.

²⁸ *In re Flaherty* (1895) 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529.

²⁹ *Gaylord v. Pasadena* (1917) 175 Cal. 433, 166 Pac. 348.

³⁰ *Ex parte Fisk* (1887) 72 Cal. 125, 13 Pac. 310.

³¹ *In re Guerero* (1886) 69 Cal. 88, 10 Pac. 261.

³² *Barbier v. Connolly* (1884) 113 U. S. 703, 28 L. Ed. 1145, 5 Sup. Ct. Rep. 730.

distinction is traced throughout the decisions, and is often of vital importance to the municipality, as will be shown. The inter-relations of the municipality with other governmental units create complex situations, and different sorts of rights and liabilities arise under much the same set of circumstances. Several interesting cases have been given us, perhaps the most important in regard to its effect upon the municipality being that of *Sincerney v. City of Los Angeles*.³³ While ordinarily the use of streets for the maintenance therein of telegraph and telephone poles and wires is a municipal affair,³⁴ yet such use by the city acting in a proprietary capacity must not interfere with the freedom of passage of railroads which are under the jurisdiction of the Railroad Commission of the State of California.³⁵ Order No. 26 of the General Orders of said body provides that no poles shall be located within eight feet of the center of the track. The City of Los Angeles violated such order, and was held liable for the resulting injury to a brakeman on a through train. The decision, no doubt, justly emphasizes the public policy in having uniform control of our state railroad service in the interests of public travel.

The distinction is clearly noted in the liability of a city for the torts of its servant or employee, committed while carrying out the various duties of a public service utility. In carrying on a public utility, such as, in this case, electricity and power service, the city is acting in a proprietary capacity. The ordinary rules of liability and principles of respondent superior are held applicable.³⁶ A person injured by the negligence or tort of the city, committed while acting in a proprietary capacity, must by general law, and here by the charter of San Diego, present the claim within six months, or it will not be sustained; nor was it sustained in *Western Salt Co. v. City of San Diego*.³⁷ While *Nebraska*³⁸ and *Massachusetts*³⁹ make a distinction and do not apply the limitation to injuries resulting by virtue of the exercise of proprietary functions, yet this court states that the charter makes no distinction and that our statutes do not. In this connection it should be noted

³³ (July 7, 1921) 35 Cal. App. Dec. 591, 200 Pac. 380.

³⁴ *Sunset Tel. & Tel. Co. v. City of Pasadena* (1911) 161 Cal. 265, 286, 118 Pac. 796.

³⁵ *Sincerney v. City of Los Angeles*. *Supra*, n. 33.

³⁶ *Ruppe v. City of Los Angeles* (June 29, 1921) 62 Cal. Dec. 50, 199 Pac. 496.

³⁷ (1919) 181 Cal. 696, 186 Pac. 345.

³⁸ *Henry v. Lincoln* (1913) 93 Nebr. 331; 140 N. W. 664.

³⁹ *D'Amico v. City of Boston* (1900) 176 Mass. 599, 58 N. E. 158.

that the Court of Appeal has lately restated the rule that a city engaged in the business of gathering garbage as a municipal affair is acting in a governmental and not proprietary capacity; therefore it is not liable for the acts or negligence of its officers, agents, or employees.⁴⁰

Following up this distinction between proprietary and governmental functions we note the case of *Postal Telegraph Co. v. San Francisco*.⁴¹ In this case the City of San Francisco, in extending its municipal lines on Market Street, attempted to compel the Postal Telegraph Company to change the position of its cable access manholes, involving a cost of over one thousand dollars, without compensation. On the authority of *Vale v. Boyle*⁴² and *Los Angeles Gas and Electric Co. v. Los Angeles*,⁴³ the city was held to be acting in a proprietary capacity and not merely exercising legitimate governmental or police powers.

This distinction is one, however, that may easily be misleading. It depends largely upon the nature of the question confronting the municipality. For example, the proprietary function is taken in its broader sense in the cases discussed above. Yet it is limited greatly when the question involved is whether certain property of the city is subject to execution. Is there, then, a valid distinction in this regard between property held in a governmental capacity, and that held in a proprietary capacity? *Marin Water and Power Co. v. Town of Sausalito* discusses the question. "The true rule is that the property which it holds for the purpose of exercising its constitutional power to operate water works to supply its inhabitants with water or other like public purposes is not subject to execution, the reason being that to subject it to sale would interfere with the exercise by the city of some of the powers for which it was organized. On the other hand, property which it holds merely as a proprietor, devoting it to no use of a public character, such as lands acquired and held for other than public purposes and not in trust for public use, are subject to execution unless some statutory or constitutional provisions forbid it."⁴⁴ And the court must have had the distinction in mind in *Marin Municipal Water*

⁴⁰ *Manning v. City of Pasadena* (Aug. 4, 1922) 38 Cal. App. Dec. 736.

⁴¹ (June 15, 1921) 35 Cal. App. Dec. 420, 199 Pac. 1108.

⁴² (1918) 179 Cal. 180, 175 Pac. 787.

⁴³ (1919) 251 U. S. 32, 64 L. Ed. 121, 40 Sup. Ct. Rep. 76. Also see *In re Board of Rapid Transit Commissioners of the City of New York*. (1909) 197 N. Y. 81, 90 N. E. 456.

⁴⁴ (Oct. 26, 1920) 60 Cal. Dec. 526, 193 Pac. 294.

District v. Chenue,⁴⁵ in which case the plaintiff refused to pay the necessary license fees for its thirteen motor vehicles operated exclusively for water district purposes. Upholding the plaintiff in its action to require the chief of the Motor Vehicle Department to issue the licenses without payment of the required fees, the court said, "The municipal water district is not a commercial corporation. . . . A motor vehicle owned and used by a municipal water district organized under the law for the purpose of collecting and distributing water to the public, and for the management of its works and system in discharging its public duties, it not used in 'business' as that term is used in section two (Motor Vehicle Act) aforesaid."

Leaving the distinction between proprietary and governmental functions, we are confronted with other distinctions. Section 18 of Article XI of the Constitution provides in effect that no county or city shall incur any indebtedness or liability exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof. This has been construed to have no reference to payment of a judgment decreeing the repayment of a tax paid under protest. "We are satisfied that the payment of the tax involved here was involuntary and that the judgment is evidence of an obligation imposed by law rather than one implied in fact. Such being the case, the city is not asked to "incur" an indebtedness in excess of its income and revenue, but is asked to provide the necessary income and revenue sufficient to meet an indebtedness imposed upon it by law."⁴⁶ Likewise, a municipality may be compelled to pay a judgment founded on tort liability; and where, as in a case involving the San Francisco charter, there was to be a discretionary payment from the "surplus fund" which was empty, mandate will be granted to compel the city to pay under Stats. 1901, p. 794.⁴⁷ Subsequently, the same plaintiff brought action for mandamus to compel the city to pay under the judgment so recovered, for which it had levied taxes. After saying that a demand upon the auditor was necessary in the first instance, by provision of city charter, the court discusses the mode of paying judgments.⁴⁸ By Stats. 1901, p. 794, two alternatives are provided: (1) single levy and payment of whole amount of judgment; or (2) annual levies and payment of fractional parts so levied, the whole not to extend over ten years. Under the latter,

⁴⁵ (May 16, 1922) 63 Cal. Dec. 575, 207 Pac. 251.

⁴⁶ Heyman v. Bath (July 11, 1922) 38 Cal. App. Dec. 604.

⁴⁷ Metropolitan Ins. Co. v. Deasy. (1919) 41 Cal. App. 667, 183 Pac. 243.

⁴⁸ Metropolitan Ins. Co. v. Rolph. (1920) 184 Cal. 557, 194 Pac. 1005.

a city cannot levy the entire amount and then pay only a fractional portion, as here attempted, but must, upon proper demand, pay all.⁴⁹

A judgment recovered against a municipality bears interest from its date, though the general rule is that in order to recover interest against a municipality there must be some statutory authority for the same.⁵⁰ But a judgment declaring a retired public officer entitled to accrued pension does not bear interest from the date of such adjudication, declares the Supreme Court, reversing the decision of the Court of Appeal in the matter.⁵¹ Analogous to the rule above mentioned, the remedy of garnishment may not be applied to funds due from a municipality, except as modified by section 710 of the Code of Civil Procedure. The rule was applied and the Code section found not applicable to the situation presented in *Vaughn v. Condon*,⁵² the rule of policy, for such it is, being "potent also to prevent the officers and agents for the time being of such corporations from waiving the exemption by appearing, without objection and admitting the indebtedness for the corporation."

In closing this subdivision, three Los Angeles cases may be briefly noted, though the subject matter does not warrant their union. In *Gamewell Fire Alarm Telegraph Co. v. Los Angeles*,⁵³ there was an attempt to evade the charter requirement that all contracts in excess of \$500 should follow certain formalities, by splitting the purchase into several items. The court rightly considered the various agreements as one contract, and therefore *ultra vires*.⁵⁴ In *Guaranty Trust and Savings Co. v. Los Angeles*,⁵⁵ a rather novel decision is presented: the city had completed a tunnel

⁴⁹ Following the rule of *Insurance Co. v. Deasy* (supra) an arbitration award between a municipality and a person injured by highway proceedings as to his property is founded on a tort, and is a judgment entitled to be enforced under Stats. 1901, p. 794. *Carry v. Long* (1919) 181 Cal. 443, 184 Pac. 857. Commented on in 7 California Law Review, 443, and 8 California Law Review, 99.

⁵⁰ *Engelbreton v. City of San Diego* (1921) 185 Cal. 475, 197 Pac. 651.

⁵¹ *Sheehan v. Police Commissioners of San Francisco* (March 29, 1922) 63 Cal. Dec. 427, 206 Pac. 70.

⁵² (May 20, 1921) 35 Cal. App. Dec. 212, 199 Pac. 545. Accord *Irillary v. San Diego*, (1921) 186 Cal. 535, 199 Pac. 1041.

⁵³ (1919) 45 Cal. App. 1149, 187 Pac. 163.

⁵⁴ Where a contract between the city and a contractor provided that a resolution of trustees was necessary to authorize extra work, a promise by one of the engineers to "make it right" is *ultra vires*. "A contractor dealing with a municipal corporation is chargeable with knowledge of limitations on the powers of its agents and officers." *Construction Co. v. Daly City*, (July 24, 1920) 32 Cal. App. Dec. 912, 192 Pac. 178.

⁵⁵ (1921) 186 Cal. 110, 199 Pac. 35.

through Hill Street, and issued bonds therefore, and after the property owners had paid the assessments, the whole proceeding was found to be void. The city was held liable for the moneys so paid by way of assessments, and in default of repayment, the tunnel was declared to be the property of the abutting owners, who were entitled to a foreclosure on the same to obtain repayment. The relationship of city and abutting owner is declared in *Porter v. Los Angeles*,⁵⁶ to be that of coterminous owners, and failure to use due care in excavating on the portion belonging to the city, resulting in injury to the abutter's land, gives rise to liabilities on the part of the city. The statute of limitations applicable is the three-year period prescribed by section 338, subdivision 2, of the Code of Civil Procedure and the distinction drawn by *Hicks v. Drew*,⁵⁷ (which Justice Olney considers should be overruled), prescribing a two-year limitation for consequential injuries to realty, is not here applicable.

MUNICIPAL LEGISLATION

In these days of municipal home rule in California, the question frequently arises as to the effect of the adoption of a new charter upon existing ordinances. *Ransome-Crumney Co. v. Fikes*,⁵⁸ answers as follows, "A change made in the organic law under which cities of a designated class are organized or controlled does not repeal existing ordinances and they remain in full force after the adoption of a new charter."

In certain other cases well-established principles have been again applied to rather novel sets of facts, in some instances. It is fundamental that the legislative recital is *prima facie* evidence of the truth thereof, and will be overthrown by the courts only if clearly erroneous. This rule has been several times restated. Of these cases four involve so-called "emergency" or "urgency" ordinances, destined to take effect immediately,⁵⁹ two cases arise by virtue of a recital in the ordinance that an expenditure is for the public benefit,⁶⁰ and one controversy is caused by a San Fran-

⁵⁶ (1920) 182 Cal. 515, 189 Pac. 105. See comments, 7 California Law Review, 451, 9 California Law Review, 71, 467.

⁵⁷ (1897) 117 Cal. 305, 49 Pac. 189, 26 L. R. A. (N. S.) 1047.

⁵⁸ (June 13, 1921) 35 Cal. App. Dec. 389, 199 Pac. 811.

⁵⁹ *Re Statham* (Jan. 12, 1920) 31 Cal. App. Dec. 193, 187 Pac. 986. *Glascok v. Wilde* (Oct. 13, 1921) 36 Cal. App. Dec. 394, 202 Pac. 456. *Morgan v. City of Long Beach* (Mar. 20, 1922) 37 Cal. App. Dec. 676, 207 Pac. 53. See 63 Cal. Dec. 581. *In re Newell* (May 23, 1922) 63 Cal. Dec. 593, 206 Pac. 61.

⁶⁰ *City of Los Angeles v. Snyder* (Feb. 23, 1921) 34 Cal. App. Dec. 598, 197 Pac. 403; *City of Los Angeles v. Dodge* (Feb. 23, 1921) 34 Cal. App. Dec. 598, 197 Pac. 403.

cisco ordinance reciting the necessity of its being.⁶¹ The Supreme Court also finds it necessary to set forth the established principle that a municipal ordinance takes effect immediately upon approval and compliance with any requisites there may be in the charter and will usually be held to relate back to the beginning of the day upon which it was adopted unless the fiction will do some injustice.⁶²

It is a well-known principle, also, that the initiative and referendum do not have any application to administrative acts, but solely to legislative enactments.⁶³ The difficulty, however, arises in the application of the rule. The exercise of discretion relative to the choice of materials for street improvements vested by the Vrooman Act in the city council, is an administrative power of which it cannot be deprived.⁶⁴ The distinction is again noticed in *McKevitt v. City of Sacramento*,⁶⁵ where the city, acting as trustee under the will of the late William Land, and pursuant to the trust, entered into a contract for the purchase of certain land for park purposes. A referendum was then held and the proposition defeated. The case arises by reason of an action on the part of the vendor to compel the city to perform specifically its contractual obligations, and the court granted the relief sought, saying that the city, acting as trustee, was acting in an administrative capacity, and such acts were not subject to referendum. Analogous to these cases, is the Supreme Court decision that a legislative action by the board of public utilities of a municipality cannot be reviewed by writ of certiorari.⁶⁶

STREET LAW

Street law is largely a matter of legislation and statutory construction, and is technical in the extreme. It is not considered to be of sufficient general interest to warrant space in this review. However, certain related cases have been included together with a few unusual points which might be interesting to other than the street law specialist. These will include two cases on the dedication of public ways, as to which subject some conflict and doubt exists. We may consider the last first.

⁶¹ *Burr v. City and County of San Francisco*, (1921) 186 Cal. 508, 199 Pac. 1034.

⁶² *Dorr v. Marsh* (1920) 184 Cal. 588, 194 Pac. 1002.

⁶³ *Hopping v. Richmond*, (1915) 170 Cal. 605, 611, 150 Pac. 977.

⁶⁴ *Hyde v. Wilde* (Jan. 15, 1921) 34 Cal. App. Dec. 311, 196 Pac. 118.

⁶⁵ (Nov. 8, 1921) 36 Cal. App. Dec. 640, 203 Pac. 132.

⁶⁶ *A. R. G. Bus Co. v. Board of Public Utilities of Los Angeles*, (1919) 181 Cal. 508, 185 Pac. 386.

The conflict arises over the question as to what is needed to constitute a dedication of a street, and an acceptance thereof, which will make the dedication irrevocable. In *Inyo County v. Given*,⁶⁷ there was a subdivision plan and sale of lots according to a map on which certain streets were delineated. There was no affirmative act or acceptance on the part of the county. Later, part of the streets were closed and the offer of dedication was definitely withdrawn. The Supreme Court in holding that there was a valid and sufficient withdrawal, attempts to clarify the general situation. *San Leandro v. Le Breton*⁶⁸ is cited as confusing the subject of dedication as between municipality and dedicator, with the private interrelations arising by way of estoppel against the vendor of the land in favor of the vendee. The matters are, of course, totally different, and the criticism seems truly to explain the confusion. A case in the appellate court in line with the *Le Breton* case is that of *Ferroggiaro v. Board of Public Works*,⁶⁹ where it was said to be the "established rule of law in this state" that dedication was complete on filing the map with the streets thereon delineated, and thereafter selling the lots accordingly. This case seemingly overlooks the Supreme Court decision, which latter, we believe, states the law correctly, that some affirmative act of acceptance on the part of the municipality, before revocation, is necessary to complete the dedication.

We may next consider the general law of this state that any obstruction of the public way is a nuisance and may be removed, this being still the rule, though modified to a considerable extent by the increasing needs of commercial policy. Even an attempt by the authorities of the city to license such obstruction is void, and one who partially obstructs a street with a lumber yard, in pursuance of such license, commits a misdemeanor, and will be liable accordingly.⁷⁰ But where a property owner dedicated, by deed, a portion of land to the county as a highway, reserving an easement for the strip of trees then growing on both sides, its

⁶⁷ (1920) 183 Cal. 415, 191 Pac. 688, Orrin K. McMurray, "California Property Decisions," 9 California Law Review, 447.

⁶⁸ (1887) 72 Cal. 170, 13 Pac. 405.

⁶⁹ (April 29, 1921) 35 Cal. App. Dec. 23, 198 Pac. 810, Orrin K. McMurray, "California Property Decisions," 9 California Law Review, 447. It was decided in this case, however, that there was a question as to the sufficiency of the original dedication, and unquestionably an abandonment by the municipality pursuant to § 2620 of the Political Code, since repealed in 1883.

⁷⁰ *Western States Gas and Electric Co. v. Lumber Co.* (1920) 182 Cal. 140, 187 Pac. 735.

municipal successor cannot by ordinance remove the obstruction even though unquestionably a nuisance, as such action would be an impairment of the obligation of contracts.⁷¹ Analogous to these decisions, we would refer to the novel contention set up in *Mulch v. Nagle*⁷² that since section 2620 of the Political Code provides that public highways should be at least forty feet in width, and private roads at least twenty feet, a public highway, twelve feet in width, could not be acquired by adverse user. The court held, however, that the section had no application to a road created by dedication, abandonment, or adverse user.

A few points of rather technical street law may be here outlined for reasons of special or general interest, although no detailed discussion can be attempted, in this review. In the first place, one new principle is added to California law by the Supreme Court in holding that where there are two or more assessment liens for street improvement, on abutting property, the lien subsequent in point of time is prior in right of foreclosure.⁷³ Another case holds that a viaduct is a bridge within the authorization of the Vrooman Act, and may be constructed under the provisions thereof.⁷⁴ The Supreme Court here overruled the contrary decision in the same case by the Court of Appeal.⁷⁵ And the general rule that there is no recovery by a property owner for a change of grade in streets, located sufficiently far from the property so as not to constitute a direct interference, is affirmed in *Wolff v. City of Los Angeles*.⁷⁶ Nor does the building of a tunnel impose an additional burden upon the easement in the street.⁷⁷ A city, having made a contract for the construction of a tunnel, may be compelled by the court, through writ of mandate, to carry out the provisions of the contract.⁷⁸ The assessment for the Twin Peaks Tunnel in San Francisco was questioned in *Larsen v. City of San Francisco*, because of the fact that it was constructed for street-car passage only,

⁷¹ *Hill v. City of Oxnard, Bayside* (Mar. 18, 1920) 31 Cal. App. Dec. 836, 189 Pac. 825, *Orrin K. McMurray*, "California Property Decisions," 9 California Law Review, 447.

⁷² (Feb. 25, 1921) 34 Cal. App. Dec. 639, 197 Pac. 421.

⁷³ *Woodill Electric Co. v. Young* (1919) 180 Cal. 667, 182 Pac. 422. Mentioned in 7 California Law Review, 453, 8 California Law Review, 106, and 9 California Law Review, 244.

⁷⁴ *Bailey v. Hermosa Beach* (1920) 183 Cal. 757, 192 Pac. 712.

⁷⁵ *Bailey v. Hermosa Beach* (Dec. 18, 1919) 30 Cal. App. Dec. 959.

⁷⁶ (Nov. 27, 1920) 60 Cal. Dec. 626, 193 Pac. 862.

⁷⁷ *Colegrove Water Co. v. City of Hollywood* (1907) 151 Cal. 425, 429, 430, 90 Pac. 1053, 13 L. R. A. (N. S.) 904.

⁷⁸ *Hayes v. Handley* (1920) 182 Cal. 273, 187 Pac. 952.

among other grounds, but was sustained, that being a valid and sufficient form of public travel.

The Supreme Court has had under consideration in several instances the curative provisions of the Street Improvement Act of 1911, among them the provision providing for an appeal to the council for a certain period of time (ten days) during which objections may be made. It has held that the decision after the period for appeal has elapsed is final and that all points not objected to are deemed waived and cannot thereafter be asserted.⁷⁹ Where the charter of the municipality is silent on the matter of improvement, the general law is deemed to control; at least as to all cities not charter cities.⁸⁰

The policy of the law to protect the erring municipality becomes again apparent in a consideration of the question whether the city is estopped to assert its claim to land, by reason of the fact that it has, through its proper officer, assessed and levied taxes on the same. The city is not estopped from asserting its easement in a street by reason of the fact that it had assessed taxes on the same to the plaintiff or his predecessor.⁸¹ And the same principle is applicable to an assessment of a city lot.⁸²

PUBLIC OFFICERS

Mayor Bartlett of Berkeley is responsible for two rather novel cases in this branch of municipal law. Berkeley has always been enterprising and adventuresome, exploring the seas of municipal powers with fearless helm. This time her pilot desires certain persons, responsible for a printing bill, to appear before him and testify as to the reasonableness thereof, and so he personally issues a subpoena for that purpose. They, however, refuse to put in any appearance. But, has the mayor this power he has attempted to exercise? The Court of Appeal in *Bartlett v. Dunscomb*⁸³ declares that he has not. His contention is that by virtue of the 1914 Amendment to Section 6 of Article XI of the Constitution, the freehold charter has now become the sole limitation in municipal

⁷⁹ *Watkinson v. Vaughn* (1920) 182 Cal. 55, 186 Pac. 753. *Hayes v. Handley*. *Supra*, n. 78. This is not applicable to jurisdictional defects. *City Street Improvement Co. v. Pearson* (1919) 181 Cal. 640, 185 Pac. 962.

⁸⁰ See later discussion of the Civic Center Case.

⁸¹ *Lantz v. City of Los Angeles* (1921) 185 Cal. 262, 196 Pac. 481. *Accord Burke v. City of Santa Cruz* (1912) 163 Cal. 807, 127 Pac. 154.

⁸² *Ernst v. Hall* (Mar. 16, 1921) 34 Cal. App. Dec. 801, 197 Pac. 809. Also see 10 *Ruling Case Law* 712.

⁸³ (July 24, 1922) 38 Cal. App. Dec. 685.

affairs, that he "has, therefore, complete authority to investigate any matter relating to municipal affairs unless prohibited from so doing by direct limitation." The court says, "The authority of each official, board, or department of the municipality to exercise any corporate powers with which it has been clothed, must be distinctly conferred or necessarily implied, in order to entitle it to act." . . . "the question of the regularity of a claim is one for the council, which has the sole power, under the charter to determine such question. . . ."

In the other case, Mayor Bartlett sought to maintain a proceeding in mandamus to compel the auditor of Berkeley to allow the claim of a creditor of the city for goods furnished the municipal market, a municipal business authorized by charter.⁸⁴ He relied on Article XI, Section 21, of said charter, reading as follows: "The Mayor shall be the chief executive officer of the City and shall see that all the ordinances thereof are duly enforced. He shall be charged with the general oversight of the several departments of the municipal government. He shall see that all contracts made with the city are faithfully performed." The court, however, disposed of his claim, the following excerpts containing the gist of the opinion: "It is clear that the appellant is not authorized to maintain this proceeding. He is not the real party in interest. . . . There exists no direct and tangible interest on the part of the City in the payment of this claim. . . . If the writ were granted the City would be no richer and no property or other tangible right would be secured by it. So far as the rights of the city are concerned, the controversy is over a mere moot question in which it has no financial interest." Regarding the Mayor's obligation to see that all ordinances and contracts are properly observed: "The duties conferred by the charter cover only matters in which the City has an affirmative interest. . . ." If the case is *de novo* in California, the humble reader of this decision might be pardoned a rebellious thought. Does not the court lay too much stress on the financial interest necessary? Is it not in accordance with the modern trend and better policy to grant relief even if other than a direct financial interest is involved? Is not the business honor and good name of a municipal institution greater than a mere financial interest? And if the city itself has a vital interest, what policy should prevent the chief executive officer from obtaining relief at the proper forum?

⁸⁴ (June 29, 1922) 38 Cal. App. Dec. 489.

But despite their interest, too much time cannot be spent on these cases. We must notice briefly the compensation, pension, civil service and other problems that have occupied the period of our review.

The right of a public officer to disability and other compensation exists only as an incident to the office. If the office pertains exclusively to the municipality, it is a municipal affair.⁸⁵ Disability legislation is not ipso facto retroactive, and in dealing with changes in the law applying to existing disabilities, the state of the law at the time the original injury occurred, is held to be the measure of the damage, the subsequent change of statute being disregarded.⁸⁶

On the other hand, pension legislation is usually given a retroactive effect unless otherwise specified.⁸⁷ Pension is determined by the existing rank and rate of pay at time of retirement, even though the pay may have been raised just prior to retirement.⁸⁸ Pension legislation usually requires that the officer shall have held the rank one year prior to retirement, but *Whitehead v. Davie* construes this to mean that the amount of pension shall be determined by the rank and salary held and received one day, a year prior to application for retirement.⁸⁹ Should the pay attached to the rank be raised subsequent to retirement, the court, following the analogy of the retired army officer cases,⁹⁰ says that the pensioner is then entitled to pay at such increased rate.⁹¹

The civil service cases rest upon statutory construction to a large extent. Two points may however be made. The acts and rules of civil service bodies are generally administrative in nature and not subject to review unless clearly in excess of their jurisdiction and powers.⁹² And where the charter creating the body has given it the power of hearing the appeals of discharged employees, this includes the power of reversing the discharge on sufficient reason,⁹³ the discharged officer being then entitled to

⁸⁵ *Jackson v. Wilde* (Apr. 15, 1921) 34 Cal. App. Dec. 1023, 198 Pac. 822.

⁸⁶ *Holmberg v. Oakland* (Nov. 21, 1921) 36 Cal. App. Dec. 746, 203 Pac. 167.

⁸⁷ *Whitehead v. Davie* (Feb. 15, 1922) 37 Cal. App. Dec. 385. Affirmed on rehearing in the Supreme Court. See Note 89.

⁸⁸ *Rumetsch v. Davie* (May 17, 1920) 32 Cal. App. Dec. 247, 190 Pac. 1075. Whether the officer must have held that rank for one entire year prior to retirement is left in doubt by the opinion of Justice Wilbur in the Supreme Court hearing of *Whitehead v. Davie*. See Note 89.

⁸⁹ *Whitehead v. Davie* (Oct. 11, 1922) 64 Cal. Dec. 369, 373.

⁹⁰ *U. S. v. Tyler* (1881) 105 U. S. 244, 26 L. Ed. 985.

⁹¹ *Aitken v. Roche* (July 29, 1920) 32 Cal. App. Dec. 1019, 192 Pac. 464.

⁹² *Mann v. Tracy* (1921) 185 Cal. 272, 196 Pac. 484.

⁹³ *Hackett v. Morse* (Feb. 5, 1920) 31 Cal. App. Dec. 388, 188 Pac. 308.

reinstatement at the rank and rate of pay held at the time of discharge.⁹⁴

Summary removal of officers under sections 758 and 772 of the Penal Code has been the object of attack in two cases, both sections being sustained as within the powers of the state. The fact that the usual accoutrements of a criminal trial are not present does not affect the validity of the proceeding.⁹⁵

Two other cases affect county officers exclusively but are interesting. Is a county sheriff who takes custody over and provides services for the Federal prisoners in the county jail, to that extent a Federal officer and therefore not accountable to the county for the moneys so received? The Supreme Court answers in the negative, and holds him only a county officer, the relationship being rather between the county and the Federal government.⁹⁶

The County Engineer Act⁹⁷ has been held unconstitutional since it is provided therein that the board of supervisors shall appoint the county engineer, wherever desired; this being in violation of Section 4 of Article XI of the Constitution which requires the legislature to establish uniform county political organizations.⁹⁸ Section 7½ and 7½a thereof, providing for freehold county charters and consolidated county and city governments, furnish the only exception to the above constitutional requirement.

A few general rules may be noted, well established but interesting. Any office which may be established by a municipality may be abolished in like manner, and provisions in the laws or charter, restricting removal of officers, do not apply to the abolishing of the office, if done in good faith.⁹⁹ And while a public officer, wrongfully removed, is entitled to pay up to the time of reinstatement, yet if during the pendency of the investigation the office is abolished, any right to pay ceases at such time.¹⁰⁰ The power to remove an officer is administrative, not judicial, and the rules applicable to judges regarding bias and prejudice do not apply to a board of commissioners in trying an officer for misfeasance under

⁹⁴ Title to an office may not be tried by mandamus. *Petersen v. Morse*, (July 6, 1920) 32 Cal. App. Dec. 758, 192 Pac. 51.

⁹⁵ *Reid v. Superior Court of Trinity County* (1919) 44 Cal. App. 349, 186 Pac. 634. *Cline v. Superior Court of Los Angeles County* (1920) 184 Cal. 331, 193 Pac. 929.

⁹⁶ *County of Los Angeles v. Cline* (1921) 185 Cal. 299, 197 Pac. 67.

⁹⁷ Stats. 1919, p. 1290.

⁹⁸ *Coulter v. Pool* (1921) 187 Cal. 181, 201 Pac. 120.

⁹⁹ *O'Neil v. Williams* (May 5, 1921) 35 Cal. App. Dec. 283, 199 Pac. 870.

¹⁰⁰ *Id.*

Stats. 1919, p. 1290.¹⁰¹ Just what the rights of an office-holder are regarding discharge and removal, is a little hard to decide. When is a hearing of some sort necessary? The Court of Appeal in one case says, "The removal of an officer involves the exercise of judicial functions only when the law in which the power is conferred requires notice and a hearing of the charge as a condition precedent to the removal."¹⁰² In another case it says, ". . . appointments to continue 'during good behavior' or for a fixed term of years, cannot be terminated except for cause, and the authorities are generally to the effect that in the latter cases the office-holder is entitled to notice and an opportunity to be heard."¹⁰³

MUNICIPAL POWERS

The cycle of the political theory of municipal government has had many interesting ramifications and developments. Of these, the ideal of "home rule" is probably by far the most interesting and instructive. When we consider the early city state and then our modern independent municipal unit, it will be seen that the use of the term "cycle" is justified. The history of home rule in California is interesting. Section 6 of Article XI of our Constitution as it originally read provided that all municipal charters should be subject to and controlled by general laws. Under this reading it was held that in case of any conflict between the provisions of a city charter and a general law the latter should prevail. To obviate this the section was amended in 1896 so as to provide that city charters should be subject to and controlled by general laws except in municipal affairs. The result was that thereafter in case of conflict between charter provisions and a general law, the former prevailed. The amendment, however, affected only cases of conflict between charter and general laws. It did not affect or change the rule in cases of conflict between general laws and municipal ordinances or other attempted exercise of municipal power upon matters as to which the city charter was silent. In case of such a conflict the general law still prevailed, since there was no conflict between it and the charter. To obviate this condition, the constitutional section was again amended in 1914 to read as at present. It provides that cities by their charters may be authorized "to make and enforce all laws and regulations, in

¹⁰¹ *Butler v. Scholefield* (Sept. 14, 1921) 36 Cal. App. Dec. 169, 201 Pac. 625.

¹⁰² *Sweetnam v. Board of Police Commissioners of Los Angeles* (Feb. 27, 1922) 37 Cal. App. Dec. 495, 206 Pac. 102.

¹⁰³ *Boyd v. Pendergast* (April 28, 1922) 38 Cal. App. Dec. 58, 207 Pac. 713.

respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters." The intent and effect of this amendment is very clearly to make municipal ordinances and exercises of power as to municipal affairs prevail over general laws in case of conflict between them.¹⁰⁴

If the charter is silent as to any particular subject, may a city operating under a freeholders' charter amended to make it supreme in municipal affairs, avail itself of the general laws upon the subject? The cases dealing with the question can be best appreciated by setting them forth in chronological order. The point is first raised in *Civic Center Association v. The Railroad Commission of the State of California*,¹⁰⁵ where the court construes the effect of a charter amendment to the Los Angeles Charter giving Los Angeles supreme power in municipal affairs subject only to the restrictions in its charter, the court saying,¹⁰⁶

"By subdivision 51, (Los Angeles Charter) as will be observed, the city has brought itself within the conditions of the amendments of 1914 to Sections 6 and 8 of Article XI of the Constitution. Thereupon, according to the terms of those sections of the Constitution, its powers over municipal affairs became all-embracing, restricted and limited by the charter 'only' and free from any interference by the state through general laws, including laws giving the Railroad Commission powers over public utilities. The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force with respect to Los Angeles. If its charter gives it powers concerning them, it has those powers; if its charter is silent as to any such power, no general law can confer it. Whether such powers heretofore conferred upon it by general law, if any there be, are now abrogated, or suspended, is a question we need not decide."

After the *Civic Center* case, Los Angeles, in January 15, 1919, amended its charter in order to take advantage of general laws.¹⁰⁷ Shortly before this 1919 amendment, two cases arose, in one of which

¹⁰⁴ Dissent by Justice Olney, *Morgan v. Los Angeles* (1920) 182 Cal. 301, 313, 314, 187 Pac. 1050.

¹⁰⁵ (1917) 175 Cal. 441, 166 Pac 351.

¹⁰⁶ *Id.* p. 448.

¹⁰⁷ Charter of Los Angeles, subd. 51, (1917) "To make and enforce all laws and regulations in respect to municipal affairs subject only to the restrictions and limitations provided in this charter, (1919) provided, however, that nothing herein shall be construed to prevent or restrict the City from exercising or consenting to, and the City is hereby authorized to exercise, any and all rights, powers and privileges heretofore or hereafter granted or prescribed by general laws of the state."

it was said "it is nevertheless true that the legislative body of the city has power to adopt any state law applicable to its municipal affairs. . . ." ¹⁰⁸ February 20, 1920, the Supreme Court decided the case of *Morgan v. City of Los Angeles*, ¹⁰⁹ where the majority of the court held that a city operating under a freeholders' charter, could not avail itself of general laws unless, by charter amendment, power had been given it to do so. Justice Olney dissented as to this construction of the constitutional provisions in question. The last of this line of cases was *Hyde v. Wilde*, ¹¹⁰ decided January 15, 1921. Two quotations will indicate the position taken. "Where no particular provisions are made covering the matter falling within the classification as a 'municipal affair,' the state law controls." And "Where no special proceeding is outlined touching a municipal subject, the state law always controls by force of the Constitution. (Section 6, Art. XI, Const. Cal.)"

This case made no mention of the *Morgan* case; we can only conjecture that it was not called to the court's attention. The writer cannot see the line of logic running through these cases. Justice Olney seems to have a more sound view of the constitutional sections in question than his associates; the *Hyde* case is in line with his opinion, and opposed to the majority in the *Morgan* case. But in view of the *Morgan* case it would seem necessary for charter cities to follow the example of Los Angeles in the 1919 amendment to her charter.

It is with relief that we turn to certain rules of law upon which the courts are agreed. Both Section 18 of Article XI of the Constitution and the Municipal Incorporation Act require that a municipality in order to contract for expenses exceeding the income for the year must have the assent of two-thirds of the voters. These provisions were successfully called upon to restrain the completion of a contract whereby the commission of Sacramento attempted to bind the city to make an annual expenditure of five thousand dollars, in return for a deed of park land. ¹¹¹ But they are not applicable to the expenditure of a present fund for the acquisition and construction of a dam for municipal water purposes, ¹¹² nor to the purchase of a private water system, ¹¹³ nor the

¹⁰⁸ *Cole v. City of Los Angeles*, (1919) 180 Cal. 617, 182 Pac. 436. *Hayes v. Handley*, (1920) 182 Cal. 273, 187 Pac. 952.

¹⁰⁹ (1920) 182 Cal. 301, 187 Pac. 1050.

¹¹⁰ (Jan. 15, 1921) 34 Cal. App. Dec. 311, 196 Pac. 118.

¹¹¹ *Chester v. Carmichael* (1921) 187 Cal. 287, 201 Pac. 925.

¹¹² *Heilbron v. Sumner* (1921) 186 Cal. 648, 200 Pac. 409.

¹¹³ *Kane v. Wedell* (Oct. 13, 1921) 36 Cal. App. Dec. 391, 202 Pac. 340.

repayment of a tax paid under protest,¹¹⁴ nor a judgment founded on a tort liability.¹¹⁵ The provisions refer only to general property taxes for current expenses and not special assessments for particular forms of public improvement.¹¹⁶

The municipality, being a corporation is subject to limitations upon its contractual powers, much like a private corporation. It must regularly pursue its authority. Under the authority of section 1281 of the Code of Civil Procedure, any municipality may submit to arbitration any subject of civil action against it.¹¹⁷ The city may act as trustee under a will, and as such acts are purely administrative, its contracts pursuant to the trust are hence not subject to control by the voters.¹¹⁸ Ordinary contracts are entered into pursuant to ordinance enacted for that purpose. Usually an ordinance takes effect in thirty days, but certain emergencies justify an ordinance intended to take effect immediately. Where a contract is made pursuant to such an urgency ordinance and the court finds the urgency non-existent, is the contract void, or merely postponed for thirty days? The Supreme Court, denying a rehearing from the decision in the Court of Appeal in *Morgan v. City of Long Beach*,¹¹⁹ intimates that "any contract made within the thirty days would be unauthorized. Any contract, whether express or implied, made thereafter in pursuance of the ordinance would be valid."

The trend of modern authority is to permit a far wider scope of undertaking, corresponding with the increasing complications of civilization. Our appellate court recently granted mandate compelling the executive officers of the City and of the County of Los Angeles to enter into a contractual arrangement for a stadium, the legislative bodies having determined that this constituted a public purpose.¹²⁰ The sale and distribution of electric energy manufactured by the city is an example of a business enterprise that cities are finding profitable. It "is a municipal affair and one over which

¹¹⁴ *Heyman v. Bath* (July 11, 1922) 38 Cal. App. Dec. 604.

¹¹⁵ *Metropolitan Insurance Co. v. Deasy* (1919) 41 Cal. App. 667, 183 Pac. 243.

¹¹⁶ *Emery v. San Francisco Gas. Co.* (1865) 28 Cal. 347. *Chambers v. Satterlie* (1870) 40 Cal. 514.

¹¹⁷ *Cary v. Long* (1919) 181 Cal. 443, 184 Pac. 857. See 8 California Law Review, 99.

¹¹⁸ *McKevitt v. City of Sacramento* (Nov. 8, 1921) 36 Cal. App. Dec. 640, 203 Pac. 132.

¹¹⁹ (May 19, 1922) 63 Cal. Dec. 581, 207 Pac. 53.

¹²⁰ *City of Los Angeles v. Snyder* (Feb. 23, 1921) 34 Cal. App. Dec. 598, 197 Pac. 403. *County of Los Angeles v. Dodge*. Id.

the legislature of the state has no control."¹²¹ We may emphasize our point, as to the newer liberal views of the business powers of a municipality by the following statement in the case last cited, "There ought to be some limit placed in equity upon the right of a taxpayer to inflict a great loss upon the city by a claim of technical departure from authorized procedure."¹²² The two Los Angeles cases involving contracts by the city with certain power companies turn largely on construction of the Los Angeles charter, and for that reason, though interesting, are omitted.

However, it seems that the courts do still recognize technical distinctions, for the Supreme Court refused to allow the city of San Diego to build an amusement pier, saying that "a municipality cannot ordinarily construct a public improvement outside the jurisdiction without special sanction of charter or general law." Justices Olney, Lawlor, and Sloane dissented, very reasonably feeling that a pier starting from within the boundaries and extending out into ocean waters would be only technically speaking outside the boundaries.¹²³ Nevertheless the law must be upheld even if the result is to deprive our southern friends of such a glowing tourist attraction. It has also been held that the construction and operation of sewers by a city is not a business that may be carried on for the purposes of revenue, under the general laws applicable to municipalities of the various classes and a charge that is found to include revenue purposes is invalid.¹²⁴ In another pleasure pier case, the City of Oceanside was constituted trustee under a charitable trust of one hundred thousand dollars to be used in building said municipal pleasure pier, on condition that the city provide a like amount. The court held that the amendment of 1917 to section 1313 of the Civil Code, excepting the state or a state institution from the restriction of the act upon charitable bequests or trusts, has no application to a municipality, which is neither a state, nor a state institution, nor in the same class within the construction of that section.¹²⁵ This seemingly settles the law on the question and leaves it in a rather unsatisfactory state. It

¹²¹ *Los Angeles Gas & Electric Co. v. City of Los Angeles* (Feb. 25, 1922) 63 Cal. Dec. 295, 205 Pac. 125.

¹²² *Id.* See also *Miller v. City of Los Angeles* (1921) 185 Cal. 440, 197 Pac. 342.

¹²³ *Mulville v. City of San Diego* (1920) 183 Cal. 734, 192 Pac. 702. See Note in 9 California Law Review, 161 criticizing the decision.

¹²⁴ *City of Madera v. Black* (1919) 181 Cal. 306, 184 Pac. 397. Note in 8 California Law Review, 100.

¹²⁵ *City of Oceanside v. Moody* (1921) 186 Cal. 643, 200 Pac. 417.

may be suggested that here is a field for beneficial legislation. The political agents and units of the state might well be brought within the list of exceptions.

What rights are given by our laws to a common carrier, in and upon the streets of a municipality for the use of its tracks and appurtenances thereto? The Pacific Electric Railway Company, acting upon a franchise granted by ordinance of Los Angeles County, built an industrial spur line to the premises of the Simons Brick Company. The Supreme Court on the basis of *Los Angeles v. Southern Pacific Railroad Co.*,¹²⁶ says that the use of highways by railroads under section 465 and 470 of the Civil Code is limited to main tracks.¹²⁷ As to the fact that the company had expended money because of the permission granted it is said, "The doctrine of estoppel cannot, we think, be applied so as to validate, as against the public, grants in excess of the limited powers conferred upon the public agents who assumed to make them."¹²⁸

The modern trend is again indicated in the modification of the common-law rule that a political unit could not validly employ a person to assist in carrying out functions of government which were delegated or assigned to public servants. This has been accomplished by legislation, notably additional assistance for county officers pursuant to section 4041 C of the Political Code. This puts in code form the effect of a decision supporting a contract to collect delinquent taxes.¹²⁹ And the settled construction of subdivision 16 of section 4041 (also subdivision 16 of section 4041 a) of the Political Code is that the Board of Supervisors may in its discretion employ any counsel it wishes, to prosecute and defend suits and actions.¹³⁰

Again we come to a case that stands out because of its unusual interest and importance. In the *City of Pasadena v. Railroad*

¹²⁶ (1910) 157 Cal. 363, 108 Pac. 65.

¹²⁷ *Simons Brick Co. v. City of Los Angeles* (1920) 182 Cal. 230, 187 Pac. 1066. A grant of a right of way over city lands is void if it does not follow, (1) in the case of a city railway, the provisions of the charter; (2) in the case of a larger railroad, the provisions of the Broughton Act. *City of San Diego v. Kerckhoff* (Oct. 5, 1920) 33 Cal. App. Dec. 286, 193 Pac. 801. The right of the larger railroad in city streets under § 465 of the Civil Code is a mere right of way, while that of the city railway, granted by the city, is held to be a franchise. *San Francisco Railway Co. v. Scott* (1904) 142 Cal. 222, 228, 75 Pac. 575.

¹²⁸ *Gardella v. County of Amador* (1913) 164 Cal. 555, 129 Pac. 993.

¹²⁹ *Skidmore v. West* (1921) 186 Cal. 212, 199 Pac. 497. See 7 California Law Review, 443.

¹³⁰ *Woolwine v. Superior Court of Los Angeles County* (1920) 182 Cal. 388, 188 Pac. 569.

Commission of the State of California,¹³¹ the city brought an application for certiorari to review an order of the commission, requiring the city to file a schedule of rates for its electric service which it conducted as a public service unit. The order was annulled; the court, in overruling the contention that the city while acting as a public service unit was a private corporation in effect, said, "The distinction does not go to its character as a corporation but to its liabilities in exercising one class of its powers as compared to its liabilities in the exercise of its functions as a local governmental agency." *Los Angeles Gas and Electric Co. v. Department of Public Service of Los Angeles*,¹³² decided in the Court of Appeal on the strength of the Pasadena case, affirms the rule that the Public Utilities Act has no application to, and the Railroad Commission no jurisdiction over any public service carried on by a municipal corporation under authority of the constitution and laws of this state. While it may be desirable to extend the powers of a municipality to all such affairs as may within reason be called municipal, yet it might seem that the regulation of public utility rates is a matter of general concern; that if it is to the interest of the people to have the rates charged by a private corporation regulated by a state commission, it is of like interest to have those charged by a municipal corporation, acting in a quasi private capacity, also subject to regulation. However, academic discussion of the question is worth little in view of the fact that the people of the state have expressed their will, in the recent general election, that the municipally owned public utility shall not be subject to state regulation. An interesting point was raised but not decided in the Pasadena case: In the event that a city such as Pasadena, for example, should furnish public utility services to an adjoining city, such as South Pasadena, which of them would have jurisdiction to regulate rates in the latter corporation? South Pasadena would seem rendered ineligible by the rule in California that a municipality cannot regulate the rates of a privately owned utility within its boundaries. The court in the principal case stated definitely that the Railroad Commission did not have jurisdiction under such circumstances.¹³³ Lastly we approach that hodge-podge

¹³¹ (1920) 183 Cal. 526, 192 Pac. 25. See note criticising in 9 California Law Review, 252.

¹³² (March 21, 1921) 34 Cal. App. Dec. 809, 197 Pac. 962.

¹³³ The note in 9 California Law Review, 252 at 254, discusses the question raised, giving authorities which have held the State Commission to have jurisdiction in like circumstances.

of things indefinite, that juridical garbage-can containing the sweepings from the judicial table, which has, for want of a better name, been termed "police powers." Upset the receptable and there roll forth questions of dance, undertaking parlors, infectious diseases, goats, frozen oranges and gushing rivers of bootleg. A brief examination of these articles may prove interesting and in some cases amusing, though our classification is arbitrary and anything but artistic.

Some naughty people danced in a proper place therefor in Pasadena, which had become improper by virtue of an ordinance prohibiting intensive study of the terpschicorean art, or its melodic running partner, in a room within twenty-five feet of a building used as a residence by another person, between the hours of 10 p. m. and 8 a. m. the next day. The court rallied to the defense of our great national exercise, feeling that while possibly the variations and varied contortions thereof lacked dignity and grace nevertheless they could not permit the Fourteenth Amendment to the Federal Constitution, or Section 1 of Article I of our California Constitution to be infringed.¹³⁴

The zoning problem is coming to be of considerable importance in municipal law. The only recent case on the subject deals with regulation of an undertaking parlor, where the court said, "We entertain no doubt that the establishment of undertaking parlors in thickly settled communities and residential districts may constitute such an invasion as to bring the regulation and control and if necessary the prohibition thereof, within the well-recognized police power of the state."¹³⁵ A hospital for the treatment of infectious diseases, while probably subject to zoning, cannot be prohibited entirely, this being an unreasonable exercise of the police power.¹³⁶ But it is not unreasonable for Pasadena to prohibit the keeping of goats within twenty feet of the nearest dwelling, there being an insufficient benefit therefrom to overbalance legitimate objections.¹³⁷

Liquor questions, as has been intimated, furnish a large supply of cases on police powers. What are considered the main decisions during the period under review have been selected and set forth. The City of Stockton adopted an ordinance expressly making the

¹³⁴ *In re Hall* (Dec. 31, 1920) 34 Cal. App. Dec. 218, 195 Pac. 975. Note in 9 California Law Review, 343.

¹³⁵ *Brown v. City of Los Angeles* (1920) 183 Cal. 783, 192 Pac. 716. Note approving decision in 9 California Law Review, 164.

¹³⁶ *San Diego Tuberculosis Association v. City of East San Diego* (1921) 186 Cal. 252, 200 Pac. 393.

¹³⁷ *In re Mathews* (July 31, 1922) 38 Cal. App. Dec. 726.

Volstead Act applicable within the city limits. In habeas corpus proceedings, the validity of the ordinance was attacked,¹³⁸ but the ordinance was sustained on two grounds: (1) that by virtue of the independence of the municipality in municipal affairs since the 1914 amendment of Section 11 of Article XI of the state Constitution, it may enforce the same; and (2) that the state has empowered the municipality with the prohibition of traffic in intoxicating liquors in the exercise of its police powers. In *re Kinney*,¹³⁹ presents a further point, inasmuch as the ordinance under consideration provided that nothing should be deemed a violation of it that was not a violation of the Volstead Act. It was contended that this was such a delegation of legislative powers as to render the act in question void, but the court held otherwise, saying that it amounts merely to a further reference to legislative acts of another body in existence. In this connection, what is the effect of national legislation upon municipal legislation which is partly in conflict therewith? Does it abrogate the entire ordinance or merely render that certain part inoperative? The Court of Appeal takes the latter view and sustains the prohibitory portion of an ordinance while admitting that the regulatory and permissive portions are invalid.¹⁴⁰ It should be mentioned that these are ordinances adopted before the Eighteenth Amendment to the Federal Constitution.¹⁴¹

ELECTION LAW

The law of elections is technical and almost entirely based on statutory construction; for these reasons we may briefly dismiss the few recent cases appertaining thereto. The two bond election cases from Los Angeles present two points, the court deciding in one that a legislative requirement that a proposition receive two-thirds of the votes of the qualified voters means two-thirds of those expressing themselves at the polls, saying that a person is not

¹³⁸ In *re Volpi* (June 17, 1921) 35 Cal. App. Dec. 453, 199 Pac. 1090. Note discussing this line of cases in 10 California Law Review, 70.

¹³⁹ In *re Kinney* (Aug 10, 1921) 35 Cal. App. Dec. 855, 200 Pac. 966.

¹⁴⁰ In *re Tostello*, (April 29, 1922) 38 Cal. App. Dec. 61. In *re Pappas* (April 24, 1922) 38 Cal. App. Dec. 15; also see 38 Cal. App. Dec. 19; In *re Ajuria and Uriguen* (May 22, 1922) 63 Cal. Dec. 592 and the cases therein cited: Also see *Carse v. Marsh* (Sept. 3, 1921) 36 Cal. 73, discussed in note in 10 California Law Review, 70. (Rehearing of this latter case was granted by the Supreme Court, October 31, 1922, which is still pending.)

¹⁴¹ A liberal construction of police powers is found in *Re Newell*, (May 23, 1922) 63 Cal. Dec. 593, where an ordinance was sustained as a valid exercise of police powers which prohibited shipping of oranges showing a certain percentage of frost injury.

considered a "qualified voter" within the meaning of Section 18 of Article VI of the Constitution till he shall have expressed himself by his vote.¹⁴² In the other case, a bond election for electric system bonds was held together with a municipal election, the elections being called separately, but the same rosters, voting booths, ballot boxes, list of assisted voters, et cetera, were used. Construing the Municipal Bond Act, the election was sustained, as being a separate election within the meaning of the Act.¹⁴³

Los Angeles again furnishes us with a case directing attention to the well-recognized distinction between directory and mandatory provisions in the election law. Here the error complained of was a failure to print the words "municipal ticket" and printing the words "instructions to voters" in smaller type than required by the general law. The court rightly held these only directory, and, showing that no harm had resulted, sustained the election.¹⁴⁴

While it is probably advisable to consider the election of municipal officers as a municipal affair, yet it is confusing to the practitioner who desires to rely upon the precedent of cases decided upon municipal election questions. As pointed out in *Wright v. Engram*,¹⁴⁵ all cases arising over freehold charter questions must be carefully examined, and the individual charter consulted in each case. Generally speaking, however, the distinction between the ministerial and discretionary duties of the clerk is maintained. Where the clerk performs his duty as required and makes a decision, the court will not interfere; it is only in case of failure to act, or a plain abuse of discretion that the court takes jurisdiction. The act of the clerk in determining whether a certain petition filed in his office is sufficient to authorize a recall election,¹⁴⁶ or is sufficient to authorize an election of freeholders to prepare a charter in accordance with Section 7½ of Article XI of the Constitution, is ministerial.¹⁴⁷ So also is the duty of the clerk to allow an amendment to the affidavit accompanying an initiative petition.¹⁴⁸

For all cities operating under a freehold charter the decision of *Moore v. City Council of Los Angeles*,¹⁴⁹ will be interesting. Sec-

¹⁴² *Morgan v. City of Los Angeles* (1920) 182 Cal. 301, 187 Pac. 1050.

¹⁴³ *Mead v. City of Los Angeles* (1921) 185 Cal. 422, 197 Pac. 65.

¹⁴⁴ *Rideout v. City of Los Angeles* (1921) 185 Cal. 426, 197 Pac. 74.

¹⁴⁵ *Wright v. Engram* (1921) 186 Cal. 659, 201 Pac. 788. This case distinguishes *Baines v. Zemansky* (1917) 176 Cal. 369, 168 Pac. 565.

¹⁴⁶ *Wright v. Engram* (Supra).

¹⁴⁷ *Chester v. Hall* (Dec. 13, 1921) 36 Cal. App. Dec. 981, 204 Pac. 237.

¹⁴⁸ *Hinkley v. Wells* (March 29, 1922) 37 Cal. App. Dec. 746, 206 Pac. 1023.

¹⁴⁹ (July 18, 1922) 38 Cal. App. Dec. 644.

tion 8 of Article XI of the Constitution, referring to the adoption of a municipal charter, says, "The legislative body of said City shall within fifteen days after such filing . . . cause such papers to be published" Later in the section it is said "The amendments submitted shall be advertised in the same manner as herein provided for the advertisement of a proposed charter . . ." The question arises whether "manner" includes "time;" must the proposed amendment be advertised within fifteen days of filing? The court reaches the logical conclusion that it is not the legislative intent that "manner" should include "time," in view of other portions of the Constitution.

For those concerned with recall elections, it might be well to mention the case of *Cohn v. Isensee*,¹⁵⁰ construing it to be the intention of the legislature that sections 1196 and 1197 of the Political Code with respect to blank spaces should apply to the Recall Act, and granting mandate to provide the ballot in such cases with blank spaces.¹⁵¹

ANNEXATION AND CONSOLIDATION

The ambition of Los Angeles to be the metropolis of the west has given rise to some law upon this subject. The question of consolidation is bound up with election law, but is preferably dealt with here. In a case arising over the proposed consolidation of Sawtelle and Los Angeles the Supreme Court has decided that the ballot in the Sawtelle election must contain a notice of sharing the indebtedness of the larger city, in accordance with Section 8½ of Article XI of the Constitution. Justice Wilbur dissented on the ground that the notices of election had sufficiently set forth this assumption of indebtedness.¹⁵² In *Fawkes v. City of Burbank*,¹⁵³ the court decided that a notice of election to submit the proposition of consolidation with Los Angeles together with assumption of a rated share of her indebtedness was insufficient, but in its discretion refused to order a new election, the electors having, at the void election expressed an overwhelming opinion against the proposition.

¹⁵⁰ (1920) 45 Cal. App. 531, 188 Pac. 279.

¹⁵¹ For the purposes of the Disincorporation Law requiring a petition signed by one-half of the voters at the last municipal election, the election voting to incorporate may be such "municipal election." *Watson v. Fouch* (Dec. 24, 1921) 37 Cal. App. Dec. 6. Affirmed by Supreme Court in denying petition for rehearing. (Feb. 21, 1922) 63 Cal. Dec. 266, 205 Pac. 58.

¹⁵² *People ex rel. Coe v. City of Los Angeles* (1921) 187 Cal. 56, 200 Pac. 947.

¹⁵³ *Fawkes v. City of Burbank* (March 14, 1922) 63 Cal. Dec. 363, 205 Pac. 675.

This being a political question, a private citizen cannot be heard to question the same in court.¹⁵⁴ Likewise the incorporation of a school district cannot be questioned by a mere taxpayer.¹⁵⁵ They are matters which only the state may question.¹⁵⁶

Van Wagener v. MacFarland prohibits a county school district from irregularly annexing territory of a city of the sixth class, since by section 1576 of the Political Code it is provided that "in no instance shall the territory within an incorporated city of the sixth class be in more than one school district." In another case the contention, based on this section, was that a city of the sixth class could not annex additional territory which was part of another school district. The court rightly refused to follow this logic, stating that the section applies only to school districts.¹⁵⁷ What then becomes of the portion newly annexed? There is an expression of opinion that, following the analogy of *Petition of East Fruitvale Sanitary District*,¹⁵⁸ the part annexed will merge with the municipal school district.¹⁵⁹

CONFLICTS OF LAW

This terminology is intended to cover a slightly larger field than is ordinarily considered to be within its scope. Certain conflicts have arisen, however, that may be thus classified, and are of genuine interest. Four recent cases have arisen by virtue of real or apparent conflicts between municipal legislation and the Motor Vehicle Act.¹⁶⁰ A municipal fire engine collided with a street car, which had failed to yield the right of way prescribed by municipal ordinance. It was contended that the section in the above act relating to fire apparatus was controlling, but this contention was denied by the court, which stated that it should not be construed to apply to the government or its agencies unless expressly included by name.¹⁶¹ The effect of the decision was to render the defendant street-car company liable for the injury resulting from its breach

¹⁵⁴ *Coe v. City of Los Angeles* (1919) 42 Cal. App. 479, 183 Pac. 822. See 7 *California Law Review*, 444.

¹⁵⁵ *Van Wagener v. Mac Farland* (June 16, 1922) 38 Cal. App. Dec. 350.

¹⁵⁶ *People v. City of Los Angeles* (1908) 154 Cal. 220, 97 Pac. 311.

¹⁵⁷ *Mitchell v. Henry* (1920) 184 Cal. 266, 193 Pac. 502.

¹⁵⁸ (1910) 158 Cal. 453, 111 Pac. 368.

¹⁵⁹ A description in an incorporation proceedings like that used in an ordinary deed and based on a government map was sustained in *Wagner v. City of Inglewood* (June 29, 1921) 35 Cal. App. Dec. 524, 200 Pac. 60.

¹⁶⁰ *Stats.* 1917, p. 382.

¹⁶¹ *Balthasar and City of Pasadena v. Pacific Electric Railway Co.* (1921) 187 Cal. 302, 202 Pac. 37.

of the municipal ordinance, whereas, had the Motor Vehicle Act prevailed, the defendant having complied with its provisions, could not have been held responsible.

Again, an ordinance making the driving of an automobile while intoxicated a misdemeanor, is inconsistent with Section 17 of the Motor Vehicle Act, which makes it a felony or, in the discretion of the court, a high-grade misdemeanor. The state law prevails.¹⁶² *Mann v. Scott*¹⁶³ is cited as showing a tendency on the part of the courts to hold that the Motor Vehicle Act is supreme over inconsistent municipal legislation on matters within its purview. But the ordinance is not necessarily inconsistent if it merely adds certain new regulations to govern the added traffic of a city street, such as keeping close to the curb in turning corners.¹⁶⁴ The case presents an interesting point, declared not yet to have been decided by the Supreme Court, whether a municipality under a freeholders' charter may regulate street traffic as a purely "municipal affair." In *ex parte Daniels*,¹⁶⁵ the Supreme Court seems to have decided this very point, the petitioner being arrested for driving between fifteen and twenty miles per hour on the streets of Pasadena, which had by ordinance provided a fifteen-mile speed limit, while the provisions of the Motor Vehicle Act concerning speed in closely settled communities provided a rate of twenty miles. Writ of habeas corpus was granted, the court holding the municipal ordinance inconsistent and therefore invalid. The opinion of the majority may well be quoted: "We therefore conclude that the regulation of traffic upon the streets of a city is not one of those municipal affairs in which, by the Constitution, chartered cities are given a power superior to that of the state legislature, but that such power is subject to the general laws of the state, and [municipal ordinances] if inconsistent therewith, are invalid." There is much to be said however, on behalf of the dissenting opinion of Justice Shaw, in which Chief Justice Angellotti concurred. In their belief, the regulation of traffic under such conditions is a

¹⁶² *Helmer v. Superior Court of Sacramento County* (June 10, 1920) 32 Cal. App. Dec. 590, 191 Pac. 1001.

¹⁶³ (1919) 180 Cal. 550, 182 Pac. 281.

¹⁶⁴ *Pemberton v. Army* (1919) 42 Cal. App. 19, 183 Pac. 356. Note in 8 California Law Review, 111. This case was decided on a damage suit by an injured wife. In a case of the same name, involving the same injury, the husband suing, the Supreme Court found it unnecessary to the decision and refused to state whether or not the ordinance in question was annulled by the Motor Vehicle Act. *Pemberton v. Army* (1919) 180 Cal. 762, 182 Pac. 964.

¹⁶⁵ (1920) 183 Cal. 636, 192 Pac. 442.

"municipal affair," and municipal regulation thereof should prevail over general laws. It seems to the writer to be a case of the balance of convenience; of asking whether the general public need is better served by uniform conditions of travel over the state than by local regulation within the boundaries of municipalities operating under more of less crowded and peculiar traffic conditions.

Likewise, while the use of streets for the maintenance therein of telegraph and telephone poles and wires is a municipal affair,¹⁶⁶ yet in some matters, especially as pertaining to the regulation of railroads running through the municipality, the Railroad Commission has jurisdiction and exclusive control.¹⁶⁷ Therefore the City of Los Angeles was held liable for violation of General Order No. 26 of that body, providing that no poles should be located within eight feet of the center of the track.¹⁶⁸

Several cases have been decided involving interpretation of county charter which may be of interest to those facing like problems. The provisions of a county charter regularly adopted pursuant to Section 7½ of Article XI of the Constitution are paramount to the provisions of the general law upon the particular subject.¹⁶⁹ However, if the charter provision runs counter to the constitution it must fail. The section of the Constitution above mentioned provides for the regulation of deputyships by the Board of Supervisors under freehold charters. The Tehama County charter while failing to provide for the office of deputy county clerk, did provide that the county clerk's "chief deputy shall receive One Thousand Two hundred dollars per annum." The court found this invalid and declared that under such circumstances the constitutional provision implies that the general law shall remain effective and finding that the chief deputy had been appointed in conformity with section 4024 of the Political Code granted him his salary in accordance with section 4266 of that code.¹⁷⁰

With regard to the payment of official salaries, counties may be classified as follows: (1) Definite salary for each principal officer

¹⁶⁶ *Sunset Telephone and Telegraph Co. v. City of Pasadena* (1911) 161 Cal. 265, 118 Pac. 796.

¹⁶⁷ *Civic Center Association v. Railroad Commission* (1917) 175 Cal. 441, 451, 166 Pac. 351.

¹⁶⁸ *Sincerney v. City of Los Angeles* (July 7, 1921) 35 Cal. App. Dec. 591, 200 Pac. 380.

¹⁶⁹ *Winter v. De Shields* (March 15, 1920) 31 Cal. App. Dec. 807, 189 Pac. 703. Charter salary rate upheld. *County of Tehama v. Winter* (Jan. 31, 1922) 37 Cal. App. Dec. 295, 205 Pac. 97. Charter mode of ascertaining and paying salary upheld.

¹⁷⁰ *Jones v. De Shields* (1921) 187 Cal. 331, 202 Pac. 137.

and for each deputy. For example, in Tulare County the treasurer's salary is \$2,800 and the deputy's salary is \$1,800.¹⁷¹ (2) Officers paid in a lump sum; i. e. total amount for all expenses of their office, including their salaries and that of any deputy or deputies. The Tehama County charter providing for a salary of \$2,400 per annum for sheriff and compensation for deputies not to exceed \$1,300 is an example of this latter class, giving a lump sum of \$3,700. This charter provision was considered not to be a limitation upon the right of the supervisors to appoint further deputies and was hence not violative of the constitution.¹⁷²

This classification and distinction becomes of importance in construing the new 1921 section of the Political Code, section 4041C, which provides, "Whenever in the judgment of the board of supervisors of any county it is necessary for the expeditious transaction of the business of any county office, the board by unanimous vote may provide for and allow additional assistance to any county officers. In any such case the board of supervisors shall fix the amount of compensation of such additional employees and shall limit in advance the period of time for which assistance is allowed. The powers granted to the supervisors under the provisions hereof shall not be so exercised as to result in increasing the compensation of any county officer after his election during his term of office."

The result of *Foucht and County of Tulare, v. Herni* seems to be that counties under the first classification may avail themselves of the benefits of section 4041C aforesaid but that counties under the second classification cannot fully avail themselves thereof, inasmuch as providing additional assistance to an officer operating under the lump sum plan, during the existing term, is raising his salary in violation of the Constitution.

The court again found it necessary to state that the county cannot legislate for the municipality in respect to affairs of which the municipality ordinarily takes cognizance; and it is the right of every municipality to legislate on the subject of liquor regulation.¹⁷³ Nor is county legislation to be classed as general laws relative to the municipality.¹⁷⁴

¹⁷¹ *Foucht and County of Tulare v. Herni* (May 18, 1922) 38 Cal. App. Dec. 202, 208 Pac. 362.

¹⁷² *Martin v. De Shields* (1921) 187 Cal. 340, 203 Pac. 118.

¹⁷³ *In re Knight* (Dec. 3, 1921) 36 Cal. App. Dec. 903, 203 Pac. 777.

¹⁷⁴ The gist of certain cases, not sufficiently important, for our purposes, to justify discussion, is here set forth:

MISCELLANEOUS

A few cases will not fit within even the generous interpretation given some of our previous subdivisions. This heading serves merely to give physical unity to the unrelated cases that remain to be discussed.

Section 8 of Article XI of our Constitution, relative to the adoption of municipal charters, has twice been before the courts for judicial construction. In *Comstock v. Davis*,¹⁷⁵ it was objected that a charter approved by concurrent resolution as therein provided was invalid because the title did not contain a statement of subject matter as required in case of general laws by another section of the Constitution (Article XI, Section 24). This contention was rejected, however, by reason of long acquiescence in this mode of charter approval. It would also seem that, if authorized by the Constitution, it cannot be prohibited by another portion of the constitution, and if a conflict exists, the remedy is constitutional amendment. In *Spaulding v. Desmond*,¹⁷⁶ the petitioner sought to attack the charter of Sacramento and refer back to the journals of the houses to show that the present charter was incorrect. The court quoted Section 8 of Article XI of the California Constitution as follows: "one copy of the charter so ratified (by concurrent resolution) and approved shall be filed with the Secretary of State, one with the Recorder of the county in which such city is located, and one in the archives of the city; and thereafter the courts shall take judicial notice of the provisions of such charter." The court held itself bound by the ratified and filed copy.

1. "The government of schools and the employment and discharge of teachers are not municipal affairs, and by virtue of the constitutional provisions referred to (Article XI, Sec. 8) the state law controls whenever a conflict arises." *Vallejo High School District of Solano County v. White* (1919) 43 Cal. App. 359, 184 Pac. 302. Also see *West v. Board of Education* (1919) 43 Cal. App. 199, 184 Pac. 877.

2. The Act of 1909, page 528, providing for the issuance of school bonds, is not inconsistent with § 880 et seq. of the Political Code (Overruling a dictum to the contrary in *Santa Ana School District v. Talbert* (1912) 19 Cal. App. 104). *Board of Education of Santa Ana v. Talbert* (May 19, 1921) 35 Cal. App. Dec. 214, 199 Pac. 555.

3. The charter is paramount to the general law regarding municipal elections. *Sidler v. City Council of Bakersfield* (1919) 43 Cal. App. 349, 185 Pac. 194.

4. Municipal firemen are not within the provisions of the various state eight-hour laws. *Danielson v. City of Bakersfield* (1920) 184 Cal. 262 193 Pac. 242.

¹⁷⁵ (1919) 44 Cal. App. 275, 186 Pac. 380.

¹⁷⁶ (May 26, 1922) 63 Cal. Dec. 607. See 64 Cal. Dec. 1.

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In *Monsch v. Pellissier*,¹⁷⁷ the liability of a property owner in a city, subject to the provisions of the Vrooman Act, for defects in his sidewalk is discussed. The Supreme Court, reversing the lower appellate court, held the owner liable. In *Frost v. City of Los Angeles*, the Supreme Court decided that the Act of 1913 regarding the furnishing of water to consumers by a public utility has no application to a municipality when acting in this capacity.¹⁷⁸ This, while decided before the Pasadena rate case, seems to proceed on the same basis. And in this connection a recent decision of the Supreme Court, concerning a proceeding before the Railroad Commission by the City of Auburn to fix the value of a water plant which it was purchasing by authority of law, is interesting. The court in a prolonged discussion chooses the "straight line" method of determining the value of the plant, rather than the "sinking fund" method. "In this method the value is reduced in the ratio which the age bears to the life of the plant."¹⁷⁹

From the citizen's standpoint two important cases have been given us by the Supreme Court, during the year 1922. In the recent decision in *O'Farrell v. County of Sonoma*,¹⁸⁰ the facts were as follows: the Supervisors had called an election on a road building bond issue, pursuant to general law, setting forth as one item the following:

"Sebastopol to Freestone:

"Beginning at a point in the present Sebastopol-Freestone Road 1.1 mile Westerly from the limits of the Town of Sebastopol, said point at the end of the present oil road; thence along the present road to its intersection with the present Freestone-Valley Ford Road.

"Distance 4.0 miles.

\$85,000.00"

The bonds were voted, and the county surveyor thereafter prepared plans and estimates for a portion of the road only, namely 1.93 miles, and these were submitted for bids. The lowest bid was \$72,840.00, which the supervisors proposed to accept, this action being brought to enjoin such a contract, inasmuch as the remaining 2.07 miles would cost much more than the part for which bids were received. The court in granting the injunction said: "The order calling the election and the ratification of that

¹⁷⁷ (1922) 187 Cal. 790, 204 Pac. 224. Note approving decision in 10 California Law Review, 358.

¹⁷⁸ (1919) 181 Cal. 22, 183 Pac. 342.

¹⁷⁹ *Pacific Gas & Electric Co. v. Devlin* (Jan. 30, 1922) 63 Cal. Dec. 132, 203 Pac. 1058.

¹⁸⁰ (July 28, 1922) 64 Cal. Dec. 133, 208 Pac. 117, adopting the opinion rendered in 37 Cal. App. Dec. 714.

order by the electors constituted a contract between the state and the individuals whose property was thereby affected. . . . The contract between electors and supervisors can only be altered by the entire consent of all parties thereto."

The other case is that of *Anderson v. City of Los Angeles*.¹⁸¹ The Act of 1921 (Stats. 1921, p. 844) provided in effect for the sale of all unsold bonds held by a municipality at a price which would net the purchaser not more than six per cent. Los Angeles had put forth an issue in 1914 at four and one-half per cent, and one in 1919 at five per cent, parts of both issues remaining on hand, and it entered into a contract with one Hellman to sell the entire stock on hand at sufficiently less than par to net him six per cent in accordance with the Act of 1921. The court, in granting an injunction to prevent the city from carrying out the contract, says that the action of the voters in authorizing the above issues, proceedings being taken under the Bond Act of 1901, created a status very analogous to a contractual relationship, and to sell at a greater interest is a fraud on them, which the court will prevent, and the legislative body cannot sanction anything which will have that effect. The majority did not think that an actual contractual relationship, such as was found in *Merchants etc., Bank v. Escondido Irrigation District*,¹⁸² was here present, but Chief Justice Shaw believes it was. His theory is interesting, namely, that the voters are the principals, and their assent was material, that the city was the agent and promisor, and the buyer was the promisee. The effect of this decision is to nullify the operation of the Act in question in all cases where bonds have been issued pursuant to an election wherein the voters have voted as to a rate of return on such bonds. The decision is based largely on our historical policy of protecting the citizen from any arbitrary action on the part of the governmental unit. As a matter of good business, the Act in question is a good measure. The remedy suggested is to amend the Act so as to give the voters a chance to assent to the new contracts.

Lloyd E. Graybiel.

San Francisco, California.

¹⁸¹ (1922) 187 Cal. 753, 203 Pac. 992.

¹⁸² (1904) 144 Cal. 329, 77 Pac. 937.