9-1-1975

"Reference Statutes"--Borrow Now and Pay Later?

R. Perry Sentell Jr.
University of Georgia School of Law

"REFERENCE STATUTES"—BORROW NOW AND PAY LATER?

*R. Perry Sentell, Jr.**

I.

In 1923, the General Assembly of Nod enacted the "Statute of Paul" (so designated because of the sponsoring legislator, Paul Perfect), which empowered municipalities of Nod (called "sleepy hollows") to issue licenses to individuals wishing to engage in legitimate private enterprises. One provision of the Paul Statute directed that applicants for such licenses "must make application in the mode prescribed by Code Section 23-112, dealing with county licesning of pickle processors" (popularly known as the "Peter Piper Statute").

In 1923, Code Section 23-112 required that an applicant for a pickle processing license submit his application to county licensing authorities in 25 copies. In 1974, however, the Nod legislature amended this code section so as to reduce from 25 to 3 the required number of application copies.

In 1975, Mary Marvel applied to the municipality of Dull, in the State of Nod, for a license to operate a commercial establishment to be known as Mary Marvel's Museum. Dull refused to issue the license on the ground that Mary had applied only in triplicate and (under the Statute of Paul) was thus 22 copies short in her application. Mary contends that she has met the applicable application requirements (under the 1974 amendment to the Peter Piper Statute), that Dull's refusal is thus invalid, and that she is entitled to a license.

Which position is the correct one, and why—Or, when you borrow from Peter to pay Paul, what happens to Mary?[1]

II.

Lazy legislators are frequently big borrowers. In proposing, drafting, introducing, and enacting legislation, they often find it convenient to utilize other legislation already on the books. Instead of detailing the manner in which a particular subject is to be handled,

---

* Professor of Law, University of Georgia School of Law. A.B., LL.B., University of Georgia, 1956, 1958; LL.M.. Harvard Law School, 1961. Member of the Georgia Bar.

[1] A distilled version of a germ of a proposal for a future examination question in the University of Georgia Law School's famous course in "Law of Legislative Government."

they simply incorporate or adopt merely by reference the manner provided by an earlier statute for handling another subject. This legislative borrowing process is called "incorporation by reference," and the incorporating enactment is designated a "reference statute."[2] The reference terminology may be either specific or general in nature, and it may extend to an entire statutory scheme, or to only one statute in a scheme, or to only one provision or section of a statute. Whatever the extent of the reference, however, the consanguinity and affinity between the adopting statute and the adopted measure is an extremely important relationship in legislative law.

The device of incorporation by reference is practically a universally employed one, and its historical roots permeate the thirteenth century English Parliament.[3] Its claimed virtues have been extolled and its reputed vices condemned through an analytical balancing process which renders mild by comparison the splitting of the atom.[4] On the one side, the device has been called safer, because it introduces no new policy matters, and has been deemed conducive to legislative enactment, because it results in a briefer and less intimidating statute.[5] On the other side, the device has been characterized as dangerous, capable of compounding existing statutory errors, and often ill-suited for the legislative occasion.[6] Most of the authorities appear to agree that the evils of incorporation by reference outweigh its advantages.[7]

Perhaps the single greatest problem of legislative borrowing is the potential which it creates for future confusion.[8] Even assuming that

---

[2] *See, e.g.*, Read, *Is Referential Legislation Worth While?*, 25 MINN. L. REV. 261 (1941).

[3] *Id.* at 262.

[4] *See, e.g.*, 2A J. SUTHERLAND, STATUTORY CONSTRUCTION §§ 51.07, 51.08 (4th ed. C. Sands 1972); J. DAVIES, LEGISLATIVE LAW AND PROCESS IN A NUTSHELL 225 (1975); R. DICKERSON, LEGISLATIVE DRAFTING 96-99 (1954); Poldevaart, *Legislation by Reference—A Statutory Jungle*, 38 IOWA L. REV. 705 (1953); Read, *Is Referential Legislation Worth While?*, 25 MINN. L. REV. 261 (1941); Annot., 168 A.L.R. 627 (1947).

[5] *See, e.g.*, J. DAVIES, LEGISLATIVE LAW AND PROCESS IN A NUTSHELL 225 (1975); R. DICKERSON, LEGISLATIVE DRAFTING 96-99 (1954).

[6] *Id.*

[7] *See, e.g.*, Poldevaart, *Legislation by Reference—A Statutory Jungle*, 38 IOWA L. REV. 705, 707 (1953).

[8] Incorporation by reference gives rise to other problems not discussed here. First, there is the issue of whether such incorporation runs afoul of the typical state constitutional prohibition against revising or amending statutes by mere reference to their titles. Many jurisdictions appear to have resolved this issue in the negative. *See, e.g.*, 2A J. SUTHERLAND, STATUTORY CONSTRUCTION § 51.07 (4th ed. C. Sands 1972). Further there is the issue of whether such incorporation—when the adopted measure comes from another legislative or administrative

the reference is clear and that the two measures appropriately complement each other, what is to be the result when the adopted measure is later changed? What is the impact upon the adopting statute when the adopted statute is later amended, suspended, or repealed? Is the adopting statute also changed or terminated, and, if not, what meaning can then be assigned to it? When the matter borrowed is no more, what is the plight of the borrower?

One solution to this quandary might be an explicit statement by the legislature at the time it changes or repeals the adopted statute.[9] Short of such legislative foresight—and the same pressures which gave rise to the adopting statute also cut against this explicitness—resolve must come from the courts when litigation ensues. Over the years, the basic judicial attitude has been that once the incorporation by reference has taken place, the adopting statute and the adopted statute coexist as independent entities.[10] Thus, neither statute depends upon the other for its existence, and the adopted provisions are as much a part of the adopting statute as if they were expressly detailed therein.[11] Logically emerging from this attitude, it is recounted, was the early common law rule that the legislature's change or repeal of the incorporated statute had no effect upon the incorporating statute.[12]

In later times, according to the writers, American courts diluted the absolute nature of the earlier rule by holding the matter to be resolved according to "legislative intent," and then proceeded to construct avenues for reaching that intent.[13] The most popular of these avenues was the approach which focused upon the nature of the reference employed by the incorporating statute.[14] If that refer-

---

body—breaches the typical proscription on the delegation of state legislative power. A popular approach has been to approve incorporations which adopt only existing measures and to condemn incorporations which purport to extend to future changes in the adopted measures. *See, e.g.*, Brabner-Smith, *Incorporation by Reference and Delegation of Power*, 5 GEO. WASH. L. REV. 198 (1936).

[9] An even more obvious and preferable solution would be an express legislative statement in the original incorporating statute as to whether later changes in the incorporated measure are also adopted. Indeed, this is the counsel of most of the authorities. In most incorporations by reference, however, this is not done; and the problem here discussed is thus created. *See, e.g.*, Poldevaart, *Legislation by Reference—A Statutory Jungle*, 38 IOWA L. REV. 705 (1953); Read, *Is Referential Legislation Worth While?*, 25 MINN. L. REV. 261 (1941).

[10] *See, e.g.*, 1A J. SUTHERLAND, STATUTORY CONSTRUCTION § 23.32 (4th ed. C. Sands 1972).

[11] *See, e.g.*, Read, *Is Referential Legislation Worth While?*, 25 MINN. L. REV. 261, 269 (1941).

[12] *Id.* at 270.

[13] *Id.* at 271-72.

[14] *See, e.g.*, 2A J. SUTHERLAND, STATUTORY CONSTRUCTION § 51.08 (4th ed. C. Sands 1972);

ence was fairly specific—as to a stated statute or section or provision—then the manifested intent was that the incorporating statute took the incorporated statute as it then existed and was not affected by later changes in it. If, however, the reference was a less particular one—as to the law of a subject generally—then the incorporation was intended to extend to later changes in the incorporated provisions.[15] Neither of these approaches was absolute, however, and both could be rebutted by stronger indications of legislative intent in the opposite directions.

The judicial ploy described has been the subject of considerable criticism. An initial objection goes to the device of legislative intent itself: many times the one clear point about legislative intent is that there was no such intent concerning the matter in litigation.[16] Moreover, the indicated emphasis upon the nature of the reference in discovering this intent has also been found unsatisfactory. First, the distinction between a specific and general reference is only a matter of degree—at times an exceedingly slight degree—and can be extremely nebulous. It offers little in the way of a definitive test.[17] Second, the courts themselves have not always been faithful to the distinction, and, on occasion, appear to employ techniques irreconcilable with it. For instance, some have evolved the rule that when a local or special statute incorporates general statutes—no matter how general the reference may be—the adoption does not include later changes in the general statute.[18] It has been observed that under this approach the emphasis is unaccountably placed upon the nature of the incorporating statute rather than the nature of the incorporation itself.[19] Finally, the most basic criticism is that most of the courts forced to confront the problem have been content merely to enunciate the general approaches as though they were dogmatic rules and that reasoned judicial analysis has been almost absent from the opinions.[20]

Poldevaart, *Legislation by Reference—A Statutory Jungle*, 38 IOWA L. REV. 705, 724 (1953); Read, *Is Referential Legislation Worth While?*, 25 MINN. L. REV. 261, 271 (1941).

[15] *Id.*

[16] Poldevaart, *Legislation by Reference—A Statutory Jungle*, 38 IOWA L. REV. 705, 730 (1953).

[17] *Id.* at 724.

[18] *Id.*; Annot., 168 A.L.R. 627, 635 (1947).

[19] Poldevaart, *Legislation by Reference—A Statutory Jungle*, 38 IOWA L. REV. 705, 724 (1953).

[20] Read, *Is Referential Legislation Worth While?*, 25 MINN. L. REV. 261, 273 (1941).

III.

Against the magnitude of the background now sketched, the Georgia story is a puny one indeed. Whatever the reason for this dearth of detail, it is not that the Georgia General Assembly shuns employment of incorporation by reference. Rather, it appears that until recent years the practice was rarely focused as the point of attack in Georgia litigation. This trait of reticence on the part of statutory challengers is now fading, however, and reference legislation is beginning to feel the heat. A glancing glimpse at this skimpy saga may at least posit the problem in perspective.[21]

An early example of incorporation by reference, as well as some of the problems it presents, was provided by the 1923 case of *Jackson v. Beavers*.[22] The statute there challenged purported to declare certain conduct criminal, providing that ". . . the violation of the preceding sections shall be punished as for a misdemeanor, under Code of Georgia, volume 3, section 1065, of 1911."[23] Because there was no volume 3 of the adopted specified code, the challenger argued that the adopting statute failed to provide a penalty and was thus incapable of enforcement.[24] In considering this contention, the supreme court conceded that the Georgia Code of 1911 consisted only of volumes 1 and 2. Technically it was true, therefore, that the challenged statute had incorporated by reference a provision which did not exist. Eschewing such technicalities, however, the court noted that volume 2 of the 1911 Code did contain a section 1065 which fixed the punishment for misdemeanors "except where otherwise provided."[25]

> In arriving at the meaning of the legislature, and thus at the true construction of this section of this act, the code number may be rejected under the maxim *falsa demonstratio non nocet*. . . . By doing this, this act provides punishment for those breaking its provisions.[26]

---

[21] For a similar and perhaps vaguely related exercise in legislative law, see Sentell, *Repeals of Repeals: Statutory Musical Chairs*, 10 GA. ST. B.J. 41 (1973).

[22] 156 Ga. 71, 118 S.E. 751 (1923).

[23] *Id.* at 73, 118 S.E. at 752.

[24] "The reasoning is, that, as there is no volume 3 of the Code of 1911, there is no penalty for infractions of this law." *Id.* The statute purported to regulate the conduct of professional bondsmen.

[25] *Id.* at 73, 118 S.E. at 752.

[26] *Id.*

In this fashion, therefore—and in the name of "legislative meaning"—the court appeared to "correct" the reference in the incorporating statute from "volume 3" to "volume 2." At this point, however, the court hedged: even if this substitution could not be made and the incorporating statute rendered complete, still the result would not be invalidity. Rather, in that event section 1065 of volume 2 of the Code would provide the missing penalty. Indeed, that was its declared purpose.[27]

Jackson v. Beavers thus illustrated one of the most perplexing potentials of incorporation by reference—the attempted adoption of a nonexisting statute. At best such legislative blunders are likely to produce litigation, and at worst to result in a meaningless reference statute. That this was not the result in *Jackson* could be attributed to the Georgia supreme court's persistent patience in seeking "legislative meaning" to uphold even a criminal statute. The strength of the court's convictions in "correcting" the reference was rendered somewhat questionable, however, by its apparent appeal to an alternative rationale.

Probably the most famous Georgia legal controversy ever to touch upon the topic was the litigation of *Featherstone v. Norman*.[28] In that well-known case of 1930, the Georgia supreme court was presented with a potpourri of protests against the validity of the state's first income tax statute.[29] One of these protests pointed to provisions of the statute which expressly adopted the method of calculating net income employed by the federal income tax statute, and which similarly incorporated federal tax exemptions.[30] These adoptions, the protest persisted, amounted to an unconstitutional delegation of the state's legislative power to Congress.[31]

It was not the supreme court's poo-poo of the protest, but rather the foundation fashioned, which was significant for present purposes. In determining whether such statutory borrowing amounted to invalid delegation, the court indicated that a distinction must be

---

[27] "So it follows, that, if section 8 of this act does not provide for such punishment, this section of the Code does fix a punishment for violations of its provisions." *Id.* at 73, 118 S.E. at 752.

[28] 170 Ga. 370, 153 S.E. 58 (1930).

[29] [1929] Ga. Laws 92.

[30] The court said that the statute adopted "certain existing features of the Federal income tax in arriving at the net taxable income of the taxpayer under it, and makes, along with other exemptions of its own, those allowed by the income tax act of the general government." 170 Ga. at 394, 153 S.E. at 70.

[31] GA. CONST. art. III, § I, para. I (1877).

drawn between the adoption of existing federal provisions and the adoption of provisions which Congress might enact in the future. So long as the adoption was only of existing provisions, no state legislative power was delegated to Congress. In the Georgia income tax statute, the court declared, only existing provisions were incorporated:[32]

> When a statute adopts a part or all of another statute, domestic or foreign, general or local, by specific and descriptive reference thereto, the adoption takes the statute as it exists at that time. The subsequent amendment or repeal of the adopted statute or any part thereof has no effect upon the adopting statute. . . . Prior acts may be incorporated in a subsequent one by terms or by relation; and when this is done, the repeal of the former leaves the latter in force, unless also repealed expressly or by necessary implication. The adoption of a general law does not carry with it the adoption of the changes afterwards made in such law. . . . An act adopting by reference all or a part of another statute means the law as existing at the time of the adoption, and does not adopt any subsequent addition thereto or modification thereof.[33]

Accordingly, the delegation argument was rejected.[34]

Featherstone was not concerned, therefore, with an instance in which the General Assembly had incorporated by reference one of its own prior enactments. Rather, the adoption was of a prior federal statute; and this was the point which gave rise to the delegation argument. In responding to that argument, however, the Georgia supreme court applied a distinction which turned upon general principles not limited to the adoption of federal statutes. The purpose of these principles was to determine whether an incorporation by reference adopted only existing provisions or future ones as well. The thrust of the principles was that the specific and descriptive reference to any provisions amounted to an adoption limited to that point in time. Subsequent amendments, modifications, or repeals

---

[32] "This act in no way undertakes to make future Federal legislation a part of the law of this State upon that subject." 170 Ga. at 394, 153 S.E. at 70.

[33] *Id.* at 394-95, 153 S.E. at 70.

[34] The court distinguished its decision in Green v. City of Atlanta, 162 Ga. 641, 135 S.E. 84 (1926). For a discussion see Sentell, *Delegation in Georgia Local Government Law*, 7 GA. ST. B.J. 9 (1970), reprinted in R. P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 479 (2d ed. 1973).

thus had no effect upon the reference statute unless clearly specified. In this fashion, therefore, the Georgia court enunciated precepts for dealing with the impact of changes in adopted statutes upon adopting statutes, in a case where no such changes had occurred. If these precepts had been previously stated in Georgia, the court appeared unaware of the occasion; in formulating them, it cited not a single Georgia authority.

Litigation which did present the instance of later changes in adopted provisions was the 1967 case of *Campbell v. Hunt*.[35] There a 1943 municipal charter directed that "if any person shall desire to contest any election held under and by virtue of this Act, said contest shall be held, and notice thereof given, as is now provided for contest of elections for County officers in this State."[36] In 1943, general statutes provided that election contests for county officers must be heard and determined by the county ordinary.[37] In 1964, however, these general statutes were expressly repealed and replaced by a state election code which vested jurisdiction over county election contests in the superior courts and which declared its inapplicability to municipal elections.[38] The issue presented by *Campbell* was whether, under the 1943 charter, a municipal election contest could be heard by the superior court.[39]

In resolving this issue, the Georgia court of appeals set forth a "summary from legal texts" which included the following observations:[40]

> The question whether one statute adopting provisions of another by reference will be affected by amendment or repeal of the adopted statute is one of legislative intent and purpose. . . . A specific reference statute (referring specifically to a particular statute by its title or section number) incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, and unless the legislature has expressly or by strong implication shown its intention to the contrary, subsequent amendment or repeal of the referred statute will have no effect on the reference statute. A

---

[35] 115 Ga. App. 682, 155 S.E.2d 682 (1967).
[36] [1943] Ga. Laws 1624.
[37] GA. CODE § 34-3001 (1933).
[38] [1964] Ga. Laws Spec. Sess. 26.
[39] The trial court had answered the question of jurisdiction in the negative.
[40] For this summary, the court cited only to textual sources.

> general reference statute (referring to the law of a subject generally) adopts the law on the subject as of the time the law is invoked. This will include all amendments and modifications of the law subsequent to the time the reference statute was enacted.[41]

By virtue of *Campbell v. Hunt*, therefore, Georgia was confronted with a classic instance of the General Assembly's incorporating by reference its own prior enactments which it then later repealed and replaced. By virtue of its "summary" in the *Campbell* opinion, the court of appeals sought to deal with this instance by focusing upon both legislative intent and the nature of the incorporation. The problem was that in this case these two elements appeared at war. Although the reference of incorporation was considerably general in nature,[42] the court relied upon three features which it viewed to cut in the opposite direction. First, the use of the words "as is now provided" in the adopting charter manifested legislative intent not to adopt later changes in the adopted general statutes.[43] Second, the 1964 replacement for the general statutes specifically declared that it did not apply to municipal elections.[44] Finally, "the adoption in a special or local law of the provisions of a general law does not carry with it the adoption of changes afterward made in the general law."[45] Accordingly, the court concluded that under the municipal charter the appropriate forum for an election contest was the county ordinary and not the superior court.

As indicated, *Campbell v. Hunt* was a significant milepost along the route here traced. As recent as it was, it presented an outstanding example of incorporation by reference in Georgia statutory law and of the problems projected when changes are later made in the adopted statute. Although the court of appeals rather unquestioningly formulated general rules from "legal texts," it then employed "legislative intent" to avoid the stated result of a general reference. That reference did not, after all, incorporate later changes in the adopted statute, the court concluded, for a combination of reasons. Whether any one of these reasons would have been sufficient stand-

---

[41] 115 Ga. App. at 684, 155 S.E.2d at 684.

[42] The statute referred only to the adopted law generally and not to any specifically described statute, section, or provision.

[43] "The word 'now' has a fixed and definite meaning." 115 Ga. App. at 683-84, 155 S.E.2d at 684.

[44] [1964] Ga. Laws Spec. Sess. 26, 28.

[45] 115 Ga. App. at 684, 155 S.E.2d at 684.

ing alone, the court did not indicate. Although two of them were interpreted from language in the statutes at issue, the third depended simply upon the nature of the reference statute. The possibility of tension between the focus of this exercise and that of looking to the nature of the incorporation was not explored by the court. Finally, as in *Featherstone*, the court mentioned virtually no prior Georgia authority for its ruminations—not even *Featherstone*.

Providing appropriate contrast with the court of appeals' decision in *Campbell* was its 1970 treatment of *Davis v. City of Macon*.[46] One of the questions there in issue was whether the municipality possessed the power to waive its immunity from tort liability by becoming a self-insurer.[47] This authority was claimed by virtue of a 1960 population statute which purported to empower covered municipalities "to become self-insurers under the provisions of Ga. L. 1955, p. 448, sections 1 and 2, codified in Ga. Code Ann., Sections 56-1013 and 56-1014."[48] The opposing contention was that in 1961 the legislature had expressly repealed and re-enacted the 1955 statute as a part of the new state insurance code.[49] Thus, after 1961, the argument proceeded, the statute incorporated by the 1960 population statute no longer existed, and the reference statute could no longer constitute valid authority.[50]

The court initiated its consideration of the controversy by quoting *Campbell*'s counsel that such questions were to be determined "by the intent and purpose of the legislature."[51] So armed, the court then characterized the 1961 legislative treatment of the 1955 statute as a mere codification, by virtue of which no changes were made or intended.[52] "Hence we regard it as a law of continuous life to which the 1960 population Act still applies."[53] Consequently, the court could conclude:

> [W]e construe the authorization granted to municipalities in the 1960 population Act "to become self-insurers under the provisions of Ga. L. 1955, p. 448, sections 1 and 2, codified in

---

[46] 122 Ga. App. 665, 178 S.E.2d 557 (1970).

[47] The municipal activity in litigation was the operation of a motor vehicle.

[48] [1960] Ga. Laws 2709.

[49] GA. CODE ANN. § 56-2437 (1961).

[50] This was the defensive argument offered by the municipality.

[51] 122 Ga. App. at 670, 178 S.E.2d at 560.

[52] "The Insurance Code merely codified Ga. L. 1955, p. 448 as Insurance Code § 56-2437, and it is apparent that no change of the waiver-of-immunity provisions of the 1955 Act were made or intended." *Id.* at 670, 178 S.E.2d at 560.

[53] *Id.*

> Ga. Code Ann., Sections 56-1013 and 56-1014" as now referring to Insurance Code § 56-2437.[54]

In this manner, the municipality was held to possess the authority to waive its governmental immunity.

At this juncture, therefore, the court of appeals' performance was one of genuine intrigue. In *Campbell* it enunciated with approval a developed precept that general incorporations by reference extended to later changes in the adopted statute and that descriptive incorporations by reference did not. It immediately qualified this precept by "legislative intent," however, and then employed that qualification in *Campbell* to hold that a general incorporation did not include later changes in the adopted statute. In *Davis*, it engaged the same qualification to conclude that a highly specific and descriptive incorporation did include later changes in the adopted statute. The consistency in the performance, therefore, was the court's departure from the general precept.

One year following the court of appeals' decision in *Davis*, the supreme court was forced to a flashback of *Featherstone*. In *Johnston v. State*,[55] the following provision of a Georgia criminal statute was alleged to constitute an invalid delegation of legislative power:

> The term "depressant or stimulant drug" means . . . any drug which contains any quantity of a substance designated by present regulations promulgated under the Federal Act as having potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.[56]

Moreover, the statute expressly defined "Federal Act" to include "all amendments thereto, and all regulations promulgated thereunder."[57] When these two provisions were considered together, the challenger maintained, they purported "to make future Federal legislation a part of the law of this State," and infringed the formulation of *Featherstone*.[58]

Rejecting this challenge, the supreme court highlighted the words

---

[54] *Id.* Otherwise, said the court, a 1963 population statute, "approved after the effective date of the Insurance Code, and containing the same reference to the 1955 Act, is likewise meaningless and futile." *Id.*

[55] 227 Ga. 387, 181 S.E.2d 42 (1971).

[56] GA. CODE ANN. § 79A-903 (1967).

[57] GA. CODE ANN. § 79A-102 (1967).

[58] 227 Ga. at 392, 181 S.E.2d at 46.

"present regulations" in the adopting provision, and construed them to mean "those existing at the time of the enactment."[59] So construed, this language served as a limitation upon the other adopting provision's reference to amendments.[60] "Had the General Assembly used 'regulations' with no adjective," conceded the court, "appellants' contention might have merit."[61] As here presented, however, the reference did not extend to future federal legislation and was not an invalid delegation of legislative power by the General Assembly.[62]

Illustrating the ascending attractiveness of incorporation by reference to litigation in Georgia is the point that in 1974 both appellate courts were called to the task. At virtually the same time, both courts were confronted with controversies which called for current consideration of the matters here traced. With history as prologue, however, few predictions of performance could be proffered.

The supreme court's opportunity came in *Boynton v. Lenox Square, Inc.*,[63] litigation over the validity of procedures for contesting tax assessments. Pursuant to local amendment to the constitution, the joint city-county board of tax assessors was created in 1952 by special statute.[64] In 1958, that special statute was amended to incorporate by reference "Code Section 92-6912, relating to arbitration."[65] In 1972, the General Assembly expressly repealed Code Section 92-6912, and replaced it with a statute which abolished the arbitration procedure in respect to county boards of tax assessors, and established instead county boards of equalization.[66] The taxpayers in *Boynton* contended that by virtue of the 1972 statute, the joint board of assessors could no longer employ the arbitration procedure, and a board of equalization must be provided.[67]

---

[59] *Id.*

[60] This was true, the court said, regardless of whether or not the reference may have the contended effect upon other provisions of the statute not so limited.

[61] 227 Ga. at 392, 181 S.E.2d at 46.

[62] "Furthermore," the court observed, "the amendment to the Federal Act which expressly included the drug LSD as a 'depressant or stimulant drug,' was enacted in 1966, hence was a part of the Federal Act at the time of its adoption by the Georgia General Assembly in 1967." *Id.* at 393, 181 S.E.2d at 46-47.

[63] 232 Ga. 456, 207 S.E.2d 446 (1974).

[64] [1952] Ga. Laws 2825.

[65] [1958] Ga. Laws 3390.

[66] [1972] Ga. Laws 1094. The replacement statute was substituted as a new section 92-6912.

[67] They further contended that since no such board had been provided, they had been denied due process, and the 1973 tax assessments were null and void. The trial court had agreed with this contention.

Without citation to any Georgia authority, the supreme court concluded that the 1972 statute did not affect the operation of the joint board:

> The repeal of Code § 92-6912 abolished arbitration in each county that had a county board of tax assessors, but it did not abolish arbitration for the joint Atlanta-Fulton County operation since arbitration for this joint operation had been established for it by the special 1958 statute which had incorporated Code § 92-6912 by reference. The repeal of Code § 92-6912 by the 1972 statute did not repeal the 1958 special statute.[68]

The court quoted a textual formulation of the "general rule" which focused upon whether the reference was "specific and descriptive,"[69] and finished as follows:

> We hold that the 1958 special statute in this case, which adopted Code § 92-6912, was not repealed either expressly or by implication by the enactment of the 1972 statute which repealed Code § 92-6912.[70]

Accordingly, the joint board could still employ arbitration and was not obligated to establish a board of equalization.[71]

Only eight days after *Boynton*, the court of appeals rendered its performance in *Medical Association v. Joint City-County Board of Tax Assessors*.[72] Interestingly, this controversy dealt with the same legislative sequence as *Boynton*, but with a variation. The issue was whether the board possessed statutory authority to appeal from an arbitration award, and again the answer turned upon the effect of the 1958 incorporation by reference of Code § 92-6912.[73] Although that adopted statute did not allow for such an appeal in 1958, it was amended in 1969 to so provide.[74] Additionally, the 1972 repeal and replacement of the Code section—creating boards of equalization—also provided for appeals.[75] Again, therefore, the quandary was whether the litigation was controlled by the Code section as it

---

[68] 232 Ga. at 461, 207 S.E.2d at 450.

[69] The court extracted this general rule from 50 AM. JUR. *Statutes* § 39 (1944).

[70] 232 Ga. at 461, 207 S.E.2d at 450.

[71] The trial court's decision was thus reversed.

[72] 132 Ga. App. 188, 207 S.E.2d 673 (1974).

[73] The disagreement centered upon the board's valuation of the taxpayer's property.

[74] [1969] Ga. Laws 942.

[75] [1972] Ga. Laws 1094.

stood at the date of its incorporation, or as it was later changed.[76]

Advocates of the appeal focused upon the following language of the 1958 incorporation:

> In connection with the equalization of assessments, the joint city-county board of tax assessors shall have all the power and authority provided by Title 92, Chapter 69, Code of Georgia, as amended, which said chapter relates to the equalization of assessments by county board of tax assessors. The particular sections which are adopted as applicable are as follows: . . . Section 92-6912. Relating to arbitration.[77]

They argued that by thus expressly providing that the Code section was adopted "as amended," the General Assembly had intended the incorporation to extend to later changes.

In summary fashion, the court of appeals posited *Campbell* as its source of authority, and defined the approach there enunciated as turning upon the tests of legislative intent and nature of the incorporation.[78] Here, said the court, the 1958 incorporation "specifically referred to Code § 92-6912," and thus foretold a limited adoption.[79] Moreover, the court refused to view the additional language of the incorporation as indicating otherwise:

> This language does not amount to an expressed intention or even a strong implication that the legislature meant to include subsequent modifications of Code § 92-6912. Instead the language is more susceptible to the conclusion that reference was being made to the amendments to Code Ch. 92-69 after its codification and up until the 1958 Act.[80]

With this wind-up, the court executed its delivery as follows:

> We therefore hold that the 1958 Act adopted the Code section in question only as it was constituted at that time and did not include future amendments. Hence, there was no authorization for the instant appeal to the superior court and the trial judge erred in so holding.[81]

---

[76] The trial court had held that the later changes authorized the appeal.

[77] [1958] Ga. Laws 3390.

[78] The court also cited both *Featherstone* and *Johnston*.

[79] 132 Ga. App. at 190, 207 S.E.2d at 674.

[80] *Id.*

[81] *Id.*

Thus 1974 was an important year for evolution of the Georgia doctrine of incorporation by reference. That both appellate courts, at the same time, would be confronted with the same facet of the problem, emerging out of the same legislative activity, was striking indeed. Even more intriguing was the variation between the two episodes. In *Boynton* the incorporation referred to an adopted statute which then contained the provision in issue but was later changed to eliminate it; in *Medical Association* the incorporation referred to an adopted statute which did not then contain the provision in issue but was later changed to include it. Obviously, this difference was not one of distinction to the courts—they both held the incorporation to be a limited one. Both courts employed approaches which focused primarily upon the specific and descriptive nature of the incorporation. Neither court was willing to qualify that approach because of language in the incorporation arguably extending to later changes. The supreme court did not mention the point—perhaps it was not argued—and the court of appeals offered an alternative explanation for it. In reaching its conclusion, the court of appeals quoted from and cited earlier Georgia cases; the supreme court noted none. Neither court deemed it necessary to bolster its conclusion by reviving the *Campbell* rationale that the incorporating statute was a special one and the incorporated statute was a general one. Finally, neither court considered the effect of its decision in the case.

IV.

The inflation of litigation is a constant threat to the legislative borrowing process of incorporation by reference. The reference statute is well grounded in utilization, in history, and in the confusion which it engenders. Perhaps the most confusion emerges from the nature of the relationship between the incorporating statute and the incorporated statute, and the impact upon the former when the latter undergoes subsequent legislative change. Absent explicit statutory provision, the result of such an occurrence has historically been a matter of judicial evolution from case to case. The general point of departure for American courts is that the two statutes are separate and distinct entities, but this point is then blunted in the cases by a liberal measure of "legislative intent." The most popular clue to such intent is the nature of the reference employed by the incorporating statute, but this approach too is qualified at several

junctures. Even more unsettling is the absence from the opinions of genuine judicial analysis.

In Georgia, incorporation by reference has not frequently been the focal point of litigation, but this now appears to be changing. From early times, the Georgia courts have indicated the desire to avoid a hiatus in attempted references of incorporation, as well as an unreceptive attitude toward the contentions of delegation of legislative power. Indeed, it was in this latter context—in *Featherstone v. Norman*—that the supreme court fashioned its basic precept for dealing with reference statutes generally. This precept purported to focus upon the nature of the incorporation, and to draw a distinction between descriptive and general references. Since *Featherstone*, however, both the supreme court and the court of appeals have demonstrated a willingness to qualify the precept when they deemed it necessary to resolve the controversy. Thus, by virtue of "legislative intent," both descriptive and general references have produced conclusions opposite from those posited by the precept, and particular words of reference have been isolated to yield either limited or unlimited incorporations. Other approaches, some apparently in tension, have cropped up along the way.

In any event, at least three general observations appear appropriate at this point. First, the litigation of incorporations by reference is on the increase in Georgia. Second, the judicial approach to the problem here traced is entirely too ad hoc for comfort. Finally, the analytical triangle of Peter, Paul, and Mary remains eternal, but this is the stuff of legislative law.