9-1-1977

Extraterritorial Power in Georgia Municipal Law

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GEORGIA LAW REVIEW

VOLUME 12 FALL 1977 NUMBER 1

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I. INTRODUCTION

The image of municipal power carries with it the accompanying concept of limitations on that power. One of the seemingly most natural of such limitations is that pertaining to territory. If a municipality is an incorporated entity, composed of precisely described physical boundaries, then its operational existence would normally be presumed to take place within those boundaries. The municipality's power to function outside its limits would thus appear not only unnecessary but foreign to the corporate conception.[1]

The problem with such neatness, of course, is its unworldliness. The truism is that neither man nor municipality is an island and that physical description does not delimit existence. Whether from desire, necessity, or happenstance, life—individual or corporate—is an encroaching experience. Obviously one's perception of a given episode is apt to be determined according to whether his perspective is that of encroachor or encroachee.[2]

These countering pressures are well reflected in the law's ambivalence toward the municipality's attempt to exercise extraterritorial, or "extramural," powers. On the one hand, it sometimes appears to say, there is no such power; on the other hand, it sometimes appears to say, there must be such power. Somewhere between these

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[1] This type of approach to defining a municipality spills over into the subject of annexation and accounts in part for the requirement of "contiguity." For treatment, see Sentell, *Municipal Annexation in Georgia: The Contiguity Conundrum*, 9 GA. L. REV. 167 (1974), *reprinted in* R. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 517 (3d ed. 1977).

[2] In earlier times, some attempted to avoid these conceptual difficulties by defining a municipality as "a bundle of jurisdictions." *See* Anderson, *The Extraterritorial Powers of Cities* (pts. 1-2), 10 MINN. L. REV. 475, 564 (1926).

extremes lies an approximation of an approach to resolving the quandary.

Most of the authorities appear to depart, at least, from the same gate: The general prohibition against the exercise of extraterritorial power is stated as the rule, and instances of the exercise are given as the exception.[3] Beyond that point, however, a vista of variations on the theme emerges. Some posit the point, for example, that the general prohibition applies only to "governmental" but not "proprietary" functions,[4] while others expressly declare it to be applicable to all functions.[5] Some view the exceptions to arise only when the municipality is expressly authorized to act extraterritorially,[6] while others argue for authorization by implication.[7] Most agree that instances of express authorization are not infrequent, and some envision this as a continuing movement toward dealing with metropolitan area perplexities.[8] Others deprecate this means of providing for area-wide government as outmoded and encompassing as many problems as it placates.[9] Finally, all appear to experience difficulty in postulating judicial constants in grappling with the issue of extraterritorial municipal power.[10]

Against this background of uncertainty, a random sampling of the Georgia experience should fit comfortably indeed.

II. JURISDICTION TO PUNISH

One clear instance of extraterritorial operation occurs when a municipality purports to exact punishment for activities admittedly taking place outside its defined corporate boundaries.[11] This instance has been litigated in several contexts in Georgia.

In 1825, the Georgia General Assembly enacted a local statute declaring that "the jurisdictional limits of the City of Savannah, and the hamlets thereof, shall be extended to one mile beyond the

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[3] *Id.* at 481-82. *See also*, 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 5.10 (1975); 2 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 10.07 (1966); C. RHYNE, MUNICIPAL LAW § 13-1 (1957).

[4] *See, e.g.*, 2 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 10.07 (1966).

[5] *See, e.g.*, 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 5.11 (1975).

[6] *See, e.g.*, C. RHYNE, MUNICIPAL LAW § 13-1 (1957).

[7] *See, e.g.*, 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 5.10 (1975).

[8] *See, e.g., id.* § 5.12 (1975).

[9] *See, e.g.*, W. VALENTE, LOCAL GOVERNMENT LAW 252 (1975).

[10] Indeed, it has been indicated, there are none: "[T]here is no single theoretical foundation for the analysis of municipal extraterritorial powers, either generally, or with reference to any designated function." *Id.*

[11] As the cases treated in this section indicate, the word "punishment" here is not intended in the criminal sense, although some of the cases are of that nature.

present boundary, so as to enable the Mayor and Aldermen, for the time being, to pass an Ordinance or Ordinances, prohibiting the cultivation of rice within the aforesaid extended limits."[12] Acting pursuant to this statute and its amendment,[13] the municipal governing authority adopted two ordinances for the prescribed area—one prohibiting the cultivation of rice,[14] and one providing for the destruction of growing rice as a nuisance.[15]

In *Green v. Mayor & Aldermen of Savannah*,[16] the Georgia Supreme Court upheld the validity of the two municipal ordinances. In evaluating the measures, the court separated the issues of power and constitutionality. With respect to power, the court merely pointed to the authorizing statute.[17] With respect to constitutionality, it discounted the ordinances as "mere regulation,"[18] and magnified the public health interests in "dry culture" lands.[19] So balanced, the health interests justified the regulation.

For analytical purposes, therefore, the decision in *Green* is a barren one. The litigation does serve to emphasize, however, how early Georgia municipalities were utilizing express legislative authorizations to operate extraterritorially. For the single subject of rice cultivation, and "for the time being," the municipality's power of prohibition was extended one mile beyond its chartered corporate limits. Remarkably, the appellant in *Green* did not challenge this point in the case, and the court was thus free to ignore it. This the court did.[20]

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[12] GA. COMPILED LAWS 464 (Dawson 1831).

[13] The amendment was enacted in 1831. GA. LAWS DIGEST 648 (Prince 1837).

[14] This ordinance was adopted in 1826.

[15] This ordinance was adopted in 1848 and provided for notice and hearing prior to the destruction.

[16] 6 Ga. 1 (1849). For discussion of this case in the context of municipal power to prohibit the conduct of business, *see* Sentell, *Reasoning by Riddle: The Power to Prohibit in Georgia Local Government Law*, 9 GA. L. REV. 115 (1974), *reprinted in* R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 693 (3d ed. 1977).

[17] "The General Assembly, by the Act of 1825, delegated the authority to the mayor and aldermen of the city of Savannah, to enact the ordinance of 1826, prohibiting the cultivation of rice within the prescribed limits." 6 Ga. at 10.

[18] *Id.* at 13.

[19] The court said that "[e]very right, from an absolute ownership in property, down to a mere easement, is purchased and holden, subject to the restriction, that it shall be so exercised as not to injure others." *Id.*

[20] The extraterritorial reach of the municipal ordinance was subject to similar judicial inattention in Wright v. Richmond County Dept. of Health, 182 Ga. 651, 186 S.E. 815 (1936). That ordinance contained a requirement that "[n]o ice cream shall be shipped into Augusta from outside of inspection area of local board of health within a radius of 60 miles." Ignoring this left-handed manner of extraterritorial operation, the court summarily upheld the validity

At virtually this same early time, however, the court was giving expression to the more general precept of extraterritorial punishment. Thus, in *Taylor v. Mayor & Council of Americus*,[21] the supreme court reversed on this precise point a municipal conviction for disorderly conduct. There the problem was not that the defendant's conduct was other than disorderly.[22] Neither was it that the municipality was without power to punish for such conduct.[23] The missing link was, rather, that no evidence in the case established that the disorderly conduct occurred within the municipality's corporate limits.[24] Without that evidence, the prospect of extraterritorial punishment reared its head and condemned the conviction.

In the years that followed, a series of similar situations accounted for unrelenting judicial direction: "Before the defendant can be convicted of a violation of an ordinance . . ., it should be made to appear by competent and sufficient evidence that the act alleged to have been done in violation of such ordinances was within the limits of said city as prescribed in its charter."[25] It was not sufficient, the courts continued, that the evidence located the occurrence within "Ponce de Leon Park,"[26] or at a certain store,[27] if it did not also demonstrate that the park or store was inside the municipality. It was likewise inadequate that all involved in the trial actually knew that the place designated was within the corporate limits:[28] "it was essential that that fact should have been proved by evidence submitted, in order to establish the guilt of the accused."[29]

A different factual situation yielded the same result in *Ball v. Peavy*.[30] There the municipal charter expressly provided "[t]hat

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of the ordinance against attacks grounded in both due process and equal protection.

[21] 39 Ga. 60 (1869).

[22] "On this trial there was evidence of a quarrel between Lucinda and another." *Id.* at 60.

[23] "The Charter and Ordinance of Americus were not produced here, but it was admitted that the mode of trial had was regular, and that the Mayor and Council had a right to punish for disorderly conduct, provided it occurred within the corporate limits of Americus." *Id.*

[24] *Id.* at 61.

[25] Martin v. City of Gainesville, 126 Ga. 577, 55 S.E. 499 (1906).

[26] Edwards v. City of Atlanta, 124 Ga. 78, 52 S.E. 297 (1905).

[27] Ringer v. Town of Milner, 6 Ga. App. 790, 65 S.E. 814 (1909): "There being no evidence in this case that the store in which the alleged disorderly conduct took place was within the corporate limits of the town of Milner, it was error to overrule the certiorari."

[28] Garrett v. City of Atlanta, 152 Ga. 675, 110 S.E. 886 (1922).

[29] *Id.* at 675-76, 110 S.E. at 887. "That the location of the alleged offense was in the city was of the essence of the charge against him and a material part of the charge against him, and it was as necessary to prove that by evidence then submitted as to prove any other ingredient of the offense." The court cited numerous decisions as authority. *Id.*

[30] 210 Ga. 575, 82 S.E.2d 143 (1954).

for the purpose of protecting the peace, good order, morals and health of said city, its corporate limits and its jurisdiction shall extend for one mile beyond its limits as now defined or . . . hereafter . . . extended."[31] Pursuant to this provision, the municipality adopted an ordinance which prohibited the sale of fireworks within the municipality and within the one-mile zone of its police jurisdiction. Pursuant to this ordinance, municipal authorities sought to prosecute one who sold fireworks outside the corporate limits but within the one-mile zone.[32]

In scrutinizing the validity of the prosecution, the Georgia Supreme Court focused upon the caption of the charter: "An act to provide and establish a new charter for the city of Waycross . . . and to extend and define its corporate limits."[33] Because that caption failed to provide adequate notice of the charter grant of "extra powers over the neighboring territory within one mile of the city's limits,"[34] held the court,[35] the charter provision was violative of the Georgia Constitution.[36] Accordingly, and without additional discussion, the court declared that the ordinance was invalid and enjoined the municipality's prosecution.

Throughout this series of decisions, therefore, the court thwarted one municipal law enforcement effort after another. Unless the suspect conduct occurred within municipal limits, it was not subject to municipal prosecution. Both the municipality's express authority over the territory and the fact that the conduct occurred there must affirmatively appear in the municipality's evidence against the defendant. In most of these cases, the problem was insufficient demonstration of location—the evidence simply failed to show exactly where the conduct took place. In *Ball v. Peavy*, however, this was not the perplexity—there the evidence placed the area of conduct with precision. The problem came, rather, in respect to the munici-

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[31] 1909 Ga. Laws 1456, 1461.

[32] The defendant alleged that he had obtained a proper county license to sell the fireworks.

[33] 1909 Ga. Laws 1456.

[34] 210 Ga. at 577, 82 S.E.2d at 145.

[35] The court appeared to view the caption's reference as being to corporate limits and the provision's reference as being to power jurisdiction. Hence, in that view, the former did not pertain to the latter. Obviously, this is a troublesome analysis, and the court relied strongly upon its earlier decision in Blair v. State, 90 Ga. 326, 17 S.E. 96 (1892), discussed *infra* at text accompanying notes 101-19.

[36] GA. CONST. art. III, § VII, ¶ VIII (1945), GA. CODE ANN. § 2-1908 (1973): "No law shall pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof." The 1976 provision is contained in GA. CODE ANN. § 2-1304 (Supp. 1976).

pality's authority over the area. Dealing most restrictively with the caption-subject quandary, the court invalidated express legislative extension of the municipality's law enforcement limits. Without that legislative authority, the validity of the ordinance of prohibition was not deemed worthy of independent consideration. In none of the cases, therefore, was there any discussion—indeed, any mention—of the possibility of implied extraterritorial authority. Rather, the nonexistence of any such possibility appeared to be taken for granted.

In contrast to *Ball*, where the quandary was ordinance but no charter, *Raskin v. Mayor & Aldermen of Savannah*[37] presented the complexity of charter but no ordinance. There the charter expressly conferred upon the municipal police court "jurisdiction to try all offenses against the laws and ordinances of the municipal government . . . committed within the corporate limits of said city and within three miles thereof."[38] Moreover, a municipal ordinance penalized disturbing the peace, disorderly conduct, and keeping a disorderly house within the municipal limits.[39] The court of appeals' question to the supreme court was "[u]nder and by virtue of this act of the legislature, was the recorder . . . authorized to administer punishment for a violation of the city ordinance referred to, where the offense occurred outside the corporate limits . . . but within three miles thereof?"[40] The supreme court's response was equally puzzling:

> If the provision of the act of the General Assembly . . . confers authority upon the Mayor and Aldermen . . . to declare penal an act committed beyond the corporate limits of the city but within three miles thereof, the ordinance in question does not undertake to exercise the power conferred. The ordinance must be strictly construed. Under proper construction, only acts committed within the corporate limits of the city . . . are declared to be unlawful.[41]

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[37] 152 Ga. 204, 108 S.E. 778 (1921).

[38] 1906 Ga. Laws 1033.

[39] 152 Ga. at 204, 108 S.E. at 778.

[40] *Id.* at 205, 108 S.E. at 778. "In other words, did this act of 1906 automatically, so to speak, amend the city ordinance referred to, so that that ordinance was violated if the acts therein made penal were done within the corporate limits of the City of Savannah or within three miles thereof?"

[41] *Id.* at 205, 108 S.E. at 779. The supreme court's opinion gave virtually no hint of rationale. From the court of appeals' question, it might be conjectured that the ordinance had

Because this was the extent of the supreme court's consideration of the issue, little can be inferred from it. In any event, *Raskin*'s strict construction of the ordinance provides an appropriate point of comparison with *Ball*'s strict construction of the charter. Both exercises produced the same result: the municipality was devoid of power to punish conduct occurring outside its chartered corporate limits.

The court of appeals came forward with a similar resolution in *City Council of Augusta v. Garrison*,[42] although the power in controversy savored more of regulation than punishment. There the municipality required a licensee using its streets for delivery purposes to execute a bond for the benefit of those whom he might injure.[43] Later the municipality sought to recover on this bond on behalf of one injured by the licensee while delivering just outside the municipal limits.[44] Rejecting the municipality's claim,[45] a majority of the court said simply that "a municipal ordinance being without extraterritorial operation . . . such a bond does not apply to injuries sustained outside the limits of the municipality."[46] The court reached this conclusion purely by means of interpretation; neither the ordinance requiring the bond nor the bond itself was expressly restricted to injuries occurring inside the municipality.[47]

III. Municipal Tort Liability

On occasion, the municipality itself will ring in consideration of extraterritoriality. When claimants seek to impose responsibility for negligent conduct by municipal agents, one defense is that the conduct occurred outside the municipal boundaries. In this fashion, the municipality will attempt to tag the conduct as ultra vires and thus to disclaim liability for damage caused by it.[48] As is the case with

existed first and thus was originally confined to the municipal corporate limits. Later, the charter extended police court jurisdiction three miles beyond those limits. Without a still later change in the ordinance, however, its terms did not cover the charter extension.

[42] 68 Ga. App. 150, 22 S.E.2d 412 (1942).

[43] The court expressly refused to decide whether the municipality possessed the power to adopt such an ordinance.

[44] The injury allegedly resulted from the licensee's negligence.

[45] *I.e.*, the defendants' general demurrers were sustained.

[46] 68 Ga. App. at 150, 22 S.E.2d at 412. The court's only Georgia authority was the supreme court's decision in Taylor v. Mayor & Council of Americus, 39 Ga. 60 (1869). *See* text accompanying notes 21-24 *supra*.

[47] 68 Ga. App. at 151, 22 S.E.2d at 413 (Stephens, J., dissenting).

[48] The ultra vires defense in municipal tort law involves more than extraterritorial operation. For a discussion in context, see R. Sentell, The Law of Municipal Tort Liability in Georgia 48-52 (2d ed. 1972).

many other legal principles, therefore, the concept of extraterritorial operation is a two-edged one. The extent to which the concept has been employed—successfully and unsuccessfully—is indicated by a selective line of cases in both appellate courts.

As early as 1892, in *Loyd v. Mayor & Council of Columbus*,[49] the supreme court relied upon the concept to reject summarily a property owner's action for damage from municipal excavation.[50] Said the court: "The acts of the city authorities complained of were ultra vires, they having, at the time the acts were done, no power or jurisdiction over the land in question."[51] Thus, the court concluded, "the municipal corporation is not liable for damages resulting from such acts."[52]

The headnote opinion in *Loyd* fails to illumine the source of the court's knowledge that the plaintiff's land was outside the municipal limits. Nor does it contain information as to precisely why the municipality had no authority in the matter. Was it that the charter did not empower the municipality to engage in excavating land? Or did the deficiency lie exclusively in the point that the land was outside the limits? Was the problem one of no express or implied power to excavate extraterritorially? Or was a consideration of implied power inappropriate to the case? Primarily, it seemed, the conduct was ultra vires because it was ultra vires.

Less than ten years after *Loyd*, the supreme court relaxed its approach. In *City Council of Augusta v. Mackey*,[53] the plaintiff came to grief when the horse upon which he was riding fell into a municipal excavation in a public road. The excavation was located outside the municipal limits and resulted from the removal of a pipe through which the municipality had been supplying water to an army encampment.[54] Because the site was extraterritorial, the municipality proffered the defense of ultra vires activity.

The court agreed with the municipality, but not too strongly:

> It is true that as a general rule a municipal corporation can not exercise powers beyond the limits of the municipality, and

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[49] 90 Ga. 20, 15 S.E. 818 (1892).

[50] The municipality had allegedly conducted the excavations upon the plaintiff's property and had caused his land and fence to cave in.

[51] 90 Ga. at 20, 15 S.E. at 818.

[52] *Id.*

[53] 113 Ga. 64, 38 S.E. 339 (1901).

[54] Allegedly, the municipality had refilled the excavation with loose earth, and the horse fell when stepping upon it.

> equally as true that grants of power to a municipality are to be construed strictly. But, by an act of the General Assembly of Georgia . . ., the right to exercise certain powers and privileges outside of the limits of the City . . . was expressly conferred upon its municipal authorities.[55]

To this, the municipality urged two qualifications. First, the extraterritorial authority expressly granted was for the construction of a waterworks system to supply the municipality and was only for the municipality's benefit. This authority did not cover the municipality's supply of water to the encampment.[56] Secondly, authority was conferred for the municipality to lay pipes in the road, not to remove them.

The court was not willing to give the statute "such a limited construction."[57] For,

> while the purpose of the General Assembly was primarily to give the city council authority to increase its water supply by the construction of waterworks beyond the corporate limits of the city, for the benefit of the city, it also distinctly conferred on that body the right "to contract with any and all persons, including any incorporated town or village, for the use of water from said water-mains."[58]

As to the power of removal, the court said that "the right to take it up when necessary or expedient went with the power granted to lay it down."[59] Accordingly, the municipality's contract with the encampment was "within both the spirit and terms" of the statute, and the court could impose liability for negligence in its performance.[60]

In this "yes-but" fashion, the supreme court now appeared on record in several respects. "Yes," the general rule prohibited extraterritorial operation, "but" this could be overcome by express legis-

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[55] 113 Ga. at 66, 38 S.E. at 339-40. The court quoted portions of the local statute, 1895 Ga. Laws 127, authorizing the municipality to construct and operate waterworks outside its corporate limits, to lay watermains and pipes under county roads, and to contract for the use of water from the mains.

[56] A temporary pumping station furnished the water supplied to the encampment. The municipality said the station was not intended to supply the municipality but was intended only for the benefit of the soldiers. 113 Ga. at 67, 38 S.E. at 340.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] The court affirmed the trial court's rejection of the municipality's demurrer.

lative authority. "Yes," such authority must generally be strictly construed, and "yes," the primary purpose of this authority was to increase the municipality's water supply, "but," both the spirit and terms of the delegation cut against this construction. "Yes," the authority granted was to lay the pipe, "but" this necessarily included the power to remove it. By the turn of the century, therefore, and in the context of insulation against liability, the court's receptiveness to the extraterritorial-power argument appeared on the wane.

Only two years later, the supreme court seized upon *Langley v. City Council of Augusta*[61] as an opportunity for expressing the intensity of its feelings on the matter. *Langley* presented an action in nuisance for damage to the plaintiff's property from a municipal sewer ditch, and the municipality argued ultra vires extraterritorial operation.[62] The court confessed that it did not know where the municipality's boundaries were, but said "this perplexing question need not be decided in this case."[63] Citing *Mackey*, the court also conceded that "the general rule is that such a corporation can not purchase and hold real estate beyond its territorial limits or lawfully perform any act beyond such limits, unless the power to do so is expressly given by the legislature."[64] However, the court continued, "there are sound reasons why this rule should not be extended to the construction of drains and sewers or the acquisition of land for that purpose. Every consideration of propriety, and oftentimes absolute necessity, demands that this form an exception to the general rule."[65] Indeed, proposed the court, the general rule should be reversed: "It should not be presumed, unless the language of the municipal charter or of some legislative act requires it, that the General Assembly intended to restrict a municipal corporation to the use of land within its limits for the purpose of constructing drains and sewers."[66]

The court admitted that the problem with its proposal was its own earlier decision in the *Loyd* case. Because the plaintiff in

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[61] 118 Ga. 590, 45 S.E. 486 (1903).

[62] Injury allegedly consisted of both property damage and unhealthful conditions.

[63] 118 Ga. at 594, 45 S.E. at 487.

[64] *Id.*

[65] *Id.*

[66] *Id.* Otherwise, said the court, the municipality would be required "to discharge matter reeking with fetid odors and noxious gases in the very midst of its citizens. Such a suggestion is intolerable."

Langley had not requested that the court review and overrule *Loyd*, the court deemed it "decisive" for the position that "a municipal corporation can not, without legislative authority so to do, lawfully construct a drain or sewer beyond its limits."[67]

Not to be denied, however, the court then probed the municipal charter and discovered a delegation of power to the board of health "to construct a canal or canals, drain or drains, from said city to the Savannah river, or such other stream or streams as said board, in the exercise of a sound discretion, may determine for the purpose of emptying said drain or drains."[68] This language made it plain, the court declared, "that the board of health was to have authority to utilize streams beyond the city limits for the purpose indicated."[69] The problem was that the ditch in issue had been constructed by the municipal council without the cooperation of the board of health. Could the delegation of power to the board be transferred to the council?

> We are aware that there are cases holding that all the conditions precedent to an act must be complied with, or else the city will not be liable; but the weight of authority, at least of modern authority, is that where a city has authority to do an act, performance in an irregular way, or by a different instrumentality from that prescribed, will not prevent liability from attaching.[70]

Thus, the grand conclusion was that the municipality could be held responsible in nuisance.

Even today *Langley* remains a remarkable judicial tour de force: The location of the municipal boundary is unknown but immaterial. The general rule prohibits extraterritorial operation, but the court should declare an exception to the rule. The court can not declare an exception because of a prior decision with which it disagrees but which the plaintiff did not request it to overrule. The court can decide the case under the general rule which requires express charter authority. The charter delegated authority only to the board of health, but the municipal council validly exercised that authority. Clearly, the municipality is responsible for the nuisance!

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[67] *Id.* at 595, 45 S.E. at 488.
[68] 1880 Ga. Laws 365.
[69] 118 Ga. at 596, 45 S.E. at 488.
[70] *Id.* at 597, 45 S.E. at 489.

Perhaps an appropriate conclusion for the supreme court's performance in this context is provided by *Town of Mansfield v. Cofer*.[71] There the death of the plaintiff's husband allegedly resulted from the negligence of the municipality in constructing poles and electrical wires outside the corporate limits.[72] Agreeing that "[u]nquestionably the general rule" prohibits a municipality from performing any act beyond its territorial limits "in the absence of express authority,"[73] the court employed a two-step analysis to avoid that result. First, it implied authority to operate an electrical system from the municipal charter's general welfare clause.[74] Second, it discovered express charter authority to acquire property outside the municipal limits for corporate purposes.[75] "It follows," said the court, that

> as the Town of Mansfield possessed the right to provide electrical lighting for that municipality, and was expressly given the power to acquire property beyond the limits of the town for corporate purposes, that the town was not engaged in an ultra vires act, in the performance of which the plaintiff's husband received his fatal injury.[76]

By its brief opinion in *Cofer*, therefore, the supreme court had taken yet another significant step away from its original position of absolute prohibition. It said that the municipality could not construct an electrical system extraterritorially unless it possessed express authority to do so. It held that the municipality could construct an electrical system extraterritorially although it possessed no express authority to do so.

A similar progression of positions appears manifested in a series of decisions by the Georgia Court of Appeals. For instance, among the first cases ever decided by that court was *Mayor & Council of Montezuma v. Law*,[77] an action against the municipality for injuries

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[71] 145 Ga. 459, 89 S.E. 410 (1916).

[72] The plaintiff alleged that her husband was a municipal employee working on the project and was killed by a falling pole.

[73] 145 Ga. at 460, 89 S.E. at 410. The court cited *Langley* for this general rule.

[74] Although the court did not set out the provision, it assured that the charter "contains a very broad general welfare clause." *Id.*

[75] The court somehow viewed this as "an express power for the city to acquire by contract a right to erect its poles for the purpose of stringing wires to connect with a source from which it will receive electrical current with which to light its city." *Id.* at 460, 89 S.E. at 411.

[76] *Id.* at 460-61, 89 S.E. at 441. The court affirmed the trial court's rejection of the municipality's demurrer.

[77] 1 Ga. App. 579, 57 S.E. 1025 (1907).

to the plaintiff's horse resulting from a defectively maintained bridge. Although the bridge was located outside the corporate limits, the municipality had constructed it pursuant to express legislative authorization.[78] According to the court, however, a problem remained:

> While the act empowers the city . . . to build the bridge, it does not follow that the right was implied to maintain the bridge and keep it in repair after it was built. Public acts authorizing municipal corporations to own property, or to perform any duty beyond the territorial limits of the municipality, must be construed strictly, and unless the right is expressly given, or the duty expressly imposed, it can not be derived by implication.[79]

Consequently, even though the municipality had in fact maintained the bridge, it was not responsible for any negligence in doing so.[80]

The court engaged this same philosophy in *Newton v. City of Moultrie*,[81] a wrongful death action for the alleged negligence of a municipal employee in turning on electric current in lines outside the corporate limits.[82] The court sustained the municipality's general demurrer by observing that its only authority to maintain an electrical system was that implied from the general welfare clause of its charter.[83] "[S]uch authority," the court concluded, "does not

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[78] 1888 Ga. Laws 204. This local statute expressly authorized the municipality to issue bonds in order to raise money with which to build the bridge.

[79] 1 Ga. App. at 580-81, 57 S.E. at 1026. The court relied upon the supreme court's decisions in *Mackey* and *Langley* for the general rule against extraterritorial operation without express authorization. It said that

> in every case that we have been able to find, where the municipality has been held liable for damages resulting from acts of negligence on property beyond its territorial limits, the right to own such property and to erect public works for the municipality thereon and to maintain the same was expressly given by the legislature of the State.

Id. at 581, 57 S.E. at 1026.

[80] The court said that the duty of maintenance had devolved upon the county in these circumstances.

[81] 39 Ga. App. 702, 148 S.E. 299 (1929).

[82] The municipality constructed a steam plant which it operated jointly with a power company.

> A minor employed by the power company was killed by reason of the alleged negligence of the superintendent in turning the current from the steam-plant onto the lines of the company outside the city, in pursuance of the company's business in serving its outside customers, after having been instructed by the power company not to do so.

Id. at 702-03, 148 S.E. at 299.

[83] This was stated simply as a conclusion, and the court did not set forth the general welfare clause in the opinion.

extend beyond its corporate limits,"[84] and the employee's negligence was thus ultra vires the municipality's powers.[85]

By 1960, however, the court of appeals, too, was reexamining its restrictiveness. In *City of Fairburn v. Clanton*,[86] it gave short shrift indeed to the municipality's extraterritorial-operation defense to a wrongful death action.[87] There the plaintiff's son had collided his motor scooter with a municipal work project which was laying water pipe outside the corporate limits.[88] To the plaintiff's argument of a failure to provide warning, the municipality defended that "the petition affirmatively shows that the accident complained of occurred out of the city limits."[89] In treatment which has not mellowed with age, the court simply declared that "it not being alleged that the project was ultra vires, this fact renders the city no less liable for its negligent acts."[90]

One of the court's most recent confrontations with the quandary came in *City of Gainesville v. Pritchett*,[91] a nuisance action for injuries suffered when the plaintiff's boat collided with a float allegedly left in the river channel by the municipality.[92] The municipality tendered an ultra vires defense, citing the court's own prior decisions in *Law* and *Newton*. The court reviewed those and other decisions and found them "conditional": "[T]hose cases do not establish a rule of law in Georgia that acts of a municipality or its agents outside the City boundaries are per se ultra vires . . . ."[93] Indeed, the supreme court's decision in *Langley* demonstrated "that

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[84] 39 Ga. App. at 703, 148 S.E. at 299. As authority for this holding, the court cited the supreme court's decision in Mayor & Council of Gainesville v. Dunlap, 147 Ga. 344, 94 S.E. 247 (1917), discussed at text accompanying notes 162-69 *infra*.

[85] "As a general rule, a municipal corporation can not, without express or implied authority granted in its charter, exercise its corporate powers beyond the limits of the municipal boundaries." 39 Ga. App. at 703, 148 S.E. at 299.

[86] 102 Ga. App. 556, 117 S.E.2d 197 (1960).

[87] The court affirmed the trial judge in overruling the municipality's demurrers.

[88] The project, consisting of a dirt mound, vehicles, and pipe line, allegedly blocked passage on the plaintiff's son's side of a public road.

[89] 102 Ga. App. at 558, 117 S.E.2d at 198.

[90] *Id.* The court designated as "the leading case in point" the supreme court's decision in *Mackey*, which it viewed to dictate that the municipality is liable for negligent excavations in public roads when specifically authorized to lay the pipes. *Id.* at 558, 117 S.E.2d at 199.

[91] 129 Ga. App. 475, 199 S.E.2d 889 (1973).

[92] Plaintiffs alleged that the float had been used in a July Fourth celebration jointly planned and conducted by a private ski club, the municipal recreation department, and the American Legion. The court held that the fact of the municipality's participation in the project was for the jury's consideration and that the trial judge had thus correctly denied the municipality's motion for summary judgment.

[93] 129 Ga. App. at 477-78, 199 S.E.2d at 891.

there is no Georgia rule that a city may not commit a nuisance outside its own boundaries."[94] Rather, "the general rule of territorial limitation of a municipality's authority has an exception for express or implied charter authority for acts outside its boundaries."[95]

The court then turned to the matter of authorization. It noted the charter's delegation of power to condemn property located outside the municipality for purposes of public recreation,[96] and discovered general statutory authority to maintain extraterritorial recreational centers and to conduct facilities upon land controlled by other authorities.[97] It interpreted these grants to authorize the municipality "to undertake recreational activities on land outside the city,"[98] and arrived at the following conclusion: "Because the activity was authorized, the fact that it occurred outside the corporate limits is immaterial and will not in and of itself insulate the city from liability."[99]

The difference between the court of appeals' opinions in *Law* and *Pritchett* was much greater than just the sixty-six intervening years. In *Law*, the court said that extraterritorial power could not be derived by implication; in *Pritchett*, the court said that extraterritorial power could be derived by implication. Tweedle-dum and tweedle-dee is one thing; tweedle-dee yea and tweedle-dee nay is another.[100]

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[94] *Id.* at 478, 199 S.E.2d at 892. The court said that liability was imposed in *Langley* because the supreme court found that the municipal charter showed "that the city was not forbidden to perform acts outside its boundaries in connection with sewers and drains." Although this was a proposed reversal of the general rule suggested in *Langley*, it will be recalled that the supreme court did not carry this proposal to fruition because of its own prior decision to the contrary in *Loyd* which it had not been requested to overrule. Rather, the court's decision in *Langley* rested upon its discovery of sufficient affirmative authority in the municipal charter. *See* text accompanying notes 64-69 *supra*.

[95] 129 Ga. App. at 478, 199 S.E.2d at 892. The court cited its own decision in *Clanton* for this general rule, but it will be recalled that *Clanton* actually said nothing at all about implied authority. *See* text accompanying notes 86-90 *supra*.

[96] 1956 Ga. Laws 2847, 2859.

[97] GA. CODE ANN. §§ 69-602, 69-603 (1976).

[98] 129 Ga. App. at 479, 199 S.E.2d at 892.

[99] *Id.*

[100] *Law* appears to remain valid authority when there is no semblance of a grant of power from which an implication can be derived. Recently, for instance, the court rejected an action against a municipality for failing to respond to a fire in the plaintiff's home which was located outside the corporate limits. Said the court:

> Since the municipality had no charter authority to provide fire protection services outside the city limits, and "the agreement on the part of the city to extinguish fires or to furnish water for that purpose was in the exercise of a governmental function," no liability could attach in the instant case for failure of the city to respond to a fire in plaintiff's home outside the city limits.

IV. Power to Make Arrests

Still another illustration of extraterritorial activity is provided by the municipal power of arrest. This power has been the subject of judicial consideration in Georgia from early times. In its 1892 decision of *Blair v. State*[101] the supreme court declared invalid a municipal charter provision which purported to create a "police district" in territory within one and one-half miles of the corporate limits.[102] The title of the charter did not afford adequate notice of this provision,[103] held the court, and thus violated the constitution's requirement of such notice.[104] "This being so," the court concluded, "a policeman had no more power than any private person to make arrests on such adjacent territory."[105] Consequently, the court invalidated the municipal arrest.

The message of *Blair* was thus brief but basic. When the defendant challenges the validity of a municipal arrest, the court directs its inquiry to the legislative authorization for that arrest. When the defendant challenges the validity of the legislative authorization itself, the court then examines its constitutionality. When the court deems that the legislative authorization is unconstitutional, the validity of the arrest is doomed as well.

In the nature of things, the municipal arrest more likely to incur territorial problems is the one regarding traffic offenses. For such offenses, the General Assembly has expressly provided that "officers of an incorporated municipality shall have no power to make arrests beyond the corporate limits of such municipality, unless such jurisdiction is given by local or other laws."[106] In thus committing the

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City of Lavonia v. Powers, 140 Ga. App. 323, 231 S.E.2d 93 (1976).

[101] 90 Ga. 326, 17 S.E. 96 (1892).

[102] This provision authorized the municipality to regulate the sale of spiritous and malt liquors in the district and declared municipal criminal ordinances in effect there. *Id.* at 327-28, 17 S.E. at 96.

[103] The court quoted the title as follows: "An act to create a new charter for the city of Columbus, and to consolidate and declare the rights and powers of said corporation, and for other purposes." Then the court inquired: "Would the title prefixed to this new charter of Columbus put any one on notice, either in the General Assembly or out of it, that any territory of the State was to be dealt with except the city? We think not." *Id.* at 329, 17 S.E. at 96.

[104] Ga. Const. art. III, § VII, ¶ VIII (1945), Ga. Code Ann. § 2-1908 (1973): "No law shall pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof." The 1977 provision is contained in Ga. Code Ann. § 2-1304 (1977).

[105] 90 Ga. at 326, 17 S.E. at 96. "On the trial of the present case in the court below, he policeman allgeged to have been assaulted should have been treated simply as a private citizen with reference to his power of making arrests on the territory adjacent to the city."

[106] Ga. Code Ann. § 92A-509 (1972). This statute was enacted in 1937.

Blair message to statutory declaration, however, the legislature appears not to have answered all questions. Indeed, the court of appeals failed even to mention the statute as it sought to resolve the arrest quandary presented by *Shirley v. City of College Park*.[107] Its resolution was to sustain the validity of an arrest made beyond the municipal limits and unsupported by any statutory authority.[108] In explanation, the court emphasized that municipal police officers had observed the defendant's automobile weaving on the highway.[109] They were thus justified, said the court, "in following the defendant, signaling him to stop and, when he refused to stop, in pursuing, stopping, and arresting him."[110] Moreover, "[t]his is true although the city police officers did not succeed in apprehending the defendant within the city limits of the municipality, and, when he stopped, the automobile was actually located in a small piece of unincorporated territory completely surrounded by the municipality."[111]

Fifteen years later, in deciding *Wooten v. State*,[112] the court of appeals finally got around to announcing what it viewed itself to have accomplished in *Shirley*. *Wooten* encompassed two arrests outside the municipal limits: one of a speeder who had been chased to the area,[113] and one of the defendant who then appeared there. The municipal policeman charged the defendant with interfering as he attempted to direct traffic around the speeder's automobile following that arrest.[114] The defendant contended that once the speeder's arrest had been effected, the policeman's authority outside the municipal limits "immediately ceased."[115]

In evaluating these positions, the court conceded the existence of the statutory declaration,[116] but then cited *Shirley* for this qualifica-

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[107] 102 Ga. App. 10, 115 S.E.2d 469 (1960).

[108] *I.e.*, without statutory authority on the point of extraterritorial power.

[109] The automobile thus presented a hazard to other traffic.

[110] 102 Ga. App. at 10, 115 S.E.2d at 470.

[111] *Id.* The defendant in the case was also convicted of using profanity, but that had occurred within the municipal limits.

[112] 135 Ga. App. 97, 217 S.E.2d 350 (1975).

[113] The municipal policeman had attempted to stop the speeder within the municipality, and finally stopped and apprehended him outside. The policeman then remained on the highway to direct traffic and insure the safe removal of the speeder's car.

[114] The officer alleged that the defendant demanded possession of the speeder's car, walked into the middle of the highway as the officer attempted to direct traffic, struck the officer with his fist, and, after a scuffle, ran away.

[115] 135 Ga. App. at 99, 217 S.E.2d at 351.

[116] *I.e.*, GA. CODE ANN. § 92A-509 (1972).

tion: "[O]ur courts have recognized, as an exception to this rule, instances in which a crime is committed in the municipality and the officer's 'hot pursuit' takes him beyond his geographical limits to effectuate the arrest."[117] So armed, the court then extended the exception to cover the defendant's arrest as well:[118] "Reason compels this court to conclude that the . . . policeman's legal authority under the hot pursuit doctrine included both the power to arrest and the power to perform other normal police functions incidental to and necessitated by the arrest."[119]

The twist of events was indeed striking. *Blair*'s message had been no outside arrest without legislative authority. Later, the General Assembly had refined *Blair*—at least in respect to traffic offenses—and committed it to statutory prescription. Still later, the court of appeals had completely ignored that prescription, sustaining a traffic arrest outside the municipality without authorization. Fifteen years after that, the court explained that what it had done was bottomed by hot pursuit, but now the question was how quickly hot pursuit cooled. In dealing with that question, the court fanned the flame to cover an arrestee who had not been pursued from the municipal limits and who had never committed an offense within the municipal limits. Hot pursuit had thus singed both *Blair* and the statutory prescription.

Finally, an instance found to fall within the statute was presented by *Wright v. State*.[120] There the court of appeals responded to a driver's complaint of extraterritorial arrest by describing a population statute which empowered the municipality to perform county police services.[121] This statute specified that "each of the persons performing county police duties as contemplated herein shall have the same power to make arrests, to execute and return all criminal warrants and processes and serve as peace officers as sheriffs now have."[122] The court viewed this provision as express authority for the

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[117] 135 Ga. App. at 98, 217 S.E.2d at 351.

[118] "We cannot agree with appellant's contention that Officer Williams was instantly stripped of his authority once McBee's arrest was effectuated. . . . In directing traffic around McBee's car until the vehicle could be safely removed, Officer Williams was performing a function incidental to his lawful arrest." *Id.* at 99, 217 S.E.2d at 351.

[119] *Id.*

[120] 134 Ga. App. 406, 214 S.E.2d 688 (1975).

[121] This was not an instance of hot pursuit, as the arrest was made for conduct occurring outside the municipal limits.

[122] 1951 Ga. Laws 591, 595. "Generally," confirmed the court, "officers of a municipality have no power to make arrests beyond the corporate limits of such municipality, 'unless such jurisdiction is given by local or other laws.'" 134 Ga. App. at 406, 214 S.E.2d at 689.

municipal police to make arrests in the unincorporated area and thus sustained the validity of the arrest.[123]

V. Formation and Enforcement of Contracts

A municipality often finds it necessary or desirable to enter into various contractual relationships in undertaking to carry out many of its functions, and extraterritorial functions are no exception to this practice. On occasion, therefore, it is the contractual aspect which looms large in the controversy. Two fairly early decisions by the supreme court will briefly illustrate the point.

In *City of Quitman v. Jelks*,[124] the municipality sought specific performance of an alleged contract by which the defendants would convey specified land to be used for a municipal park.[125] Because the land was located beyond the corporate limits, the defendants urged that the agreement was ultra vires the municipality's powers and thus was unenforceable.[126] The court rejected that contention by quoting charter authorization for the municipality to purchase, hold, and enjoy land "within or without the limits of said city, for corporate purposes."[127] The acquisition of land for a public park "is for a corporate purpose," held the court, and "[i]t follows that the City . . . had charter power to acquire, by purchase, land beyond its territorial limits, to be used as a public park."[128] The municipality's action to enforce the contract was thus not subject to the defendant's demurrer.[129]

The court assumed a much more extreme position in *Hall v. Mayor & Council of Calhoun*,[130] where the municipality again sought to defend its capacity to contract. The agreement in issue involved the use by the municipality of water from the plaintiff's spring which was located beyond the corporate limits.[131] Again the supreme

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[123] *I.e.*, it affirmed the trial court in overruling the arrestee's motion to suppress the evidence of the arrest.

[124] 139 Ga. 238, 77 S.E. 76 (1913).

[125] The petition alleged the defendants' offer, the municipality's acceptance, the municipality's performance of its part of the agreement, and the defendants' refusal to convey the land.

[126] The trial court had apparently upheld this defense.

[127] 1905 Ga. Laws 1060.

[128] 139 Ga. at 238, 77 S.E. at 76.

[129] Accordingly, the trial court's decision was reversed.

[130] 140 Ga. 611, 79 S.E. 533 (1913).

[131] Actually, the municipality made the agreement, a written and signed contract under seal, with the plaintiff's predecessor in title in 1898. The owner had conveyed the right to use water from the spring to the municipality, in return for the municipality's agreement to

court rebuffed an attack upon the validity of the agreement, but this time its rationale was more tenuous.[132] First, the court purported to imply from the charter's general welfare clause the municipal power to establish and construct a system of waterworks.[133] Then, citing its decisions in *Jelks* and in *Langley v. City Council of Augusta*,[134] the court announced the following conclusion: "The municipality having charter power to establish and construct a system of waterworks, where necessary to go beyond the corporate limits to obtain its supply of water, it was not ultra vires of the corporation to enter into the contract mentioned in the statement of facts."[135] As to its more restrictive philosophy in other cases, the court simply said that its ruling in *Loyd v. City of Columbus*[136] had been "criticized and doubted" in *Langley* and would not be "extended."[137] Accordingly, the contract for the spring water "could not be cancelled on the ground that it was ultra vires of the corporation."[138]

Clearly, the headnote announcement of *Hall* positioned the supreme court in the most innovative posture yet witnessed. In a few instances heretofore—and always without directly saying so—the court appeared to have implied the power to operate extraterritorially, given the municipality's express authority to perform the function inside its limits. In *Hall*, the court implied the power to perform the function in the first instance, and, on the basis of that implication, further implied the power to perform extraterritorially. Moreover, neither of its cited decisions sufficed as authority. In *Jelks*, the charter expressly authorized extraterritorial operation. In *Langley*, once the dicta is cleared away, the court reaffirmed the general rule that "a municipal corporation can not, without legislative authority so to do, lawfully construct a drain or sewer beyond

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provide him with water in his residence. A number of years later, the owner had sold the land with the spring to the plaintiff, and the plaintiff brought this action to cancel the contract.

[132] For the confusion presented by this decision to still another area of municipal law, see the discussion in Sentell, *Local Government and Contracts that Bind*, 3 GA. L. REV. 546 (1969), *reprinted in* R. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 541 (3d ed. 1977).

[133] The court enumerated the provisions of the clause and they contained no mention of a waterworks system.

[134] 118 Ga. 590, 45 S.E. 486 (1903), discussed at text accompanying notes 61-70 *supra* and at note 149 *infra*.

[135] 140 Ga. at 611, 79 S.E. at 533-34.

[136] 90 Ga. 20, 15 S.E. 818 (1892), discussed at text accompanying notes 49-52 & 67 *supra*.

[137] 140 Ga. at 611, 79 S.E. at 534.

[138] *Id.* at 612, 79 S.E. at 534.

its limits."[139] Although the court did then proceed to sustain extraterritorial operation, it discovered express charter authority in a delegation to the board of health.[140] It was one thing not to "extend" *Loyd*, but the court's decision in *Hall* was something else. What—in 1913—had become of the doctrine of "strict construction"?

VI. Condemnation of Property

Perhaps one of the most famous extraterritorial-power decisions ever rendered by the Georgia Supreme Court was that in *Howard v. City of Atlanta*.[141] The issue there confronting the court in 1940 was "whether the City of Atlanta in expanding an airport which it now owns and operates has the authority to condemn property situated beyond its geographical limits and within the limits of the City of College Park."[142] Thus, a number of explosive elements—condemnation, extraterritoriality, airports, and separate municipal entities—converged in *Howard* to produce a classic episode in Georgia municipal law.

All agreed that the case was to be decided under the "Uniform Airports Law" of 1933.[143] That statute expressly empowers municipalities to acquire, establish, own, operate, and expand airports "either within or without the geographical limits of such municipalities."[144] The statute also authorizes the condemnation of private property needed by a municipality for an airport or its expansion.[145] Pointing to these provisions, the prospective condemnees observed that the grant of extraterritorial power did not mention condemnation and that the authorization of condemnation did not mention extraterritoriality.[146] Consequently, they urged, the municipality was without power to condemn property for airport expansion beyond the corporate limits.[147]

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[139] Langley v. City Council of Augusta, 118 Ga. 590, 595, 45 S.E. 486, 488 (1903).

[140] *See* discussion at text accompanying note 68 *supra*.

[141] 190 Ga. 730, 10 S.E.2d 190 (1940).

[142] *Id.*

[143] Ga. Code Ann. ch. 11-2 (1973).

[144] Ga. Code Ann. § 11-201 (1973). The statute grants this authority as well to counties and "other political subdivisions."

[145] Ga. Code Ann. § 11-203 (1973).

[146] The plaintiffs were seeking to enjoin the municipality's condemnation of their property.

[147] The court said the plaintiffs relied upon two principles:

> The first is that, as a general rule, a municipal corporation can not, without express or implied authority granted in its charter, exercise its corporate powers beyond the limits of the municipal boundaries. . . . The other is that statutes conferring the power of eminent domain must be given a strict construction.

The court initiated its consideration of the matter by reporting upon an examination of prior decisions regarding extraterritorial operation. That examination had shown that

> whether or not a municipality can in fact exercise a given power beyond its territorial limits, in the absence of express language to such effect, depends at last upon the nature of the subject-matter to which the power relates, and whether a full and complete exercise of the power reasonably requires action beyond the territorial limits of the municipality.[148]

The two decisions expressly relied on for this formulation were *Langley* and *Hall*. *Langley* was read to say that express authority to construct sewers and drains "should" include power to construct them beyond the corporate limits when deemed reasonably necessary by municipal officials.[149] *Hall* was read to hold that when a municipality possessed charter authority to establish a system of waterworks, it could contract for a source of water beyond its limits where necessary.[150]

The remaining task was to determine whether the facts fit the formulation: "It is a matter of common knowledge that an airport requires an extensive tract of land, and it is evident that in the majority of cases it would be most impracticable and undesirable to set aside so much land within the confines of a municipality for such purpose."[151] Consequently, under the court's formulation, the express grant of power to condemn land for airports might well "in and of itself be sufficient authority for a municipality to condemn land beyond its limits where it is reasonably necessary."[152]

At this point in its opinion, with rationale elaborated, with conclusion in sight, and completely without warning, the court changed

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190 Ga. at 731, 10 S.E.2d at 191.

[148] *Id.* at 732, 10 S.E.2d at 192.

[149] The court made it appear as though this had been the holding of *Langley*. Rather than noting that *Langley* expressly confirmed the restrictive rule of the *Loyd* decision, the court said only that "*Loyd v. Columbus*, . . . which constituted a ruling to the contrary, was criticized and doubted by the court." *Id.*

[150] The court did not point out that in *Hall* the authority to construct the system in the first instance had been implied from the general welfare clause of the charter, and was not expressly granted.

[151] 190 Ga. at 732, 10 S.E.2d at 192.

[152] *Id.* at 733, 10 S.E.2d at 192. This might be true, the court said, even giving the condemnation provision a strict construction. "Especially is this true in regard to the *expansion* of an airport owned and operated by a municipality such as the City of Atlanta beyond its territorial limits, under authority theretofore granted to it by the General Assembly."

courses. What it had declared to this point was not controlling: "It is not necessary . . . that we go to this extent in the present case."[153] Rather, this controversy was to be resolved by an interpretation of the two noted provisions of the Uniform Airports Law. When one provision empowered the creation and expansion of airports extraterritorially and another provision of the same statute authorized condemnation of property needed for airport expansion, the second provision must have contemplated the first one.[154] "Therefore it seems clear that the grant of power to condemn in section 3 is as broad as the power to establish and expand, etc., provided for in section 1."[155]

With the existence of statutory authority for extraterritorial condemnation established, the application of that authority to lands lying within the confines of another municipality presented no insuperable problem.[156] "To summarize," offered the court,

> our interpretation of the Uniform Airports Act is that municipalities are thereby invested with absolute power to appropriate by condemnation land necessary for the establishment or expansion of airports and landing fields either within or without their respective boundaries. If it should appear that it is reasonably necessary for a municipality . . ., in order to expand an airport owned and operated by it, to do so within the confines of an adjoining municipality, we are of the opinion that the act gives it such authority.[157]

The condemnees' action for an injunction was thus dismissed.

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[153] *Id.*

[154] "There can be no better evidence than this that the General Assembly recognized that it might be necessary and expedient for municipalities, in order to establish or expand existing airports, to go beyond their respective boundaries." *Id.*

[155] *Id.* at 733, 10 S.E.2d at 192.

[156] The phrase "within and without the geographical limits of such municipalities" is as broad as the universe, since every point is either within or without the limits of a municipality. In its broad sense it includes territory which is within the confines of a municipality and all of that which is not so situated, including that in another municipality. *Id.* at 773-34, 10 S.E.2d at 193. Although the court does not mention it, at this point its opinion threatened to impinge upon another consideration of municipal law. For discussion of that consideration, *see* Sentell, *Municipal Annexation in Georgia: The Contiguity Conundrum*, 9 GA. L. REV. 167 (1974), reprinted in R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 517 (3d ed. 1977).

[157] 190 Ga. at 736, 10 S.E.2d at 194. The court did add that the municipal authority must be "reasonably" exercised, and not in "bad faith" or without "necessity."

Howard v. City of Atlanta must be acknowledged in context and on two levels. On the first level—the noncontrolling part of the opinion—the supreme court engaged in quite an excursion. The appropriate question was no longer whether the court could imply extraterritorial power but rather under what circumstances the court could make the implication. As noted, the court formulated two tests for answering that question: first, the nature of the subject; and second, the reasonable requirements of complete exercise of the power. Further, the court indicated that sewers, drains, waterworks systems, and airports all scored well on both tests. Unfortunately, that is the extent of the court's indications. Were the tests devised as a throwback to the "governmental vs. proprietary" quagmire? Or was the point that these subjects, no matter what their nature, were ones which often depended upon extraterritorial sustenance? If so, which others might be included? Finally, by far the most striking point of this part of the opinion was the court's refusal to apply it in deciding the case.

In any event, the second level was the controlling one. That is, the court was not prepared to hold—under its first-level rationale—that the express power to condemn for an airport carried with it the implied power to condemn extraterritorially. Rather, the court held that the express power to condemn for an airport—when properly interpreted—was also itself the express power to condemn extraterritorially. As noted, the court accomplished this interpretation by reading two provisions of the applicable statute together. When one provision spoke of extraterritorial expansion and the other spoke of condemnation, the condemnation thus envisioned must be extraterritorial. The only vagary with this interpretational gambit is that two can play the game. Thus, a still later provision in the same statute authorizes municipalities to exercise police power over such airports. This provision expressly specifies its applicability "without the geographical limits of such subdivision."[158] The legislature so specified with regard to police power; why would it not do the same with regard to condemnation power, if it intended that power to operate extraterritorially? Obviously, there are responses to this, but the court does not make them by failing even to raise the question. There is something illogical about stressing interpretation of the context as a whole and then failing to consider the whole context.[159] *Howard v. City of Atlanta* thus becomes what-

[158] GA. CODE ANN. § 11-208 (1973). This section was a part of the original 1933 statute.

[159] As the court itself says in *Howard*, "it is elementary that all of the provisions of an

ever a later court wishes to make of it.[160]

VII. Utility Services

A final illustrative instance of extraterritorial operation is the municipality's provision of utility services. Although already noted in other contexts,[161] this instance is considered in its own light in several cases.

An apt point of departure is the 1917 decision by the supreme court in *Mayor & Council of Gainesville v. Dunlap*.[162] There plaintiff customers sought to enjoin the municipality from discontinuing its supply of water to them outside the corporate limits.[163] As authority for their position, the plaintiffs pointed to charter provisions which empowered the municipality to acquire and hold rights and property, within or without its limits, "necessary or appropriate for affording a complete and sufficient supply of reasonably pure and clear water to said city."[164] Where the municipality had acted under these provisions to supply them with water, the plaintiffs argued, it could not then discontinue the service and remove the pipes.

In treating this argument, the court began with the "general rule": "[A] municipal corporation's powers cease at municipal boundaries, and can not, without express authority granted in its charter, or necessary legislative implication therein, be exercised beyond its limits."[165] The court then reviewed the charter, but found it wanting for this purpose: "Neither this nor any other provision of the charter, expressly or by implication, authorizes the city to engage in the business of supplying water to customers beyond the city limits."[166] Accordingly, "where a municipality, in pursuance of charter powers . . ., acquires a supply of water beyond the city limits and lays water-mains from the city to the source of supply,

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enactment should be considered in determining the meaning of any part." 190 Ga. at 733, 10 S.E.2d at 192.

[160] The court of appeals has recently utilized *Howard* in upholding the power of a county board of education to condemn land outside its territorial boundaries for a sewer easement to benefit a particular school. The court said that unless a satisfactory sewage system was established, the school would be closed. Norton Realty Co. v. Hall County Bd. of Educ., 129 Ga. App. 668, 200 S.E.2d 461 (1973).

[161] *See, e.g.*, the discussion of municipal tort liability at text accompanying notes 48-100 *supra*.

[162] 147 Ga. 344, 94 S.E. 247 (1917).

[163] The trial court granted the injunction.

[164] 1892 Ga. Laws 168.

[165] 147 Ga. at 344, 94 S.E. at 247.

[166] *Id.*

it is ultra vires to engage in the business of supplying water outside of the city to persons along the route."[167] The plaintiffs' action for injunction was thus doomed.[168]

If the municipality could not be enjoined from discontinuing the water supply, then it could be enjoined from continuing such supply; and indeed this was the message of *City of Cornelia v. Wells*.[169] There the charter expressly empowered the municipality to construct and operate a water and sewerage system and to condemn property within or without the corporate limits

> whenever the corporate authorities deem it necessary and proper for the purpose of procuring the necessary water supply, laying water-mains, water-pipes, sewer-pipes, disposal plants, standpipes, or reservoirs, or any other things or appurtenances that may be necessary to the proper construction and operation of the waterworks and sewerage system in the City of Cornelia.[170]

Relying exclusively on *Dunlap*, the court summarily declared that "this provision did not confer on the City of Cornelia the power to furnish water to the inhabitants of a different municipality, or to others than the inhabitants of the City of Cornelia."[171] The court thus sustained the plaintiffs' action for injunction.

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[167] *Id.* The court likewise rejected the argument of estoppel: "the fact that the customers may have improved their property under the expectation of having the benefits of the water-main will not estop the city from subsequently discontinuing the service and removing the water-pipes."

[168] The court said this case differed from Hall v. Mayor & Council of Calhoun, 140 Ga. 611, 79 S.E. 533 (1913), discussed at text accompanying notes 130-140 *supra*, which had upheld the municipal power to contract for water beyond the corporate limits. There, it will be recalled, the court first implied the power to establish a system of waterworks and then implied the power to go beyond municipal limits to obtain a water supply. Although the court did not mention it, this case must also have differed from City Council of Augusta v. Mackey, 113 Ga. 64, 38 S.E. 339 (1901), discussed at text accompanying notes 53-60 *supra*. The court in *Mackey* held the municipality responsible for a negligent excavation in a road outside the corporate limits which resulted from the removal of a pipe by which the municipality had been supplying water to an army encampment. There the argument was expressly made that charter authority to provide for an extraterritorial water supply did not cover the municipality's provision of water to the encampment; but the court rejected that argument by pointing to other language in the charter.

[169] 181 Ga. 554, 183 S.E. 66 (1935). The plaintiffs sought, and the trial court had granted, an injunction to restrain the municipality from furnishing water to persons outside its corporate limits, and from applying the proceeds of bonds to purposes other than those for which they were validated.

[170] 1931 Ga. Laws 732.

[171] 181 Ga. at 554-55, 183 S.E. at 67.

With its decisions in *Dunlap* and *Wells*, therefore, the supreme court appeared to have erected a considerable barrier to the municipality's extraterritorial sale of water. Shortly after *Wells*, however, this barrier was in part permeated; but the event was not judicially announced until 1954. At that time the court decided *Lipscomb v. City of Cumming*,[172] still another action to enjoin the municipal extension of a water line beyond corporate boundaries.[173] In deciding the controversy, the court made a number of concessions. It conceded that the area in issue was indeed outside municipal limits; that the municipality possessed no charter authority to supply the water; and that *Dunlap* and *Wells* loomed as limitations. At this point, however, the court drew the line. In 1937, it explained, the General Assembly had enacted the "Revenue Certificate Law,"[174] a statute providing for the issuance of municipal revenue certificates for stated undertakings.[175] That statute also expressly authorized the extension and operation of those undertakings "wholly within or wholly without the municipality, or partially within and partially without the municipality."[176] Because this authorization applies to all municipalities in the state,[177] the court could not enjoin the construction of the extraterritorial water line in this case.[178]

With *Lipscomb*, therefore, Georgia municipalities discovered that since 1937 they had possessed express authority by general statute to finance, construct, and maintain the extraterritorial sale of water. The rule of *Dunlap* and *Wells* was apparently confined to extraterritorial attempts not a part of a bond issuance proceeding.

Even with express extraterritorial authority present, however, the problems do not all disappear; and this is the thrust of a number of

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[172] 211 Ga. 55, 84 S.E.2d 3 (1954).

[173] The court described the action as one "which sought to enjoin the City of Cummings from constructing a water line and furnishing water to customers because they were located outside the corporate limits of the city . . . ." *Id.* at 56, 84 S.E.2d at 4.

[174] The statute is now designated the "Revenue Bond Law" and appears in GA. CODE ANN. ch. 87-8 (1971). This statute is expressly authorized by the constitution. GA. CONST. art. VII, § VII, ¶ V (1945), GA. CODE ANN. § 2-6005 (1973). The 1976 constitution's provision is contained in GA. CODE ANN. § 2-6501 (1977).

[175] The statute specifically lists a number of revenue-producing undertakings. GA. CODE ANN. § 87-802 (1971). Revenues produced by the undertakings for which they were issued finance the bonds.

[176] GA. CODE ANN. § 87-803 (1971).

[177] The court said that the statute was a part of the charter of every municipality of the state. 211 Ga. at 56, 84 S.E.2d at 4.

[178] The court emphasized that the constitution expressly authorizes the general statute, "and by that the courts are bound and have nothing to do with the reasonableness, wisdom, policy, or expediency of the law." *Id.*

cases. In *Collier v. City of Atlanta*,[179] for example, the charter expressly empowered the municipality to construct pipes and supply water outside its corporate limits under such rules and regulations as it might establish.[180] At one point the municipality sought to raise the rates of its outside customers, who promptly confronted it with a challenge.[181] In disposing of this litigation,[182] the supreme court formulated a number of precepts. On the one hand, outside customers could not compel the municipality to supply them with water;[183] the municipality could classify rates and terminate service for nonpayment; and the municipality could establish higher rates for the outside customers than those within the corporate limits.[184] On the other hand, the municipality could not compel those outside its limits to accept the water service.[185]

The municipality's power to classify rates turns not only upon inside consumers and outside consumers; it extends also to outside consumers who receive different services. Thus, in *City of Moultrie v. Burgess*,[186] outside customers who purchased only water paid one rate, and outside customers who also purchased electricity paid a lower rate for water.[187] Sustaining the validity of this distinction, the court reasoned that the municipality was "under no legal duty to supply such service to either group."[188] Consequently,

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[179] 178 Ga. 575, 173 S.E. 853 (1934).

[180] 1917 Ga. Laws 525. Indeed, the municipality's authority extended into adjoining counties.

[181] The municipality increased the rates by 25% for the purpose of extending a new and larger water main to other outside customers.

[182] The trial court had refused to enjoin the municipality's actions, and the supreme court affirmed.

[183] This was true, said the court, unless there had been a voluntary contract between the parties.

[184] The court rejected arguments of unconstitutionality under both the federal and state constitutions.

[185] The court in Barr v. City Council of Augusta, 206 Ga. 753, 58 S.E.2d 823 (1950), expressly confirmed *Collier*:

> A municipal corporation may not compel any person outside its territorial limits to accept water service which it undertakes to furnish, nor may the municipal authorities be compelled to render such service. A municipal corporation may classify rates to be charged in outlying territories, and upon failure of customers to pay such charges, the municipal corporation may discontinue its service. An ordinance, which provides that rates for water service shall be higher in territory outside the corporate limits, is not unconstitutional and void as denying "due process" and "equal protection" under the Federal and State Constitutions.

Id. at 753-54, 58 S.E.2d at 824-25.

[186] 212 Ga. 22, 90 S.E.2d 1 (1955).

[187] Again, there was no problem of extraterritorial authority. The charter expressly empowered the municipality to serve customers outside its limits and to regulate charges therefor. 1943 Ga. Laws 1458.

[188] 212 Ga. at 24, 90 S.E.2d at 3. The court relied upon both *Collier* and *Barr*.

> the plaintiffs, having no right to demand water service from the city, may purchase it at the city's charge therefor, or they may decline to do so, at their will, but they are in no position which authorizes them to complain of an excessive charge or a discriminating rate.[189]

Finally, there is the issue of to whom the service must be provided, and a recent decision considered that point. In *Denby v. Brown*,[190] the plaintiff alleged that the municipality possessed charter authority to provide extraterritorial sewage disposal, that it in fact did provide this service to others, but that it refused to permit the plaintiff to connect his outside sewer line to the municipal system.[191] The supreme court rejected both due process and equal protection contentions of the plaintiff[192] and said that the municipality "is authorized but not required to furnish sewage service to persons outside the city limits."[193] Accordingly, "whether to serve such persons is discretionary and not subject to mandamus, no gross abuse of discretion being shown."[194]

VIII. CONCLUSION

It need not be emphasized at this point that extraterritorial municipal power is a concept of many colors. If the law's response to it is uncertain generally, this appears even more so in Georgia. Again,

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[189] *Id.*

[190] 230 Ga. 813, 199 S.E.2d 214 (1973).

[191] The plaintiff owned apartment buildings outside the municipal limits and alleged that the municipality provided sewage service to both residences and businesses in the outside area.

[192] The court upheld the trial judge's dismissal of the complaint.

[193] 230 Ga. at 814, 199 S.E.2d at 215. Another provision of the charter spoke of the municipal system's being sufficient to meet the needs of the outside area, but the court said that "[t]his section is concerned with the construction and operation of any sewage plant which may be located outside the city limits and does not control whom the city may serve." *Id.*

[194] *Id.* In dissent, Justices Gunter and Hawes maintained that the extraterritorial authority made the area outside the municipality the "service area" of the municipal utility, and that the municipality could not arbitrarily deny the use of its disposal system within that area. *Id.* at 815, 199 S.E.2d at 215.

On occasion, the grant of extraterritorial power can place the municipality at odds with the county. For instance, in City of Atlanta v. Markwell & Hartz, Inc., 108 Ga. App. 488, 133 S.E.2d 628 (1963), the 1927 charter authorized the municipality to operate and use its extraterritorial lands and to exercise police jurisdiction over them; a 1939 population statute authorized the county to make rules and regulations in respect to buildings outside incorporated areas. In this context, the court of appeals held that the county, and not the municipality, possessed authority to collect a building permit fee for the construction of a sewage disposal plant on municipality-owned land outside its corporate limits.

therefore, ambivalence is the most precise characterization.

Even this random survey confirms the existence of a concept of both judicial and statutory composition as well as inconsistent complexion. On most fronts, prohibition is the general rule which is then promptly modified by manifold exceptions. Judicial postures vary according to theatre of operation thereby rendering summarization difficult indeed. In some, strict construction is a highly honored approach; in others, it is honored only in the breach. In some, implied power is never mentioned; in some, it is mentioned but not used; in some, it is denied but employed; and in some, it is acknowledged. On the surface, at least, the "governmental-proprietary" quagmire is not a controlling consideration.

Although an arbitrary designation, two of Georgia's leading cases would seem to be *Langley v. City Council of Augusta*[195] and *Howard v. City of Atlanta*.[196] Certainly their opinions offer the most extensive discussions of the subject, and their styles are strikingly similar. Both contain dictum and holding; in both, the dictum is pervasive and the holding fairly narrow. Moreover, it is the dictum for which both are primarily remembered. With this kind of judicial instability, only conjecture can replace prediction.

It may be that extraterritorial power is desirable for the effective and efficient disposition of metropolitan area problems. For instance, that may have been the theme indicated by the well-known but little-understood "Constitutional Amendment 19" of 1972.[197] That amendment authorizes municipalities, counties, or combinations of them to exercise and provide a large number of stated powers and services.[198] It also contains the following proviso:

> Provided, however, that no City or County may exercise any such powers or provide any such service herein listed inside the boundaries of any other local governments except by contract with the City or County affected unless otherwise provided by any local or special law and no existing local or special laws or

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[195] 118 Ga. 590, 45 S.E. 486 (1903). *See* discussion at text accompanying notes 61-70 *supra*.

[196] 190 Ga. 730, 10 S.E.2d 190 (1940). *See* discussion at text accompanying notes 141-60 *supra*.

[197] GA. CONST. art. XI, § III, ¶ I (1945), GA. CODE ANN. § 2-7091a (1973). In the Constitution of 1976, this provision is contained in art. IX, § IV, ¶ II (1976), GA. CODE ANN. § 2-6102 (1977).

[198] *E.g.*, fire protection, garbage collection and disposal, public health facilities, street and road construction, parks, sewage systems, water systems, housing, urban redevelopment, public transportation, libraries, parking facilities, and air pollution. *Id.*

> provision of this Constitution is intended to be hereby repealed.[199]

Does this provision now serve as authority for a municipality to act beyond its limits to exercise and provide these powers and services, if it contracts with the county to do so? Or, rather, does it serve to prohibit the courts from implying extraterritorial authority, in the absence of contract, and require express authorization by local or special statutes? The point is that, as with most other statements on the subject, this proviso, too, can be read in more than one light.

If there is a general conclusion, therefore, it can only be that the "law" of extraterritorial municipal power is made as the problems arise. As in other areas of municipal law, this approach leaves much to be desired.

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[199] *Id.*