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LOCAL GOVERNMENT AND CONTRACTS THAT BIND

*R. Perry Sentell, Jr.**

TO paraphrase a modern slogan, in local government law "little goes right if the contract's too tight." For the layman who bargains in good faith with a municipality or county, the intoduction to this principle can be a jolt. To be told that his contract was not a contract, because it would have unduly bound the local government, must prompt serious doubts in his mind about the law commanding this result. To be told that he is legally presumed to know this must confirm his suspicions.

The local government too, seeking to do battle with the multitudes of modern problems which confront it, must yearn to be free of the principle. Without question, it would seem to constitute an obstacle more frequently than a shield.

Even the local citizens and taxpayers, when told that the principle exists in large part for their benefit and protection, must at least wonder whether on balance this proves to be true.

But the principle is a well-established one, existing in most jurisdictions from early times. Its wisdom has rarely been questioned by the authorities, and the courts appear to afford it fairly routine treatment in the cases. In Georgia, the principle is embodied in the statutory law, and a line of relatively few judicial decisions have evolved it over a period of time. Its history makes for a rather compact chapter of local government law.

The effort here, then, is simply to unfold this brief chapter.

I

Few businesses can be more successful than their ability to negotiate and agree with others. These negotiations and agreements, of course, are the avenues through which most of their purposes must be accomplished. Indeed, the development of the law of contracts itself is but manifestation of the need for a semblance of order in achieving these goals. On the surface, these basics might appear equally applicable to government; and, to an extent, they are. Here too, little can be sucessfully effected unilaterally; here also, the exchange of understandings

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offers the hope for ultimate satisfaction. Here again, the necessity for an ordered approach exists.

Because of additional elementary principles, however, further consideration must be given to government's efforts to contract. For when government acts, it does so, of course, as the designated agent of the electorate; and it exercises, in the main, delegated powers. When government obligates itself, it commits the funds of its tax-paying constituents, funds theoretically contributed for purposes more or less specified. Moreover, when government seeks particular objectives, both the means utilized and the objectives desired are ordinarily unique. In a phrase, government is government.

These and other similar principles have been traditionally viewed as especially appropriate for local government, that government which is close to the citizens and peculiarly of a "grass roots" nature. Under this historic view of strict accountability, most jurisdictions have nurtured limitation after limitation upon the contracting capabilities of their local governments. Even a cursory survey reveals the existence of agency limitations, indebtedness limitations, self-interest limitations, formality limitations, and a host of others—commanded by constitution, statute, or public policy.[1]

As a result, a body of contract law has evolved which focuses uniquely upon local government. These legal questions remain, therefore, even after the traditional contract precepts of offer, acceptance, and consideration have been examined. Questions as to the type of limitation in effect, the purposes it was meant to serve, the forcefulness of its command, the status of a contract which ignores it, the plight of a private party to the contract, the local government obligation engendered by his performance and many others can arise.

II

As indicated, the defect in a local government contract can be of many varieties. The exact status of a defective contract, therefore, depends upon the type of limitation which the local government has ignored in making it. If the contract was imperfectly or irregularly executed, it may not necessarily be completely ineffective, as long as it was a type of contract within the power of the local government to make.[2] But if the limitation ignored was one which places the contract

1 For treatment of these and other limitations upon local government's power to contract a purchase, see Sentell, *Some Legal Aspects of Local Governmental Purchasing in Georgia*, 16 MERCER L. REV. 371 (1965).

2 10 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 29.10 (3d ed. rev. 1966). "Contracts

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completely beyond the power or competence of the local government, then the contract will be termed ultra vires, and its status is absolute nullity.[3] Ultra vires contracts, then, are defined as "those completely beyond the competence of local governments in all circumstances."[4]

When the contract is determined to be ultra vires, the position of the party with whom the local government has purported to bargain is a precarious one.[5] More accurately, his position is nonexistent, for he is treated as though there was never any agreement.[6] That he was ignorant of the existence of the limitation which voided the contract is immaterial; the law's explanation to him is that he is presumed to know of such limitations.[7] Accordingly, he dealt with the local government at his peril.[8]

For this party, therefore, the judicial declaration of an ultra vires contract entails significant consequences. Because, legally, there was never a contract, he will not be permitted to hold the local government for its breach.[9] Likewise, he will not be entitled to an order for its specific performance.[10] The nullity of the contract is such that the local government will not be held to have ratified it, even by acting under it.[11] Moreover, the local government will not be estopped from asserting the invalidity of the contract, though the other party has performed his part of the bargain or has relied upon it to his detriment.[12] Not even the theory of implied contract will enable him to hold the local government for the benefits which it has received from

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within the power of the municipal corporation to make, although illegally or irregularly made, are distinguished from ultra vires contracts." *Id.* at 251.

3 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 10.12, at 707 (1968); 10 E. McQUILLIN, *supra* note 2, § 29.10, at 250, 252.

4 1 C. ANTIEAU, *supra* note 3, § 10.12, at 707.

5 *See id.*

6 10 E. McQUILLIN, *supra* note 2, at § 29.10. "If a contract is ultra vires it is wholly void . . . ." *Id.* at 252.

7 10 E. McQUILLIN, *supra* note 2, § 29.104c, at 514-15. Indeed, by not knowing, "he will be deemed a mere volunteer to whom the law affords little protection." *Id.* § 29.04 at 224.

8 1 C. ANTIEAU, *supra* note 3, § 10.12, at 707.

9 *Id.* at 707-08; 10 E. McQUILLIN, *supra* note 2, § 29.10, at 252-54.

10 1 C. ANTIEAU, *supra* note 3, § 10.12, at 707-08.

11 *Id.* at 712. "[A]n ultra vires contract . . . is not subject to ratification, express or implied." *Id. See also* 10 E. McQUILLIN, *supra* note 2, § 29.104c, at 512-13.

12 10 E. McQUILLIN, *supra* note 2, § 29.104c, at 517-18. McQuillin states that:

> The fact that the other party to the contract has fully performed his part of the agreement, or has expended money on the faith thereof, does not estop the city from asserting ultra vires, nor is a municipality estopped to aver its incapacity to make a contract by receiving benefits thereunder.

Id. (footnotes omitted); *see* 1 C. ANTIEAU, *supra* note 3, § 10.13, at 712-13.

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him.[13] Finally, the disfavor with which the law views this party's position is carried over into the subject area of quasi-contracts, where the majority rule is stated to be that he cannot recover in quantum meruit for the value of goods or services which he has provided to the local government under an ultra vires contract.[14]

Explanations of various hews have been offered to justify the law's imposition of this burden upon a party who enters into an ultra vires contract with a local government. The general reasoning seems to be that imputing notice to this party of the limitations upon the local government which vitiate the contract is not overly harsh when the other side of the picture is considered. It is feared that to allow the agreement to appear effective in any sense, even quasi-contractually, would amount to permitting the local government to expand its own powers rather than requiring it to rely upon state legislative delegation.[15] Indeed, this would annul the limitation itself and sanction the local government's accomplishing indirectly that which it could not directly achieve.[16] From this, the argument is fashioned, it would be but a short step to governmental extravagance with resulting unreasonable risks and liabilities being heaped upon the shoulders of the local taxpayers.[17] A strict rule of absolute nullity, therefore, will catch

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[13] 10 E. McQUILLIN, *supra* note 2, § 29.111a, at 542.

[14] 1 C. ANTIEAU, *supra* note 3, at § 10.12, at 709. The commentators note that a minority of jurisdictions do hold the local government accountable in quasi-contract when it has enjoyed money, goods or services under a contract which is later held ultra vires but was not directly contrary to public policy nor specifically forbidden by statute. Georgia is included in the list, and the authority ordinarily cited is the case of Butts County v. Jackson Banking Co., 129 Ga. 801, 60 S.E. 149 (1908). See 1 C. ANTIEAU, *supra* note 3, § 10.12, at 708-09. The Georgia Supreme Court held in the *Butts County* case that an action for money had and received could be maintained by one who had loaned to a county money which had been used by the county to discharge what the courts viewed as a legally incurred liability for a current expense, although the county officials had no authority to borrow the money or to give a note therefor because of the constitutional prohibition of incurring indebtedness without a vote by the citizens. In delineating the boundaries of its decision the court said that

> [w]e recognize the soundness of the rule that where the constitution of a State forbids not only the borrowing of the money but also the incurring of the liability which was discharged by the money borrowed, the lender is without remedy against the county to recover his money in any form of action, legal or equitable. But in reaching the conclusion which we have in this case, it is upon the construction of the constitution that this paragraph does not prohibit the incurring of a liability for legitimate current expenses to be paid, or which may lawfully be paid out of the taxes of that year.

129 Ga. at 811, 60 S.E. at 153.

[15] 1 C. ANTIEAU, *supra* note 3, § 10.12, at 709.

[16] 10 E. McQUILLIN, *supra* note 2, § 29.111a, at 542-43.

[17] 1 C. ANTIEAU, *supra* note 3, § 10.12, at 709.

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these dangerous tendencies at the outset and, viewed in this light, is "consistent with principles of equity and fair dealing."[18]

Given this type of balance, therefore, the plight of the private party pales into insignificance.

III

With the backdrop now hung, the foreground can be sketched by narrowing the focus to a particular kind of ultra vires contract. Observation reveals that many jurisdictions treat with suspicion either or both of two general types of local government efforts to bargain. One of these, stated simply, is the local governing authority's attempt to bargain away its power to govern.[19] The nature of government itself, it is thought, is contrary to this type of agreement, for how can the function of exercising discretion in dealing with the unforeseen be committed to the confines of a contract?[20] How can the governing authority agree to exercise its powers in predetermined ways[21] or to interfere with its own right to reasonably provide for the health, safety, or general welfare of the community?[22] Ordinarily declared ultra vires, therefore, are contracts "which interfere with the legislative or governmental functions"[23] of the local government.

The other effort treated with disfavor is the local governing authority's attempt to commit its successors to a particular course of action.[24] The principle here appears to be that each separate governing authority is entitled to independence in dealing with the problems which confront it during its term of office.[25] Admittedly, the concern often expressed here too is in respect to "governmental functions"[26] but the objection appears to be based on the binding of successors.[27]

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18 10 E. McQuillin, *supra* note 2, § 29.111a, at 543.

19 *See id.* at § 29.07. "The established rule is that municipal corporations have no power to make contracts which will embarass or control them in the performance of their legislative powers and duties." *Id.* at 245.

20 *See* C. Antieau, Cases & Problems on the Law of Municipal Corporations 211-12 (4th ed. 1964); 10 E. McQuillin, *supra* note 2, at § 29.07.

21 C. Antieau, *supra* note 20.

22 *See* 10 E. McQuillin, *supra* note 2, at § 29.07.

23 *Id.* at 247.

24 *See* 1 C. Antieau, *supra* note 3, at § 10.18; 10 E. McQuillin, *supra* note 2, at § 29.101; C. Rhyne, Municipal Law § 10-5 (1957).

25 Authorities cited note 24 *supra.*

26 *See* C. Rhyne, *supra* note 24; 17 N.C.L. Rev. 301, 302 (1939).

27 1 C. Antieau, *supra* note 3, § 10.18, at 725. "These contracts are frequently labeled 'legislative' or 'governmental' as they are judicially voided, but the terms add nothing to the principle, and, indeed, are often so deceptive that they had better be avoided." *Id.*

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Thus, "[c]ourts have many times set aside, and will set aside, contracts by local governments when they conclude that the council or other governing body has unwisely or unfairly tied the hands of successor bodies."[28]

To project the above principles in the concrete, the following factual situation might be illustrative. For a considerable period of time, the fixed charge for a retail liquor license in a particular municipality had been $500. While this charge was in effect, the municipal council enacted an ordinance declaring that no such license was to be issued for a lesser amount in the municipality, until licenses already issued had expired. Immediately following the enactment of this ordinance, an individual obtained a license and paid the $500 charge. Two days later the municipal council which had succeeded that enacting the above ordinance reduced the charge for retail liquor licenses to $100, and proceeded to issue them at that price. The individual who had just paid the higher charge protested, pointing to the declaration of the above ordinance and suing for the $500 which he had paid.

This was the controversy presented for resolution to the Supreme Court of Georgia in the 1882 case of *Williams v. City Council of West Point*.[29] The local government function involved, *i.e.*, licensing, was about as "governmental" as it could be. Had the prior municipal council possessed the power to restrict validly the performance of this function by the present council? The supreme court began its cryptic treatment of the question[30] by conceding that generally "[a] municipal corporation may bind itself by, and cannot abrogate, any contract which it has the right to make under its charter . . . ."[31] Then, however, without noting the presence of a question of first impression or citing existing precedent, the court laid down the following limitation: "[B]ut one council cannot, by ordinance, bind itself and its successors to a given line of policy, or prevent free legislation by them in matters of municipal government."[32] The holding thus followed that the ordinance of the prior council freezing the license charge at $500 had been void and therefore not binding upon the present council.[33] The protesting individual could not repudiate his purchase of the license at

28 *Id.* at 724-25.
29 68 Ga. 816 (1882).
30 The opinion was in headnote form.
31 68 Ga. at 816.
32 *Id.*
33 *Id.* The present council had been free, therefore, to lower the charge.

the higher charge, and his suit against the municipality was dismissed.[34]

The *Williams* case apparently constituted the first effort by the Georgia courts to deal with the problem here under scrutiny. Its factual situation was intriguing because it encompassed attempts by a governing authority both to freeze the exercise of a governmental function and to commit its successors to that course of action. It could have been handled, therefore, by a decision merely prohibiting the binding of successors. But, as noted, the court went further than this in its opinion and formulated its limitation to apply to the authority taking the action, as well as its successors. This would appear to mean that even if the very same council had issued licenses one day for $500 and two days later for $100, still the individual purchasing at the higher charge would have had no complaint.

The limitation pronounced by the supreme court in the *Williams* case caught the eyes of the early codifiers in Georgia and resulted in the formulation and enactment of a statute which has survived to the present day. The statutory language is emphatic: "One council may not by an ordinance bind itself or its successors so as to prevent free legislation in matters of municipal government."[35]

A mere surface reading of this language prompts several brief observations. First, its command is expressly directed to a "council"[36]—a form of governing body utilized almost exclusively by muncipalities in Georgia. Does the command therefore not apply to county governing authorities? Second, the action prohibited by the statute is that taken in the form of "an ordinance."[37] If the local governing body can take the action in the form of a contract not reduced to an ordinance, is it clear of the prohibition? Third, the statutory limitation follows the formulation of the *Williams* court in that it applies to the council which attempts to take the binding action, as well as to its successors. Finally, of course, the only binding action which is prohibited is that which will "prevent free legislation in matters of municipal government."[38] Was this simply the codifiers' method of including the "governmental function" concern, or does the language have other meaning?

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[34] *Id.* This was true, held the court, even though the charge was lowered before he had an opportunity to use his license. *Id.*

[35] GA. CODE ANN. § 69-202 (1967).

[36] *Id.*

[37] *Id.*

[38] *Id.*

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These and other inquiries can be answered, if at all, only by analyzing the judicial evolution of the statute.[39]

IV

The noted statutory limitation has been raised in a number of contexts over the years. Study of it can best proceed, therefore, by probing the subject areas in which this has occurred and viewing the courts as they have delineated the occasions upon which the limitation could and could not be called into play.

Furnishing Sewer Services

One of the first instances for considering the limitation following its settlement into statutory law was presented in the case of *Horkan v. City of Moultrie.*[40] Here the plaintiff alleged that in return for the municipality's agreement to furnish him sufficient water and sewer services for his building,[41] he had permitted the municipality to lay its sewers through his land.[42] Although the municipality had been using the sewers for approximately two years, it presented the plaintiff a bill for specified months and threatened to cut off his water for nonpayment.[43] The Supreme Court of Georgia, it was argued, should declare the plaintiff entitled to an injunction against the municipality's actions.[44]

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39 Not discussed here is a somewhat related principle found running through a line of Georgia decisions to the effect that local ordinances commanding specified parliamentary procedures are not mandatory upon the governing authority. Representative of this line of cases is South Georgia Power Co. v. Baumann, 169 Ga. 649, 151 S.E. 513 (1929), in which one of the issues was whether an ordinance was invalid because it had not been read twice prior to enactment by the governing authority as commanded by another municipal ordinance. The Georgia Supreme Court upheld the ordinance on the grounds that

> [r]ules of procedure passed by one legislative body are not binding upon a subsequent legislative body operating within the same jurisdiction. Courts ordinarily will not invalidate an ordinance enacted in disregard of parliamentary usage, provided the enactment is made in the manner provided by statute. A municipal legislative body can not divest its successors of its legislative powers by passing ordinances or resolutions which deprive their successor of the power to exercise fully their legislative discretion. Charter provisions are structural, and must be strictly complied with. "Rules of parliamentary practice are merely procedural, and not substantive."

Id. at 650, 151 S.E. at 515.

40 136 Ga. 561, 71 S.E. 785 (1911).

41 The agreement thus would also bring this case under the discussion on furnishing water services appearing at notes 78-112 and accompanying text *infra.*

42 136 Ga. at 561-62, 71 S.E. at 785. The land was located within the municipal corporate limits.

43 *Id.* at 562, 71 S.E. at 785. The bill was for water used in two named months.

44 *Id.* The lower court had refused the injunction and dismissed the petition on a general demurrer.

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Taking a rather halting point of beginning, the court first seemed to focus upon the indefinite length of the municipality's commitment as the weak link in the contract.[45] Indeed, it clearly indicated the view that a municipal contract, even continuing beyond the term of office of those making it, would be valid if confined to "a reasonable time."[46] The agreement in issue here, however, would benefit the plaintiff indefinitely and thus impinge upon the power which succeeding councils must necessarily possess to change the water rates as circumstances may require.[47] This, said the court, might "result in great injury to the municipality and to the public."[48]

Then shifting its ground, however, the court appeared to come to rest upon the statute which had been codified from the *Williams* case.[49] But this statute, it will be recalled, applies only to municipal action in the form of an ordinance. No matter, declared the court, "[i]f this could not be done by an ordinance, of course it could not be done by a contract."[50] Then shedding light upon the nature of the municipal agreement which brought it under the statute, the court explained that:

> Power in a municipality of making and changing, by ordinance, water rates from time to time, whenever necessary to protect the city in its revenues and to enable it to furnish to all on equal terms and at reasonable rates, is a legislative or governmental power, and therefore can not be legally bargained or bartered away by one council so as to forever deprive succeeding councils of the right to exercise it.[51]

Even conceding the initial invalidity of the municipality's agreement, contended the plaintiff, here it had ratified that agreement by acting under it in laying and using the sewer. By thus deriving benefits under the contract, even while this litigation transpired, the municipality was estopped to assert its invalidity. But the court forcefully

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45 *Id.* The municipality had urged the point of the indefinite length of the commitment as a defense, and the court said that "[i]n our opinion this point was well taken." *Id.*

46 *Id.*

47 *Id.* at 563, 71 S.E. at 785. It might become necessary to change the rates in order to obtain sufficient revenue for maintenance or for serving its patrons reasonably and equally.

48 *Id.*

49 The court expressly quoted the statute. *Id.* at 563, 71 S.E. at 785-86.

50 *Id.* at 563, 71 S.E. at 786.

51 *Id.*

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rejected both the ratification and estoppel arguments, on grounds that the contract was ultra vires and absolutely void.[52]

The *Horkan* opinion, therefore, was both clarifying and confusing. Without leaving any doubt that this municipal contract was ultra vires, the court clouded the exact point upon which it rested for this conclusion. Was it the indefinitely continuing obligation created by the agreement, or simply the prohibition of the statute, which voided the contract? On the interpretation of the statute itself, the court extended its coverage to contracts as well as ordinances, and appeared to view a municipal "legislative or governmental power" as the trigger for its applicability.[53] Throughout this part of its opinion, however, the court talked of prohibiting one council from bargaining away the powers of its successors, although the language of the statute itself clearly does not turn on this point.[54]

Three years after its decision in *Horkan*, the court was confronted with an even stronger situation in *Neal v. Town of Decatur*.[55] Here the municipality desired a right of way through the defendant's land for the location of a sewer and in return had agreed that the defendant's property would be exempt from all future sewer assessments. After utilizing this right of way for more than seven years, the municipality constructed still another sewer and assessed a portion of the cost against the defendant's abutting property. To the municipality's levy of a fi. fa. upon his property, the defendant countered by pointing to the contract and to the municipality's seven-year period of enjoyment under it.

Citing *Horkan*, the court's entire response to this defense was as follows:

> The alleged agreement was ultra vires and void, and being so, could not be ratified by continued use, under the contract, of the sewer through the land by the municipality; nor would the benefit thereby received estop the municipality from subsequently setting up the invalidity of the contract.[56]

Thus, dismissal of the defendant's affidavit on demurrer was affirmed.

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52 *Id.* The lower court's dismissal of the plaintiff's petition was affirmed.

53 Apparently, this was what was meant, thought the court, by the statutory language: "so as to prevent free legislation in matters of municipal government." GA. CODE ANN. § 69-202 (1967).

54 *I.e.*, the statute prohibits the prescribed actions whether taken by the present council or its predecessors in office.

55 142 Ga. 205, 82 S.E. 546 (1914).

56 *Id.* at 205, 82 S.E. at 547. The opinion appeared in headnote form.

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Almost identical to *Neal* was the case set out by the plaintiff's petition in *J.S.H. Co. v. City of Atlanta*,[57] seeking an injunction against the municipality's enforcement of certain sewer assessments. Here again the land owner had conveyed a right of way to the municipality for the location of sewer lines, with the municipality agreeing in return to exempt his property from the assessments.[58] Upon construction of the lines, however, costs were assessed against the property.

The plaintiff attempted, apparently rather unclearly, to distinguish his situation from that of *Neal* by arguing that "the contract between the municipality and the property owners was executed within the year in which it was made . . . ."[59] But the court would not accept this distinction, noting that it "overlooks the vital principle"[60] expressed by the statute. This principle, continued the court, "was intended to leave the municipal government free to enact appropriate and necessary legislation for whatever might arise in the future."[61] As long as the municipality's agreement came within the prohibition of the statute,[62] therefore, the time of its execution was immaterial. Again, the plaintiff's petition was dismissed on demurrer.

Of a different flavor was the controversy presented in *Barr v. City Council of Augusta*,[63] which consisted of an effort by some 60 property owners to enjoin the municipality from enforcing certain charges against them for sewer services.[64] The foundation for their position was provided by a written contract entered into almost 25 years previously by the municipality and the county, in which the municipality had agreed to furnish a sewer system to county citizens upon the same terms as it was furnished to municipal citizens.[65] After the plaintiffs had erected homes in the county in reliance upon this contract,[66] the municipality began charging them for sewer services greatly in excess of the charges it made to its citizens.[67]

[57] 193 Ga. 1, 17 S.E.2d 55 (1941).

[58] *Id.* at 1, 17 S.E.2d at 56. This agreement was contained in the conveyance itself.

[59] *Id.* at 2, 17 S.E.2d at 56.

[60] *Id.*

[61] *Id.*

[62] *I.e.*, as long as it will "prevent free legislation in matters of municipal government." GA. CODE ANN. § 69-202 (1967).

[63] 206 Ga. 750, 58 S.E.2d 820 (1950).

[64] *Id.* at 751, 58 S.E.2d at 821.

[65] *Id.*

[66] *Id.* at 751-52, 58 S.E.2d at 821. The plaintiffs thus claimed to be members of the public for whose benefit the municipality had made the contract.

[67] *Id.* at 752, 58 S.E.2d at 821. The sewer charges were based however upon the amount of water used by the plaintiffs.

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Again the property owners were held to be without recourse. In a summary fashion, the court pronounced the contract in issue ultra vires and void and thus incapable of affording the plaintiffs any rights to sewer service.[68] The contract was ultra vires, said the court, because "it restricted legislative and governmental powers of future councils . . ."[69] of the municipality in respect to a "governmental function,"[70] *i.e.*, the establishment and maintenance of a sewer system. On this note, the municipality's general demurrer was sustained.

As recently as 1960, the Georgia Court of Appeals answered still another question of first impression about coverage of the statute. In *Southern Airways Co. v. DeKalb County*[71] the contest revolved around a lease of the county airport to a private corporation.[72] In one of the provisions of this lease the county agreed to furnish to the lessee without charge the sewerage facilities located upon the premises.[73] That the provision concerned a governmental function seemed of little doubt,[74] but were agreements by counties subject to the prohibition of the statute?[75] Holding that they were, the court reasoned that "[i]f a municipality cannot legally bind itself to furnish water free for such a long period, neither can a county. The same reasoning and legal principles apply with equal effectiveness to the provision for free sewerage facilities."[76] This provision of the lease, therefore, was held invalid.[77]

Furnishing Water Services

Closely akin to the municipality's agreements in respect to sewer services, at least as viewed by the courts, are its commitments to furnish water. Indeed, two of the cases already discussed, *Horkan v. City of Moultrie*[78] and *Southern Airways Co. v. DeKalb County*,[79] encompassed such commitments which were likewise held invalid and not

[68] *Id.* at 750-51, 58 S.E.2d at 822. Further, said the court, "the city would not be estopped from asserting the invalidity of the contract at any time." *Id.* at 751, 58 S.E.2d at 822.

[69] *Id.* at 751, 58 S.E.2d at 822.

[70] *Id.*

[71] 102 Ga. App. 850, 118 S.E.2d 234 (1960).

[72] The court's treatment of the lease will be discussed in the text accompanying notes 159-69 *infra*.

[73] 102 Ga. App. at 860, 118 S.E.2d at 242. The period of the lease was 15 years.

[74] *I.e.*, setting charges for sewer services.

[75] It will be recalled that the statute expressly makes its command only to councils.

[76] 102 Ga. App. at 861, 118 S.E.2d at 243.

[77] *Id.* The provision was held separable, however, from the remainder of the lease.

[78] 136 Ga. 561, 71 S.E. 785 (1911).

[79] 102 Ga. App. 850, 118 S.E.2d 234 (1960).

binding upon the local governments.[80] Additionally, the controversy described in *Barr v. City Council of Augusta*[81] included disagreement over the municipality's setting of water rates for persons residing in the county.[82] Upholding the municipality, the supreme court summed up its rule that "[t]he fixing of water rates, from time to time, by a municipality, is a legislative or governmental power, and one council may not, by contract or ordinance, deprive succeeding councils of this legislative or governmental power."[83]

Similar to *Barr*, the case of *City Council of Augusta v. Richmond County*[84] placed in issue a contract between the municipality and the county, but here the complaining party was the county itself.[85] At a time when the land upon which was located the county court house and jail belonged to the municipality, the two governments had entered into an agreement under which the municipality had consented to furnish to the county, free of charge, all water necessary for the buildings. Later the municipality had conveyed this land to the county, and then it had attempted to charge the county for the water used at the buildings.[86]

Reversing the trial court's enjoining of the municipality's efforts at collection,[87] the supreme court did not "think that the municipality could make a binding contract to furnish water free of charge for an indefinite time in the future, for the purposes mentioned in the contract referred to."[88] The agreement was thus held ultra vires and unenforceable "as against subsequent councils of the municipality."[89]

But the court's opinion here seemed somewhat hesitant. First, as noted, it again focused upon the indefinite time of the municipality's

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80 The court's reasons were the same as those discussed in respect to the sewer services.

81 206 Ga. 750, 58 S.E.2d 820 (1950).

82 This disagreement resulted in separate litigation, Barr v. City Council of Augusta, 206 Ga. 753, 58 S.E.2d 823 (1950). The rates charged were double those charged to municipal citizens.

83 *Id.* at 753, 58 S.E.2d at 824.

84 178 Ga. 400, 173 S.E. 140 (1934).

85 *Id.* In *Barr*, it will be recalled, property owners claimed to be the parties for whom the contract between the municipality and the county had been made. *See* 206 Ga. at 751, 58 S.E.2d at 821.

86 178 Ga. at 401, 173 S.E. at 140. It threatened to enforce collection for the service by cutting off the water supply.

87 *Id.* at 405, 173 S.E. at 142. The trial court had expressly based its holding upon the agreement between the governments.

88 *Id.* at 403, 173 S.E. at 141.

89 *Id.* at 403, 173 S.E. at 142. The court relied upon the *Horkan* case, discussed in text accompanying notes 40-53 *supra*.

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commitment and talked only of binding subsequent councils. Moreover, it went to pains to point out that "we do not think that the principle applying to covenants running with the land is applicable in this case."[90] What if it were?[91] Finally, the court felt the need to point out "an additional reason"[92] for its holding; *i.e.*, the municipality's conveyance of the land to the county had not mentioned furnishing free water.[93]

As though to force the court to wade in new waters, the case of *Screws v. City of Atlanta*[94] spotlighted a mandamus action by a citizen and taxpayer to force the municipality to charge and collect rates for water which it was supplying to a certain fair association.[95] In defense, the municipality pointed to a lease which it had made to the association 15 years earlier for a term of 25 years.[96] The association had agreed to hold fairs upon the property leased, and the municipality had committed to furnish, without charge, water to the association. The lease of the property had been made under the express authority of a statute specifically vesting the municipal governing authority with discretion in setting terms and conditions.[97]

The facets of the controversy were intriguing. First, even conceding the municipality's agreement to be invalid, would this entitle a mere citizen to bring an action in mandamus? The court held that it would.[98] Further, what was the effect of the express statutory authority empowering the municipality to execute the lease in its discretion? Said the court: "[W]e do not construe this provision to mean that the city was thereby empowered to bind itself to terms, otherwise illegal and ultra vires, which were not to be necessarily implied from the authority granted."[99] Finally, was the agreement actually invalid? Holding that it was, the court characterized the municipal power to fix and regulate water rates "legislative or governmental," which fell "within

90 178 Ga. at 403, 173 S.E. at 142.

91 The trial court had held the contract to constitute such a covenant.

92 178 Ga. at 404, 173 S.E. at 142.

93 *Id.* This, said the court, had been the final transaction between the two governments concerning the land upon which the two buildings were located. *Id.*

94 189 Ga. 839, 8 S.E.2d 16 (1940).

95 *Id.* at 839, 8 S.E.2d at 17. He alleged that the money lost thereby had resulted in an increase of water rates by the municipality.

96 *Id.* at 840, 18 S.E.2d at 18. The amount furnished was to be that reasonably necessary for the purposes of the association.

97 *Id.* at 843, 18 S.E.2d at 19. The statute had been enacted for this specific property.

98 *Id.* at 842, 18 S.E.2d at 19. "Neither is there any merit in the contention that the plaintiff had not sufficient interest to maintain the suit." *Id.*

99 *Id.* at 843, 18 S.E.2d at 19-20.

the limitation placed upon councils of municipalities . . ."[100] by the statute here under analysis.[101] Noting that the municipal commitment here was for a definite period of time, unlike those invalidated in *Horkan* and *City Council of Augusta,* the court nevertheless declared that "the rulings there made are applicable to such a contract for a term of twenty-five years."[102] Thus, the grounds for the holdings in those earlier cases were clarified.

The municipality's defense fell with the ultra vires contract, and the lower court was reversed in denying the plaintiff's suit for mandamus.

Illuminating the statute in its most unattractive form, of course, are those situations in which the local government brandishes it as a shield to ward off the claims of those who have taken the government at its word. In *City of Warm Springs v. Bulloch,*[103] for instance, it was raised against an action by an individual who had leased his spring to the municipality for a period of 99 years.[104] In return, the municipality had agreed to furnish the lessor with water for his personal use free of charge. After taking water from the spring for some 20 years, the municipality suddenly repudiated its promise and threatened to cut off the lessor's water supply.[105]

Refusing the lessor's prayer that the municipality be enjoined from repudiating its promise, [106] the court held the contract violative of the statute[107] and described the result as follows:

> 'Where one enters with a municipal corporation into a contract which is void because opposed to the constitution and laws of this State and contrary to its settled public policy, complete performance of such contract on the part of the person will not prevent the municipal corporation from pleading its want of power or the illegality of the contract.'[108]

Similar use was made of the statute more recently in the 1966 case of *Glendale Estates, Inc. v. Mayor & Council of Americus.*[109] Here the

100 *Id.* at 843, 8 S.E.2d at 20.

101 GA. CODE ANN. § 69-202 (1967).

102 189 Ga. at 844, 8 S.E.2d at 20.

103 212 Ga. 149, 91 S.E.2d 13 (1956).

104 *Id.* at 150, 91 S.E.2d at 14. The lease had been executed in 1935.

105 *Id.* The supply was simply to the lessor's house.

106 *Id.* The lower court had overruled the municipality's demurrer.

107 *Id.* at 150, 91 S.E.2d at 13. The decision was based on grounds that the fixing of water rates is a legislative or governmental power. *Id.* at 149, 91 S.E.2d at 14.

108 *Id.* at 150, 91 S.E.2d at 14, *quoting* City Council of Dawson v. Dawson Water Works Co., 106 Ga. 696, 697, 32 S.E. 907 (1899). The lower court was thus reversed.

109 222 Ga. 610, 151 S.E.2d 142 (1966).

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injunction sought was to prohibit the municipality from refusing to make water charges for the plaintiff's mobile home park in a certain manner,[110] as it had previously agreed to do in return for the plaintiff's consent for the annexation of his property.[111] According the plaintiff's contention only brief consideration, the court proclaimed that "[s]uch an agreement being ultra vires, it would not be binding on any future mayor and council and prevent them from enacting an ordinance changing or altering the terms of the purported agreement."[112] This petition, too, bowed to the municipality's general demurrer.

Locating a School

A case in which the principle of the statute was indicated, but the statute itself was not mentioned, was that of *Smith v. Ouzts*.[113] Here county citizens and taxpayers alleged that five years earlier they had been induced by the county board of education to withdraw a particular legal action, with the board's agreeing in return that a proposed school for the county would not be built in a certain location. Now the board had determined to place the school in that location, and the plaintiffs were seeking an injunction.[114]

One of the decisive questions in the controversy, said the court, was whether the board of education "had authority to enter the contract or agreement as to the selection of the site for the school in question."[115] By making such an agreement, the board "undertook to limit its discretion or to divest itself of the discretionary power vested in it by law in so far as the selection of the site of this school is concerned."[116] The conclusion followed that "[o]bviously such a contract or any contract which controls or restricts the discretion vested in a public officer or public body is contrary to public policy and void."[117]

Although the court did not expressly rely upon the statute here under study for its proposition, it cited other decisions in which it had

110 *Id.* at 611, 151 S.E.2d at 143. The municipality had allegedly agreed to charge the plaintiff according to a master meter for the park but was instead attempting to make a specific charge for each mobile home space.

111 *Id.* The annexation had taken place.

112 *Id.* at 612, 151 S.E.2d at 144. The court quoted the code section and cited the *Horkan* line of cases to classify the fixing of water rates a legislative and governmental power.

113 214 Ga. 144, 103 S.E.2d 567 (1958).

114 *Id.* at 144-45, 103 S.E.2d at 567-68. Plaintiffs alleged that the location in question would disregard the welfare of the county students.

115 *Id.* at 146, 103 S.E.2d at 568-69.

116 *Id.* at 146, 103 S.E.2d at 569.

117 *Id.*

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done so.[118] Was it thus indicating that the coverage of the statute could be extended to county boards of education and that a "discretionary power" was interchangeable with "legislative or governmental powers" for these purposes? Or, on the other hand, was it simply declaring an independent principle of "public policy" for governmental entities? Whatever the grounds, the contract was pronounced void, and the plaintiffs' petition was dismissed on general demurrer.

Aiding the Poor

The most extensive judicial discussion of the application of the statute was the one provided by the supreme court in the case of *Aven v. Steiner Cancer Hospital, Inc.*[119] Here citizens and taxpayers were seeking to enjoin the municipality from leasing land to a hospital corporation for a period of 35 years, with the corporation's agreeing to pay rent in the form of providing cancer treatment to the poor of the municipality.[120]

From the barrage of objections hurled by the plaintiffs at the agreement, the court selected the statute here under analysis as its ground for invalidation.[121]

Noting the case-law origin of the statute in this state, the court observed that the principle which it expressed "is applicable generally to legislative or governmental bodies."[122] The court then implicitly recognized the necessity for finding a "governmental" function in order to invoke the statute, and set out to do so. The municipality's express charter authority to legislate for the care of the poor was not a command that it do so, said the court.[123] Consequently, whether and how it would aid the poor was "a matter for determination from time to time by the governing authorities"[124] and thus demanded the exercise of

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118 See *id.* at 146-47, 103 S.E.2d at 569. The court cited both the *Barr* case, discussed at notes 63-70 and accompanying text *supra,* and the case of Aven v. Steiner Cancer Hosp., Inc., 189 Ga. 126, 5 S.E.2d 356 (1939), discussed at notes 119-33 and accompanying text *infra.*

119 189 Ga. 126, 5 S.E.2d 356 (1939).

120 *Id.* at 127, 5 S.E.2d at 358. Apparently, the indigent patients were to be those suffering from cancer. The municipality maintained that the contract "represents the best judgment of the mayor and council, who are seeking to provide such treatment, with the least expense to the city." *Id.* at 133, 5 S.E.2d at 360.

121 GA. CODE ANN. § 69-202 (1967). Mr. Justice Jenkins dissented without opinion on this point.

122 189 Ga. at 140, 5 S.E.2d at 364.

123 *Id.* Indeed, the grant of the power to legislate on the subject, said the court, fixed the matter "as one dependent on *legislative* action." *Id.* at 141, 5 S.E.2d at 365.

124 *Id.* at 140, 5 S.E.2d at 364.

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discretion. The lease in question, then, appropriated "a property right of substantial yearly value[125] for the benefit of the poor, continuously for the period of thirty-five years."[126] Moreover, reasoned the court, the care of the poor was not a matter of purely local concern but was "a public responsibility, relating to society in general, and [might] directly affect the peace, health, morals, and security of the public at large."[127] From these various lines of analysis,[128] the court could conclude that the lease

> grants the use of valuable property, as consideration for stated benefits to the poor, and thus in effect a continuing appropriation for the use of the poor, for the term of years stated; whereas future councils should be free to determine whether any expenditures should be made for that purpose; and if so, upon what terms and conditions, to what extent, and in what circumstances. If the agreement should be executed and given effect, it would necessarily prevent free legislation in regard to all of these matters concerning care of the poor. The proposed undertaking will not merely grant a lease on the city's property; it will bargain away governmental discretion.[129]

The point remaining for consideration was that the municipal contract here was for a definite term of years, unlike those in some of the other cases which have been discussed. On this point, the court was unclear. On the one hand, it seemed to indicate that this contract would be invalid no matter what the term: "The rule is not limited to either indefinite or perpetual terms."[130] On the other hand, it appeared to come back to the reasonableness of the term: "The period is thirty-five years—more than a third of a century, and half the allotted time of man. Manifestly it would not be a reasonable application of the rule to say that one city council may bind itself and its successors *in matters of municipal government* for any such period."[131]

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125 The plaintiffs alleged that the property had a rental value of $300 per month.

126 *Id.* at 140, 5 S.E.2d at 364. The court cited non-Georgia cases for the proposition that aiding the poor was a "governmental" function.

127 *Id.* at 141, 5 S.E.2d at 365.

128 In designating governmental functions, the court used some of the same approaches it had used in respect to municipal tort liability and indeed cited some of the tort statutes and cases as authority. *Id.* at 142, 5 S.E.2d at 365; *see* R. SENTELL, THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA 25-41 (1967).

129 189 Ga. at 142, 5 S.E.2d at 365.

130 *Id.* at 144, 5 S.E.2d at 366.

131 *Id.*

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Finally, the court reached the conclusion toward which it had been traveling:

> Since, as we have shown, the matter of caring for the poor is, under the city charter, a matter for municipal government, such an executory contract, intended to be of force for the period of thirty-five years, cannot be upheld as an executed donation or as a proposed immediate donation, whether or not, if it were such in fact, it might be sustainable.[132]

On this note, the court held the plaintiffs entitled to an injunction.[133]

Maintaining a Sewer Line

One of the most unsatisfying opinions revolving around the statute was that rendered by the Georgia Court of Appeals in the relatively recent case of *City of Douglas v. Cartrett.*[134] There the plaintiff had granted the municipality an easement for the construction of a sewer line across her lands, with the municipality expressly agreeing to maintain the line, to keep the water purity at a specified standard, and to pay any damages which might result to the land.[135] Eight years later, the municipality permitted the line to overflow and cause considerable damage to the plaintiff's land[136] and found itself the defendant in a breach of contract action for damages.[137]

Holding the plaintiff's action subject to general demurrer,[138] the court first established that the municipality's maintenance of a sewer system "is for the protection of the public health, and is a governmental function."[139] From this it followed, said the court, that any contract made by the municipality in respect to the sewer line "could not effectively extend beyond the term of the council making it."[140] Here several elections and changes in the government had occurred since the making of the contract.[141]

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132 *Id.* at 145, 5 S.E.2d at 367.

133 *Id.* at 147, 5 S.E.2d at 368. The lower court had refused to grant the injunction and was thus reversed.

134 109 Ga. App. 683, 137 S.E.2d 358 (1964).

135 *Id.* at 684-85, 137 S.E.2d at 360. The easement had been granted in 1952, and the municipality's agreements were expressly included in the instrument.

136 *Id.* at 683, 137 S.E.2d at 359-60. The overflow had destroyed timber on approximately 27 acres and had rendered a house and its premises untenable.

137 *Id.* The plaintiff's original action had been both for breach of contract and negligence, but she had subsequently eliminated her claim based upon the tort action.

138 *Id.* at 687, 137 S.E.2d at 362. The court reversed the lower court.

139 *Id.* at 685, 137 S.E.2d at 360.

140 *Id.* at 685, 137 S.E.2d at 361.

141 *Id.* "[I]t is apparent that there had been several elections and changes in the

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For the above analysis, the court cited the statute, thus evidencing its view that what is thereby prohibited is the binding of successors. But, as noted previously, the plain language of the statute refutes this view; it expressly prohibits a council from binding either "itself or its successors"[142] in matters of municipal government. Thus, the only appropriate question for consideration here was whether the municipality's agreement in the easement contract was one "so as to prevent free legislation in matters of municipal government."[143] The court's discussion of the governing authorities' terms of office and transpiring elections was not only inappropriate but also unnecessarily confusing.

Another point which the court raised but never effectively exhausted was that of the nature of the municipal agreement. That is, it indicated that if the municipal commitment could be construed as a covenant running with the land, it could be given binding effect, apparently as an exception to the statute.[144] Failing to expound upon this point, however, the court simply construed the agreement as collateral and not one running with the land.[145]

In holding for the municipality, the court pointed out to the plaintiff the possibility of an action for nuisance. "But the plaintiff here has elected to proceed upon the contract, and the contract upon which she relies for her action is void."[146]

Leasing Property from Private Party

Still another recent application of the statute was that effected by the supreme court in two 1967 decisions. The first of these, *McElmurray v. Richmond County*,[147] presented an action to enjoin the county from constructing a public building,[148] for the reason that the land upon

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government after the grant of the easement and before the time when it is contended that there was a breach by the city of its agreements." *Id.*

142 GA. CODE ANN. § 69-202 (1967).

143 *Id.*

144 109 Ga. App. at 686, 137 S.E.2d at 361. "The grant of the easement by Mrs. Cartrett was valid, and, since it was she may contend that the added collateral agreements over and beyond the grant of the easement but included in the same instrument are binding as covenants running with the land." *Id.*

145 *Id.* The court based its decision on the grounds that the grant of an easement did not grant any title to or estate in the land and that "[t]he agreement to pay damages neither touched nor concerned the land." *Id.*

146 *Id.* at 687, 137 S.E.2d at 362.

147 223 Ga. 47, 153 S.E.2d 427 (1967).

148 The building was to be used as office space for the county's department of family and children's services.

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which the building was to be located was obtained by the county by means of an invalid lease.[149]

Although indicating its belief that the mere rental of property was within the county's authority,[150] the court agreed with the plaintiff on the invalidity of the lease here challenged. Treating the matter with the utmost brevity, the court expressed its two-pronged objection to the lease as follows:

> The contract here shows on its face that it creates a debt payable each year for ten years without the approval of the voters and also binds future governing authorities without their approval contrary to constitutional and statutory authorities shown above. Thus the contract was void from its inception and the trial court erred in denying the plaintiff's prayers for temporary injunction.[151]

The "statutory authorities" referred to by the court meant the statute here under study.[152]

In concluding its opinion, the court appeared to point out an exception to the statute: "[W]here the continued existence of the contract is based upon the continued approval of the public authority making the contract then such a contract does not clash with the . . . statutory prohibition . . . ."[153] After simply making the declaration, however, it failed to further elaborate, and the authority upon which it purported to rely is equally uninformative.[154]

Rebounding from the court's decision, the county then entered into a new agreement with the private party, under which it purported to lease the property in question for one year with automatic renewal for like period for nine years.[155] Coupled with this was the agreement that the lessor would sell the property to the county at the termination of the lease for a nominal amount, provided 120 monthly payments had

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149 *Id.* An alternative contention was that the land already belonged to the county, but the court rejected this argument on grounds of failure to join an indispensable party.

150 *Id.* at 49, 153 S.E.2d at 428. The purpose for which the building was to be used was an authorized one, said the court. *Id.*

151 *Id.* at 49, 153 S.E.2d at 429.

152 GA. CODE ANN. § 69-202 (1967).

153 223 Ga. at 49, 153 S.E.2d at 428-29.

154 The court cited Macon Ambulance Service v. Snow Properties, 218 Ga. 262, 127 S.E.2d 598 (1962), for this point, but the opinion in that case does not mention GA. CODE ANN. § 69-202 (1967).

155 Richmond County v. McElmurray, 223 Ga. 440, 441, 156 S.E.2d 53, 54 (1967).

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been made.[156] Upon challenge, the supreme court found these agreements subject to the same defects[157] and further stated:

> [P]ublic officials would be forced to continue it in effect to avoid moral and pecuniary loss to the public and county goverment by refusing to continue the agreement, and it would always require affirmative action on their part to prevent it from amounting to a 10-year lease and a debt payable for 10 years in the purchase of a public building without the approval of the voters binding on future governing authorities without their approval contrary to constitutional and statutory authorities . . . ."[158]

Without further ado, the plaintiffs were again held entitled to an injunction.

Leasing Property to Private Party

Noticeably absent from the court's summary opinions in the *McElmurray* cases, and many of the others here noted, was any attention to the exact nature of the specifically challenged function of the local government. If, as the court has declared, the statute here under focus constitutes a limitation only upon the making of commitments respecting "governmental" functions, this attention would seem a prerequisite in any litigation. Of interest, therefore, is a 1960 effort by the court of appeals at grappling with this unhappy issue.

The controversy in *Southern Airways Co. v. DeKalb County*[159] resulted from the county's having leased its airport to a private party for a period of fifteen years. Prior to the beginning of the lease,[160] however, the county had second thoughts and contended that the lease was void, unenforceable, and not binding upon either party. Accordingly, the plaintiff lessee requested the court to issue a declaratory judgment on the validity of the agreement.

One of the arguments upon which the county based its position was that the lease violated the statute as an invalid effort by the governing

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156 *Id.* Additionally, the lease provided that in the event of condemnation of the property, the award would first go to the lessor in an amount equal to 120 monthly payments less whatever rent had been paid.

157 *Id.* at 442-43, 156 S.E.2d at 55. The court appeared to view the county's second contract as an attempt to do indirectly that which it had already held could not be directly accomplished.

158 *Id.*

159 102 Ga. App. 850, 118 S.E.2d 234 (1960).

160 This beginning point had been postponed by the parties when the United States Government took possession of the airport for a time.

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authority to bind itself and its successors. In considering this argument, the court noted the contract limitation enforced by the statute but thought it clearly not applicable "to a situation where a political subdivision is operating in a proprietary rather than a governmental capacity."[161] A probe of the county's operation thus seemed in order.

A majority of the court began its probe by pointing to the "Uniform Airports Law,"[162] a statute expressly authorizing local governments to own, lease, occupy and the like, airports. Moreover, it conceded that this statute declared that the local government's action in so doing would be "for public, governmental, and municipal purposes."[163] Nevertheless, said the majority, this declaration did not conclude the matter. It then turned to decisions dealing with municipal tort liability and showed that regardless of the declaration, the municipal operation of an airport had been termed a proprietary function and tort liability had been enforced.[164] "As this is true in the field of tort liability," reasoned the majority, "it should be true with the greater force in the field of contract law."[165] The conclusion was obvious:

> We thus hold that where, as here, a county through its proper authority leases property which it owns for use as an airport, it is engaging in a proprietary and not a governmental function. It follows that the county commissioner, the proper authority here, had the power to bind his successors in office by entering into this agreement.[166]

Aside from this wholesale utilization of tort principles in a contract subject area, the majority's opinion is worrisome in still another respect. It is difficult to determine whether what is here designated a proprietary function is the county's operation of the airport or its leasing of it to a private party. At times the opinion appears to indicate that any function, no matter how governmental, might be leased to a private party, because the leasing itself is a proprietary function. That the opinion can even be read in this light reveals a need for greater clarity.

The dissenting opinion took the majority to task for its bland

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161 *Id.* at 855, 118 S.E.2d at 239.

162 GA. CODE ANN. § 11-201 (Supp. 1968); GA. CODE ANN. §§ 11-202 to -09 (1936).

163 GA. CODE ANN. § 11-202 (1936).

164 102 Ga. App. at 854, 118 S.E.2d at 239. The decision specifically noted was Caroway v. City of Atlanta, 85 Ga. App. 792, 70 S.E.2d 126 (1952).

165 102 Ga. App. at 854, 118 S.E.2d at 239.

166 *Id.* at 855, 118 S.E.2d at 239.

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reliance upon tort principles.[167] In the tort liability cases, the dissent noted, the municipality's operation of an airport was termed proprietary only when it was shown that the airport was operated as a profit making enterprise. Here this had not been shown; "[i]ndeed, the undisputed allegations show that the airport was *not* constructed for profit-making purposes."[168] On this reasoning, the dissent concluded that the lease was invalid as a violation of the statute.[169]

V

The judicial evolution of the statutory limitation, generally, has now been traced. The leading decisions ordinarily referred to on the subject have been covered. As with most courses of judicial action, however, the path has not been perfectly straight; detours have cropped up along the way. For reasons not always apparent, or even deducible, the courts have evolved special developments under the statute from time to time, developments which defy the ordered treatment thus far attempted. Perhaps appropriate at this point, therefore, is a brief discussion of these variations on the theme.

The early case of *Hall v. Mayor & Council of Calhoun*[170] presented a rather familar factual situation. The owner of a spring had entered into a contract with the municipality by which he agreed to allow the municipality the use of his water in its water system in return for the municipality's commitment to pay for plumbing and furnish him with water free of charge.[171] After the municipality had constructed its system and furnished the spring owner with water for a number of years, he sold the land with the spring to the plaintiffs, who sought to cancel the contract on the ground that it was ultra vires.[172]

In only a headnote opinion, the supreme court held that the contract could not be cancelled and that it was not ultra vires. The court pointed to the authority granted the municipality by its charter to

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167 The dissenting opinion was written by Judge Nichols. *Id.* at 862, 118 S.E.2d at 244.

168 *Id.* at 864, 118 S.E.2d at 245.

169 *Id.* at 865, 118 S.E.2d at 245. The majority did hold two agreements included in the lease, concerning water and sewer services, to be invalid, as discussed at text accompanying notes 71-77 *supra*, but concluded that they did not invalidate the remainder of the lease. 102 Ga. App. at 861, 118 S.E.2d at 243. Judge Nichols dissented from this conclusion as well. *Id.* at 865, 118 S.E.2d at 245.

170 140 Ga. 611, 79 S.E. 533 (1913).

171 *Id.* at 612, 79 S.E. at 534. The contract had been made in 1898.

172 *Id.* at 613-14, 79 S.E. at 534. Plaintiffs wished to compel the municipality to stop taking water from their spring and to remove pipes and other equipment from their land.

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establish a waterworks system and appeared to hold this authority sufficient to validate the contract as well.[173] As to the contract itself, the court noted its recital of a consideration and the receipt of benefits by both parties under it. The only reference to the statutory limitation here under analysis was as follows: "The case differs from that of *Horkan v. City of Moultrie,* . . . where an effort was made to compel a city to furnish water 'free of charge' for an indefinite time under an agreement by the municipal council for that purpose, though made for a consideration . . . ."[174] Exactly where the difference lay, the court did not explain.

Highly reminiscent of *Hall* was the more recent case of *City of Warm Springs v. Bulloch,*[175] previously discussed,[176] in which the municipality was upheld in repudiating its commitment to furnish a spring owner with water after utilizing his spring for many years. That contract, held the court, was ultra vires and in violation of the statute.[177] In its *Warm Springs* opinion, also only in headnote form, the court said that "[t]he *Hall* case is clearly distinguishable on its facts from the present case . . . ."[178] Again, however, the court did not trouble itself to elaborate upon this obvious distinction; and, for the benefit of those who had difficulty in finding it, declared that "if in point, it would have to yield to older, full-bench decisions of this court."[179]

What then, was the *Hall* decision all about, and is it still good law?[180]

Another instance in which the supreme court drew strong nourishment from a charter authorization was its decision in *City of Summerville v. Georgia Power Co.*[181] There the municipality was seeking to

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173 *Id.* at 611, 79 S.E. 533-34. "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 . . . ." *Id.*

174 *Id.* at 612, 79 S.E. at 534. For discussion of the *Horkan* case, see text accompanying notes 40-54 *supra.*

175 212 Ga. 149, 91 S.E.2d 13 (1956).

176 See text accompanying notes 103-08 *supra.*

177 GA. CODE ANN. § 69-202 (1967).

178 212 Ga. at 150, 91 S.E.2d at 14.

179 *Id.* at 150, 91 S.E.2d at 14-15.

180 In other cases, as well, the court has indicated confusion over the *Hall* decision. In City Council of Augusta v. Richmond County, 178 Ga. 400, 404, 173 S.E. 140, 142 (1934), discussed in text accompanying notes 84-89 *supra,* the court said that "[i]n *Hall v. Calhoun* . . . the case of *Horkan v. Moultrie* was referred to; but there was no intimation that the ruling in the *Horkan* case was not sound, and the *Hall* case was differentiated from the former case on its facts." 178 Ga. at 404, 173 S.E. at 142.

181 205 Ga. 843, 55 S.E.2d 540 (1949).

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have declared void a franchise which it had granted many years previously to a public service corporation for the use of its streets in operating an electrical distribution system.[182] In one of the vaguest opinions yet noted, the court held that the municipality could not repudiate the franchise, observing that "[u]nder the express terms of the charter, the council of the City of Summerville had the power to grant franchises to public utilities . . . ."[183] "[T]his being true," the court explained, "the franchise in the present case is not subject to the attack that it is void as being in violation of Code § 69-202 . . . ."[184] What the court did not explain, of course, was the method by which a mere charter provision could be elevated to a position of priority over a general statute.[185]

Whether any principle can be extracted from these indications in the *Hall* and *Summerville* opinions is difficult to determine. Did the court actually mean to establish that express charter authorization to make a specific contract, or to undertake a specific obligation, would empower the municipality to ignore the limitation of the statute? Would the decision in *Warm Springs* actually have been otherwise had the municipality's charter expressly empowered it to lease the spring and obligate itself to furnish free water? The line of decisions such as *Screws v. City of Atlanta*,[186] discussed previously,[187] would appear to render this conclusion highly unlikely.

Still another unenlightening opinion refusing to give the statute application was that rendered in *Mayor & Council of Waynesboro v. McDowell*.[188] There the plaintiff sought to enjoin the municipality from rezoning certain property[189] on the ground that it had not com-

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[182] *Id.* at 843, 55 S.E.2d at 541. The franchise had been granted in 1924.

[183] *Id.* at 844, 55 S.E.2d at 542. The court approached its conclusion by quoting the following unclear language from Williams v. West Point, 68 Ga. 816 (1882), the decision from which the code section itself was codified: "A municipal corporation may bind itself by, and cannot abrogate any contract which it has the right to make under its charter." 205 Ga. at 844, 55 S.E.2d at 542.

[184] *Id.* Once over the hurdle of voidness, the court could then even talk of the federal constitution's prohibition against the impairment of the obligation of contracts.

[185] Indeed, after thus weaving its mystic spell, the court went on to hold that the contract being authorized, the municipality was estopped to deny its validity because of the admitted failure to publish the application for the franchise, as commanded by another provision of the charter. *Id.* at 845, 55 S.E.2d at 542-43.

[186] 189 Ga. 839, 8 S.E.2d 16 (1940). *See also* Aven v. Steiner Cancer Hospital, Inc., 189 Ga. 126, 5 S.E.2d 356 (1939).

[187] See text accompanying notes 94-102 *supra*.

[188] 213 Ga. 407, 99 S.E.2d 92 (1957).

[189] The municipality was attempting to rezone the property from residential to commercial.

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plied with an ordinance requiring a vote by three-fourths of the council. In defense, the municipality urged that this ordinance was not binding upon it, because it violated the statute.[190]

Declaring flatly that "we do not find . . . [the statute] to be applicable to the facts in the instant case,"[191] a majority of the court set out to resolve the controversy from another approach.[192] First, it explained, general statutes prohibited changes in the municipal zoning plans without these changes having been first submitted to the municipal planning board.[193] Here it was admitted that the proposed change had not been submitted to the board, and thus it had not been validly adopted by the municipal council. This concluded the matter,[194] and the plaintiff was entitled to his injunction.

Further special developments under the statute can be detected in a series of decisions dealing with the issuance by local governments of revenue anticipation bonds. The case of *Lawson v. City of Moutrie*,[195] for instance, presented an attack upon a municipal ordinance providing for the issuance of such bonds for the improvement of a waterworks system. One of the grounds for this attack was that the municipality had included in the ordinance a number of commitments which violated the statute.[196] The supreme court rejected this argument, however, pointing to the general statute authorizing the issuance of the bonds,[197] and said that the additional municipal commitments in the ordinance "were part of the contract between it and the holders of the certificates."[198] Still not satisfied, the court explained that "[t]hese portions of the ordinance relate, not to the governmental functions, but to the

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190 GA. CODE ANN. § 69-202 (1967).

191 213 Ga. at 408, 99 S.E.2d at 94. No reasons were given for this conclusion.

192 Chief Justice Duckworth and Justices Candler and Hawkins dissented. *Id.* at 410, 99 S.E.2d at 95.

193 *Id.* at 409, 99 S.E.2d at 94. The statutes referred to are GA. CODE ANN. §§ 69-813, -814 (1967).

194 213 Ga. at 409, 99 S.E.2d at 94. The court believed that "the legislature has itself restricted the power of the governing authorities of a municipality which has elected to come within the provisions of theh zoning act, . . . to adopt, amend, or change a zoning plan proposed or adopted by them." *Id.*

195 194 Ga. 699, 22 S.E.2d 592 (1942).

196 *Id.* at 702, 22 S.E.2d at 594. The commitments were "that throughout the period which these certificates run the city would keep the property insured, have audits made, provide for the payment of a certain percentage of the revenues into a certain fund . . . and similar provisions including the manner in which the plant should be operated . . . ." *Id.*

197 GA. CODE ANN. §§ 87-801 to -826 (1963).

198 194 Ga. at 702, 22 S.E.2d at 594.

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proprietary action of the municipality."[199] Thus classified, the agreements escaped the coverage of the statutory limitation.[200]

More complex was the court's resolution of the controversy in *Reed v. City of Smyrna*.[201] There under fire was an ordinance providing for the issuance of revenue bonds to enable the municipality to improve and combine its water and sewerage systems,[202] and authorizing a contract between it and the county for the joint construction and operation of a water main.[203] This ordinance also included express agreements by the municipality that it would initiate specified minimum water rates and also that it would maintain a system of rates and charges necessary to pay off the revenue bonds.[204] Again one of the challenges[205] to the ordinance was that it transgressed the statutory limitation,[206] and again this challenge was rejected, though the court's rationale in doing so is not abundantly clear.

The court could not resolve the issue here by mere function classification, as it had in *Lawson*, for both the maintenance of a sewerage system and the setting of water rates were traditionally considered governmental in nature.[207] From this approach, therefore, the municipal agreements fell within the confines of the statute. Taking another approach, however, the court focused upon the authority under which revenue bonds were issued by local governments. First, as noted in *Lawson*, the direct authority to issue bonds came from a general statute.[208] Probing further, however, the court observed that the state

199 *Id.* The court cited a tort liability decision to classify the operation of a water plant as a nongovernmental function. *Id.*

200 For its basis, the court went back to language in *Williams v. West Point* itself, declaring that "[t]he quoted language recognizes a distinction which is applicable in the instant case." *Id.* at 702, 22 S.E.2d at 594.

201 201 Ga. 228, 39 S.E.2d 668 (1946).

202 Previously the municipality had operated them as separate entities.

203 201 Ga. at 229, 39 S.E.2d at 669-70. The municipality's water supply had become inadequate.

204 *Id.* at 230, 39 S.E.2d at 670. The municipality would maintain a system of rates and charges "necessary to provide funds sufficient to pay the principal and interest on the certificates and create a reserve for that purpose." *Id.*

205 The challenge came in the form of a citizen's intervention in the proceedings to validate the bonds. *Id.* at 231, 39 S.E.2d at 671.

206 GA. CODE ANN. § 69-202 (1967).

207 *See, e.g.*, Glendale Estates, Inc. v. Mayor & Council of Americus, 222 Ga. 610, 151 S.E.2d 142 (1966); City of Douglas v. Cartrett, 109 Ga. App. 683, 137 S.E.2d 358 (1964).

208 GA. CODE ANN. §§ 87-801 to -826 (1963). The statute expressly authorizes the issuance of revenue bonds for the purpose of combining water and sewerage systems. GA. CODE ANN. §§ 87-802(a)(3), -804 (1963).

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constitution expressly adopted this general statute by reference.[209] From this, concluded the court, "[i]t follows that the Constitution itself expressly provides that water-works systems and sewerage systems may be combined in the identical manner undertaken in the instant case."[210] The same conclusion followed in respect to the validity of the other municipal agreements included in the ordinance.[211]

Whatever the court accomplished in *Reed*, it accomplished with a minimum of explanatory effort. Whatever the principle there established, it operated to free the municipal agreement from the shackles of the statute. To attempt to define the boundaries of this principle, however, is to grapple with the unknown. In basic terms, what the court appeared to be saying was that one general statute (the authorization for the issuance of revenue bonds) was to be given precedence over another general statute (the limitation on municipal contracts) because the first statute was expressly referred to in the constitution. This reference, by some process, seemed to elevate the revenue bond statute to a position of at least quasi-constitutional law. This would seem to be an odd principle indeed.

Even if this were the principle established, how far could it be extended? Was the court indicating that the municipality could validly make any binding commitment as long as it was included in an ordinance providing for the issuance of revenue bonds? What if the commitment was included in such an ordinance but was entirely unrelated to the purposes for which the bonds were being issued? What if the commitment concerned the purposes for which the bonds were being issued but was not included in the ordinance itself? The possibilities seem limitless.

As though to test the court of appeals' view of the *Reed* principle, the 1962 case of *Johnson v. State*[212] confronted the court with a fascinating variation. There the municipality had enacted an ordinance providing for the issuance of revenue bonds for the construction of an electrical distribution system, and specifically incorporated into the ordinance by reference a contract between the municipality and the Tennessee Valley Authority. In the contract TVA agreed to supply

209 GA. CONST. art. VII, § 7, para. 5, GA. CODE ANN. § 2-6005 (1958). This provision expressly authorizes the issuance of revenue anticipation obligations for any purposes permitted by the general statute.

210 201 Ga. at 234, 39 S.E.2d at 673.

211 *Id.* "What has been said in division one of this opinion answers this argument [§ 69-202] of the plaintiff in error adversely to his contention." *Id.*

212 107 Ga. App. 16, 128 S.E.2d 651 (1962).

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electric current for use in the municipality's system, and the municipality agreed to resell the electricity at specified rates and to raise or lower rates in the future as necessary for the sound operation of the system.[213]

Against challenge, the municipality forthrightly argued that the revenue bond statute rendered Code section 69-202 inapplicable to its contract with TVA.[214]

Splitting the issue, the court first held that the municipality's purchase of electrical current itself would not be limited by section 69-202, on the ground that the operation of an electrical system was a proprietary function.[215] The setting of rates, however, was another matter, and the court was forced to face the argument of the *Reed* principle. In doing so, it concluded that "when the Revenue Bond Law of 1957 is considered in its totality, neither this nor any of its other provisions renders meaningless the mandate of *Code* § 69-202."[216] True, conceded the court, the revenue bond statute did allow the municipality to make commitments to the bondholders themselves,[217] and this was the holding of *Reed*. "However, this express statutory authority for a municipality to contract with the bond holders as to specified future utility rates does not extend to contracts with the wholesaler of electrical power."[218] Accordingly,

> [t]here being no express general law authorizing the council to bind itself and its successors in this regard, the contract between the City of Chickamauga and TVA is ultra vires and void.[219]

To this extent, therefore, the supreme court's *Reed* principle has been considered, at least by the court of appeals.

Of a different flavor and not as noteworthy was the supreme court's decision in *Smith v. State*.[220] There challenged was the validation of

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213 *Id.* at 16-17, 128 S.E.2d at 652-53. Changes in rates were to be agreed upon by both parties.

214 *Id.* at 20, 128 S.E.2d at 655. Again, the challenge came in the form of an intervention in the bond validation proceeding.

215 *Id.* at 19-20, 128 S.E.2d at 654. Even a twenty year contract would not be held unreasonable per se as to time, said the court. *Id.*

216 *Id.* at 20, 128 S.E.2d at 655.

217 *Id.* "It is true that the Revenue Certificate Law of 1937, as amended by the Revenue Bond Law of 1957, specifically authorizes a municipality to covenant as to rates in any resolution authorizing the issuance of revenue bonds." *Id.*

218 *Id.* at 21, 128 S.E.2d at 655.

219 *Id.* Presumably, express general statute authorization would be held to repeal by implication the prohibition of GA. CODE ANN. § 69-202 (1967).

220 217 Ga. 94, 121 S.E.2d 113 (1961).

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revenue bonds of a municipal-county development authority,[221] as well as the validity of certain agreements between the municipality, county and authority,[222] and the lease by the authority of certain property to a private business.[223] According little specific attention to the statutory limitation on local government contracts, the court described in detail the local amendment to the state constitution creating the development authority, empowering the local governments to cooperate with it, and expressly delegating to the authority all powers provided for it by the general assembly. The conclusion seemed foregone:

> [S]ince the City of Waycross had ample constitutional power to contract with the Authority for the use of its services in performing an activity or transaction which the city itself was authorized to undertake, there is clearly no merit in the contention that the contract, insofar as the city is concerned, is ultra vires and void because it is prohibited by *Code* (Ann.) § 69-202 . . . .[224]

Upheld on the same rationale was the lease contract between the development authority and the private business.[225]

VI

This, in essence, constitutes the history of the limitation on binding contracts in Georgia's local government law. Its roots go deep and its prohibition is emphatic. Appreciation of the limitation can come only by tracing this route from case law to statute and back to case law again. Although the litigation has not been exhaustive, it does provide at least a restrictive subject-matter panorama of the limitation's applicability and of the ensuing results.

The basic reason for such a limitation in local government law is one derived purely from a process of balancing the advantages and disadvantages. As explained, the advantages have traditionally weighed heavier on the scales of most authorities.

With an agreement or commitment to which the limitation is conceded to apply, little doubt remains but that all the drastic conse-

221 *Id.* at 98, 121 S.E.2d at 116-17. The bonds were for the purchase of certain realty upon which industrial facilities could be located.

222 *Id.* at 98-99, 121 S.E.2d at 117. Both the municipality and the county agreed to continue to levy specified taxes in order to pay named annual sums to the authority.

223 *Id.* The lease was for a period of 15 years.

224 *Id.* at 103, 121 S.E.2d at 119.

225 *Id.* at 103, 121 S.E.2d at 120.

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quences of a full-fledged ultra vires contract ensue. These consequences too, of course, are justified by the fears of an alternative approach.

As with most limitations, the point at which most flexibility exists is that of determining the factual situations to which the limitation is applicable. Here, as shown, these can be grouped with a fair degree of order into specified subject-matter contexts, but the quality of judicial treatment leaves much to be desired. As noted, all too often applicability has been declared by arbitrary headnote pronouncements, utterly lacking in reasoned analysis or explanation.

Even the arbitrariness, however, has not been consistent. Avenues of escape from the limitation apparently exist, but here again they seem to result more from judicial maneuverability than from ordered precept or logic.

The conclusion for the chapter, then, cannot be an altogether comforting one. Perhaps slight solace can be taken, however, from the proposition that knowledge, even of inconclusiveness, is preferable to ignorance.

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