NEW LEGAL SANCTION IN GEORGIA FOR THE CORPORATE CONTRIBUTION TO PRIVATE EDUCATIONAL INSTITUTIONS

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Public spirited and thoughtful Georgia lawyers—and they are legion by nature of the profession—though currently bombarded by all media of public information with the financial and segregation problems of the public supported educational institutions, are none the less aware that the financial problems of the private college are even more acute than those of the state supported college or university. If, by chance, they are not aware of this problem, a mere listing of certain commonly known facts should convince them:

1. The private college gets no direct financial support from the state or federal governments, and wants none.
2. The past source of large testamentary endowments from alumni has been dried up to a major extent by the almost confiscatory estate tax rates.
3. The size of inter vivos gifts from alumni has been materially reduced by current income tax rates.
4. Operating costs have gone up with the general cost of living, and it is probably true that some "maintenance men working around on campuses have been demanding more take home pay than some experienced instructors can be given."[1]
5. Endowment income has shrunk, due principally to low interest rates.
6. Tuition charges have never been enough to cover operation costs and, low as they are by this standard, are probably so high as to have passed the point of deminishing returns.

Aware of these facts, believing in education, and being loyal to his college, the Georgia lawyer has contributed what he could to the annual appeals for unrestricted alumni gifts. But it seems that these funds, while generous and helpful, have been insufficient to cover the operating deficits. Other sources of revenue must be found.

Having sat, probably, on one or more corporate boards of directors, or having been consulted by them, our Georgia lawyer knows that corporations have for many years, as a matter of course, made contributions annually to the Community Chest, Red Cross, and similar charities. He knows that the federal income tax law allows a deduction for these contributions up to five per cent of net income.[2] He also knows that the Georgia

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1. Bell, *Corporate Support of Education*, 38 A.B.A.J. 119 (Feb. 1952).
2. INT. REV. CODE § 23 (q).

income tax law, in 1952 for the first time, permitted the deduction of such contributions by a corporation.[3]

Why not add a private college to the group of donees? Perhaps our friend has not heretofore examined very thoroughly the legality of these contributions from the standpoint of Georgia corporation law for any one or all of the following reasons:

1. Donations being small, they have been dismissed under the theory of *de minimis*.
2. Corporate by-law allows them.
3. The board of directors or stockholders have approved or ratified them.
4. Benefits to the corporation, from a public relations standpoint, of contributions of Community Chest Funds and similar charities are rather obvious.
5. The 1952 amendment to the Georgia income tax law allows the contributions as deductions.
6. In the rare case, the corporate charter or a charter amendment allows them.

Now, however, wanting to be able to approve the legality of a substantial corporate contribution to a private educational institution, he digs a little deeper. Knowing that a corporation, being a creature of law, can exercise only those powers granted to it, he encounters the following problems. First, there is no specific authority in the corporate charter, as amended, nor in the by-laws. Second, there is no specific authority in the broad general powers set out in Ga. Code Ann. § 22-1802(h);[4] nor in the nine so-called "inherent powers" set out in Ga. Code Ann. § 22-1827 (a)-(i);[5] nor in the "conferred" powers set out in Ga. Code Ann. § 22-1828 (a)-(j).[6]

Third, and most important perhaps, in the November-December 1953 session of the Georgia General Assembly, the specific power to make contributions to charity was given to corporations chartered after the effective date of the Act[7] (December 12, 1953) as follows:

> Section 1. Every private corporation hereafter chartered in this State shall have, in addition to the powers granted in its charter and in addition to other general powers conferred by law, power to make donations for the public welfare or for charitable, scientific, or educational purposes.

As to those corporations chartered before its effective date, the Act is as follows:

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3. Ga. Laws 1952, p. 427. Query: Is this corporate deduction really the law? Notice that amending clause specifically says what words of the Code section shall be deleted and what words added, but the corporate deduction is not mentioned. The deduction is found in the last clause of the section, reading as amended.
4. Ga. Laws Ex. Sess. 1937-38, p. 216.
5. Ga. Laws Ex. Sess. 1937-38, pp. 214, 222, 223.
6. Ga. Laws Ex. Sess. 1937-38, pp. 214, 223.
7. Ga. Laws Nov.-Dec. Sess. 1953, p. 121.

> Section 2. Every private corporation heretofore chartered and whose charter was issued subject to the right reserved in the State to change the charter or withdraw the franchise shall also have the power described in Section 1.

Fourth, there appears to be a possibility that such a contribution comes within the "incidental and necessary powers" conferred by Ga. Code Ann. § 22-1828(h):[8]

> . . . to do all and everything necessary and proper for the accomplishment of the objects enumerated in the charter or any amendments thereof or necessary or incidental to the protection and benefit of the corporation and in general to carry on any lawful business necessary or incidental to the attainment of the objects of the corporation.

Researching the fourth proposition first, our Georgia lawyer looks into Nadler on *Georgia Corporation Law* and finds, at section 279, the following:

> Comprehensively stated, an "incidental" power exists only for the purpose of enabling a corporation to carry out the powers expressly granted to it (that is to say, the powers necessary to accomplish the purpose of its existence), and can in no case avail to enlarge powers, and thereby warrant it to devote its efforts or capital to other purposes than such as its charter expressly authorizes or to engage in collateral enterprises not directly but only remotely connected with its specific corporate purposes. [citing the North Carolina case of *Victor v. Louise Cotton Mills*, 148 N.C. 107, 61 S.E. 648, 16 L.R.A. (N.S.) 1020 . . .]

Mr. Nadler then says: "Thus, the doctrine of 'ultra vires' is being further limited and discredited." (Citing Ga. Code Ann. § 22-719,[9] and five Georgia cases.[10])

But the cited annotated Code section appears to refer to the power of officers as contrasted with the power of the corporation itself, and all the cases, though denying the corporation's defense of ultra vires, find a tangible benefit to the corporation in the completed performance of the complaining party.

The question then arises whether the necessary benefit to the corporation can or will be found in a gratuitous contribution to a private college, especially when the court is confronted with the decisions in *Brinson Railway Co. v. Exchange Bank of*

8. See note 6 *supra*.
9. Ga. Laws 1843, p. 108.
10. Williams Bros. Lumber Co. v. Young Men's Syrian Ass'n, 65 Ga. App. 480, 15 S.E.2d 908 (1941); Bank of Garfield v. Clark, 138 Ga. 798, 76 S.E. 95 (1912); Mercantile Trust Co. v. Kiser, 91 Ga. 636, 18 S.E. 358 (1893); Jones v. E. B. Ezell & Co., 134 Ga. 553, 68 S.E. 303 (1910); Towers Excelsior & Ginning Co. v. Inman, 96 Ga. 506, 23 S.E. 418 (1895).

Springfield,[11] *Military Interstate Ass'n. v. Savannah Railway*,[12] and five other cases.[13]

In the *Brinson* case, the court said:

> (a) The president of a railway company incorporated under the general laws of Georgia as a common carrier has no power, either with or without the consent of its board of directors, to donate funds belonging to the corporation, or to execute in the corporate name a note to be discounted in behalf of or to raise funds as a recognized donation for the erection of a public school, or for the purpose of building up or promoting the town in which the school is situated, even though the school or town be located on the line of the company's railway and its transportation business might thereby be increased. A note executed in the name of the railway company for such a purpose could not bind the corporation where the president of the bank to which it was made payable, who "O.K.'d" it and authorized his bank to accept and discount it, had full notice of the purpose for which it was given and that it was a mere donation, and the cashier of a branch of the said bank, who actually accepted and discounted the note for the bank (the original payee), was directed at the time by the president of the railway corporation, who executed the note in its name and behalf, to place the proceeds thereof to the credit of a certain school, on the books of the payee bank, and the payee, therefore had full notice of the unauthorized purpose for which the note was given [citing the *Interstate Ass'n.* case], where the Supreme Court treated as ultra vires and void a subscription by a railway corporation to the capital stock of a corporation organized to furnish amusement to the public at a point on the line of the railway, and which therefore might incidentally increase the transportation business of the railway. . . .

The court also held that being a demand note, and being transferred to plaintiff "without recourse," plaintiff "took it subject to all equities between the original parties, including the defense of ultra vires interposed by the railway company."

Thus it seems that corporate gifts are ultra vires acts unless the cited cases can be distinguished; unless the present day Georgia courts, by finding a benefit, construe the gifts to be within the "incidental and necessary" powers or unless the enabling and permissive legislation previously referred to controls.

As for distinguishing the five cases from a case of corporate

11. 16 Ga. App. 425, 85 S.E. 634 (1915).
12. 105 Ga. 420, 31 S.E. 200 (1898).
13. Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co., 12 Ga. App. 818, 79 S.E. 45 (1913); First Nat. Bank of Tallapoosa v. Monroe, 135 Ga. 614, 69 S.E. 1123, 32 L.R.A. (N.S.) 550 (1911); Piedmont Feed & Grocery Co. v. Georgia Feed & Grocery Co., 52 Ga. App. 847, 184 S.E. 899 (1936); Cherokee Iron Co. v. Jones, 52 Ga. 276 (1874); Galloway v. Mitchell County Electric Membership Corp., 190 Ga. 428, 435, 9 S.E.2d 903 (1940). See also, L.R.A. 1917A, 897, where, after reviewing Georgia cases, it is said that Georgia at that time had not repudiated the doctrine of ultra vires where the act was beyond the corporate powers, but that there were certain circumstances there pointed out wherein the corporation would be estopped to plead the doctrine.

gift to a private college, three[14] involved executory contracts of guaranty or accommodation endorsement, clearly beyond the powers of business purposes expressed in either the charter or the statutory and incidental powers, and the others[15] involved the use of corporate funds or powers to start separate businesses alien to those expressed in the charter.

Then, too, the Georgia cases denying the corporation's plea of ultra vires can probably be considered as dealing, not with corporate acts or contracts being ultra vires as *beyond* their powers, but rather that the acts and contracts are *within* their powers, but that they were done in an unauthorized way and by an unauthorized person; or that they involved an injured and innocent third party, and the corporation, having benefited, was estopped to plead ultra vires; or that it was against public policy for the corporation to retain the benefit without paying the consideration.

As for the *Brinson Railway* case and the *Military Interstate Ass'n.* case, there seems to be no genuine basis for a distinction, and if one be asserted, it is likely to be a strained distinction without a difference. Yet, it is submitted, these cases are effectively nullified by the permissive legislation previously cited. If it then be contended that while the permissive legislation can be applied constitutionally and properly only to those corporations chartered after the effective date of the legislation, but not to those chartered before such effective date, the answer is found in the recent New Jersey case of *A. P. Smith Mfg. Co. v. Barlow*[16] which upheld the right of a corporation to give $1500 to Princeton University against the attacks of stockholders that such gift was ultra vires, and that the New Jersey statutes permitting such gifts were unconstitutional because they impaired the obligation of contracts, deprived the stockholders of property without due process, and took private property for public purposes without compensation.

Specifically, the court held the power to make the gift was within the incidental powers of the corporation, saying:[17]

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14. Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co., 12 Ga. App. 818, 79 S.E. 45 (1913); First Nat. Bank of Tallapoosa v. Monroe, 135 Ga. 614, 69 S.E. 1123, 32 L.R.A. (N.S.) 550 (1911); Piedmont Feed & Grocery Co. v. Georgia Feed & Grocery Co., 52 Ga. App. 847, 184 S.E. 899 (1936).
15. Cherokee Iron Co. v. Jones, 52 Ga. 276 (1874); Galloway v. Mitchell County Electric Membership Corp., 190 Ga. 428, 435, 9 S.E.2d 903 (1940).
16. 26 N.J. Super. 106, 97 A.2d 186 (1953).
17. 97 A.2d 186, 190, 192 (1953).

> I am strongly persuaded by the evidence that the only hope for the survival of the privately supported American college and university lies in the willingness of corporate wealth to furnish in moderation some support to institutions which are so essential to public welfare and therefore, of necessity, to corporate welfare. What promotes the general good inescapably advances the corporate weal. I hold that corporate contributions to Princeton and institutions rendering the like public service are, if held within reasonable limitations, a matter of direct benefit to the giving corporations, and this without regard to the extent or sweep of the donors' business. The benefits derived from such contributions are nation-wide and promote the welfare of everyone anywhere in the land.
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> There is also the broader question here involved, namely, that the contribution here in question is towards a cause which is intimately tied into the preservation of American business and the American way of life. Such giving may be called an incidental power, but when it is considered in its essential character, it may well be regarded as a major, though unwritten, corporate power. It is even more than that. In the court's view of the case it amounts to a solemn duty. . . .

In reference to the constitutional objections, the court had this to say:[18]

> The constitutional objections raised by the defendants under both Federal and State Constitutions are substantially alike. So considered they amount to the claim that the legislation here in question impairs the obligation of contracts, deprives the defendants of property without due process, and, finally, constitutes a taking of private property for public purpose but without compensation. I do not regard those objections as tenable. The granting of the charter by the State to the plaintiff company has at all times been subject to the reserved power of the State to alter, suspend or repeal the same, in the discretion of the Legislature. This reserve power has received in our decisions a broad construction, the important limitation being that a legislative enactment which has the effect of altering an ante-dating charter shall not run afoul of constitutional guarantees. [Citing and discussing New Jersey cases.] I therefore hold that the facts of the Legislature here under discussion are well within the reserve power of the State and that the exercise of that power is binding not alone upon the company but upon the stockholders in respect of their contract *inter se*.[19]

The court then cites numerous United States Supreme Court decisions to support the statement that an act passed by a state under its reserve power does not impair the obligation of a charter contract nor does it operate as a deprivation of property without due process of law, even though it is more burdensome than the New Jersey charitable contribution statutes.

The court further holds[20] that, " . . . the legislation challenged

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18. 97 A.2d 186, 193, 194 (1953).
19. Georgia's reserve power is contained in GA. CODE ANN. §§ 22-1202-1203, at least for corporations chartered since Jan. 1, 1863. For those prior, see South Western R. Co. v. Benton, 206 Ga. 770, 58 S.E.2d 905 (1950).
20. 97 A.2d 186, 194 (1953).

in this case is clearly sustainable under the police power reserved to and residing in each State."

Being sustainable under both the reserve and police powers, the charitable contributions statutes do not deprive the stockholders of any vested property interest because they must be held to have constructively acquiesced in the legislation.

Having carefully considered the *Smith* case, our Georgia lawyer likely thinks the result would be the same in Georgia under the circumstances, but is probably doubtful that the arguments as to incidental powers there presented and espoused by the New Jersey court would be of equal weight before a Georgia court, especially since the Georgia permissive statute does not contain a full statement of public policy as does the New Jersey statute in the amendment thereto of 1950. Nevertheless, he continues his research and finds that twenty-three other states have permissive statutes more or less similar to the New Jersey statute held constitutional in the *Smith* case.[21]

Being conservative, he decides to secure a permissive corporate by-law at the next stockholders meeting. Knowing that he will have to allay certain fears of stockholders, he figures that the proposed permissive by-law should incorporate, *inter alia,* some or all of the following limitations:

1. No power to make the gift unless the corporation is showing a profit and no impairment of financial structure by virtue of the proposed by-law.
2. No power to make gift if, at the time, the recipient institution owns certain percentage of the voting stock of the donor corporation.
3. Size of annual gifts limited to a percentage of capital and surplus not to exceed that allowed as deductions by federal and Georgia income tax laws.
4. If a certain percentage of the stockholders object in writing, then the gift must be authorized at a stockholders' meeting.

Pending passage of the by-law, he puts the situation to the board of directors for study and the setting up of a policy covering, first the type or manner of gift, and, second, which college shall be the beneficiary. He reports on various courses followed by others as found in the very excellent article by Laird Bell previously cited.[22]

Some corporations, in seeking to achieve the maximum of immediate benefit, have provided scholarships for employees or their children to selected schools or to schools of the recipient's choice, fellowships for graduate study in fields pertinent to corporation's business, or scholarships plus supplementary direct grants to the selected college's general education budget.

21. See note 1 *supra.*
22. See note 1 *supra.*

Others feel that although the benefit to the corporation is less immediate and measurable, nevertheless support in the form of unrestricted grants for general as well as for specialized education can be justified also on the grounds of public relations, duties of citizenship in a democracy, insurance against the encroachment of government on the private college, and the providing of a "reservoir" for scientific and managerial talent.

In answer to the question "which college," some corporate donors let the student choose the college. Others use a geographical limitation to the state where the corportion is located or does most of its business, or even to the "hometown" of the corporation. Also, it is reported that in Indiana several colleges themselves made joint solicitations on the basis of contributions to the college the corporation might favor, or, if none were designated, to the group for equal division. All in all, the solution here should probably be tailored to the requirement of the particular corporation concerned.