SOME LEGAL ASPECTS OF LOCAL GOVERNMENTAL PURCHASING IN GEORGIA*

By R. PERRY SENTELL, JR.**

INTRODUCTION

One attempting to answer the important question "What is the 'law' governing purchasing by municipalities and counties in Georgia?" must begin by posing yet another question: "To what 'law' does the inquirer refer?" For, as with many other matters respecting Georgia's local governments, legal principles of purchasing could conceivably be found at any of the plateaus of "laws" here in operation. The State Constitution; the statutes of general operation passed by the General Assembly—including the popular but troublesome "population statutes";[1] the legislature's statutes which have only local or special application; enactments of the local governing authority, such as ordinances, resolutions, rules, and regulations; any of these statutory-type "laws" could provide regulation of local governmental purchasing.[2] Finally, but never to be overlooked, are the court-made "laws" emanating from judicial decisions.

The distinctions having been drawn, the observation can then be made that most of the specific purchasing regulations in existence in Georgia counties and municipalities—where they exist at all—must be found in and interpreted from special statutes (*e.g.*, charters) passed

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

1. For examples of such population statutes, see GA. LAWS, 1941, p. 408, as amended by GA. LAWS, 1961, p. 3009, which create a county purchasing department in each Georgia county having a population of 500,000 or more, generally vest exclusive county purchasing authority in a county purchasing agent, and set forth specific limitations and directions respecting all county purchases, such as amounts of purchases, types of specifications, and the like.

   See also GA. LAWS, 1957, p. 2832, as amended by GA. LAWS, 1959, p. 2657, which authorize the appointment of a purchasing agent in each Georgia county within the population bracket of 108,000 to 113,000, and provide for the salary which this agent is to receive.

   The governing body of each county and municipality in the state must constantly be on guard for the prospects or dangers of its locality sliding within or without the population limitations of such statutes as the locality over the years increases or decreases in size.

2. The relative controlling authority of these statutory-type "laws" would generally be in the order here listed.

by the General Assembly or enactments of the local governing authority. Although many of the court decisions hereafter discussed provide instructive examples of such regulations, these types of "laws" are, of course, peculiar to each locality; and little other treatment of them can here be offered. Their location and construction, however, is crucial and rest—as do all other legal matters of the locality—with its city or county attorney.

The observation is sometimes noted that, respecting the Constitution and general statutes, there is no "law" on county or municipal purchasing in Georgia. This paper is devoted to pointing out that this observation is not entirely accurate. Purchasing, like most other functions of governments and human beings, does receive some attention from these higher levels of "laws" and from our State's common law background. That this attention might be indirect does not detract from its importance.

Here offered, then, is a brief discussion of some of the most important of the general legal principles of local governmental purchasing in Georgia.[3]

PRINCIPLES OF COUNTY AND MUNICIPAL PURCHASING

THE GOVERNMENTAL AGENT

When individuals create a relationship of agency between themselves for the performance of a particular function, general statutes regulating this relationship come into play. Certain of these statutes—looking primarily to the protection of he principal—in effect prohibit a purchasing agent from himself being the seller (unless the principal, having knowledge of the facts, should consent to the agent's actions);[4] and from personally profiting from the principal's property.[5] In an early decision[6] the Supreme Court of Georgia held these statutes to govern the actions of public agents as well as private agents, and in doing so invalidated a contract by which a municipality had agreed to pay its mayor an annual sum to fence, drain, and repair the municipal park for a period of five years. Thus, the efforts of the municipality to purchase these specific services were defeated.

In a similar vein, the court has held that a county commissioner

3. For purpose of this discussion, what is perhaps a broader-than-usual connotation of "purchasing" is adopted. For instance, the examination goes beyond the mere acquisition of personal property by the local government and covers contracts for services and the like; this because consideration of such contracts uncovers legal principles of value in purchasing generally.
4. GA. CODE §4-204 (1933).
5. GA. CODE §4-205 (1933).
6. Mayor & Council of Macon v. Huff, 60 Ga. 221 (1878).

could not legally receive a commission for selling real property for the county.[7] Going further, the court stated that

> the law will not allow a board of county commissioners or the mayor and aldermen of a city to contract with one of their members or agree to compensate him for anything he may do in the performance of his official duties, whether the act done is an admitted part of his duty or is incidental or collateral thereto.[8]

These principles of agency, then, play an historical and controlling role in the local governing body's purchasing activities.

MONOPOLY AND COMPETITION

The law's abhorrence of monopoly and its general insistence upon free competition would likewise appear to constitute limiting factors in regard to the local government's power to purchase. At the turn of the century these factors were utilized by the Supreme Court to declare invalid a municipal ordinance requiring its officials, when purchasing printing work for the municipality, to deal exclusively with sellers who belonged to a specified union.[9] The court's opinion conceded that the governing authority was under no charter requirement to award purchases to the lowest bidders and that indeed it was invested with broad discretionary powers in the subject area; still this ordinance was held to defeat the power to fully exercise that discretion and necessarily to unlawfully defeat competition and encourage monopoly.[10]

A majority of the court approached similarly a municipal ordinance which set forth a fixed scale of wages to be paid various workers who performed certain types of public work for the municipality.[11] In addition to encouraging monopoly and defeating competition, this ordinance, in the eyes of the court, placed a heavier burden upon municipal taxpayers than if free competition for this work had been allowed. Thus the ordinance and all contracts made pursuant to it were invalidated.

Although not specifically cited in either of the above court decisions, both the Georgia Constitution[12] and general statutes[13] condemn contracts tending to lessen competition or to encourage monopoly, and would apply to county or municipal purchasing.

7. Dorsett v. Garrard, 85 Ga. 734, 11 S.E. 768 (1890).
8. *Id.* at 739, 11 S.E. at 770.
9. City of Atlanta v. Stein, 111 Ga. 789, 36 S.E. 932 (1900).
10. The court pointed out that under this ordinance only four out of the 19 printing firms in the municipality would be allowed to compete for the municipality's printing work. 111 Ga. at 793, 36 S.E. at 934.
11. Wilson v. City of Atlanta, 164 Ga. 560, 139 S.E. 148 (1927). Justice Hines dissented.
12. GA. CONST. art. IV, §4, para. 1 (1945), GA. CODE ANN. §2-2701 (Rev. 1948).
13. GA. CODE §20-504 (1933).

INDEBTEDNESS

Another indirect, though forceful, restriction upon the county or municipal governing authority's power to purchase results from the "indebtedness" provision of the Georgia Constitution.[14] This provision, in general, limits the amount of debt which a county or municipality can incur to 7 per cent of the assessed value of all the taxable property in the locality,[15] and constitutes the assent of a majority of the qualified voters a prerequisite for the county's or municipality's assumption of any new debt.[16] Any county or municipal purchasing efforts, therefore, must take into account both these Constitutional requirements.

Numerous cases have arisen revolving around the question what purchasing conduct by the county or municipality amounts to incurring a "debt" within the meaning of the Constitutional restriction.[17] And the general principle has evolved that

> a liability for a legitimate current expense may be incurred, provided there is at the time of incurring the liability a sufficient sum in the treasury of the municipality which may be lawfully used to pay the same, or if a sufficient sum to discharge the liability can be raised by taxation during the current year.[18]

At an early date the Georgia Supreme Court indicated the types of governmental purchases which could and could not be made within the meaning of the above principle. Thus, a municipality's contract to purchase lamps and gasoline for street lighting purposes, the entire payment therefor to be made upon delivery of the items and cash sufficient for this payment being in the municipality's treasury, was held not to

14. GA. CONST. art. VII, §7, para. 1 (1945), GA. CODE ANN. §2-6001 (Supp. 1963).
15. The Constitution does allow, however, the locality to incur additional indebtedness not to exceed three per cent of the assessed value of the taxable property if this indebtedness is repayable in equal installments within five years and is approved by the registered voters. GA. CONST. art. VII, §7, para. III (1945), GA. CODE ANN. §2-6003 (Rev. 1948).
16. The provision exempts from this voter-approval requirement, however, the incurring of a debt "for a temporary loan or loans to supply casual deficiencies of revenue"; that is, a deficiency caused by accident or an unknown cause. Even these temporary loans cannot exceed one-fifth of one per cent of the assessed value of the locality's taxable property. GA. CONST. art. VII, §7 para. 1 (1945), GA. CODE ANN. §2-6001 (Supp. 1963).
17. For an extensive discussion of municipal indebtedness, see City Council of Dawson v. Dawson Waterworks Co., 106 Ga. 696, 32 S.E. 907 (1899). For purposes of treatment here, the indebtedness provision of the 1877 Constitution was the same as the present provision, except that the locality's vote of approval had to be by two-thirds of the qualified voters. See GA. CONST. art. VII, §7, para. 1 (1877).
18. City Council of Dawson v. Dawson Waterworks Co., 106 Ga. 696, 713, 32 S.E. 907, 914 (1899); Butts County v. Jackson Banking Co., 129 Ga. 801, 804, 60 S.E. 149, 150 (1907); Whigham v. Gulf Refining Co., 20 Ga. App. 427, 428, 93 S.E. 238 (1917); City of Jeffersonville v. Cotton States Belting & Supply Co., 30 Ga. App. 470, 472, 118 S.E. 442, 443 (1923).

create a municipal debt.[19] On the other hand, a municipality's purchase of fire extinguishing equipment, paying a part of the purchase money in cash and giving notes for the balance which were payable in installments extending over several years, did amount to creating a debt in the view of the court; and, no Constitutionally-required election having been held in advance, the purchase was declared illegal.[20]

The court has also indicated a less-than-sympathetic attitude toward local government attempts to evade this Constitutional debt restriction on purchasing. Accordingly, where a municipality attempted to contract for a particular purchase by paying a certain amount during the year and by "recommending" that future governing authorities follow up with payments and interest in future years, with the agreement that if they did not the seller was to take over the property, the court issued a declaration of invalidity.[21] Seeing this attempt as one to make a "cash" contract in form but an installment contract in effect, the court observed that "to say that this creates no debt within the meaning of the Constitution is simply to juggle with words."[22] Consequently, the contract could not be made "without submitting the question to the qualified voters as the Constitution requires."[23]

PURCHASES FROM THE STATE AND FEDERAL GOVERNMENT

The General Assembly, by statute,[24] has made special provision for the purchase by counties and municipalities of any real or personal property from the state or federal governments. Regardless of requirements which may appear in charters, ordinances, resolutions, or the like,[25] these purchases may be made without the county's or municipality's being required to post notices or public advertising for bids or expenditures, or inviting or receiving competitive bids, or requiring the delivery of the purchases prior to payment.[26]

Further, the statute would appear to empower the governing authority of the county or municipality to authorize an officeholder or employee to attend any sale held by the federal government, to enter bids for property there offered for sale, and to make the required payment

19. City of Conyers v. Kirk & Co., 78 Ga. 480, 3 S.E. 442 (1887).
20. Town of Wadley v. Lancaster, 124 Ga. 254, 52 S.E. 881 (1905).
21. Renfroe v. City of Atlanta, 140 Ga. 81, 78 S.E. 449 (1913).
22. *Id.* at 95, 78 S.E. at 455.
23. *Id.* at 98, 78 S.E. at 456.
24. GA. CODE ANN. §§91-510 - 91-515 (Rev. 1963).
25. GA. CODE ANN. §91-514 (Rev. 1963).
26. GA. CODE ANN. §91-510 (Rev. 1963). The statute emphasizes, however, that it does not affect contracting or purchasing requirements which might be set out in general or special statutes in regard to any other types of purchases. GA. CODE ANN. §91-513 (Rev. 1963).

for the bid or sale, when that governing authority itself is lawfully authorized to purchase the property.[27]

MUNICIPAL PURCHASING

Discussed in this division are various principles of purchasing, derived primarily from court decisions, which by terminology or according to the factual situation involved were applied only to municipalities. That these principles were thus restricted, however, does not necessarily mean that they are not instructive for county purchasers.

SELF-INTEREST PROHIBITIONS

The general theory to the effect that a municipal official should not be permitted private gain from his position receives emphasis through both statute and judicial declaration in Georgia. The theory has been applied in a number of purchasing contexts and to a number of different municipal officials.

THE MAYOR

Two early Georgia appellate court decisions appropriately afford examples of municipal charter application of the above theory to the mayor of the municipality, and illustrate the courts' approach to such requirements. In the case of *West & Co. v. Berry*[28] the Supreme Court was required to consider and apply a provision of a municipal charter which commanded that the mayor not be "interested directly or indirectly in any contract, office or appointment in said town."[29] The court construed this prohibition to prevent the municipal council from paying the mayor, an attorney, for services rendered by him to the municipality in court cases to which the municipality had been a party. The court held the charter provision to prevent the municipality's payment for the services, whether or not an express purchase contract had been made.

A slightly more recent case[30] brought before the Court of Appeals a municipality's charter provision that "no person holding an office in this municipal corporation shall, during the term for which he was elected or appointed, be capable of contracting with said corporation . . . for the performance of any work which is to be paid out of the treasury of said town."[31] This provision was held to void an implied contract by

31. *Id.* at 385, 108 S.E. at 480.

27. GA. CODE ANN. §91-511 (Rev. 1963).
28. 98 Ga. 402, 25 S.E. 508 (1896).
29. *Id.* at 404, 25 S.E. at 508.
30. Mayor & Council of Hogansville v. Planters Bank, 27 Ga. App. 384, 108 S.E. 480 (1921).

the municipality to purchase electric light services from a corporation in which the mayor of the municipality was a stockholder and pecuniarily interested.

As a warning to municipal purchasers, however, that the self-interest prohibition upon purchasing does not necessarily depend upon express charter provision looms the Georgia Supreme Court's decision in the 1937 case of *Trainer v. City of Covington*.[32] Here in question was the validity of a contract made by the municipality for the purchase of a truck from the mayor. Conceding that the mayor had not voted for the approval of this contract nor exercised his influence upon members of the council to do so, that the mayor's bid on the purchase was the lowest of several submitted and was the most advantageous for the municipality, and that the contract was fair and free from fraud, the court nevertheless—even in absence of charter prohibition—held the purchase contract invalid. This holding was commanded, said the court, by "public policy"[33] and did not depend upon statutory or charter provisions.

THE COUNCIL

A general statute of long standing in Georgia provides that "it is improper and illegal for a member of a city council to vote upon any question brought before the council, in which he is personally interested."[34] That this satute has bearing upon the Georgia councilman's actions respecting municipal purchases has been emphasized by the state's appellate courts.[35]

Shortly after the turn of the century the Supreme Court of Georgia rested upon this statute and upon a charter provision of the City of Gainesville to hold illegal and void a contract for the city's printing for the year awarded by the mayor and council to a private corporation in which one of the councilmen owned stock.[36] Explaining its holding, the court observed that "a stockholder in a private corporation clearly has an interest in its contracts; and if the city cannot make the

32. 183 Ga. 759, 189 S.E. 842 (1937).
33. *Id.* at 760, 189 S.E. at 842.
34. GA. CODE §69-204 (1933).
35. Indeed, it appears that municipal purchasing activity is important in creating the "financial interest" on the part of the councilmen which the courts seem to hold necessary to bring the statute into play. For example, in Smith v. City of Winder, 22 Ga. App. 278, 96 S.E. 14 (1918), the Court of Appeals held not violative of the statute a councilman's voting for an ordinance designating a certain bank the municipality's depository even though the councilman was an officer of the bank. Again, in Story v. City of Macon, 205 Ga. 590, 54 S.E.2d 396 (1949), the Supreme Court upheld a councilman's action in voting for an ordinance to pave certain municipal streets when the councilman owned property on those streets which the paving would cause to be increased in value.
36. Hardy v. Mayor & Council of Gainesville, 121 Ga. 327, 48 S.E. 921 (1904).

contract with the officer himself, it cannot make it with a corporation in which such officer is a stockholder."[37]

In a later case the court quoted the above statute as the basis for its decision that it was illegal for a member of a law firm, which member was also a municipal councilman, to participate in the execution of a contract between the municipality and a paving company where the company had employed the law firm to handle the matter.[38]

Illustrating charter restrictions upon the municipal councilman's actions was the case of *Montgomery v. City of Atlanta*,[39] where the court considered the following provision of Atlanta's charter:

> It shall not be lawful for any member of the general council to be interested, either directly or indirectly, in any contract with the City of Atlanta, the mayor and general council, or any one or more of them, having for its object the public improvement of the city, or any part thereof, or the expenditures of its moneys.[40]

The court held this provision to render illegal a contract for the laying of pavement in the city between the municipality and a construction company in which company a member of the city council was a large stockholder.

In its *Montgomery* opinion, however, the court went much further than it was required to do by declaring that independently of any statute or charter provision, and even though the councilman did not vote on the paving ordinances nor attempt to influence other councilmen to do so, the contract would be illegal although it was fair and free from fraud. Indicative of the court's attitude here is the following language:

> One who is entrusted with the business of others will not be allowed to make out of the same a pecuniary profit to himself. This doctrine is based upon principles of reason, morality, and public policy. . . . The fact that he did not take any part in securing this contract for his corporation does not change the situation. . . . Inaction on the part of the councilman in this respect amounted to a violation of his duty to the public.[41]

OTHER OFFICIALS

The reasons commonly advanced for imposing self-interest prohibitions upon the municipal mayor and council regarding the municipality's purchases would seem to serve equally well as a basis for restricting

37. *Id.* at 328-29, 48 S.E. at 922.
38. Cochran v. City of Thomasville, 167 Ga. 579, 146 S.E. 462 (1928).
39. 162 Ga. 534, 134 S.E. 152 (1926).
40. *Id.* at 547-48, 134 S.E. at 158.
41. *Id.* at 546-47, 134 S.E. at 157-58.

similar activity on the part of other municipal officials or agencies. The 1934 decision in the case of *Doyal v. City of Rome*[42] indicates that the Georgia Court of Appeals would agree with this idea. In that case the court held invalid and unenforceable an ordinance of the municipal governing authority by which the authority contracted to pay the city attorney $1,000 to compile a code for the municipality. Under the municipality's charter provision prohibiting "any officer" of the municipality from being interested in any contract for the expenditure of the municipality's money, it was necessary for the court to answer two questions of construction. First, was the contract here one for the expenditure of money? Second, was the city attorney an "officer" of the municipality? Answering both questions in the affirmative, the court went on to note that

> irrespective of any statutory inhibition upon the conduct of the officials of a city with respect to making contracts with the city out of which they obtain a pecuniary benefit, such contracts are against sound public policy. The officials, by such contracts, necessarily acquire interests antagonistic to the interests of the city which they are supposed to serve.[43]

In *City of Albany v. Lipsey*[44] the Supreme Court was required to pass on the validity of a purchase by the city board of education of heating plant materials from an individual who was fire chief and building inspector of the municipality. The municipality conceded that this purchase violated charter provisions prohibiting municipal officers and employees from being interested in any contract made by the city and requiring competitive bids and advertisement where the amount of the purchase exceeded $500, but contended that the city board of education was a separate entity from the municipality itself and thus free from charter restrictions. Rejecting these contentions, the court held the board to be a mere agent or arm of the municipal government and thus not capable of exercising greater latitude in purchasing than was provided for the municipality itself. Accordingly, the lower court's injunction against the municipality was affirmed.

SELF-SUPERVISION PROHIBITIONS

Akin to the opposition to the municipal official's personally profiting from his position is the principle that neither should the official be permitted to supervise his own functions. This principle too has received application by the courts to thwart municipal efforts to purchase certain services.

42. 48 Ga. App. 664, 173 S.E. 214 (1934).
43. *Id.* at 666-67, 173 S.E. at 215.
44. 199 Ga. 437, 34 S.E.2d 513 (1945).

In an early case which has here been previously noted the Georgia Supreme Court held invalid a contract by which a municipality had agreed to pay its mayor an annual sum to fence, drain, and repair the municipal park for a period of five years.[45] Pointing out that the mayor, as chief executive officer of the municipality, had the duty of seeing that these services were properly performed, the court stated as a "fundamental principle"

> that no officer or agent, public or private, whose duty it is to supervise a contract in behalf of his employers or principal, can himself undertake to do that thing which his office or agency makes it his duty to supervise for others, and to see to it for them that it is well and faithfully done.[46]

The court applied this "fundamental principle" in a later case to invalidate a contract by which the municipal flood commission employed an individual to prepare plans and specifications and advertise bids in providing for flood protection to the municipality.[47] Pointing out that the individual with whom the contract was made was the municipal public works commissioner as well as ex officio engineer who thus had the duty to supervise the work done on behalf of the city under the flood commission, the court concluded that "under the contract he therefore occupies the position of chief judge in his own case."[48]

Finally, as recently as 1963, the Supreme Court utilized the principle established by the above two cases to hold invalid a contract by a municipality purporting to employ as an individual the mayor of the municipality to fill the office of city manager.[49] Holding the municipality's charter not to authorize such employment, the court declared that "public policy forbids acceptance by . . . [mayor] of employment which it is his official business as mayor . . to supervise and see that it is faithfully performed."[50]

45. Mayor & Council of Macon v. Huff. 60 Ga. 221 (1878).
46. *Id.* at 224.
47. Twiggs v. Wingfield, 147 Ga. 790, 95 S.E. 711 (1917).
48. *Id.* at 796, 95 S.E. at 713. Four years later the Supreme Court held that the "fundamental principle" it had announced in the *Huff* and *Twiggs* cases did not apply when the General Assembly had expressly conferred authority on the governing body to employ one whose other official duties cast him in the position of his own superior. Thus, in Board of Lights and Waterworks v. Dobbs, 151 Ga. 53, 105 S.E. 611 (1921), the court upheld the employment by the municipal board of lights and waterworks of the mayor of the municipality as treasurer of the board, where such employment was expressly authorized by the municipal charter. Said the court in distinguishing *Twiggs*: "The expression of the legislature is conclusive on the question of public policy." 151 Ga. at 56, 105 S.E. at 612.
49. Welsch v. Wilson, 218 Ga. 843, 131 S.E.2d 194 (1963).
50. *Id.* at 844, 131 S.E.2d at 196.

POWERS AND DISCRETION OF THE MUNICIPAL PURCHASERS

Assuredly, all the ideas and principles discussed thus far affect the amount of power or discretion possessed by the municipality in making specific purchases. The presence or absence of many of these items in a particular situation, as has been noted, may well determine whether a purchase can legally be consumated. On occasion, however, the question of power or discretion properly is raised respecting an attempted purchase; and in this section a few examples of such instances will be considered.

In the case of *City Council of Augusta v. Thomas*,[51] citizens and taxpayers challenged the power of the governing authority of the municipality to purchase a boat or barge with which to transport freight on the river.[52] Upholding this purchasing power, the court viewed the general welfare grant of authority by the municipal charter as liberal in nature, noting that it delegated to the governing body the power to establish "any other bylaw or regulation that shall appear to them requisite and necessary for the security, welfare, and convenience of the said city."[53] Determining that the boat purchase would constitute a "public municipal purpose," the court concluded that it would fall within the broad language of the charter.

In a case of more recent date[54] the court was forced to face squarely the discretionary element involved in municipal purchasing. A proceeding was brought to prevent the consumation by a municipality of the purchase of ten Chevrolet automobiles on the ground that the municipal board of purchase should have awarded the contract to the local Ford dealer, whose bid was $392 lower. Again upholding the purchase, the court emphasized the position of the board of purchase as a branch of the municipal government invested with discretion in the purchase of all materials required by the city, noted that the bids in question were on different makes of automobiles thus calling for an exercise of that discretion, and pointed to the municipality's evidence or reasons why Chevrolets were better suited for this particular purpose. In the absence of evidence of fraud or corruption, said the court,

> where a municipal board is authorized to do a particular act in its discretion, the courts will not control this discretion unless manifestly abused, nor inquire into the propriety,

51. 159 Ga. 435, 126 S.E. 144 (1924).
52. It was somewhat unclear whether the barge would be used by the municipality only for its own hauling or whether in addition it would be operated as a common carrier.
53. 159 Ga. at 445, 126 S.E. at 149.
54. J. C. Lewis Motor Co., v. Mayor & Council of Savannah, 210 Ga. 591, 82 S.E.2d 132 (1954).

> economy, and general wisdom of the undertaking, or into the details of the manner adopted to carry the matter into execution.[55]

Finally, a 1959 decision by the Georgia Court of Appeals[56] stresses—as have other decisions noted throughout this discussion—the importance of the charter of the particular municipality which is attempting to make the purchase in question. Here the court denied the power of the city manager to purchase personal property for the city when the charter of the municipality vested the authority to purchase and to contract in the mayor and council and further provided that no duty could be assigned to the city manager which devolved by law upon the elected officers of the municipality.

COUNTY PURCHASING

At the county level of local government in Georgia several general statutes exist which have reference, either directly or indirectly, to purchasing. It shall be the purpose of this division to call attention to these statutes and to afford indication of the manner of their interpretation by the Georgia appellate courts.[57]

PURCHASE CONTRACT FORMALITIES

General statutory law in Georgia requires that "all contracts entered into by the ordinary with other persons in behalf of the county shall be in writing and entered on his minutes."[58] Over the years this statute has been applied by the courts to numerous county attempts to contract, including contracts for the purchase of materials and services. A consideration of some of the examples of this application is now in order.

At an early date the Supreme Court of Georgia held that under this statute a written contract entered into by a county ordinary by which the county purported to purchase materials and work necessary for the erection of a county courthouse, but which contract was not entered on the ordinary's minutes, was not a perfected or completed

55. *Id.* at 597, 82 S.E.2d at 136.
56. Ingalls Iron Works Co. v. City of Forest Park, 99 Ga. App. 706, 109 S.E.2d 835 (1959).
57. Not discussed, but worthy of note, is the Constitution's limitation on the purposes for which county taxes may be levied and collected. Most of these purposes are set out in Art. VII, §4, para. 1, GA. CODE ANN. §2-5701 (Supp. 1963); but other express or implied tax authorizations may be found in other provisions, some of only local effect.
    It would seem, then, that the Constitution limitations on the power to tax would also limit the purposes for which county purchases could be made.
58. GA. CODE ANN. §23-1701 (1933).

contract which could serve as the basis for a suit against the county by the seller.[59]

Again emphasizing its insistence that the statutory requirement be met, the court in a later case declared illegal the county's issuance of warrants to pay the purchase price of culvert pipe where the written order for the pipe, which was signed by the chairman of the county commissioners and which also contained a guarantee signed by the seller, had not been entered on the minutes of the commissioners.[60] Thus though the language of the statute refers only to the ordinary, the courts have applied its requirements to county commissioners as well.

Apparently attempting to comport with the formality required by the statute, the authorities of Murray County entered upon their minutes a resolution which declared that a certain attorney was thereby employed to represent the county in a specified matter and upon specified terms and conditions. In 1931 the Georgia Court of Appeals declared this resolution unenforceable because it was not a contract in writing and entered upon the minutes as required by law.[61]

Meeting neither requirement of the statute was the attempted purchase giving rise to the case of *Griffin v. Maddox*.[62] Here a county commissioner had given an oral order for bridge material to be delivered in the future. Following delivery of the material, the county issued a warrant to the seller for the amount of the purchase price, payable in the future, plus interest. The Supreme Court wasted no time in stating the rule of the statute and holding the purchase contract unenforceable; accordingly, the seller was denied recovery.

Finally, in the 1955 case of *Floyd v. Thomas*,[63] the court held insufficient to meet the statutory requirements the county commissioners' authorization of a county employee to purchase a certain type dump-truck which authorization did not specify the seller nor the price to be paid for the truck.[64]

59. Wagener v. Forsyth County, 135 Ga. 162, 68 S.E. 1115 (1910). The court went on to hold, however, that entrance of the contract upon the minutes after the work was completed but prior to the suit for its enforcement cured the defect.
60. Douglas v. Austin-Western Road Machinery Co., 173 Ga. 386, 160 S.E. 409 (1931).
61. Murray County v. Pickering, 42 Ga. App. 739, 157 S.E. 343 (1931).
62. 181 Ga. 492, 182 S.E. 847 (1935).
63. 211 Ga. 656, 87 S.E.2d 846 (1955).
64. The court also held the authorization an illegal attempt to delegate the commissioners' exclusive purchase-contract authority. Thus, the general theory to the effect that the commissioners cannot delegate to administrative officers the legislative powers vested in the commissioners by the state nor any powers vested exclusively in the commissioners might hamper in certain instances an attempt at centralized purchasing by the county, if by law the commissioners themselves have been granted the county's purchasing powers. For this problem at the municipal level, see the case of Ingalls Iron Works Co. v. City of Forest Park, 99 Ga. App. 706, 109 S.E.2d 835 (1959), discussed on p. *supra*.

These selected appellate court decisions, then, stand as a formality caution signal to county purchasers.[65]

SELF-INTEREST PROHIBITIONS

At the county level too exists the objection to officials possessing a personal interest in governmental purchase. Dealing with this matter presents the opportunity also to call to notice another point of importance in county purchasing generally.

With two qualifications or exceptions, general statutes prohibit any county official who is authorized to spend county funds for the purchase of any goods or property for county purposes from purchasing these materials from any store in which the official is an employee or is directly or indirectly interested or from any person or partnership of which he is a member or by whom he is employed.[66] The two statutory exceptions to this prohibition exist when a majority of the board of county commissioners sanction such a purchase, or when "it shall be made clearly to appear that the said individual, partnership or owner of the store offers and will sell the goods or property as cheap as or cheaper than it can be bought elsewhere."[67] The statutes declare any contract made in violation of this prohibition to be illegal, and give to the county taxpayers express power to institute proceedings for the removal from office of any county official who commits the violation.[68]

The above noted point of importance, one prevading the entire field of county purchasing, is that to the extent that purchasing involves the powers and duties of county commissioners, it—like other powers and duties of these commissioners—can be governed by local or special statutes of the General Assembly which add to or completely change provisions set forth in general statutes.[69] For this reason, an

65. The Georgia Court of Appeals early expressly held that this formality requirement does not apply at the level of the municipality. Walker v. City of Rome, 6 Ga. App. 59, 64 S.E. 310 (1909).

66. GA. CODE §23-1713 (1933).

67. *Ibid.*

68. GA. CODE §23-1714 (1933).

69. This principle has resulted from the Georgia Supreme Court's interpretation of two Constitutional provisions, Art. VI, §17, para. 1, GA. CODE ANN. §2-5201 (Rev. 1948): "The General Assembly shall have power to provide for the creation of county commissioners in such counties as may require them, and to define their duties"; and Art. XI, §1, para. VI, GA. CODE ANN. §2-7806 (Rev. 1948): "Whatever tribunal, or officers, may be created by the General Assembly for the transaction of county matters shall be uniform throughout the state,, and of the same name, jurisdiction, and remedies, except that the General Assembly may provide for Commissioners of Roads and Revenues in any county. . . . ", as prevailing over the general Constitutional prohibition of local or special acts in cases "for which provision has been made by an existing general law." Art. 1, §4, para. 1, GA. CODE ANN. §2-401 (Rev. 1948).

For a complete history of this interpretation, see Sentell, *The Validity of Statutes Pertaining to Georgia County Commissioners: An Exercise in Constitutional Interpretation,* 15 MERCER L. REV. 258 (1963).

examination of the special statutes creating a particular board of county commissioners, as well as the later amendments to these statutes, is always crucial in attempting to determine the legality of a particular county purchase no matter what provisions may be found in the general statutes.[70]

In the noteworthy case of *Bradford v. Hammond*,[71] the Georgia Supreme Court applied this point to the above described general statutory prohibitions on self-interest county purchases. In this case a would-be seller of supplies to the county complained that his bid to furnish these supplies, at a lower price than other bidders, had been rejected because he was related to one of the commissioners. Pointing out that his bid would fall within one of the exceptions set forth by the general statute prohibitions, he contended that self-interest purchasing prohibitions contained in special statutes creating this particular board of commissioners, which prohibitions did *not* provide for this exception, were invalid. The Supreme Court forcefully rejected the seller's contention, in effect holding that in this particular county the general statute did not govern county purchasing.

In 1940 the Supreme Court expressly refused to overrule its holding in the *Bradford* case and stated that the general statute self-interest prohibitions "so far as they refer to county commissioners are subject to qualification by special acts, and the special acts need not be uniform."[72]

Indicating the extent to which the courts might carry the point here under discussion is the decision in the case of *Moore v. Whaley*.[73] This case presented a proceeding, as authorized by the general statutes, by taxpayers of a county for the removal from office of a commissioner for his actions in purchasing county goods from himself. In the charter of the county appeared the following provision:

> that said board shall not hire or employ or contract with any member of said board or with any one related to any member of said board, for work to be done or supplies to be furnished said county, except such work to be done or supplies to be furnished shall be let at public outcry to the best bidder.[74]

Holding that this special statutory provision repealed by implication in that county the general statute self-interest prohibitions, the court

70. For judicial emphasis that the same situation does not exist at the municipal level, see Bradford v. Hammond, 179 Ga. 40, 46, 175 S.E. 18, 21 (1934).
71. 179 Ga. 40, 175 S.E. 18 (1934).
72. Robitzsch v. State, 189 Ga. 637, 638, 7 S.E.2d 387, 393 (1940)
73. 189 Ga. 647, 7 S.E.2d 394 (1940).
74. *Id.* at 649, 7 S.E.2d at 396.

concluded that this commissioner could not be removed from office under the provisions of the general statute.

Leaving the point of special statutory changes in self-interest prohibitions, the court in *Claxton v. Johnson County*[75] was faced with the question whether a county could employ an attorney, who was the first cousin of one of the commissioners, to represent it in a particular matter, under general statutes and under a special statute as follows:

> . . . said board shall make no contract for service or for the purchase of any article or material whatsoever with any person who is related to any of its members within the third degree of consanguinity or affinity; and wherever practical, all purchases of equipment, material and supplies shall be purchased by competitive bids.[76]

Upholding the county's purchase of the attorney's services, the court interpreted the above provision to contemplate "only such services as would be in the nature of commodities whose value might be standardized or acquired on a competitive basis," and announced that "the professional services of an attorney are not services of that character."[77] Accordingly, the court concluded that the purchase was not prohibited by either general or special statute.

PUBLIC WORKS PURCHASES

The purpose of this section is nothing more than to note the existence of specific statutory provisions which regulate a special class of county purchases. Because these purchases are of a special nature—also because they will typically be of sufficient magnitude to necessarily involve the county attorney from the beginning—extensive discussion of the statutes and of their judicial construction is here foregone.

Generally, these statutes come into play when the county governing authority wishes to have built or repaired any public works in a county, such as a courthouse, jail, bridge, causeway, or the like.[78] In purchasing this work, the authority is directed, after making specified advertisement,[79] to let the contract to the lowest bidder at public outcry to be held before the courthouse door.[80] The authority is given discretion, however, to reject all bids made and to purchase the work

75. 194 Ga. 43, 20 S.E.2d 606 (1942).
76. *Id.* at 45, 20 S.E.2d at 608.
77. *Id.* at 49, 20 S.E.2d at 610.
78. GA. CODE §23-1702 (1933). The statutes expressly exempt, however, public work which costs less than $300, and work which can be done by a county chain gang. GA. CODE ANN. §23-1704 (Supp. 1963). Otherwise, the failure of the governing authority to comply with the statutes, as well as its attempt to derive a profit from the purchase, is declared a misdemeanor. GA. CODE §23-9904 (1933).
79. See GA. CODE §23-1703 (1933).
80. GA. CODE §23-1702 (1933).

by contract or by sealed proposals, following stated procedures, if it deems the public interest to so require.[81] Bidders are expressly prohibited from attempting to eliminate competition from the bidding procedures.[82]

Other statutory provisions require the successful bidder who is awarded the county's contract to give performance bonds[83] and payment bonds,[84] and set forth the procedures by which these bonds are to be approved, filed,[85] changed, or strengthened,[86] and by which an action on the bonds can be maintained.[87]

Successful bidders are also required, under penalty of a void contract,[88] to take an oath in writing to the effect that they have not violated any of the specified requirements in procuring the contract for the public work.[89]

RECENT LEGISLATION

At the January 1964 session, the Georgia General Assembly enacted legislation leveled at basic dishonest conduct on the part of officers, employees, and agents of local governments.[98] Although expressly declaring that other statutes and ordinances are not repealed[91]—thus, that this legislation is supplementary in nature—the statute contains provisions directly affecting local governmental purchasing where none before existed. The purpose of this section is to briefly call attention to these provisions.[92]

First of importance here is the provision[93] declaring it a felony, and punishable by imprisonment for not less than one nor more than five years, for an individual who is both interested in the pecuniary profits or contracts of any business entity and an officer, agent, or employee of the municipality or county to sell to the municipality or county "any goods, wares or merchandise, personal property or chattels . . . in excess of $100.00 unless sold as a result of bona fide bidding."[94]

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81. *Ibid.*
82. GA. CODE §23-1710 (1933).
83. See GA. CODE ANN. §§23-1704, 23-1705 (1) (Supp. 1963).
84. See GA. CODE ANN. §23-1705 (2) (Supp. 1963).
85. See GA. CODE ANN. §23-1706 (Supp. 1963).
86. See GA. CODE ANN. §23-1707 (Supp. 1963).
87. See GA. CODE ANN. §§23-1708, 23-1709 (Supp. 1963).
88. GA. CODE §23-1712 (1933). Also under penalty of punishment by imprisonment and labor in the penitentiary for 3 to 10 years. GA. CODE §23-9906 (1933).
89. GA. CODE §23-1711 (1933).
90. GA. LAWS, 1964, pp. 261-68.
91. GA. LAWS, 1964, p. 268.
92. The statute itself should be checked thoroughly by all interested persons.
93. GA. LAWS, 1964, p. 263.
94. *Ibid.* The statute does require, however, an intent on the part of the individual to defraud the municipality or county. For a discussion of the possible effects of this provision upon the court decisions previously mentioned, see Sentell, *Local Government,* 16 MERCER L. REV. 147, ___ (1964).

Likewise declared felonious is conduct of any officer, agent, or employee of a county or municipality in knowingly making false statements, representations or reports "as to the character, quality, quantity, or cost of any material used or to be used" by the county or municipality.[95]

Finally, the statute declares illegal "every contract, combination or conspiracy, in restraint of trade or in restraint of free and open competition in any transaction" with a county or municipality, whether the transaction is for goods, materials, or services.[96] Persons making such contracts or engaging in such conspiracies are subject to imprisonment for a felony.[97]

95. GA. LAWS, 1964, p. 264.
96. GA. LAWS, 1964, p. 265.
97. *Ibid.*