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William H. Sherwood

University of Nebraska College of Law

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MUNICIPAL CORPORATIONS: CONTRACTS IN PERPETUUM

In 1905 the newly organized University of Florida was looking for a home. By statute¹ the Board of Control was empowered to choose the site, and in so choosing, to take donations offered by municipalities wishing to be chosen. Through its "Citizen's Committee" (an unofficial body with no real authority) the City of Gainesville, Florida, offered, in addition to substantial donations of buildings and lands, to furnish water to the University free of charge. The offer was accepted; the University of Florida, with an enrollment of 135 students, set up blackboards in Gainesville (population 3,633);² and water began flowing through University pipes.

The instant case³ was brought by the City of Gainesville, praying for a declaration of rights under the contract. In the interim between the "donation" and the suit, enrollment of the University had increased to 11,000 students.⁴ The City (population 26,861)⁵ alleged it had floated revenue bonds for its present waterworks, the revenue from the waterworks was insufficient to retire the bonds, new facilities were needed, but new bonds could not be sold under the present situation.

The City's contentions were: (1) the "Citizen's Committee" had no authority to make the contract, and the contract, "ultra vires" in its inception, could not be ratified by subsequent actions of the City; (2) the term of the contract being indefinite, it was (a) void as against public policy as being "perpetual," or (b) if construed as being for a "reasonable time," the "reasonable time" had expired sometime during the past forty-five years;

²⁵ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

¹ Fla. Acts c. 538 (1905).

² 1 Census of Population: 1950, 10-8.

³ *Gainesville v. Board of Control of Florida*, 81 So. 2d 514 (Fla. 1955).

⁴ *Id.* at 516.

⁵ 1 Census of Population: 1950, 10-8.

and (3) the present size of the University was not contemplated at the time the contract was made, and, as the contract places an un contemplated burden upon the City of considerable magnitude, the City should be relieved from the contract.

Held: Affirmed, the contract is enforceable. Assuming the "Citizen's Committee" lacked the power to make the donation, such a donation was within the proprietary power of the City, and had been ratified by forty-five years of free water. Regarding the term of the contract, it is clear from the statute⁶ that the City could, and did, contract for a term, not "perpetual" or "forever," but for "so long as the University remains in Gainesville."⁷ As to the size of the University, and the burden upon the City, the court reasoned that the larger the University, the more business and money accrued to the City.

May a municipal contract last forever? There is some authority for the proposition that the municipality, if properly authorized by statute, may make a "perpetual" contract.⁸

Was Gainesville authorized to make such a contract? The statute was by no means explicit that Gainesville could so contract. In fact, the statute said nothing on this point.⁹ Nor did the city charter. The court reasoned from the fact that (1) the Board

⁶ Fla. Acts c. 538 (1905).

⁷ "We take judicial notice of the location as permanent, but we do not indulge the clairvoyance that it will be perpetual. Herculaneum and Pompeii were permanent but history records that they were not perpetual.

We do not dare or wish to anticipate or apprehend that misfortune or disaster will overtake either the University of Florida or the City of Gainesville or that circumstances will bring about removal of the institution from its present site, but we do say that the physical situation is not so inexorably fixed that the contract can be condemned as one to last forever." *Gainesville v. Board of Control of Florida*, 81 So. 2d 514, 518 (Fla. 1955).

⁸ 10 *McQuillin, Municipal Corporations* § 29.102 (3d ed. 1949); *Borough of Milltown v. City of New Brunswick*, 138 N.J. Eq. 552, 49 A.2d 234 (1946); *Borough of Milltown v. City of New Brunswick*, 46 A.2d 562 (N.J. 1946); *City of New Brunswick v. Borough of Milltown*, 135 N.J. Eq. 310, 38 A.2d 288 (1944). All three cases involved a contract between the Borough and the Town whereby the Town agreed to dispose of the Borough's sewage. It was held in these cases that, as the statute delegating to cities the power to contract contained no limitations as to the length of time the contract might run, the contract was valid, although, by its terms, it might be perpetual. *Des Moines v. West Des Moines*, 239 Iowa 1, 30 N.W.2d 500 (1948), holding a similar sewage contract between two cities valid although, by its language, capable of being perpetual in operation.

⁹ Fla. Rev. Stat. § 325 (1892).

of Control was given power to "receive donations," and (2) another statute¹⁰ authorized the city of Tallahassee to guarantee to the Board the payment of \$2,000 per year "forever," to the conclusion that although Gainesville confessedly lacked express power, it was clothed with the implied power to make an (almost) perpetual, donation-type contract.

Should such a power be implied?

As a legal matter, there is considerable authority for the proposition that the giving of water, free of charge, is a legislative or governmental function of the city, and that a contract whereby the city agrees to furnish water for an indefinite future time, or forever, is invalid as binding the legislative power of subsequent councils.¹¹ And as a practical matter this contract, while not "perpetual," will bind the City for a long, long time.

¹⁰ *Gainesville v. Board of Control of Florida*, 81 So. 2d 514, 517 (Fla. 1955).

¹¹ *City Council of Augusta v. Richmond County*, 178 Ga. 400, 173 S.E. 140 (1934) (a contract whereby a municipality agreed to furnish water for a courthouse and jail deeded by the municipality to the county was ultra vires and not enforceable against subsequent councils); cf. *Screws v. City of Atlanta*, 189 Ga. 839, 8 S.E.2d 16 (1940) (the power to fix water rates is a governmental power, and a contract whereby the Council agreed to furnish free water to the lessee of municipally owned fairgrounds for a period of twenty-five years was ultra vires and not binding upon subsequent councils); *Horkan v. Moultrie*, 136 Ga. 561, 71 S.E. 785 (1911) (a city cannot contract to furnish free water to a private person for an indefinite period even where consideration for the contract is a sewer right-of-way over lands owned by the person, as power to fix water rates is governmental in character and cannot be bargained away, nor can contract be ratified, or city estopped to assert its invalidity); *Trustees of the Illinois Hospital for the Insane v. Jacksonville*, 61 Ill. App. 199 (1895) (a contract by the city to furnish water to the hospital at a fixed rate for ten years is not enforceable against the city because the power to fix rates for water is a governmental function, and one council cannot bind its successors with regard to legislative powers); and see *Commonwealth ex rel. Fortney v. Bartol*, 342 Pa. 172, 20 A.2d 313 (1941) (holding a contract whereby the City agreed to make an annual appropriation of \$3,000 to a Volunteer Fire Department invalid); *Robbins v. Boulder County*, 50 Colo. 610, 115 Pac. 526 (1910) (the power to expend the County's money for future years being a governmental function, the County could not accept a bequest of \$50,000 from a Colorado decedent on condition that it agree to maintain a hospital for orphans and "old widow ladies" which was to be built with the \$50,000); *State v. Minnesota Transfer Ry.*, 80 Minn. 108, 83 N.W. 32 (1900) (an agreement by a municipality to maintain forever a railroad bridge to be built jointly by the railroad and the city was invalid); 10 *McQuillin, Municipal Corporations* §§ 29.101, 29.102 (3d ed. 1949).

But it was on the basis of practical considerations that the implied power was read into the statute. By the decision an impossible "reasonable time" question was avoided; similar suits regarding donations were discouraged; and the State budget was not confused.¹² And thus the drain on the Gainesville water-works, and the City budget, was confirmed in perpetuity (almost).

William H. Sherwood, '56

¹² Fla. Stat. Ann. § 282.01, item 62, footnote (1953), as cited by the court: "*Provided that none of these monies shall be used to purchase water from the City of Gainesville." *Gainesville v. Board of Control of Florida*, 81 So.2d 514, 517 (Fla. 1955).