Notre Dame Law Review

Volume 35 | Issue 2 Article 6

3-1-1960

Municipal Corporations: Power of a Municipality to Appropriate Public Funds in Support of Cultural and Recreational Activities

Gerard M. Gallivan

Municipal Corporations

Power of a Municipality to Appropriate Public Funds in Support of Cultural and Recreational Activities

Introduction

It is a truism that government and governmental activity are expanding, consistent with the predominantly broader view of the role of government. Successively, it has been a keeper of an uneasy peace, a guardian of individual property rights, a regulator of economic equality, a social reformer, and most lately a guarantor of an amorphous body of civil rights.[1] Consonant with this recognition of its duty toward the totality of man, sporadic attempts have been made to cultivate among the citizenry that which is peculiarly human by sponsorship or subsidization of recreational and cultural activities.

On this level, a historical backwash of unrelated abuses promises to cause difficulty. That period of our history comparable to awkward, adolescent growth has left an unpleasant memory of foolish endeavors, and a body of constitutional inhibitions imposed by people wary of their government's power to cause mischief.

Typical of the situations giving rise to the era of reform was that existing in Texas:

> Because the great interior of the state was relatively worthless until it was supplied with transportation facilities, the people of Texas were exceedingly liberal with donations of both public and private funds to aid in the construction of railways.
>
> Although no public aid was extended to the first railway companies chartered in Texas, after a dozen or more companies had forfeited their charters without being able to raise funds enough to begin work of construction, the statesmen of the time realized that too sparse a population and too scarce amount of free capital hampered the development of railway facilities. They did, therefore, just what was being done in many other states, namely provided for the sale of the public credit in the shape of county and city bonds in order to secure funds for railway construction.[2]

The Supreme Court of Florida continues the narrative:

> Many of these institutions were poorly managed, and either failed or became heavily involved, and, as a result, the state, counties, and cities interested in them became responsible for their debts and other obligations. These obligations fell ultimately on the taxpayers. Hence the amendment, the essence of which was to restrict the activities and functions of the state, county, and municipality to that of government, and forbid their engaging directly or indirectly in commercial enterprises for profit.[3]

After waves of such failures brought about or hastened by panics in 1837, 1857 and 1873, insurance against such a recurrence of near ruin to governmental finance was sought in constitutional prohibitions of sort illustrated by the New York provisions:

> The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking. . . .[4]
>
> No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking, or become directly or indirectly the owner of stock in, or bonds of, any private corporation or association; nor shall any county, city, town, village or school district

1 Compare Pound, Introduction to the Philosophy of Law 33-47 (1954). Pound speaks of four successive, reigning ideas about the end of law.

2 Interpretative Commentary to Tex. Const. art. 11, § 3 (Vernon 1955).

3 Bailey v. City of Tampa, 92 Fla. 1030, 111 So. 119, 120 (1926).

4 N.Y. Const. art. VII, § 8.

> give or loan its credit to or in aid of any individual, or public or private corporation or association, or private undertaking. . . .[5]

It is against this background that the problem posed in this Note must be set. The extension of governmental activity into the fields of recreation and culture seems to be inevitable. It is the purpose of this Note to discuss how formidable, or indeed how real, are the obstacles set up by the various state constitutions, when public funds are put in private hands for promotion of recreational or cultural activities.

The difficulties inherent in any coverage of this subject cannot be fully overcome. As advanced above the problem is a relatively new one, and so progressive by nature that its treatment largely depends upon the stage of development of governmental theory within the state. Minimizing differences in prohibitory forms,[6] it is the contention of this Note that the decisions are reconcilable to any degree only in terms of policy. This is not to say that policy is uniform among the jurisdictions, since important determinants of policy, *i.e.*, history and present need, obviously vary. For the same reason, references must be made frequently to cases not falling within the narrow factual ambit of this Note, but which may be illuminative of the attitude of a given judiciary toward the provisions in question.

I. The Constitutional Provisions

> A municipal corporation . . . is a body politic and corporate, established by public law, or sovereign power, evidenced by a charter, with defined limits and a population, a corporate name, and a seal . . . , and perpetual succession, primarily to regulate the local or internal affairs of the territory or district incorporated, and secondarily to share in the civil government of the state in the particular locality.[7]

For purposes of this Note, the fact that municipal corporations owe their creation and continued existence to the state is of paramount importance. It is within the absolute discretion of the state to create, to describe and alter the mode of existence, and to destroy a municipal corporation.[8] The powers of a municipality are those which the state in its discretion has seen fit to delegate and to continue to delegate.[9] Moreover, the powers delegated are to be construed strictly and doubts to be resolved against the corporation.[10] The conflict to be observed here is between the provisions of the constitution applicable to all municipalities and the questionable acts of some of them.[11]

The constitutional provisions which give rise to the problem are fairly common among the states,[12] and where existing seem to be absolute in their terms.[13] There

---

5 N.Y. Const. art. VIII, § 1. That prohibition of state aid to private enterprise does not imply a similar prohibition upon local governments may be inferred from the two separate provisions. In Visina v. Freeman, 252 Minn. 177, 89 N.W.2d 635 (1958), the court construed a similar provision regulating state activity as inapplicable to a municipality.

6 See Johns Hopkins University v. Williams, 199 Md. 382, 86 A.2d 892 (1952) and Melvin v. Board of County Comm'rs, 199 Md. 402, 86 A.2d 902 (1952), wherein the donation of the proceeds of a sale of bonds to educational institutions was held not to violate a prohibition against lending of credit to a private institution.

7 McQuillan, Municipal Corporations § 2.07 (3d ed. 1950).

8 Hunter v. Pittsburgh, 207 U.S. 161, 178 (1907).

9 Trenton v. New Jersey, 262 U.S. 182 (1932).

10 2 McQuillan, Municipal Corporations § 10.18, 10.19 (3d ed. 1950). This formula is given effect in Gritton v. City of Des Moines, 247 Iowa 326, 73 N.W.2d 813 (1955).

11 There seems to be no purpose served in excluding counties from the coverage of this Note inasmuch as they are in a comparable status with reference to the state, and the constitutional provisions usually include them.

12 Ala. Const. art. 4, § 94; Ariz. Const. art. IX, § 7; Ark. Const. art. 12, § 5; Cal. Const. art. 4, § 31; Colo. Const. art. XI, § 1; Del. Const. art. 8, § 8; Fla. Const. art. 9, § 10; Ga. Const. art. 7, § 2-5801; Idaho Const. art 12, § 4; Ill. Const. separate § 2; Ind. Const. art. 10, § 6; La. Const. art. 14, § 9; Mich. Const. art. 10, § 12; Miss. Const. art. 7, § 183; Mo. Const. art. 6 §§ 23, 25; Mont. Const. art. XIII, § 1; Nev. Const. art. 8, § 10; N.J. Const. art. 8, § 1; N.M. Const. art. 9, § 14; N.Y. Const. art. 8, § 1; N.D. Const. art. XII, § 185; Ohio Const. art. VIII, § 2; Okla. Const. art. X, §

are, however, several instances where exceptions for specific purposes are authorized.[14] These exceptions are outside of our problem but do serve to give some indication of the official policy of the state. Courts exhibit a tendency to construe the prohibitions not only in the spirit in which they were enacted,[15] but also with an eye to the exceptions necessarily implied from other constitutional grants.

Constitutional provisions which limit governmental spending to public purpose,[17] or provide for authorization by a majority of the voters[18] are not directly in point here. However, public purpose is a necessity in any appropriation,[19] and is sometimes an overriding consideration in jurisdictions having a strict provision.[20]

II. Public Purpose

It has been convincingly advanced that the power to spend is coterminous with the power to tax.[21] Whether this theory is based on the fourteenth amendment,[22] it is reasonable that since the source of governmental funds is almost exclusively taxation, a use of public funds for private purposes is an intolerable abuse of governmental powers.[23] But as certain as is the rule that public funds be spent only for public purposes, its application to the particular case has been neither consistent with, nor enlightening as to a standardized meaning of the term.[24]

The mere incidence of benefit to private parties does not vitiate public purpose;[25] nor, indeed, does ultimate public benefit completely justify any appropriation.[26] Somewhere between the two, a balance is struck where public benefit outweighs any argument that public funds are being diverted to a private purpose.[27]

In judging the constitutionality of an act on grounds that the proposed expenditure is not for a public purpose, the courts typically remark that "the exact line of cleavage between what is, and what is not, a public use, is somewhat difficult to mark," that "the courts have never attempted to lay down with minute detail

---

17; Pa. Const. art. 9, § 7; Tex. Const. art. 4, § 3; Utah Const. art. VI, § 30; Va. Const. art. XIII, § 185; Wash. Const. art. VIII, § 7; Wyo. Const. art. 16, § 6. The above listing does not purport to be exhaustive.

13 See notes 4 and 5, *supra*, for typical provisions.

14 *E.g.*, Cal. Const. art. 4, § 31; Ga. Const. art. 7, § 2-5801.

15 Johns Hopkins University v. Williams, 199 Md. 382, 86 A.2d 892 (1952) wherein the court limits the prohibition through an appeal to the historical circumstances from which it arose.

16 *E.g.*, MacMillan Co. v. Clarke, 184 Cal. 491, 194 P. 1030 (1920).

17 *E.g.*, Ky. Const. § 171; S.C. Const. art 8, § 3; S.D. Const. art. 10, § 2.

18 *E.g.*, N.C. Const. art. VII, § 7; Tenn. Const. art. 2, § 29.

19 Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 661 (1874). San Diego County v. Hammond, 6 Cal. 2d 709, 59 P.2d 478, 484 (1936).

20 In Mills v. Stuart, 76 Mont. 429, 247 Pac. 332 (1926) a grant of limited liability for a tort already committed was held not to be a donation within the meaning of the prohibition because for a"public purpose." The court equated donation with gift which it defined as "an appropriation for the relief of one who has no legal claim upon which to base it." The court felt that the existence of a legal claim was a sufficient public purpose, the declared policy of the legislature controlling.

21 2 Cooley, Constitutional Limitations 1026 (8th ed. 1927).

22 That it apparently is, see Green v. Frazier, 253 U.S. 233, 238 (1920).

23 Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1874).

24 See 15 McQuillan, Municipal Corporations § 39.21 (3d ed. 1950) for an extensive listing of what are and what are not public purposes.

25 Carman v. Hickman County, 185 Ky. 565, 215 S.W. 408, 411 (1919).

26 State *ex rel* St. Louis School & Museum of Fine Arts v. St. Louis, 216 Mo. 47, 115 S.W. 534 (1908). In Wilentz v. Hendrickson, 133 N.J.E. 447, 33 A.2d 366 (1943), the court expressly rejects the public purpose doctrine as any justification for a violation of the letter of the prohibition which is viewed as specifically aimed at the means employed and so cannot be defeated by any argument based upon desirability of the end served. The case further holds that to remove a supposed "contractual payment" from the proscribed "donation" class, the consideration must be "unimagined, substantive, and veritable." *Id.* at 384.

27 See Furlong v. South Park Comm'rs, 340 Ill. 363, 172 N.E. 757 (1930). *Contra,* Detroit Museum of Art v. Engel, 187 Mich. 432, 153 N.W. 700 (1915).

an inexorable rule. . .because it would be impossible to do so," that "the determination is primarily for the legislative branch,"[27] and finally that the "courts will not intervene unless there is a plain departure from every public purpose which could reasonably be conceived."[28] These principles, often recited, however, in cases holding the given act unconstitutional,[29] are capable of the most illiberal application despite their appearance.

In *Bowman v. Kansas City,*[30] where the court held constitutional an ordinance providing for the acquisition of real estate for off-street parking, a more realistic view was advanced:

> The term is elastic and keeps pace with changing conditions. . . . As might be expected, the more limited application of the principle appears in the earlier cases, and the more liberal application has been rendered necessary by complex conditions due to recent developments of civilization and the increasing density of population. In the very nature of the case, modern conditions and increasing interdependence of the different human factors in the progressive complexity of a community make it necessary for the government to touch upon and limit individual activities at more points than formerly.[31]

The corollary to the view that the meaning of public purpose depends upon a changing set of conditions is that public purpose as defined by courts is largely dependent upon the judge's view of what public policy now is or should be in the light of present conditions and past lessons. Seldom will a court be so rigid as to require precedent to establish conclusively that a particular use or expenditure has or lacks a public purpose.[32]

Furlong v. South Park Commissioners illustrates this point.[33] There the commissioners and the Museum of Science and Industry agreed as follows: the commissioners agreed to apply the entire net proceeds of a $5,000,000 bond sale to pay the cost of restoration of the Fine Arts Building, which had not been torn down after the World's Columbian Exhibition in Chicago in 1893, and then allocate the use of this building without rental to the museum corporation. The corporation agreed to provide $3,000,000 for the remaining cost of restoration and maintenance. Section 2 of the Illinois constitution provides that "no county, city, town, township or other municipality, shall ever . . . make donation to or loan its credit in aid of such [private] corporation."

The court, in holding the agreement constitutional, said, "it strikes us very forcibly in considering this case that the park commissioners were acting in the public interest."[34] The constitutional ban was viewed as one pertaining strictly to ultimate objectives and not as to means adopted. It was said that the state has the right to select its own agencies for the purpose. *Boehm v. Hertz,*[35] the cited authority for the last statement, had to do with a state grant to a Normal University which was conducted by the State Board of Education. The Board had been characterized a private corporation in a previous, unrelated case, which is clearly distinguishable and weak authority for the proposition. It seems clear that the court decided the case on the theory of public purpose, and rationalized upon familiar principles, agency being mentioned most prominently.

Two other earlier courts deciding very similar cases justified a contrary result by different lines of reasoning. In *State ex rel. St. Louis School & Museum of Fine Arts v. City of St. Louis,*[36] a grant by the city was held unconstitutional as a grant to a private corporation. That the tax could be upheld because for a public purpose

28 State *ex rel.* Jackson v. Middleton, 215 Ind. 219, 19 N.E.2d 470, 475 (1939).
29 See, *e.g.,* Loan Ass'n v. Topeka 87 US (20 Wall.) 655, 665 (1874).
30 361 Mo. 14, 233 S.W.2d 26 (1950).
31 *Id.* at 32.
32 *But see,* Kulp v. City of Philadelphia, 291 Pa. 413, 140 Atl. 129 (1928).
33 340 Ill. 363, 172 N.E. 757 (1930).
34 *Id.* at 760.
35 82 Ill. 154, 54 N.E. 973 (1899).
36 216 Mo. 47, 115 S.W. 534 (1908).

was labeled untenable. The court expresses the opinion that the city could provide a museum of its own, having title in the building and art, and exercising a control over it. But the present case is one of donation to a private museum. The city had neither title nor the power to exercise control over the museum.

In *Detroit Museum of Art v. Engel*,[37] the court added a new notion to public purpose. In this case, an appropriation to the Detroit Museum of Art by the city of Detroit was held unconstitutional as the use of public funds for a private purpose, and as a grant of public funds to a private corporation. Stating first that the private corporation, no matter how public its aims, must take on the form of a municipal agency to escape the constitutional inhibition, the court seems to follow closely the *St. Louis School and Museum case*. It points out that the transfer of corporation property to the city and the granting of a minority representation on the board of directors to the city does not change the character of a private corporation to public. "It is not a public purpose within the meaning of our taxing laws, unless it is managed and controlled by the public." [38]

It is to be noted in these cases that mere public purpose would not justify the violation of the letter of the constitutional inhibition without the aid of a supplementary rationalization. Even the *Furlong* case which seems to go furthest along this path mentions the standard rationalizations in this field — public ownership and control (real or specious), an agency or instrumentality theory, and a contract rationale. It is to these we now turn.

III. Control and Instrumentality

> Whether the purpose is a public one, therefore, is no longer the sole test as to the use of the state's credit. . . . It will not do to say that the character of the act is to be judged by its main object; that because the purpose is public, the means adopted cannot be called a gift or a loan. To do so would be to make meaningless the provision. . . .[39]

Thus there must be something present in the factual situation which will serve to take the given case "out of the act." Perhaps the most obvious way is to make the corporation public, or so place it under the control of the government unit in question. Thus, where an act authorized the establishment of a free public library supported by a stipulated tax, the board of trustees was composed of the mayor, the superintendent of public instruction *ex officio* and five appointees of the mayor. The board was also given power to contract debts and incur expenses within the annual appropriation, but it could not purchase or hold property in its own name. In dictum, the court said:

> To sustain the right to make these donations, in view of article 1, §§ 19 and 20, of the Constitution, which forbid any city to give any money or property to or in aid of any individual association or corporation, . . . it would seem necessary to hold that these corporations are a branch or a board of the municipal government, public in their character, to manage educational matters for the benefit of the whole community.[40]

It is fairly clear that this control situation would satisfy most courts. The New Mexico court has said that "the state must have complete control over the corporation, so that the corporation is then but a subordinate governmental agency." [41] In Pennsylvania, control consisting of ownership of the land and a representation of one half on the board of the Carnegie Free Library was said to be adequate control by the city to constitute the library as a non-private institution.[42] The *Detroit*

37 187 Mich. 432, 153 N.W. 700 (1915).
38 *Id.* at 703.
39 People v. Westchester County Nat'l Bank, 231 N.Y. 465, 132 N.E. 241, 244 (1921).
40 Trustees of Free Public Library v. Civil Service Comm'n, 83 N.J.L. 196, 83 Atl. 980, 982 (1912), *aff'd*, 86 N.J.L. 307, 90 Atl. 261 (1914). The court in affirming the classification of library employees within the civil service act found it unnecessary to expressly declare the library to be a public corporation.
41 Harrington v. Atteberry, 21 N.M. 50, 153 Pac. 1041, 1045 (1915).
42 Laird v. City of Pittsburgh, 205 Pa. 1, 54 Atl. 324 (1903).

Museum case is fairly typical of a situation where an attempt has been made to rid the corporation of its private character, but has failed in the court's estimation. There the court found that the surrender of its real property to the city and the grant to it of a minority representation on the board of directors failed to change the character of the corporation[43] probably because it also found that the corporation was still run by a private board of directors.

It would seem that the public control method of taking the corporation out of the operation of the prohibition would realistically require at least a bare majority of the directors to be representatives of the city, if the constitutional prohibition is to have any meaning. To require a domination so complete as to constitute the corporation a municipal agency seems unduly strict and tends to limit the corporation more than a presently subsisting corporation worthy of public aid would normally desire.

When it is clear that there is no control over the private corporation so as to give it a quasi-public character and avoid the letter and spirit of the prohibition, resort is often had to the fiction that an agency has been established.

In *Sambor v. Hadley*,[44] it was said, in answer to an argument that the corporation which received the benefit of the appropriation was a private one, that "the appellant loses sight of the fact that the so-called private corporation was really an agency formed and incorporated for the purpose. . . ." [45] In upholding an appropriation by the city of Philadelphia to the Sesquicentennial Exhibition Association whose purpose was the holding of a celebration commemorating the one-hundred-fiftieth anniversary of the signing of the Declaration of Independence, the court had little trouble in finding a municipal purpose but undoubtedly felt constrained to further justify the transaction. Agency offered a convenient theory where control was clearly lacking.

But in *Johns v. Wadsworth*,[46] the court refused to uphold a similar appropriation to a county fair where the buildings to be erected for the fair would become county property and members of the board of county commissioners were *ex officio* members of the agricultural fair association. While admitting the purpose to be public, they ruled out the agency argument by a strict interpretation of the constitutional ban on appropriations to private corporations and incidentally lashed out at token gestures of granting control to public officials.

In an early Maryland case,[47] the theory of agency was invoked by charitable institutions for pauper children aided by the city of Baltimore. The court in construing the general principle that a city can exercise only defined and limited powers as prescribed in the charter, reached a conclusion that the city could not aid private institutions "which are not created for or required in the exercise of the powers and performance of duties prescribed by law." [48] Against the contention of the institutions that they were in a sense public corporations managed for public purposes and in fact municipal agencies, the court required of such an agency that they owe their creation to the municipal power conferred on the city of Baltimore.

There is no doubt that the court had in mind a much more proper sense of "agency" than that of the previous cases where the term is equated to the notion of independent contractor and is used in the loose, layman's notion of instrumentality. The *Restatement's* definition of agency requires that the agent be "subject to [the principal's] control." [49] The court found that the recipients of these grants "are separate and distinct corporations, composed of private individuals, and managed and controlled by officers and agents of their own, and over which the City

43 187 Mich. 432, 153 N.W. 700 (1915).
44 291 Pa. 395, 140 Atl. 347 (1928).
45 *Id.* at 350.
46 80 Wash. 352, 141 Pac. 892 (1914).
47 St. Mary's Industrial School v. Brown, 45 Md. 310 (1876).
48 *Id.* at 327.
49 1 RESTATEMENT (SECOND), AGENCY § 1 (1958).

has no supervision or control, and for the management of which there is no accountability to the City whatever." [50] This relationship not only does not classify as agency under our notion of governmental agency (as the court would prefer) but does not even approach the common law notion of agency in the manner of its formation or in its legal consequences of binding the principal contractually. The agency, to qualify in a strict constitutional sense, must not exceed the powers of the principal as established by charter. For the meaning of the constitutional provision would be *nil* if the bar were absolutely "personal" to the municipal corporation and avoidance of the limitation could be had in establishing an "agency" of this nature.

It seems apparent in light of the discussion of control and instrumentality that the fundamental objection to an appropriation for an admittedly public purpose can be summarized in the reluctance of the public to let public funds out of the control of public officers. The theory is that these officers are answerable to and under the ultimate control of the electorate. The principle of public purpose, although vague, sufficiently limits the objects for which expenditures may be made, but there remains the proper choice of means to obviate the possibility that the unscrupulous may divert the flow of public money. It is to this evil that the phraseology of the provisions is directed when it includes all non-public recipients within its prohibitions.[51]

IV. Control and Contract

The theories of control and instrumentality are generally found sufficient only when control is adequate and the courts are prone to look behind forms. To the common law lawyer, the most familiar theory to obtain a degree of control over another person is contract and this theory has not been ignored in this field. Public contracts with private parties to accomplish a public purpose, absent ever present defenses of fraud, duress and the like, may contain within their terms sufficient control over the private person to avoid the spirit of the prohibition.

As an example of the practical importance of control in deciding the constitutionality of an appropriation, the treatment of the question of public support of libraries in New York gives a good insight into the real thrust of the constitutional provision. Libraries may be established by a municipal corporation,[52] or by contract. Municipalities may provide for library services with the trustees of a free library.[53] The municipality may even make a grant to such a library, except that in the absence of a contract, this payment cannot be made in a lump sum but must be retained by a proper governmental authority and expended only upon the presentation of properly authenticated vouchers at the direction of the library trustees.[54] The danger avoided here is that of the retention of public funds by private parties under no public control.

In the matter of contract, it is clear that public purpose is a prime requisite in all other cases. In *Brister v. Leflore County*,[55] it was pointed out that the constitutional ban may be avoided by governmental control over the appropriation specifically through an obligatory contract enforceable in a court of competent jurisdiction. The court went on to point out that the consideration rendered must be such as to rebut any argument that the conveyance is a donation or gratuity.[56] The last statement is doubtful in view of court's traditional statement that the adequacy of consideration will not be questioned and especially in the light of familiar leasing arrangements for a nominal rent.[57]

50 45 Md. 310, 329 (1876).
51 People v. Westchester County Nat'l Bank, 231 N.Y. 465, 132 N.E. 241 (1921).
52 N.Y. Munic. Law § 79; N.Y. Educ. Law § 255.
53 N.Y. Educ. Law § 256.
54 7 Ops. State Compt. 388 (N.Y. 1951).
55 156 Miss. 240, 125 So. 816 (1930). (dictum)
56. *Id.* at 819.
57 South Side Dist. Hospital v. Hartman, 62 Ariz. 67, 153 P.2d 537 (1944).

It is far more likely that the court will question the reality of the contract in terms of binding obligation. In *Kulp v. City of Philadelphia*,[58] the court would not construe as a binding contact an arrangement whereby the city would pay $2500 upon each of ten performances by the Civic Opera. The supreme court did not choose to interfere with lower court findings that it was not a municipal purpose and, therefore, that the contract was not one which the city had power to make. More importantly in understanding the reason for the decision, the court found no element of control, no right of auditing the company's books and no power of management in the city. It further stated: "The opera does not contract to give any performance. To be sure, it cannot collect the $2500 installments unless it gives one [performance for each installment], but it could give none and not be liable for breach of contract." The reasoning of the court, however, overlooks the possibility of a unilateral or a series of unilateral contracts. But the larger objection of no control by the contract seems to be valid. There is no binding obligation to use the funds provided for the given purpose, nor adequate protection against misuse.

In *Stone v. State ex rel Mobile Broadcasting Corp.*[59] the court looked beyond questions of consideration and binding obligation to determine whether a true contract had been created. The adequacy of consideration was not questioned, but it was found that the notion that something was given in exchange was therein lacking. By the terms of the contract, the radio station was to disseminate information concerning Mobile County in return for a sum of money. The court found that "advertising and promoting the county's resources was a mere incident or subsidiary objective of the contract" [60] and that the motive behind the appropriation was the aiding by public funds of private enterprise which was within the constitutional bar.

Thus, the theory of contract as a means of avoidance of the provision while pleasing on its face is fraught with difficulties. The subject matter of the contract must be within the proper sphere of governmental activity. Whether this is stated in terms of the requirement of public policy or the various limits of governmental and proprietary activity, it must be somehow explicitly found in, or necessarily implied from, the charter. The twofold requirements of consideration must be met, *i.e.*, something of *value* must be given in *exchange*. The obligation thus imposed must be so enforceable as to meet the objection that the element of control is missing. However, reflection reveals that these requirements are not too stringent. The contract theory is not without worth. The growing concept of government's proper role influences thought whether in the course of defining the limits of "public purpose" or interpreting what is "necessary and proper" to the exercise of those powers specifically granted in the charter. Consideration, although seldom mentioned in these cases poses no greater obstacle here than in the field of private contracts. Questions both of sufficiency, and of bargain, seem to be reducible to the power of the municipality and the exercise of legislative discretion.

Conclusion

There is no comprehensive rule or system of rules on this subject. In any given case of an appropriation, we are met at the outset by the question of public purpose which *may be* immediately determinative. Clearing this hurdle, there may still be posed valid objections to the means used to effect the public purpose.

Viewed in historical perspective, there seems to be good reason for requiring more than public purpose, if we view the evil as the irresponsible giving and lending of money or credit, and the correct remedy may well be a blanket prohibition against all aid to private parties, or the use of the most strict control methods. However, there are a substantial number of cases which reflect the view that the evil lies in the identity of the interest aided. This is the inevitable conclusion in jurisdictions where public purpose is expressly determinative.

58 291 Pa. 413, 140 Atl. 129 (1928).
60 *Id.* at 729.

The latter view sees government in a larger role and does not wish it hampered by an unyielding constitutional ban which recognizes no difference between the good cause and the abuse of legislative discretion. The question of foregoing the more desirable good to avoid the possibility of evil is precluded for the adherents of this opinion by their adherence to the more comprehensive view of government. Clearly, the trend of the times is with them, but the lesson of history is that the possibility of abuse or error is strong.

The reliance upon public purpose as a complete justification for any use of government funds or credit, when there exists a strict constitutional prohibition leaves the court with an amount of discretion in certain fiscal affairs which should properly be exercised only by a legislative body. Perhaps this last observation is the most bothersome aspect of the problem.

Gerald M. Gallivan