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R. Perry Sentell Jr.

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SPECIAL CONTRIBUTIONS

County Contracts in Georgia:  
"Written and Entered"

By R. Perry Sentell, Jr.*

I. INTRODUCTION

The law surrounds the local government contracting process with a number of requirements. Some of those requirements go primarily to the substance of the contract, and some deal largely with matters of form. Of the latter, the two points most often projected are the tangibility of the agreement and its location in the official records.

Beginning in 1863 and continuing in 1980, Georgia statutory law has highlighted both tangibility and location for the contracts of counties. Via a single mandate, the historic statute commands that "[a]ll contracts entered into by the ordinary with other persons in behalf of the county shall be in writing and entered on his minutes." Over the years the ap-

* Regents' Professor of Law, University of Georgia School of Law. University of Georgia (A.B., 1956; LL.B., 1958); Harvard University (LL.M., 1961).
4. The progression of the statute through the various codes was as follows: Code of 1863 § 465; Code of 1868 § 527; Code of 1873 § 493; Code of 1882 § 493; Code of 1895 § 343; Code of 1910 § 386; Code of 1933 § 23-1701.
pellate courts have, on a number of occasions, articulated their views of the objects served by the mandate: to afford accessible information to the public on contracts being made by the county;\(^6\) to apprise taxpayers of the purposes for which their monies are being expended;\(^7\) to allow opportunity for citizen challenge to the county's exercise of power;\(^8\) to open the public's business to inspection;\(^9\) and to protect taxpayers against unauthorized and illegal expenditure agreements.\(^10\)

The desirability of such objects is, of course, incontestable. As with most matters, however, merit tends to turn upon perspective; different perspectives necessarily radiate tensions which, at the extreme, materialize in controversy. For 117 years, the statutory command on writing and entering county contracts has yielded its share of litigated controversy. Perhaps a useful purpose might be served by a brief effort to canvass, illustrate, and organize some instances of that litigation.

II. EARLY TIMES

A. Applications

What appears to be the Georgia Supreme Court's earliest consideration of the statute is also a dramatic illustration of the mandate's application. *Pritchett v. Inferior Court of Bartow County*\(^11\) presented an action to recover on a county bond, in which the plaintiff attached to his declaration a copy of the bond that stated its amount, the purpose for which issued, and the rate of interest, and bore the signatures of the county clerk and treasurer.\(^12\) In highly abbreviated fashion, the court simply cited the statute and said that a bond was not valid unless entered upon the minutes of the county court. Because "[i]t nowhere appears that any entry of this contract was ever made on the minutes of the Court,"\(^13\) the court affirmed the trial judge's dismissal of the proceeding.

In the formative years, the appellate courts engaged the *Pritchett* approach to turn away the claims of scores of individuals who had performed assorted services for counties while believing they were acting under contractual agreements. That was the approach of the supreme

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11. 46 Ga. 462 (1872).
12. The bond had been issued to an individual for monies loaned to the county for the support of soldiers' families.
13. 46 Ga. at 465.
court in *Holliday v. Jackson County*\(^1\) to a physician who had treated a family of paupers at the order of the county ordinary,\(^2\) and of the court of appeals in *Laurens County v. Thomas*\(^3\) to one who had been elected "county physician." In the latter case both the election and the salary appeared in the minutes, but the court deemed the minutes deficient in failing to disclose the duties of the employment.\(^4\)

In *Spalding County v. Chamberlin & Co.*,\(^5\) architects sought recovery from the county for the preparation of plans for the building of a courthouse. The plaintiffs relied upon an agreement which had been entered on the minutes of the county commissioners stating the plaintiffs' employment and duties.\(^6\) Reversing the trial judge's refusal to sustain the county's demurrer, the supreme court emphasized the minutes' failure to specify what the plaintiffs were to receive for their services.\(^7\) Rejecting the plaintiffs' allegations that the fee had been understood and agreed upon,\(^8\) the court reasoned that "[t]o permit a county to be held liable on a contract when a material part of it is in parol, and only part of it in writing and on the minutes, would defeat the object of the statute."\(^9\)

Indeed, the court elaborated,

> [t]he taxpayers of the county are entitled to know, not only for what purpose their money is being disbursed, but the amount thereof that is to be expended for a given purpose, if any amount is agreed upon; and this statute intended to provide a source from which such information could be reliably obtained,—that is, through the medium of the contract itself spread upon the public records of the county.\(^10\)

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15. The ordinary had written an order accepting the family as paupers and directing the plaintiff physician to treat them at reasonable charges. The supreme court affirmed the trial judge's grant of a nonsuit.
17. The court reasoned that state statutes did not establish the office of county physician and thus the duties of employment were a material term of the contract which must "in some definite way" be disclosed by the county minutes. *Id.* at 569, 65 S.E. at 302.
19. The court agreed that the county resolutions on the minutes evidenced the employment.
20. The court said that to meet the statutory mandate, "all the material portions of the contract actually made should be in writing and on the minutes; and if the county employs any one to perform services and a price is agreed upon, this should appear in the contract on the minutes." 130 Ga. at 652, 61 S.E. at 534.
21. The plaintiffs alleged an understanding that they were to receive a fee in the amount of 5% of the contract price of the courthouse.
22. 130 Ga. at 652, 61 S.E. at 534. The court said that "[o]ne of the main objects of the law is to prevent disputes as to the terms of the contract to which the county is a party . . ." *Id.*
23. *Id.*
What controlled the claims of physicians and architects also governed the county's agreement with an attorney. The plaintiff in *James v. Douglas County* sought to recover stated fees for legal services rendered to the county under a contract of employment. Affirming a dismissal of the action, the supreme court noted the absence of evidence that the contract was in writing or entered upon the county minutes. A petition in a contract action against a county "is not good," said the court, "unless it affirmatively avers that such contract was entered upon the minutes of the proper authorities in charge of the financial affairs of the county." In addition to contracts for services, the early courts evidenced few qualms in applying the statutory mandate to county agreements of other complexities. For instance, in *Carolina Metal Products Co. v. Taliaferro County*, the court of appeals affirmed the dismissal of a seller's effort to recover for culvert materials and dump carts supplied to and used by the county. The plaintiff's petition was defective, held the court, because it failed to allege a written and entered contract. In *Killian v. Cherokee County*, the supreme court afforded similar disposition to one claiming to be a lessee from the county. There the court enjoined the continuing trespass of the “lessee” with the following rationale: “This contract of rental was not in writing. It was not spread upon the minutes of the county commissioner who made it. It was unenforceable and did not bind the county.”

### B. Status of the “Contract”

Given the seriousness with which the law viewed noncompliance with the statutory mandate, a necessary by-product was the quandary over the

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25. Plaintiff alleged that the county had already received the benefit of the services.
26. 131 Ga. at 270, 62 S.E. at 185. To the same effect, see Garner v. Floyd County, 24 Ga. App. 693, 101 S.E. 918 (1920), where the court of appeals upheld a judgment for the county sued by one who alleged employment as a "concrete foreman." The court explained that "[u]pon the trial of the case it appeared that the specific contract with the plaintiff was not in writing and had never been entered upon the minutes of the board of roads and revenues. . . ." *Id.*
27. 28 Ga. App. 57, 110 S.E. 331 (1922).
28. The plaintiff was the transferee of the seller's account and alleged that the county had made partial payment on the goods.
29. The court said that “[t]he statute is positive as to how and in what way liability of a county may be fixed." 28 Ga. App. 57, 58, 110 S.E. 331, 332 (1922).
31. The defendant was a former employee of the county and alleged leasing the property in issue from a former county commissioner.
32. 169 Ga. at 320, 150 S.E. at 162. The court viewed the evidence as failing to disclose that the county had received any of the fruits of the alleged contract.
precise status of the agreement in issue. Constituting an early presentation of that quandary, *Milburn v. Glynn County* was an architect's action on a written contract with the county for services in constructing a new courthouse. Reviewing the detailed and lengthy provisions of the contract, the supreme court found nothing on the county minutes relating to those provisions and thus declared "an utter failure to comply" with the mandate. "The only question left for consideration," continued the court, was "whether or not this omission to enter of record this contract renders the same absolutely void, and prevents a recovery thereon by the plaintiff." In his opinion for the court, Justice Lewis confessed tension between his personal views and what he considered to be settled law on the point. On the one hand, he urged, a distinction should be drawn between a total want of power and an irregular exercise of existing power. The county's failure to enter the contract came within the latter category, he argued, and a denial of recourse to those who had acted in good faith was "a hard rule." Nevertheless, the Justice conceded, the question was not "an open one" at this point. Recalling the *Pritchett* decision, he concluded that unless the pleadings affirmatively demonstrated entry upon the minutes, the contract—even if good in other respects—was invalid.

Still another courthouse construction quagmire spawned a series of contract-status confrontations for the supreme court. In *Jones v. Bank of Cumming*, the bank sought to mandamus the county ordinary to issue a warrant for payment of sums to the bank which would reimburse the bank for advances to one who had constructed a courthouse for the county. Although the plaintiff's petition failed to show any construction contract on the county minutes, the trial judge granted the mandamus. Reversing the trial court's decision, the supreme court conjectured that the judge had been misled by the personal views of Justice Lewis in the *Milburn* case. Emphasizing the actual decision in *Milburn*, the court recalled that decision's reliance, in turn, upon *Pritchett*—a holding of inva-

33. 109 Ga. 473, 34 S.E. 848 (1899).
34. After making the contract, the county commissioners decided not to build the courthouse.
35. 109 Ga. at 475, 34 S.E. at 850.
36. Id. at 476-76, 34 S.E. at 850.
37. Id. at 476, 34 S.E. at 850. The Justice observed that the party contracting with the county has no control over the minutes.
38. Id. at 477, 34 S.E. at 850.
39. The court thus affirmed the trial judge's dismissal of the action. The court did observe that the county had received no benefits under the contract.
41. The bank alleged a contract between the county and the courthouse builder and a contract between the builder and the bank.
lidity even though it appeared that the county had received the full benefit of the agreement. The court offered the following counsel to those who contracted with counties:

Persons contracting with a county are presumed to know the law in reference to such contracts, and they can protect themselves against repudiation of the contract by the county, after performance on their part, by refusing to perform until the ordinary, or county commissioners, as the case may be, have complied with this requirement of the law; and can, if necessary, enforce compliance therewith by mandamus.

The bank, wasting little time in following the supreme court’s counsel, then brought an action to mandamus the ordinary to enter the courthouse construction contract on the county minutes. In affirming the trial judge’s grant of the mandamus, Justice Lumpkin, for a unanimous supreme court, first rejected the county’s argument of delay: “If the duty once arose, there is no law which made it cease to be a duty until it was complied with.” The court was equally aloof to the contention that the original failure to enter rendered the contract absolutely void and that a subsequent entry would be fruitless. The point in controversy, responded the court, was whether the contract was now to be entered on the minutes: “It is not necessary to decide what effect such entry will have, or as to whether the contract would then be valid or enforceable.”

Having designated the point not ripe for consideration, Justice Lumpkin promptly proceeded to consider it. Despite indications to the contrary, he urged, the court had not yet foreclosed the question; indeed, the statutory requirement that written contracts be entered “seems to imply the possibility of having a contract in writing complete before it is entered on the minutes.” Thus, Justice Lumpkin did not think that the court had “yet decided that the failure of an ordinary to do his duty in

42. The court conceded that nonrecovery was a harsh result but countered with the point that contract information should be accessible to the public before the party contracting with the county has begun to perform.
43. 131 Ga. at 196, 62 S.E. at 70.
45. The court however refused to mandamus the ordinary to also enter upon his minutes the order given by the builder to the bank.
46. 131 Ga. at 618, 63 S.E. at 38. “Certainly the continued neglect on the part of an officer to discharge an official duty resting upon him does not cause the duty to terminate.” Id.
47. Id. at 620, 63 S.E. at 39. “All the Justices concur in holding that the mandamus absolute was properly granted as to this contract, without deciding what effect such entry would have, or what defenses might be made to the contract, if suit were brought upon it.” Id. at 621-22, 63 S.E. at 39.
48. He expressly spoke only for himself on this point.
49. 131 Ga. at 622, 63 S.E. at 40.
recording a contract promptly, however wrong it may be, renders such contract an absolute nullity.”

Conceding the Pritchett opinion’s description of such contracts as “invalid,” Justice Lumpkin opined that “that word is not always used in the sense of describing an absolute nullity.”

Taking solace in the personal qualms of Justice Lewis in the Milburn case, Lumpkin concluded by posing the following query:

At what point did the failure of the ordinary to perform his duty, as the public may presume he will do, render his written contract an absolute nullity? If the contract was “invalid” until recorded, only in the sense that it was not perfected or completed in matter of formal entry, so as to form a basis for a suit, could the county get the courthouse and use it, and when called on to pay, respond that its official made the contract in writing but failed to record it, and that if it should now be recorded it would still be a nullity?

The Lumpkin query in the second Jones case was not to go long unanswered. Wagener v. Forsyth County was the third episode arising from the same controversy; there the courthouse builder sued the county in behalf of the bank on the now-recorded construction contract. The controlling question, said the court, was whether the entry of the contract on the minutes, subsequent to completion of the work and under order of mandamus, afforded the builder the same contractual rights he would have possessed had entry been made at the time of the agreement. Reversing the trial judge, the court quoted from Justice Lumpkin’s predilections in Jones and concluded that

the contract was not absolutely void or invalid before it was recorded, except “in the sense that it was not perfected or completed . . . so as to form a basis for a suit;” and when that defect in the contract had been remedied, either by the voluntary act of the ordinary in entering it upon his minutes, or in entering it at the behest of the court, it might, if properly executed by parties having authority to execute it on the part of the county, and if complied with by the other contracting party, be enforced

50. Id. at 623, 63 S.E. at 40.
51. Id. “A contract may be so imperfect as to be not enforceable, and yet not so absolute a nullity that it can not be perfected.”
52. Id. at 624, 63 S.E. at 40-41. The Justice also spurned the contention that the contract might validly have been recorded only up to the time the builder began work: “The statute makes no such declaration, and prescribes no time within which the written contract remains inchoate and at the end of which it will become null because not entered.” Id.
53. 135 Ga. 162, 68 S.E. 1115 (1910).
54. The builder pleaded that the bank had advanced money to him in reliance upon the contract.
55. The judge had held the contract nonenforceable if “kept off the minutes until the contract was fully executed and the work finished.” Id. at 165, 68 S.E. at 116.
Several years later, in Weathers v. Easterling, a county attempted yet again to defend a mandamus-to-enter action by arguing the illegality of the contract, at least when the commissioners who executed the contract were no longer in office. Rebuffing that defense, the court dismissed out of hand the point about successor commissioners and, quoting Justice Lumpkin extensively, moved directly to the illegal contract contention. That contention, the court reasoned, was not material to the issue presented. The issue was entry, not validity, and the court held that:

[T]he contract appearing legal upon its face, the successors of the first commissioners are under the duty of placing the contract on the minutes, and on their failure to do so they may be compelled by mandamus; and this would not prevent them from setting up any legal defense they have as to the invalidity of the contract, if such there be, when suit is brought by the plaintiff in order to enforce his rights under the contract.

C. Qualifications

From the beginning, in one fashion or another, the courts have refused to apply the written-and-entered requirement to some of the controversies brought before them. Indeed, in the Pritchett era itself, and on strikingly similar facts, the supreme court evolved a qualification upon the precept. Akin v. Ordinary of Bartow County presented an action to re-
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cover on bonds issued by the county in specified amounts, with stated interest rates, and bearing the signatures of the county clerk and treasurer.\(^{63}\) Holding error in the trial judge’s charge to the jury on the applicability of the statutory mandate,\(^{64}\) the supreme court restated the Pritchett precept and took care to explicitly reaffirm it. The court, however, viewed Akin as “an entirely different case.”\(^{65}\) Both the plaintiff’s declaration and other evidence demonstrated that the county court’s authorizing orders were entered upon that court’s minutes. “The entry on the minutes of the inferior court of the orders authorizing and directing the bonds to be issued, was a compliance with the requirements of the 493d section of the Code. . . .”\(^{66}\) Moreover, the court declared, “when issued as authorized and directed by said orders, and the money received therefor, as shown by the evidence in the record, it became an executed contract, which was binding in law upon the county. . . .”\(^{67}\)

The court called yet another situation outside the rule in Central Georgia Power Co. v. Butts County.\(^{68}\) That case reversed the typical positions of the parties, with the county seeking to enforce an alleged agreement with a power company regarding the flooding of a county road.\(^{69}\) In an apparent response to the defendant’s attempt to avoid responsibility by brandishing the statutory mandate, the court summarily discovered compliance: \(^{70}\) “The written application by the power company, its acceptance by the proper county authorities, and the entry of both on the minutes, are sufficient to constitute a contract.”\(^{71}\)

The court of appeals also quickly proved adept at discovering exceptional circumstances. For instance, in Early County v. Fielder & Allen Co.,\(^{72}\) the county defended a contract claim by admitting the contract but alleging that the goods purchased from the plaintiff were of insufficient quality.\(^{73}\) Emphasizing that the county had filed no demurrer and had failed to raise the point at the trial, the court held that the county would

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63. Just as in Pritchett, the bonds had been issued by the county for the purpose of acquiring funds for the relief of soldiers’ families.
64. The case had gone to the jury, which found a verdict for the defendant county ordinary.
65. 54 Ga. at 69.
66. Id. at 70.
67. Id.
68. 139 Ga. 490, 77 S.E. 380 (1913).
69. The county alleged its agreement to permit the flooding in return for the power company’s pledge to erect bridges and change the location of the road at the company’s expense.
70. The court’s statement was contained in only a brief headnote.
71. 139 Ga. at 490, 77 S.E. at 380.
73. The contract was for the purchase of furniture, and the county admitted that the furniture had been delivered.
“not be allowed, after verdict against it, to raise for the first time, on motion for a new trial, the point that the plaintiff did not prove that the contract was entered on the minutes of the county commissioners.”

Moreover, in Voris v. Early County, even a timely county demurrer was of no avail. In that case, the court sustained a claim made upon a county warrant which had been issued to pay for materials used in repairing the county roads. The court disposed of the county demurrer—alleging that the contract for the purchase of the materials was not in writing and on the minutes—by engaging a presumption “that in the drawing of a county warrant all the officers concerned therewith have performed their duty.”

A contention otherwise, said the court, “is a matter for answer and not demurrer.”

The supreme court then returned to the scene in Americus Grocery Co. v. Pitts Banking Co., still another controversy arising from the issuance of county warrants. In that case, the holder of warrants sought to mandamus the payment of interest, and the defendant countered with the contention that the interest provision had not been entered on the minutes of the county commissioners. The court’s entire rationale for rejecting the defendant’s position was as follows:

The contrary not being shown, it will be presumed that county warrants when issued are based upon a valid contract duly recorded as provided in the Civil Code, § 386. The failure to so record is a matter of defense against payment, when suit is brought on such warrants and not upon the contract itself.

D. Summary

The formative years of judicially evolving the statutory mandate that county contracts be written and entered were lively and impressive ones.

74. 4 Ga. App. at 268, 63 S.E. at 354. “The admission of a party that he made ‘a contract’ will, in the absence of explanation, limitation, or exception, be construed to mean that he made a valid, binding contract, executed with the formality required by law.” Id.

75. 25 Ga. App. 650, 104 S.E. 89 (1920).

76. The petitioners alleged that they had possession of a county warrant issued for a lawful purpose by the county commissioners, and that sufficient funds had been raised during the year by the county for payment of the warrant.

77. 25 Ga. App. at 650, 104 S.E. at 89.

78. Id.

79. 169 Ga. 70, 149 S.E. 776 (1929).

80. The plaintiff sought to require the county depository to pay the interest on the warrants and, if no funds for payment were available, to require the county commissioners to levy a tax for that purpose. By demurrer, only the bank depository was left as a proper defendant.

81. 169 Ga. at 71, 149 S.E. at 779. The trial court’s issuance of the mandamus was affirmed. This case was later overruled on other grounds.
Following by only a few years the occasion of the mandate's placement in the code, the supreme court afforded the command forceful application in the *Pritchett* case. The *Pritchett* precept promptly became grist for the mills of both appellate courts as they spurned scores of litigated claims for a wide assortment of services and materials provided to counties by suppliers who professed to act under contractual agreements. In that line of cases, the courts' responses to all were unrelenting: if the county minutes did not fully reflect the existence and content of the agreement, then that agreement was "invalid" and "unenforceable." That response also applied to the pleading stage of litigation, and claimants' petitions that failed to affirmatively allege county compliance with the mandate consistently fell victims to dismissal.

No sooner had the courts adopted the *Pritchett* position than they were forced to consider the status of the "invalid" agreement. As early as *Milburn*, Justice Lewis openly confessed his personal reservations about the "hard rule," at least in instances where the agreement was in writing. Later opinions then seized upon those reservations as a platform for counseling those who dealt with counties to delay performances until the county had met the mandate, under mandamus if necessary. In the second *Jones* case, Justice Lumpkin took up the cause by mandamusing the entrance of the written agreement upon the county minutes and by individually opining that the "invalid" agreement was thus snatched from the jaws of absolute nullity. Subscribing to the suggestion of Justice Lumpkin, the court quickly moved to allow enforcement of the "invalid" agreement although its entry upon the minutes had come only through mandamus and long after the claimant's performance. The court was later to rationalize that mandamus of the entry did not prevent the county from setting up any legal defense to the contract; of course, that defense could no longer include the point that the contract was not entered upon the minutes.

Equally unsettling was the development of still another line of cases which appeared to project exceptions to the rule. Almost from the beginning, the *Pritchett* precept was analytically defanged in a number of situations. In some, the courts appeared to engage in a "substantial compliance" exercise; in others, they simply designated the precept immaterial. The latter focused particularly upon county warrants where the courts employed significantly permissive presumptions of validity in order to relegate the mandate to a matter of defense (rather than demurrer) in actions upon the underlying contracts themselves.

Clearly, much remained for clarification.
III. THE MIDDLE AGES

A. Applications

For approximately the next twenty years (1930-1950) the Georgia courts continued the evolution of the mandate on all fronts. Its application was a matter of routine and summary declaration on numerous occasions and in a plethora of predicaments.82

A major area of continued application was that of contracts for services. In the 1931 case of Ward v. State Highway Board,83 for instance, the supreme court took pointed issue with the trial judge over the mandate's coverage of a county's oral agreement with a contractor for road construction.84 Rejecting out of hand the trial judge's position that the statute "was not intended to prevent the county authorities from hiring laborers to perform work on the county roads,"85 the court declared the agreement illegal, "it being in parol and not entered on the minutes, and consequently not complying with the mandatory requirement of the section. ..."86 At virtually the same time, the court of appeals was equally unyielding in Murray County v. Pickering,87 a controversy focusing on the validity of the county's oral agreement with an attorney.88 Conceding that the county had entered a resolution upon its minutes which purported to employ the attorney for representation in a specific case upon stated terms and conditions, and that the attorney had already tendered performance of the agreement, the court nevertheless invalidated the contract.89 By way of headnote pronouncement, the court simply concluded that "[a] mere oral agreement is unenforceable even though it be embodied or recited in a resolution adopted by the county commissioners and

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82. An apt threshold example is the 1930 case, Spears v. Robertson, 170 Ga. 368, 152 S.E. 903 (1930), in which the supreme court, without even a hint as to the facts of the case, quoted the statute and concluded as follows: "Under the law embraced in that section of the code, and in view of the construction placed upon it in numerous cases decided by this court, a suit based upon an alleged contract with the county can not prevail where it is not shown that there has been compliance with that section of the code. In the present case it does not appear that there has been compliance with the above provisions of the code; and it necessarily follows that the court did not err in granting a nonsuit." Id.
83. 172 Ga. 414, 157 S.E. 328 (1931).
84. The case presented an action by landowners to enjoin the relocation of a road, and one of the attacks went to the validity of the county's contract with the road construction contractor.
85. 172 Ga. at 420, 157 S.E. at 331.
86. Id. at 421, 157 S.E. at 331.
88. The court dismissed the attorney's effort to prosecute the case for the county in order to recover his attorney fees from the defendant.
89. The court said simply that this resolution was insufficient to constitute a binding contract between the county and the attorney.
entered on the minutes.  

This unwavering judicial approach forcefully condemned the position of the county deputy warden in *Graham v. Beacham*, who sought to mandamus the county commissioners to pay his monthly salary. Highlighting the plaintiff's failure to allege a written and entered contract, the supreme court resoundingly emphasized the importance of the statutory mandate. Its purpose was to open the public's business to inspection, explained the court, and full compliance was a necessity. Indeed, any negotiations or oral agreements, or even written agreements that have not been entered on the minutes, fall short of being valid contracts conferring any right upon such party, and will not constitute a basis for an action against the county. These essential requirements of a valid contract with the county can not be waived. The mandate of this law is absolute and applicable to each and every contract made and executed on behalf of the county; and to be valid and enforceable every contract must conform to these essential requirements.

The plaintiff's action being based on contract, "and not on right to salary as fixed by or in pursuance of law," the court's dismissal on demurrer appeared to be an automatic response.

Aside from contracts for services, the courts applied the statutory requirement to a variety of other county agreements. One illustration was *Sosebee v. Hall County*, in which the court of appeals considered the claim of a property owner who had executed a right-of-way deed to the county in return for the county's agreement to move and restore a building. Seeking damages for the county's alleged breach of the agreement, the plaintiff failed to assert that the contract had been written and en-

90. 42 Ga. App. at 739, 157 S.E. at 343.
91. 189 Ga 304, 5 S.E.2d 775 (1939).
92. The plaintiff alleged a contract of appointment and indeed the county's payment of his salary except for one stated month.
93. "A suit against the county, based upon an alleged contract with the county, is defective unless it be alleged that such contract is in writing and has been entered on the minutes as required by the statute." 189 Ga. at 306, 5 S.E.2d at 776.
94. Id.
95. Id.
96. Similarly conclusive, in *McGinty v. Pickering*, 180 Ga. 447, 179 S.E. 358 (1935), the court enjoined county commissioners from disbursing funds to one whom they had verbally employed to handle a road construction project. Without further elaboration, the court said, "It appears from the record that Pickering is acting as agent of the county without right, because there is no recorded contract between him and the county, establishing such relation." Id. at 454, 179 S.E. at 362.
97. 50 Ga. App. 21, 177 S.E. 71 (1934).
98. The plaintiff alleged that the county moved the building, damaged it, and refused to restore it as agreed.
Holding that failure to be fatal,\textsuperscript{100} the court termed compliance with the statute "a condition precedent to the existence of a valid and enforceable contract against the county. . .\textsuperscript{101}"

Contracts for goods remained equally susceptible to the precept, a point classically demonstrated by \textit{Griffin v. Maddox}.\textsuperscript{102} In that case, plaintiff attempted to compel the county to levy a tax for the payment of a warrant for bridge materials which the seller had delivered upon the county's oral order. Affirming a directed verdict for the county, the supreme court relied exclusively upon the following rationale: "The contract for the purchase of the material was never reduced to writing and entered on the minutes."\textsuperscript{103}

Toward the conclusion of the period under survey, the court employed its same summary manner of disposition in \textit{Hobbs v. Howell}.\textsuperscript{104} There taxpayers sought to enjoin the county from expending funds in acquiring a road right-of-way, alleging that the county had entered into "valid and binding contracts" to pay the grantors for incidental expenses.\textsuperscript{105} The court quoted the statute and dismissed the taxpayers' efforts with the following benediction: "A petition is subject to general demurrer which alleges that contracts have been entered into with a county but which fails to allege that the contracts were in writing and entered on the minutes of the proper county authority."\textsuperscript{106}

\textbf{B. Status of the "Contract"}

The mandate's evolution in the "middle ages" included attention to the status of the "invalid" contract. Again, a single controversy gave rise to a succession of illustrative litigation episodes.

In the first episode, \textit{Douglas v. Austin-Western Road Machinery Co.},\textsuperscript{107} the supreme court outlined the transaction in issue. The chairman of the county board of commissioners had signed a written order for the purchase of culvert pipe and had agreed to issue warrants in the amount of a stated purchase price plus specified interest. The seller had signed a

\begin{itemize}
\item \textsuperscript{99} The court observed that the plaintiff had amended her petition in other respects.
\item \textsuperscript{100} The court affirmed the trial judge's action in sustaining the county's general demurrer.
\item \textsuperscript{101} 50 Ga. App. at 22-23, 177 S.E. at 72. The court quoted from the supreme court's opinion in \textit{Pritchett}.
\item \textsuperscript{102} 181 Ga. 492, 182 S.E. 847 (1935).
\item \textsuperscript{103} \textit{Id.} at 492, 182 S.E. at 848.
\item \textsuperscript{104} 204 Ga. 370, 49 S.E.2d 827 (1948).
\item \textsuperscript{105} \textit{Id.} at 370, 49 S.E.2d at 828. The plaintiffs alleged those expenses to include such matters as removing and re-erecting fences and buildings.
\item \textsuperscript{106} \textit{Id.} at 370-71, 49 S.E.2d at 829. Minus such an allegation, said the court, the petition contained only a conclusion and "presents no issuable fact." \textit{Id}.
\item \textsuperscript{107} 173 Ga. 386, 160 S.E. 409 (1931).
\end{itemize}
written guarantee of quality and had shipped the pipe. Upon receipt of the pipe, the county commissioners had issued the warrants, but had since failed to pay them.

This transaction, the court held, constituted a "contract" within the meaning of the statutory mandate. Because all parties admitted that the contract had not been entered upon the county minutes, "the issuance of the warrants to pay off the purchase-price of the material was illegal." Accordingly, the court reversed the trial judge's issuance of a mandamus compelling the county commissioners to levy taxes in an amount sufficient to satisfy the warrants.

Concurrently with its effort to mandamus taxation, and in a separate proceeding, the seller also sought to compel entry of the written contract upon the county minutes. The latter effort reached the supreme court in the second case of *Douglas v. Austin-Western Road Machinery Co.*, with the seller forthrightly contending that "petitioner can not bring suit on its contract for said breach until said contract is entered on the minutes of the commissioners."

This effort found the court in a more receptive frame:

> Where a person has a written contract with a county, he has the legal right to have the same entered on such minutes; and if the proper county authorities fail or refuse to enter such contract, the judge of the superior court should by mandamus compel the authorities to so enter it.

Even so, the court continued to limit the issue for determination: "In a proceeding for mandamus to compel the performance of such duty, the court will not inquire into the validity of the contract further than to see that on its face it is prima facie valid."

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108. Both agreements were apparently included in a single order form.

109. Indeed, in the succeeding years the commissioners had failed to levy any taxes for road purposes.

110. 173 Ga. at 387, 160 S.E. at 409.

111. The court designated the trial judge's ruling "a fundamental error." In dissent, Justice Beck contended that the transaction was not a "contract" within the meaning of the statute. The purpose of the statute, he urged was to put citizens and taxpayers on notice of executory county contracts so that challenge could be made to those not authorized by law. This transaction, Beck maintained, "amounted merely to a sale and purchase, and did not amount to a contract such as contemplated in section 386 of the Code; and the failure to enter it on the minutes did not render the same illegal, nor render the warrants for the consideration illegal." *Id.* at 389, 160 S.E. at 410.

112. 173 Ga. 834, 161 S.E. 811 (1931). This case was decided by the court approximately three months after its first *Douglas* determination.

113. *Id.* at 836, 161 S.E. at 813.

114. *Id.* at 838, 161 S.E. at 814.

115. *Id.*
purchase of the culvert pipe.\textsuperscript{116}

With the originally "invalid" contract finally forced upon the county minutes, the seller, in \textit{Austin-Western Road Machinery Co. v. Douglas},\textsuperscript{117} again petitioned to mandamus the commissioners to levy a special tax to satisfy the warrants.\textsuperscript{118} Rejecting the commissioners' demurrer, the court discovered "a presumption of law" that the warrants had been issued for a legal indebtedness, and observed that the seller's demand was for "a liquidated amount."\textsuperscript{119} The court continued to qualify, however, by pointing out that "if for any reason the contract is illegal and unenforceable . . . it may be shown by evidence on the trial. . . ."\textsuperscript{120}

\textbf{C. Qualifications}

Throughout this period as well, the courts refused to allow the mandate to control some of the controversies presented. One such instance was the court of appeals' consideration in \textit{Burke v. Wheeler County}\textsuperscript{121} of a public accountant's action to recover on a contract to audit the books of the tax collector. Although the agreement had been made in 1933, and the audit then completed, the contract was not entered upon the county minutes until 1934.\textsuperscript{122} Undeterred, the court declared a "sufficient compliance" with the command: "This statute does not state when the contract must be entered on the minutes of the ordinary or county commissioner, nor does it say that it can not be reduced to writing or signed by the parties at a date after the contract is made."\textsuperscript{123}

\textsuperscript{116} Although the court purported to so limit the extent of its inquiry, it also appeared to decide that any lack of authorization by the chairman of the commissioners to make the contract had been waived by the board's acceptance of full performance. Justice Gilbert found it necessary to concur specially "on the theory that the validity of the contract is not raised in this suit." \textit{Id.} at 840, 161 S.E. at 815.

\textsuperscript{117} 178 Ga. 642, 173 S.E. 386 (1934).

\textsuperscript{118} Three years had passed since the seller's original effort to mandamus taxation.

\textsuperscript{119} 178 Ga. at 643, 173 S.E. at 387.

\textsuperscript{120} \textit{Id.} The court appeared less charitable in \textit{Wood v. Puritan Chem. Co.}, 178 Ga. 229, 172 S.E. 557 (1934), an action to mandamus a county commissioner to enter upon his minutes an alleged contract with the county warden. There the court sustained the commissioner's demurrers with the headnote observation that "no specific authority is shown to have been granted by the commissioners to the warden of the chain-gang to execute the contract which petitioner seeks by mandamus to have entered upon the minutes. The petition must also show that the contract was one executed in virtue of authority which could be delegated by the proper county officer or officers." \textit{Id.} at 229-30, 172 S.E. at 557.

\textsuperscript{121} 54 Ga. App. 81, 187 S.E. 246 (1936).

\textsuperscript{122} One of the county's defenses was that "the contract was not originally in writing and put on the minutes, and was illegal and unenforceable." \textit{Id.} at 83, 187 S.E. at 248.

The supreme court reached a similar result, via a different route, in *Thompson v. Shurling.* 124 There the court affirmed a mandamus requiring the county treasurer to stamp the plaintiff's warrant as unpaid so that interest on the warrant could accrue. 125 In an apparent response to the treasurer's contention of unenforceability, the court declared that "[t]he contrary not being shown, it will be presumed that county warrants when issued are based upon a valid contract duly recorded as provided in the Code." 126

By far the most striking qualification upon the mandate was the one that the supreme court initiated with its 1931 decision in *Templeman v. Jeffries.* 127 Resolution of the controversy in *Templeman* turned upon the validity of the county commissioners' appointment of a "county attorney." 128 The challenge to that appointment revealed the entry upon the county minutes of a mere resolution in which the commissioners purported to designate the appointee and fix his term and salary, rather than the entry of a formal contract signed by both parties. The ground of the attack was explicit: the appointment was "invalid and void" because it had not been accomplished by a written contract entered upon the county minutes. 129 The court responded by examining the nature of the office of county attorney. Although neither general nor local statute dealt with the matter, the court conceded, nevertheless "the commissioners are by clear implication authorized to employ counsel to defend suits brought against the county in civil matters." 130 Moreover, this implied authority extended to employment of a "regular county attorney." 131 With the power to appoint so established, 132 the court then turned to the requirement that county contracts be written and entered: "The relation between the

125. The plaintiff alleged two presentations of the warrant and refusals to pay.
126. 184 Ga. at 836, 193 S.E. at 881. The court relied upon its prior decision in Americus Grocery Co. v. Pitts Banking Co., 169 Ga. 70, 149 S.E. 776 (1929). See generally notes 79-81, supra, and accompanying text.
128. The controversy arose over the validity of the composition of a county sanity commission which, under general statute, was to include the county attorney if such an officer existed. The important issue, therefore, was whether the county commissioners' earlier appointment of a "county attorney" was valid so that the failure to place the attorney on the sanity commission was fatal.
129. 172 Ga. at 901, 159 S.E. at 251.
130. Id. at 899, 159 S.E. at 251. The court appeared to draw this implication primarily from the local statute creating the board of county commissioners.
131. Id. at 901, 159 S.E. at 251. The court said that such an attorney could render better service than one "occasionally employed in the legal business of the county." Id.
132. "The title of the county attorney to his office rests upon an implied legislative power conferred upon the commissioners, and not upon a contract made by the commissioners and the attorney." Id. at 902, 159 S.E. at 252.
county and the county attorney does not rest upon contract, but arises from appointment authorized by a legislative enactment."\textsuperscript{133} From that vantage point, however attained, the court then took the analytical leap to its final destination: \textquotedblleft The execution of such power by the passage of such resolution by the county commissioners does not constitute the making of a contract within the meaning of the section of the code. \ldots \textquotedblright \textsuperscript{134}

One year later, the court employed its \textit{Templeman} rationale to decide \textit{Walker v. Stephens},\textsuperscript{135} a taxpayers' action to enjoin the payment of warrants issued by the county to the county attorney for specified legal services.\textsuperscript{136} Again, one ground of the proceeding was that the contract with the attorney \textquoteright\textquoteright for the rendition of the services was not in writing and recorded upon the minutes of the county commissioners, as required by law."\textsuperscript{137} Again also, the court found implied authority in the commissioners to appoint the attorney\textsuperscript{138} "and yet leave the matter of compensation for services to be determined from time to time according to their actual worth in view of the circumstances."\textsuperscript{139} Accordingly,

the relation between the county and the attorney would not rest upon contract, but would arise from the appointment of the attorney as a public officer, and the transaction would not fall within the purview of section 386 of the Civil Code of 1910, which requires all contracts entered into by the ordinary or county commissioners with other persons in behalf of the county to be in writing and to be entered upon the minutes of the ordinary or county commissioners.\textsuperscript{140}

The excepting principle constructed by \textit{Templeman} and \textit{Walker} then became the central point of disagreement within the court of appeals

\textsuperscript{133} \textit{Id.} at 901, 159 S.E. at 251.
\textsuperscript{134} \textit{Id.} at 902, 159 S.E. at 252.

Under the power to appoint the attorney and fix his salary, the office being created by necessary implication from the statute creating the board of county commissioners, the transaction does not constitute a contract between the county and the attorney within the meaning of the above section of the code.

Having concluded that the county attorney's appointment was valid, the court proceeded to hold invalid the composition of the sanity commission in issue.

\textsuperscript{135} 175 Ga. 405, 165 S.E. 99 (1932).
\textsuperscript{136} The services involved advising the county in respect to certain tax funds.
\textsuperscript{137} 175 Ga. at 410, 165 S.E. at 101.
\textsuperscript{138} The court examined the local statute creating the board of county commissioners.
\textsuperscript{139} 175 Ga. at 411, 165 S.E. at 102.
\textsuperscript{140} \textit{Id.} at 411-12, 165 S.E. at 102. The court thus reversed the trial judge's refusal to dismiss the taxpayers' proceeding.

In a similar vein, see Board of Educ. v. Young, 187 Ga. 644, 645, 1 S.E.2d 739, 741 (1939), a decision holding a local school system not subject to the mandate because the validity of the system was expressly confirmed by the constitution.
when that court decided Rainey v. Marion County.\(^{141}\) In Rainey, the county commissioners orally employed an attorney to defend the county against an injunction proceeding and later refused to pay the attorney's fee. Countering the attorney's action to recover the fee, the commissioners urged plaintiff's failure to show that the contract was written or entered upon the minutes. Sustaining that defense, a majority of the court of appeals distinguished Templeman and Walker by observing that in each of those cases "a county attorney was employed to represent the county generally. . . ."\(^{142}\) Here in Rainey, continued the court, the attorney "was employed to represent the county in one case only, which did not make him the county attorney, and therefore he was not an officer."\(^{143}\) On this distinction, the court held the employment contract subject to and violative of the statutory mandate and thus "void and unenforceable."\(^{144}\)

The vigorous dissenting opinion in Rainey disagreed, not with the fact of the distinction, but rather with its materiality.\(^{145}\) Indeed, the dissent queried,

why would not this attorney be as much a county attorney and public officer in so far as the particular matter or litigation for which his services were engaged was concerned, as would some attorney employed in the same manner but employed by the month or year to represent the county generally and paid a monthly or yearly compensation for his services?\(^{146}\)

Finding no answer to this query, the dissent deemed Templeman and Walker to control\(^{147}\) and to free the contract from the mandate.\(^{148}\)

\(^{141}\) 63 Ga. App. 35, 10 S.E.2d 258 (1940).

\(^{142}\) Id. at 36, 10 S.E.2d at 259.

\(^{143}\) Id. at 36, 10 S.E.2d at 259-60.

\(^{144}\) Id. The court cited its decision in Murray County v. Pickering, 42 Ga. App. 739, 157 S.E. 343 (1931). See generally notes 87-90, supra, and accompanying text.

\(^{145}\) The dissenting opinion was written by Justice Stephens.

\(^{146}\) 63 Ga. App. at 38, 10 S.E.2d at 260-61.

\(^{147}\) "The reasoning underlying the decision in Walker v. Stephens . . . was that the county authorities could employ a qualified practitioner of the law to represent the county in a particular litigation, and that in such event the relationship between the county and the attorney would not rest upon contract but would arise from the appointment of the attorney as a public officer. The same is true of the case of Templeman v. Jeffries. . . ." Id. at 37-38, 10 S.E.2d at 260.

\(^{148}\) The dissent distinguished Murray County v. Pickering under the view that that case involved a contract for services which had not been performed by the attorneys. See generally notes 87-90, supra, and accompanying text.
D. Summary

In tracing the judicial evolution of the statutory mandate that county contracts be written and entered upon the minutes, the "middle ages" provided instructive perspective. A steady and unyielding line of decisions continued application of the mandate, declaring invalid and unenforceable all manner of agreements for goods, services, and incidentals. Generally, those declarations were delivered in highly summary fashion against claimants whose petitions failed to assert compliance. Viewing the mandate's intended purpose as crucial to effective county government, the courts deemed the requirement immune from waiver and insisted upon performance to the letter. The unfortunate plight of the private party to the agreement typically went unmarked in the opinions.

This is by no means to suggest the arrival of complete analytical tranquility. The existence of a written prima facie contract at least entitled the claimant to mandamus its entry upon the county minutes. That entry, in turn, would overcome a county demurrer and achieve a trial at which the claimant could litigate the validity of the contract.

During that same period the courts refused application of the mandate in some instances. In addition to hints at substantial compliance and presumptions of validity on selected occasions, the courts unfolded an exception to the mandate for "public officers" whose relation to the county rested upon impliedly authorized "appointment" rather than contract. Employment agreements between the county and such officers, although oral and unrecorded, were thus freed from the invalidating blight of the mandate. Yet, it appeared, not all appointments were qualified appointments; and determining exceptions to the exception became as perplexing as divining exceptions to the mandate. To a considerable degree, therefore, the clarification crises persisted.

IV. Modern Machinations

A. Applications

At least one observation on the last thirty years can be advanced with confidence: there has been no decrease in litigation arising from the statutory mandate that county contracts be written and entered upon the minutes. Both appellate courts initiated the era with routine but forceful decisions of application. In Moore v. Baker, the court of appeals affirmed dismissal of a petition brought to enforce a county's promise to compensate for improvements on a right of way conveyed by the plain-
tiff. Noting the petition's failure to allege that the promise was written and entered, the court invoked the "purpose" of the mandate: "to protect the taxpayers against unauthorized and illegal contracts and expenditures of county funds." In Ferguson v. Randolph County, the supreme court dealt directly with the beneficiaries of that "purpose"; the court sustained against general demurrers taxpayers' petitions which challenged the validity of county contracts for road construction. Said the court: "If such contracts are not in writing and entered on the minutes of the proper county authority, they are not enforceable."

By no means were all the applications routine ones; on the contrary, recent years have witnessed a rich variety of factual presentations of the problem. In abbreviated headnote fashion, Floyd v. Thomas highlighted the efforts of county commissioners to obtain a dump truck by authorizing a county employee to negotiate the purchase. At the instance of taxpayers to enjoin those efforts, the supreme court deemed the arrangement insufficient to meet the statutory mandate and affirmed the trial judge's restraining order.

The mandate precipitated yet another restraining order in City of Warrenton v. Johnson, a county commissioner's effort to enjoin continued municipal use of county property for the location of a police booth. Observing that the municipality's claim to the property originated from the county's oral permission almost twenty years earlier, the supreme court proclaimed that "oral contracts on behalf of a county have repeatedly been held to be void, thus the permission here could never ripen into a valid easement."}

151. Plaintiff alleged the county's agreement to pay him "a fair and reasonable value" for houses and other improvements located on the right-of-way which he conveyed to the county. Id. at 235, 68 S.E.2d at 912.
152. 85 Ga. App. at 238, 68 S.E.2d at 914.
153. 211 Ga. 103, 84 S.E.2d 70 (1954).
154. Plaintiffs charged that the county commissioners had illegally contracted with one of their members so that the member would perform road construction contracts which the county had received from the state highway department.
155. 211 Ga. at 109, 84 S.E.2d at 75.
157. The action was to enjoin the commissioners from paying for the truck.
158. The court said the county's authorization to the employee did not designate the seller nor the price to be paid.
160. The municipality sought to restrain the commissioner from removing the booth, and the commissioner prayed for an injunction against the continued municipal use of the property.
161. Years later, the municipality had obtained written permission in the form of a letter and claimed an easement running with the land.
162. 235 Ga. at 666, 221 S.E.2d at 430-31. The court affirmed the trial judge's denial of
The court of appeals has recently revisited the scene on several occasions. In *Lasky v. Fulton County*\(^{163}\), the court considered an action to recover jewelry originally stolen from the plaintiff, recovered by the police, and which then disappeared from the custody of the county police department. The plaintiff sought to avoid the bar of sovereign immunity by arguing the existence of a bailment with the county. Affirming the trial judge's dismissal of the complaint, the court reasoned as follows:

In order to establish the existence of a contractual arrangement the guidelines of Code § 23-1701 must be met. . . . Under that section, if the contract is not in writing and not entered on the proper minutes, it is not enforceable. . . . Here, it is obvious that the plaintiff made no effort to come within the above provisions.\(^{164}\)

In *DeKalb County v. Scruggs*,\(^{165}\) the mandate was as devastating for implied contracts as it had been for easements and bailments. In litigation arising out of a construction project, the county was made the target of a cross claim which included a count seeking recovery in "implied contract" for services allegedly rendered to and received by the county.\(^{166}\) Reversing a judgment for the claimant, the court emphasized that "in order for a county to be liable in contract there must be [an] authorized, written contract, and it must be entered on the minutes."\(^{167}\) Thus, "it was error to allow [the contractor] to proceed in implied contract, and a new trial is ordered."\(^{168}\)

Finally, the 1979 case of *Commercial Credit Corp. v. Mason*\(^{169}\) provided modern confirmation of the mandate's continuing impact upon Georgia local government. In that case the plaintiff alleged the existence of a contract under which it had constructed a sewage treatment facility and the county had agreed to exempt the plaintiff from payment of a tap-on fee for connection to an interceptor sewer system. Denying the existence of a binding contractual relationship between the parties, the court made short work of rationale: "Assuming arguendo that an otherwise valid written contract exists in this case, appellant has made no showing that such contract was entered on the minutes of the . . . County Board of Com-


\(^{164}\) *Id.* at 121, 243 S.E.2d at 331. The court also held the police without power to enter into a bailment with the plaintiff that would make the county responsible under the circumstances.


\(^{166}\) A painting subcontractor sued the contractor and the contractor then cross claimed against the county under the principal contract.

\(^{167}\) 147 Ga. App. at 712, 250 S.E.2d at 160.

\(^{168}\) *Id.*

missioners as required by law."

B. Status of the "Contract"

The events culminating in *Malcom v. Fulton County* appeared generally as follows: in 1950 the county commissioners executed a contract purporting to convey timber to the defendant, but the contract was not then entered upon the county minutes; at their next meeting the commissioners discussed subsequent offers to purchase the timber and voted to rescind the contract; the defendant proceeded to cut and remove the timber until restrained by court order; in 1952 the defendant mandated entry of the contract upon the county minutes, and the county then sought to enjoin the defendant's trespass and to cancel the contract.

Approaching the controversy somewhat cautiously, the supreme court observed that at the time the defendant first cut and removed the timber the contract had not been recorded on the official minutes and was thus unenforceable. Yet, continued the court, "it is not for want of record alone necessarily void; and, if otherwise valid, it becomes enforceable when subsequently recorded." That point, however, appeared unresponsive to the issue presented: the contract was admittedly originally unenforceable and while in that status, prior to entry under mandamus, the commissioners voted to rescind it. If the contract was unenforceable, why was it not also then rescindable? The court's response was unclear: it emphasized that the county's claimed right of rescission was based entirely upon its own failure to record and that the contract was subsequently recorded pursuant to the mandamus. That rationale yielded

170. *Id.* at 443-44, 260 S.E.2d at 353. The court affirmed the trial judge's decision that the contract was invalid.
172. The commissioners' action was taken upon the express advice of the county attorney that the contract would not be binding until recorded upon the minutes. The commissioners instructed the clerk not to record that contract.
173. The defendant refused to accept the county's proffered refund of the purchase money which he had previously paid.
175. 209 Ga. at 396, 73 S.E.2d at 176.
176. *Id.* at 399, 73 S.E.2d at 178.
177. The court said that the statutory mandate "fixes no limit of time during which a county contract may be entered of record." *Id.* at 399, 73 S.E.2d at 178.
the following conclusion:

It seems very clear to us that county commissioners cannot make a contract in behalf of the county, fail to record it in discharge of their official duty, and then rescind it because it is not recorded, as the commissioners in this case undertook to do. Accordingly, the plaintiff [county] was not entitled to any of the relief sought upon the ground that the contract relied on by the defendant was not binding upon the county because it had been legally rescinded by the county commissioners.178

The court thus reversed the jury verdict in favor of the county.

Following the court's questionable decision in Malcom v. Fulton County, citizens and taxpayers launched still another offensive against the contract in issue, a proceeding which came to fruition three years later in Malcom v. Webb.179 Plaintiffs pursued a joint action against both the county and the purchaser of the timber, alleging that with knowledge of higher bids for the timber, the parties had fraudulently attempted a conveyance for inadequate consideration and that the purported contract was void. From a jury's decision ordering the contract cancelled, the defendants appealed and the supreme court found itself in familiar factual surroundings.

The court first rebuffed the defendants' argument of estoppel which relied upon the decision in Malcom v. Fulton County that the contract was valid. In the former case the question was one of execution, said the court, and in this case the issue focused upon alleged fraud.180 On the point of fraud, the court agreed with the plaintiffs' charges, and employed the matter of improper execution of the contract to do so. Thus, the court reasoned that the contract was not valid until entered upon the county minutes and delivered to the purchaser, and that both parties were chargeable with notice of those points. Before either entry or delivery, both parties possessed actual knowledge of higher outstanding offers to purchase the timber. "With knowledge of all these facts," held the court, "it was a clear breach of duty, and therefore a legal fraud, for the Commissioners to undertake to sell the timber to Malcom at a price far below that offered for it by other parties."181 With the conclusion of Malcom v. Webb, therefore, a county contract judicially declared valid in 1952 was judicially cancelled in 1955; and five years had elapsed since its original execution.

178. Id. at 400, 73 S.E.2d at 179.
180. Indeed, said the court, no allegations of fraud could have been made in the former case, "initiated by the county through its County Commissioners, for one will not be permitted in a court of equity to take advantage of its own fraud." Id. at 454, 86 S.E.2d at 494.
181. Id. at 458-59, 86 S.E.2d at 496.
The scenario of a county's acceptance of one offer only to later receive a better offer unfolded yet again in Southern Airways Co. v. Williams.\textsuperscript{182} The events leading up to that case were as follows: the county commissioner in 1940 had leased the county airport to the plaintiff, with the term suspended until possession was relinquished by the United States government;\textsuperscript{183} neither the written lease nor a 1943 amendment to it were entered upon the county minutes;\textsuperscript{184} the federal government took exclusive possession of the premises prior to the beginning of the lease period and continued its occupancy;\textsuperscript{185} in 1955 the successor commissioner repudiated the lease contracts as invalid, and the plaintiff instituted a proceeding to mandamus entry of the contracts upon the county minutes; in 1956, while the action was pending, the commissioner accepted a much higher offer for the lease from another party.\textsuperscript{186}

In only a "syllabus opinion," the supreme court reversed the trial judge's dismissal of the plaintiff's action and emphasized the commissioner's "official duty" to enter such county contracts upon the minutes.\textsuperscript{187} For nonperformance, said the court, mandamus was the appropriate remedy "unless the applicant for such relief has with respect thereto been guilty of gross laches or has permitted an unreasonable period of time to elapse before applying to the proper court therefor."\textsuperscript{188} Rejecting the commissioner's argument of an unreasonable 15-year delay in seeking entry, the court noted the plaintiff's prompt demand and mandamus action upon learning of the commissioner's repudiation.\textsuperscript{189} Thus, "there [was] clearly no merit in the defendant's contention that the plaintiff, because of its gross laches or unreasonable delay in applying therefor, [was] not entitled to the relief sought."\textsuperscript{190}

At a minimum, the decisions that an "invalid" and "unenforceable" contract can be mandamused into a "valid" and "binding" contract would appear to depend upon two prerequisites. First, there must be in exis-
tence a written agreement; and second, the county must be present as a party to that agreement. The absence of those elements controlled the supreme court's consideration of Hatcher v. Hancock County Commissioners, a physician's effort to mandamus the county's payment of a breach-of-contract judgment against the county hospital authority. In general, the court's treatment of the effort consisted of an inventory of missing ingredients. Although the plaintiff had entered into an employment contract with the hospital authority, he had not contracted with the county commissioners. Although the contract was submitted to and approved by the commissioners, it was not entered upon the county minutes. Although the plaintiff possessed a valid and unhonored judgment against the authority, that judgment was not a legal responsibility of the commissioners. Finally, the court concluded,

[while a person has a legal right to have a written contract made with the county entered on the official minutes . . . , if the contracts are not in writing and not entered on the proper minutes, they are not enforceable. . . . At the hearing, Dr. Hatcher produced no writing showing an agreement between him and the Board of Commissioners. Therefore, he could not compel its entry on the minutes. Any oral understanding between the parties was unenforceable.]

C. Qualifications

The supreme court opened the modern era by appearing to effect a considerable expansion of the exception, crafted in the middle ages, for county employment agreements not resting upon "contract." As crafted, it will be recalled that the exception was rather severely restricted to county "appointments" of "public officers," and highly selective as to precisely which appointments qualified. Some of those restrictions upon the exception appeared to dissipate, however, with the court's 1955 decision in First National Bank v. Mann. In that case, a county ordinary sought to mandamus the county depository to pay the salaries of the ordinary, her assistants, and her employees for a specified month. Although the salary schedules had been set by the county commissioner and approved by the grand jury, as provided by statute, the depository contended the schedules were illegal "for the reason that they were not entered on the

192. The breach appeared unquestioned; the hospital authority had simply failed to pay the physician's salary.
193. The court affirmed the trial judge's dismissal of the action.
194. 239 Ga. at 230-31, 236 S.E.2d at 579.
minutes of the county commissioner." Rejecting that contention, the
court's entire treatment of the written-and-entered mandate was as fol-
low: "This section refers only to contracts, and the payment of salaries of
county officials and employees is not contractual within the provisions of
this act." Both appellate courts later seized upon Mann in considering the plights
of workers whose services the county had terminated. In Deason v.
DeKalb County, for example, the supreme court held that a wrongfully
discharged county police officer was entitled to maintain an action against
the county for his wages. Noting the plaintiff's allegation of permanent-
status employment by the county commissioners, the court discounted
the written-and-entered mandate by observing that "this court has held
that the payment of salaries of county officials and employees is not con-
tractual within the provisions of this Act." The court of appeals reacted
similarly in Polk County v. Anderson, a salary action against the county by a discharged county administrator:
The petition shows that the plaintiff was a county officer, the board hav-
ing appointed him in the exercise of its implied authority conferred upon
it by the legislature to appoint an officer for a determinate term and sal-
ary to attend to the duties and business of the county. The law did not
require that his appointment be made by a contract in writing entered
upon the minutes.

The period also embodied the supreme court's explicit exclusion of
county boards of education from coverage of the mandate. Wilson v.

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196. Id. at 707, 88 S.E.2d at 363.
197. Id. at 707-08, 88 S.E.2d at 363 (emphasis supplied). The court reversed the trial
judge's issuance of the mandamus, but upon a different and unrelated point.
199. The unlawfulness of the discharge had been previously judicially determined, and
the court specified that the employee was one "with tenure under a civil service or merit
system Act." Id. at 65, 148 S.E.2d at 416.
200. Id. at 66, 148 S.E.2d at 416.
202. The county commissioners had appointed the plaintiff at a specified annual salary
for a term of two years and had then terminated his services after less than four months.
The plaintiff sued for the difference between the amount he would have received as salary
for the remainder of his employment and the amount he had received in other employment
during the term.
County, 131 Ga. 270, 62 S.E. 185 (1908), and Murray County v. Pickering, 42 Ga. App. 739,
157 S.E. 343 (1931), from the case at hand with the observation that in each of those cases
"the claimant against the county had not been appointed as a county officer but was em-
ployed only for a specific transaction or service." Id. For a discussion of these cases, see
notes 24-26 and 86-90, supra, and accompanying text.
Strange originated in disagreements over a contract between two school boards with respect to pupil attendance in the systems. The defendants in the case urged that the contract was not properly approved or recorded, and the plaintiff attempted to mandamus entry of the agreement upon the defendants' minutes. The court responded as follows:

A contract with the county commissioners must be in writing and must be entered on the minutes of the proper authority in order to be enforceable. . . . This section, however, does not apply to the County Board of Education. We can find, and we have been cited, no authority requiring the County Board of Education to enter its contracts on its minutes before it is enforceable. Therefore, the trial court properly refused to issue the mandamus.

As of 1979, the supreme court was continuing its apparent dilution of the mandate, at least from a procedural perspective. PMS Construction Co. v. DeKalb County presented an action against the county for its termination of a contract with the plaintiff to build a tennis center. In declaring the county susceptible to the action, the court conceded that the plaintiff could not recover unless the county had breached "an authorized written contract, entered on the minutes." The court also conceded that the plaintiff had failed to allege such an entry, and that "prior to the adoption of the Civil Practice Act, a complaint without this allegation was subject to a general demurrer." Since the enactment of that practice statute, however, the "pleading requirement" was no more:

Although a plaintiff may not recover from a county on a contract unless the contract is on the minutes, this is a matter of proof at trial and not a matter of pleading. If the contract is now on the minutes, PMS need only show this at trial. If the contract has not yet been entered on the minutes, PMS is, of course, entitled to amend its complaint to seek mandamus for entry of the contract on the minutes.

205. The contract was for a period of 25 years, and the court cited express constitutional authority for it.
206. 235 Ga. at 161, 219 S.E.2d at 94.
208. The complaint included counts for specific performance of the contract, the reasonable value of the plaintiff's work, and damages for breach.
209. This was an action on a contract made pursuant to legislative authorization.
210. 243 Ga. at 871, 257 S.E.2d at 287.
211. Id. The court cited as its example of the earlier rule James v. Douglas County, 131 Ga. 270, 62 S.E. 185 (1908). See notes 24-26, supra, and accompanying text.
213. 243 Ga. at 871, 257 S.E.2d at 287. The court further observed that because of the statutory mandate, there could be no "implied contract" or "quantum meruit" recovery against a county, but then proceeded to hold that an action for "restitution" was maintain-
Finally, the modern era’s more casual treatment of the mandate caught up with the supreme court in the 1980 case of *Lester Witte & Co. v. Rabun County*. There the plaintiff partnership contracted to perform accounting services for the county, but the county minutes made no mention of a contractual reservation of the plaintiff’s right to charge more than the stated fee in unusual circumstances. Plaintiff alleged that individual county commissioners later orally agreed to excess work and fees, but the county refused to pay the additional amount.

In its action against the county, plaintiff first requested that the commissioners be mandamused to enter upon their minutes the oral authorization of the additional work. Affirming the trial judge’s dismissal of that request, the court reasoned as follows:

> While it is true that at the mandamus stage the court cannot inquire beneath the surface of a facially valid contract before ordering it placed upon the minutes, in this case the alleged agreement authorizing the appellant to incur $10,000 in excess of the stated contract price is not prima facie valid because it is not in writing.

As for the plaintiff’s reliance upon the decision in *PMS Construction Co.*, the court drew the line:

> The key distinction between PMS and this case is the existence of a written contract covering all the terms PMS sued on, whereas here the trial court was correct in concluding that the oral modification Lester Witte & Company sued on was an illegal and unenforceable agreement.

The plaintiff’s alternative theory of recovery attempted to engage the “public officer” exception. Plaintiff maintained that the effect of the agreement was to appoint plaintiff the county auditor which “as a public official was exempt from having its contract placed on the minutes.” Although denoting the argument an “appealing” one, the court wondered “whether a partnership can hold the public office of appointed county

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214. *Id.* at 872-73, 257 S.E.2d at 288.
216. Although the contract contained the reservation, the court said that the county minutes recited only the character of the work and the quoted prices.
217. The county contended that the only contract it had made was the one on the minutes.
218. *Id.* at 384, 265 S.E.2d at 6.
219. The court noted that the *PMS Constr. Co.* decision had been a subject of discussion during oral argument.
220. *Id.* at 383, 265 S.E.2d at 5.
Highlighting the statutory requirement that a county officer be a qualified voter, and declaring that a partnership can not be a qualified voter, the court concluded that the plaintiff was not a public officer whose employment agreement was exempt from the written-and-entered mandate.

D. Summary

Perhaps the most impressive emanation from a survey of modern cases dealing with the command that county contracts be written and entered is an aura of vitality. In recent years, it appears, controversy over the statutory mandate is as sharp as ever; and the requirement's judicial evolution proceeds apace. In brief, one who deals with a county can realistically anticipate an encounter with the mandate.

Sales, services, purchases, easements, and bailments have all experienced the mandate's current application; and "implied contracts" are rendered impossible.

At the same time, the judicial discovery of extenuating circumstances continues. A county's attempt to repudiate one arrangement in order to attain a more attractive one evokes genuine ambivalence from the courts. At a minimum, however, even a mandamus to enter requires the existence of a writing and the presence of a county as a party.

As for explicit exceptions, the courts have gone far to extract officer and employee hiring arrangements from coverage; indeed, those arrangements are not deemed "contractual" in nature. Other exceptions are both substantive and procedural in thrust. As to the former, county boards of education are not covered entities; as to the latter, noncompliance with the mandate is a matter for trial and not for pleading.

Clarification is proving an illusive goal.

V. Conclusion

Of the legal requirements surrounding the local government contracting process, few can claim a more ancient origin than the Georgia statutory mandate that county contracts be in writing and entered upon the county's minutes. For well over 100 years that mandate has signaled an ominous caution to those who seek to effectuate understandings with counties and, in a spectrum of settings, has loomed as a dramatic focal point for litigation.

Even a non-exhaustive survey of appellate court decisions yields several

221. Id. at 385, 265 S.E.2d at 7.
223. Chief Justice Nichols and Justice Hill dissented without opinions.
analytical impressions. First, in the life of the mandate's judicial evolution there appear to be roughly three historical epochs: a formative period, a transition period, and a modern period. Second, during each of those periods the issues presented and decided lend themselves to substantive organization depicting the mandate's application, the status of a covered agreement, and possible qualifications upon the rule. Finally, at every turn there is the constant and debilitating tension between the mandate's perceived purpose of fostering effective county government and the perilous plight in which the mandate's application frequently leaves the other party to the contract. On occasion, the judicial ambivalence is resounding.

Although clarification on several scores would be beneficial, at least two conclusions are obvious: this century-old mandate remains a central point of controversy in Georgia county law today, and in instances where the mandate is applicable, its ramifications are nothing short of traumatic.