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Constitutional Law--Extension of State Credit-- Industrial Development Bond Act

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Ltd. v. B. Long & Co., Ltd., [1949] 1 All E.R. 526 (K.B.), involving commissions to be paid a clothing manufacturer's representative, "on all orders, whether received direct or indirect and on all repeats." The court found the remuneration was for the contract period and that the parties had not agreed to continue payments after termination. The issue, reasoning and holding of this case are in complete accord with the principal case.

On the other hand, in *British Bank for Foreign Trade, Ltd. v. Novinex, Ltd.*, [1949] 1 All E.R. 155 (K.B.), the principal promised the agent that in return for putting the principal in contact with the agent's friend they would pay the agent a commission on "any other business transacted with your friends"; the court overruled the trial court and found for the agent. In referring to the trial court's question, "Is the commission to be payable until the crack of doom?" the court's answer was yes, since the principal had agreed to do just that so long as it dealt with the party in question. The court went on to point out that it was within the power of the principal to bring the liability for commissions to a halt by ceasing to do business with this particular customer. In a case of this nature, where the agent induces a potentially large customer, over whom he has some influence, to commence doing business with the principal in return for the principal's promise to pay commissions on all future transactions between them, the likelihood of the agent's success in an action to recover such commissions is much greater.

When, as in the principal case, the contract concerns a selling agent whose duties were to solicit and service customers, such agent usually has no right to commissions on reorders arising after his employment has been terminated unless the terms of the contract clearly provide for it or such an intention can be gathered from the relationship between the parties. The courts have found this intention more often in oral contracts than in written but the instances in either case are rather limited.

David Gail Hanlon

Constitutional Law—Extension of State Credit—Industrial Development Bond Act

In an original mandamus proceeding, relator, *R*, alleged that the County Court of Marion County, in accordance with the provisions of the state Industrial Development Bond Act, had adopted

a resolution authorizing the acquisition of a building site for the construction of an industrial plant and the issuance of industrial development bonds to finance the project. It was alleged further that the clerk of the county court refused to attest the bonds, as required by statute. *R* prayed for a writ of mandamus to compel attestation. Respondent demurred on the grounds that the act was unconstitutional under art. X, § 6, of the West Virginia Constitution in that it authorized the indirect granting of the state's credit to a private corporation. *Held*, writ granted. The court reasoned that there was no contravention of the constitutional inhibition against the extension of the state's credit nor of the provision limiting indebtedness, because the bonds were self-liquidating revenue bonds payable from revenues to be derived from the industrial plant and the act specified that they could not constitute indebtedness. *State ex rel. County Court of Marion County v. Demus*, 135 S.E.2d 352 (W. Va. 1964); *State ex rel. County Court of Mineral County v. Bane*, 135 S.E.2d 349 (W. Va. 1964).

The Industrial Development Bond Act, W. VA. CODE ch. 13, art. 2C, § 2 (Michie Supp. 1964), states as a matter of legislative finding that unemployment is a critical problem in West Virginia, which can be relieved by the development of new industrial and manufacturing plants, and that the establishment of industrial plants will promote the general welfare of the state. Other provisions of the statute empower counties and municipalities to acquire and lease industrial plants and to issue revenue bonds to defray the cost of acquisition, with the stipulation that the bonds shall be payable out of the revenues derived from the industrial plant and shall never constitute an indebtedness within the meaning of any constitutional limitation. W. VA. CODE ch. 13, art. 2C, §§ 4, 7 (Michie Supp. 1964). As a matter of public policy, the methods authorized for the promotion of the state Industrial Development Bond Act are declared to be for a public purpose. W. VA. CODE ch. 13, art. 2C, § 2 (Michie Supp. 1964).

Although several issues were involved in the principal case, the significant issue was whether the program prescribed by the statute was an extension of the state's credit in violation of the West Virginia Constitution, which provides:

“The credit of the State shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the State

ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person; nor shall the State ever hereafter become a joint owner, or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever." W. VA. CONST. art. X § 6.

The purpose of this constitutional provision was to prevent the earlier practice in Virginia of lending the state's credit to private internal development projects such as railroads, canals, toll roads and turnpikes. Realizing that many of these ventures had turned out disastrously with the result that the state's cities and counties had become burdened with debt, the constitutional fathers did not deem it wise to extend the credit of the "new state" to speculators and subject property owners to heavy taxation. *State v. Sims*, 134 W. Va. 278, 58 S.E.2d 766 (1950), rev'd on other grounds in *West Virginia v. Sims*, 341 U.S. 22 (1951). It has been observed that one policy sought to be effectuated by the constitutional inhibition was that of encouraging municipalities to constitute separate and self-sufficient local governments, free from state control, and able to stand on their own resources. *State ex rel. City of Charleston v. Sims*, 132 W. Va. 826, 54 S.E.2d 729 (1949). Thus, the court in that case stated that municipalities, though creatures of the state, were intended to function as local governments without outside interference from any source. However, a dissenting opinion pointed out that the aim of the constitutional convention was to prevent the state from obligating itself to make payments in the future to another and that there was no intent to prohibit an appropriation or outright gift of state funds. See also 49 W. VA. L. Q. 99 (1942); AMBLER, ATWOOD & MATHEWS, DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION, 189-276 (1942).

As the present West Virginia Constitution was written in 1872, the question whether a particular program involves an extension of the state's credit is not new. Thus, an act creating a special fund for the purpose of making payments to municipalities to reimburse them for their expenditures in enforcing state laws was held to be an unconstitutional extension of the state's credit. *State ex rel. City of Charleston v. Sims, supra*. The majority of the court in that case stated that the constitutional framers never intended to prevent aid by way of granting credit and to leave the way open for unlimited aid for local purposes by direct appropriation.

Furthermore, a statute expressly waiving the state's preference over other creditors was held void as violating the constitutional inhibition against extending the state's credit in *Lawson v. Charter*, 112 W. Va. 108, 163 S.E. 813 (1932); and an act allowing state appropriated funds to be used to pay the interest, sinking fund and amortization charges on the bonded indebtedness of county road and school districts was held unconstitutional in *Berry v. Fox*, 114 W. Va. 513, 172 S.E. 896 (1934). However, a general welfare law creating a general relief fund consisting both of state and county funds was held not to be a loan of credit within the meaning of the constitution but only county participation in a state function. *Kenny v. County Court of Webster County*, 124 W. Va. 519, 21 S.E.2d 385 (1942).

The West Virginia court has held that the legislature is without power to appropriate public funds for other than public purposes, and an appropriation for private purposes is null and void. *State ex rel. City of Charleston v. Sims*, *supra*; *State ex rel. Adkins v. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947). However, an appropriation by the legislature in discharge of a moral obligation of the state is for a public purpose, *State ex rel. Adkins v. Sims*, *supra*; and the court has said that there is no moral obligation unless an enforceable obligation exists, not created or authorized by a prior statute, or unless a right to compensation is created in favor of a claimant by statute and injury results to him without his fault. *State ex rel. Cashman v. Sims*, 30 W. Va. 430, 43 S.E.2d 805 (1947). At any rate, the cases indicate that a moral obligation is a judicial question, and that a legislative determination, while persuasive, is merely directive. *State ex rel. Bennett v. Sims*, 131 W. Va. 312, 48 S.E.2d 13 (1948); *State ex rel. Adkins v. Sims*, *supra*; *State ex rel. Davis Trust Co. v. Sims*, 130 W. Va. 623, 46 S.E.2d 90 (1947); 52 W. VA. L. REV. 57 (1949).

In holding the Industrial Development Bond Act constitutional, the court in the principal case emphasized the requirement that the revenue bonds were to be payable out of revenues from the industrial plant and should never constitute a debt of a county in the constitutional sense. The court stated that the language of the statute negated any extension of the state's credit or any assumption by the state of a county's debt, as no debt was created which violated the constitutional debt limitation.

The West Virginia Constitution restricts the power of the legislature to incur an indebtedness on behalf of the state, except to meet casual deficits in revenue, as well as to suppress insurrection and to repel invasion. W. VA. CONST. art. X, § 4. Similar limitations are imposed upon counties and cities. W. VA. CONST. art. X, § 6. It is well settled that bonds issued by a governmental agency to finance a public utility, payable solely from the revenues of the utility, do not create debts within the meaning of the constitutional inhibitions against the creation of public debts. *Searle v. City of Haxtum*, 84 Colo. 494, 271 Pac. 629 (1928); *City of Bowling Green v. Kirby*, 220 Ky. 839, 295 S.W. 1004 (1927); *Bates v. State Bridge Comm'n*, 109 W. Va. 186, 153 S.E. 305 (1930). Likewise, the issuance of self-liquidating bonds by the state is not prohibited, *State ex rel. Board of Governors of West Virginia Univ. v. O'Brien*, 142 W. Va. 88, 94 S.E.2d 446 (1956); and bonds issued by municipalities, pursuant to statutory authorization, to finance self-liquidating public projects do not create debts which are inhibited by the constitution. *Casto v. Ripley*, 114 W. Va. 668, 173 S.E. 886 (1934); *Brewer v. City of Point Pleasant*, 114 W. Va. 573, 172 S.E. 717 (1934). In the *Brewer* case, the act authorizing the issuance of the bonds declared that the bonds could not become a corporate indebtedness of the municipality and required that the bonds contain a statement on their face that the municipality would not be liable. The court held that the provisions of the act became part of the contract between the municipality and the bondholders, binding the bondholders by their contracts as firmly as in any other legal contract. Thus, the court in the principal case had little difficulty in holding that bonds issued by a county did not create unconstitutional debts.

The Virginia Constitution contains a provision disallowing the extension of the state's credit similar to the West Virginia inhibition. VA. CONST. art XIII, § 185. Some recent decisions of the Virginia Supreme Court are in line with the holding in the principal case. For example, a statute authorizing a state agency to invest and reinvest its funds in securities to be used in reserves of domestic life insurance companies was not violative of the constitutional provision prohibiting the lending of the state's credit. *Almond v. Day*, 197 Va. 782, 91 S.E.2d 660 (1956). Similarly, a proposal of the state to issue bonds in order to buy railroad property and lease the property back to the railroad did not violate the constitution. *Harrison v. Day*, 202 Va. 967, 121 S.E.2d 615 (1961). The

Virginia court has held that when the underlying purpose of the transaction and the obligation incurred are for the state's benefit, there is no lending of its credit, even if others incidentally profit by the transaction. *Almond v. Day, supra*.

Other jurisdictions having like constitutional restrictions are substantially in accord with the Virginia and West Virginia decisions. *Marchant v. Mayor & City Council of Baltimore*, 146 Md. 513, 126 Atl. 884 (1924); *Holly v. City of Elizabethton*, 193 Tenn. 46, 241 S.W.2d 101 (1951). On the other hand, some states have held contra to the holding in the principal case. They have done so on the basis that a limitation on the power of the legislature to lend or give the credit of the state should be construed liberally to effect its purpose. *In re Opinion to the Governor*, 90 R.I. 135, 155 A.2d 602 (1959). Thus, an act of the Missouri Legislature authorizing the issuance of its bonds by way of donation to a private corporation and the use of the money from their sale for the purchase of a farm by a war veteran was held void. *Cole v. La Grange*, 113 U.S. 1 (1885). To like effect is *William Deering & Co. v. Peterson*, 75 Minn. 118, 77 N.W. 568 (1898), involving appropriations of public money to be lent to farmers whose crops had been destroyed.

From the standpoint of strict constitutional construction, the effect of the holding in the principal case is to place a narrower interpretation on the constitutional credit and debt limitations than what was probably the original intention. However, the West Virginia interpretation might be regarded as a realistic interpretation of unrealistic constitutional provisions. The merits of such an interpretation notwithstanding, it would seem that the task of amending the constitution is one that is better left to the legislature.

The light of history causes shadows to fall in the pathway of governments. Trends in public policy vary from generation to generation. The state credit provision in the West Virginia Constitution has been a stern government disciplinarian for nearly a century. The courts have charted the state credit boundaries within the plain language of the constitution. The decision in the principal case comes at a time when consideration is being given to a revision of the West Virginia constitution. The decision further charts the lines on state credit and debt limitations and will be instructive among guide lines for constitution revision.

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