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Constitutional Law–Municipal Debt Limit--Bond Issue Payable From Utility Income

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clusion is a flat rejection of their former decision recognizing the liquor monopoly as a valid exercise of the police power.[17] In other words, the court has considered the monopoly as a governmental function for the purpose of constitutionality but as a private function for the purpose of taxation.

This result is probably desirable for the tax imposed does not seriously burden or affect the efficient discharge of the duty to protect.[18] But, it would be more consistent to recognize the liquor monopoly as a governmental function for all purposes and to modify the doctrine of reciprocal immunity so that its applicability[19] would be limited to those cases where the imposition of the tax would be a substantial impediment.[20]

—ROBERT W. BURK.

CONSTITUTIONAL LAW — MUNICIPAL DEBT LIMIT — BOND ISSUE PAYABLE FROM UTILITY INCOME. — This was a taxpayers' suit to enjoin a bond issue to subsidize improvements to a municipal water works on the ground that it would be a debt exceeding the constitutional debt limit.[1] The city was acting under a recent statute which provides, "bonds issued under the provisions of this act shall be payable solely from revenues derived from such waterworks systems and such bonds shall not in any event constitute an

[17] Under the usual constitutional prohibition of states engaging in business, there is no other authority for the activity than the police power. State v. City Council of Aiken, 42 S. C. 222, 20 S. E. 221 (1894).

[18] The rationale of the doctrine is that in a federal system one government should not be permitted to impair or cripple the instrumentalities by which the other discharges its public duties. The Collector v. Day, *supra* n. 4. The tax imposed in the principal case would not be such an impairment.

[19] "Its application does not depend upon the amount of the exaction, the weight of the burden, or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree." Trinity Farm Construction Co. v. Grosjean, 54 S. Ct. 469, 470 (1934).

[20] A somewhat similar view is expressed in Willcuts v. Bunn, 282 U. S. 216, 225, 51 S. Ct. 125, 127 (1931). The implied exemption of the instrumentalities of state government from Federal taxation does not extend to cases "where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of the government."

[1] Other grounds stated in the case, that the ordinance does not conform to the requirements of the act, and that the act was not in the scope of the executive proclamation convening the legislature in extraordinary session, were settled in Brewer v. City of Point Pleasant, 172 S. E. 717 (W. Va. 1934).

indebtedness . . . within the meaning of the constitutional provisions or limitations . . ."[2] The statute requires that the value of the existing system and of the improvements shall be determined, that the revenue of the whole shall be "divided according to such values," and that the part allocated to the improvements be "set aside and used solely and only for the purpose of paying the revenue bonds issued for such betterments."[3] The injunction was denied. *Casto v. Town of Ripley.*[4]

It is generally held that no debt is created when a city subsidizes the acquisition of a complete utility plant by issuing bonds payable solely from the revenues of the plant and secured by a mortgage thereon.[5] Whether the same result follows in the case of improvement bonds, depends upon the specific scheme for securing their payment. In the principle case, the court recognized as valid the so-called "broad special fund" theory under which the entire plant and all its revenues are subjected to the payment of improvement bonds.[6] The conclusion is sustained by numerous cases.[7] The theory, nevertheless, it is believed, does not escape the

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[2] W. Va. Acts of 1933 (First Ex. Sess.) c. 26, § 6.

[3] *Id.* § 10. To render the bonds as desirable as possible the statute provides: "Bonds issued . . . . are hereby declared to be negotiable instruments." Under the Negotiable Instruments Law, of course, an instrument to be negotiable "Must contain an unconditional promise or order to pay a sum certain in money". Thus the later statute makes an exception to the general negotiability rule.

[4] 173 S. E. 886 (W. Va. 1934).

[5] Winston v. Spokane, 12 Wash. 524, 41 Pac. 888 (1895); Klein v. City of Louisville, 224 Ky. 624, 6 S. W. (2d) 1104 (1928); Fox v. Bicknell, 193 Ind. 537, 141 N. E. 222 (1923); Twitchell v. Seattle, 106 Wash. 32, 179 Pac. 127 (1919); Williams v. Village of Kenyon, 187 Minn. 161, 244 N. W. 558 (1932); Lang v. City of Cavalier, 59 N. D. 75, 228 N. W. 819 (1930); City of Jerseyville v. Connett, 49 F. (2d) 246 (C. C. A. 7th, 1931); see Bates v. Bridge Commission, 109 W. Va. 186, 189, 153 S. E. 305, 307 (1930); 6 McQuillan, Municipal Corporations (2d ed. 1928) § 2389.

[6] This was first suggested in dicta in the case of Welch Water, *etc.*, Co. v. Welch, 64 W. Va. 373, 377, 62 S. E. 497, 498 (1908). In the present case, the court cites City of Bowling Green v. Kirby, 220 Ky. 839, 295 S. W. 1004 (1927) (whole income pledged for improvements); Searle v. Town of Haxtun, 84 Colo. 494, 271 Pac. 629 (1928) (whole utility pledged for improvements); Lang v. City of Cavalier, *supra* n. 5 (city purchased building and transmission lines for new utility); Ward v. City of Chicago, 342 Ill. 167, 173 N. E. 810 (1930) (whole utility pledged for improvement); City of Jerseyville v. Connett, *supra* n. 5 (entirely new system purchased); Dep't of Water & Power of the City of Los Angeles v. Vroman, 218 Cal. 206, 22 Pac. (2d) 698 (1933) (whole utility pledged for the improvement).

[7] City of Bowling Green v. Kirby, *supra* n. 6; Butler v. City of Ashland, 113 Ore. 174, 232 Pac. 655 (1925); Griffin v. Tacoma, 49 Wash. 524, 95 Pac. 1107 (1908); Searle v. Town of Haxtun, *supra* n. 6; Ward v. City of Chicago, *supra* n. 6; Shields v. City of Loveland, 74 Colo. 27, 218 Pac. 913 (1923); Dep't of Water & Power of the City of Los Angeles v. Vroman, *supra* n. 6.

creation of a debt since the existing property[8] and the income[9] therefrom are made liable to payment of the bonds.[10] Even in a strict legalistic sense, one who pledges part of his assets to pay a claim, to that extent becomes indebted. In the case of an unsecured debt, the creditor's ultimate recourse at law is the debtor's property. The ultimate recourse against a municipal debtor is mandamus to compel a tax levy. Thus if the original plant was acquired with tax money the new bonds are a tax burden, and thus, a debt.

The statute involved in the principal case, as construed by the court, set up the "restricted special fund" theory,[11] under which the only recourse for payment of improvement bonds is a part of the revenue of the system proportionate to the value of the improvements. Thus if the method of allocating income is reasonably accurate, this theory is not open to objection.

Although self-liquidating municipal utility projects may clear the debt limitation hurdle in the courts, it should be made clear that ultimately the community foots the bill as fully as if an unqualified indebtedness were created, unless the whole project fails. In the one case higher rates are paid in order to liquidate the project. In the other the taxpayers of the city may be subjected to higher taxes to discharge the debt. The difference lies in the distribution of the burden. There are doubtless instances where a community might thus evade debt limits to its distinct advantage, but the scheme should be used advisedly. No matter whether the means of payment is called taxation or utility income, the citizen pays all in the end.

—ROBERT MERRICKS.

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[8] Leonard v. City of Metropolis, 278 Ill. 287, 115 N. E. 813 (1917); Lobdell v. City of Chicago, 81 N. W. 354, 222 Ill. 218 (1907); State v. Portage, 174 Wis. 588, 184 N. W. 376 (1921). It has been pointed out that if the mortgage is foreclosed, the taxpayers lose property which they have bought, any money paid out under the contract, and any improvements that might be made. Lesser v. Warren Borough, 237 Pa. St. 504, 85 Atl. 839 (1912). Apparently under the West Virginia statute, the only thing in the nature of a remedy that an improvement bondholder is entitled to is receivership and it is not clear that he is entitled to that. Other states have similar statutes; see City of Jerseyville v. Connett, *supra* n. 5, at 248, which changes the result of the often-quoted case City of Joliet v. Alexander, 194 Ill. 457, 62 N. E. 861 (1902).

[9] Hesse v. City of Watertown, 57 S. D. 325, 232 N. W. 53 (1930); see Newell v. People, 7 N. Y. 9 (1852); State v. McMillan, 12 N. D. 280, 309, 96 N. W. 310, 321 (1903); City of Joliet v. Alexander, *supra* n. 8, 194 Ill. at 463, 62 N. E. at 863.

[10] The use of special funds is only one method of evading constitutional debt limits. Other ways are through the use of special utility districts, leases with option to purchase, and conditional sales contracts. Durisch, *Debt Limits and Financing of Publicly Owned Utilities* (1931) 20 NAT. MUN. REV. 460.

[11] See esp. § 10, *supra* n. 2.