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Constitutional Debt Limitations of Wisconsin Municipalities: A Survey

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CONSTITUTIONAL DEBT LIMITATIONS OF WISCONSIN MUNICIPALITIES — A SURVEY

Since 1951 and especially during the last three years, the Wisconsin legislature has passed an abundance of legislation concerning constitutional municipal debt limitations. This significant increase in legislation in this area necessitates a historical analysis of the constitutional provisions governing this matter, a review of the judicial interpretations construing the constitution, and an explanation of the position of Wisconsin. It is, however, not within the scope of this article to discuss whether the applicable percentage limitations are appropriate.

History of the Constitutional Provision

Prior to 1874, the applicable provision of the Wisconsin constitution, Art. XI, sec. 3, read as follows:

> It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations.

The power of the various municipal corporations to tax, assess, borrow money, contract debts and loan their credit was usually not expressly limited by the legislature, with the result that vast debts were incurred and payment was left for succeeding generations. When these later generations came into being, they also incurred debts and, therefore, debt was imposed upon debt and an overwhelming burden was placed on posterity.

Most of the early municipal obligations arose after the Civil War from the purchase of railroad stock. Although such purchases may have been necessary, the municipalities had little available revenues remaining to carry on their ordinary municipal affairs. Some effective restraint was deemed necessary.[1] Art. VIII, sec. 6 of the constitution, which limited the amount of debts of the state so that they would never in the aggregate exceed $100,000, was held inapplicable to municipal corporations.[2] Thus, in 1874, Art. XI, sec. 3 was amended in an attempt to remedy the situation:

[1] The need for restraint on the power of municipalities to incur debts was recognized by Thomas Jefferson: "The principle of spending money to be paid by posterity, under the name of funding, is but swindling futurity on a large scale. . . . To preserve our independence, we must not let our rulers load us with perpetual debt. We must make our election between economy and liberty, or profusion and servitude. . . . I place economy among the first and most important of republican virtues, and public debt as the greatest of dangers to be feared." 15 McQuillan, Municipal Corporations §41.02 (3d ed. 1950).

[2] State *el rel.* Dean v. The Common Council of the City of Madison, 7 Wis.

> No county, city, town, village, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to any amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness. Any county, city, village, school district, or other municipal corporation incurring any indebtedness as aforesaid, shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same.[3]

Except for two amendments which did not affect the percentage limitation,[4] the provisions in Art. XI, sec. 3 regarding debt limits remained unchanged for fifty-eight years. In 1932,[5] an amendment prompted by case law (to be considered later) provided that "an indebtedness created for the purpose of purchasing, acquiring, leasing, constructing, extending, adding to, improving, conducting, controlling, operating or managing a public utility of a town, village or city, and secured solely by the property or income of such public utility, and whereby no municipal liability is created, shall not be considered an indebtedness of such town. . . ." Then, in 1951[6] the provision was again amended to provide that "for any city which is authorized to issue bonds for school purposes the total indebtedness of such city shall not exceed in the aggregate eight per centum of the value of such property." In 1955,[7] the value of the taxable property, in the case of school districts and cities authorized to issue bonds for school purposes, was thereafter to be determined "by the value of such property as equalized for state purposes . . . as provided by the legislature." In 1960,[8] "counties having a population of 500,000 or over" were also able to have their debt limitations determined by the value of property as equalized for state purposes. Finally, in 1961,[9] it was provided that "for any school district offering no less than grades one to twelve and which is at the time of incurring such debt eligible for the highest level of school aids, the total indebtedness of such school

688 (1858). A "qualitative" restraint was imposed in Foster v. City of Kenosha, 12 Wis. 616 (1860), where the court held that the municipality could tax only for a "legitimate municipal purpose."

[3] WIS. LAWS 1872, J.R. 11, WIS. LAWS 1873, J.R. 4, WIS. LAWS 1874, ch. 37, vote, Nov. 1874.

[4] WIS. LAWS 1909, J.R. 44, WIS. LAWS 1911, J.R. 42, WIS. LAWS 1911, ch. 665, vote, Nov. 1912; WIS. LAWS 1921, J.R. 398, WIS. LAWS 1923, J.R. 34, WIS. LAWS 1923, ch. 203, vote, Nov. 1924.

[5] WIS. LAWS 1929, J.R. 74, WIS. LAWS 1931, J.R. 71, vote, Nov. 1932.

[6] WIS. LAWS 1949, J.R. 12, WIS. LAWS 1951, J.R. 6, vote, April 1951.

[7] WIS. LAWS 1953, J.R. 47, WIS. LAWS 1955, J.R. 12, vote, April 1955.

[8] WIS. LAWS 1957, J.R. 59, WIS. LAWS 1959, J.R. 32, vote, Nov. 1960.

[9] WIS. LAWS 1959, J.R. 35, WIS. LAWS 1961, J.R. 8, vote, April 1961.

district shall not exceed ten per centum of the value of such property as equalized for state purposes."

Three proposed amendments received their first passage in the recent legislative term (passage in the next legislative term and a majority vote of the people of the state being necessary under Art. XII, sec. 1 for such amendments to become a part of the constitution). The first provides that in *all* cases, the value of the taxable property "as equalized for state purposes" shall be used to determine the permissible debt limitation.[10] The second purports to simplify the language of Art. XI, sec. 3 and to increase the per centum of debt of cities authorized to issue bonds for school purposes.[11] It reads:

> No county, city, town, village, school district or other municipal corporation may become indebted in an amount that exceeds an allowable percentage of the taxable property located therein equalized for state purposes as provided by the legislature. In all cases the allowable percentage shall be five per centum except as follows: (a) For any city authorized to issue bonds for school purposes, an additional ten per centum shall be permitted for school purposes only, and in such cases the territory attached to the city for school purposes shall be included in the total taxable property supporting the bonds issued for school purposes. (b) For any school district which offers no less than grades one to twelve and which at the time of incurring such debt is eligible for the highest level of school aids, ten per centum shall be permitted.

The third proposed amendment is intended to alleviate the problems caused by recent changes in the types of property subject to property taxation.[12]

Judicial Construction of the Provision

The language of the 1874 amendment seemed unambiguous; application of its terms seemed relatively easy, and accomplishment of its purposes seemed possible. The first case to consider and apply this amendment was optimistic about its effectiveness, but cautioned:

> [I]t is inconceivable how diverse opinions can be formed of its meaning; but the scrutiny, ingenuity and ability for critical analysis of the bar may hereafter discover some possible meaning beyond what now appears to be so clearly expressed. Arguments of convenience, of policy, or of present necesssity, should

[10] Wis. Laws 1961, J.R. 58.
[11] Wis. Laws 1961, J.R. 71.
[12] Wis. Laws 1961, J.R. 91. The amendment provides that after January 1, 1964, the local debt limits shall be determined by dividing the percent by a fraction determined as follows: Denominator, 1963 state equalized value of property in government unit; numerator, 1963 equalized value less the 1963 equalized value of merchants' stock-in-trade, manufacturers' materials and finished products, livestock and other categories of personal property that were assessable in 1963 but exempted in 1964 and thereafter.
[13] Hebard v. Ashland County, 55 Wis. 145, 147, 12 N.W. 437 (1882).

> not be allowed, by loose construction, to weaken the force or limit the extent of a constitutional prohibition so necessary and so beneficially intended.[13]

Another early decision cited with approval cases from other jurisdictions which held that similar provisions were to be strictly construed, regardless of the purpose for which the debt was incurred: " 'When such constitutional limit had been reached, the municipality is prohibited from making any contract whereby an indebtedness is created, even for the necessary current expenses in the administration of the affairs and government of the corporation.' "[14]

The first few cases to construe this amendment evinced a strong desire to apply the provision strictly. Perhaps the memory of the degenerate state of municipal finances still lingered in the courts' minds; perhaps the newness of the provision prompted a close adherence to its terms. At any rate, few loopholes were allowed. But as time passed, municipal needs became greater and municipal costs began to skyrocket. The net result — the situation cautioned against in the *Hebard* decision,[15] that "the scrutiny, ingenuity and ability for critical analysis of the bar may hereafter discover some possible meaning beyond what now appears to be so clearly expressed," soon appeared in order to alleviate the municipality's dilemma. To best discuss this situation, the cases that have considered this constitutional provision will be grouped into various categories.

I. *When indebtedness incurred*

In *Earles v. Wells*,[16] the court approved an Illinois case holding that " 'indebtedness will be regarded as having been incurred from the date of the contract, and not postponed to the time of the completion and acceptance of the work.' "[17]

In *State ex rel. Marinette, T. & W. Ry. Co. v. Tomahawk Common Council*,[18] the city contracted to buy stock in the railroad, but conditioned on the completion of the road and the legal capacity of the city at that time to become indebted. The court stated that "The phrases 'incurring such indebtedness,' and 'incurring any indebtedness as aforesaid,' manifestly refer to the time when the contract is performed by the acts of the company. . . . To incur an indebtedness is to become liable for or subject to an indebtedness."[19] Thus, by placing a condition in the contract, the rule of the *Earles* case was avoided.

The problems involved in allowing the *Tomahawk* situation to

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[14] Earles v. Wells, 94 Wis. 285, 297, 68 N.W. 964 (1896).
[15] Hebard v. Wells, *supra* note 13.
[16] 94 Wis. 285, 68 N.W. 964 (1896).
[17] *Id.* at 297-8.
[18] 96 Wis. 73, 71 N.W. 86 (1897).
[19] *Id.* at 91.

stand were seen in *Crogster v. Bayfield County.*[20] In this case, the court held that to allow the indebtedness to arise when the contract obligation or a part thereof was completed by the contractor would be to sanction a juggling of assessments. Since the contract was in existence and payment on it depended on whether the city was legally able to incur indebtedness, assessments could be manipulated to secure a favorable contract or to avoid an unfavorable one. Thus, the bondholder would be placed in a very tenuous position and municipal bonds would lose their attractiveness. The court determined that the problem would best be solved by using the last assessment before the execution of the contract to determine whether the debt limit would be exceeded. This would allow the parties to know in advance whether the contract was a valid one. In this regard, the *Tomahawk* case was expressly overruled.[21]

The *Crogster* decision was distinguished in *Janes v. City of Racine,*[22] where the court was dealing with the city's purchase of an existing waterworks plant. Since such a purchase was governed by the Public Utility Act,[23] the court held that the transaction for the purchase of the

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[20] 99 Wis. 1, 74 N.W. 635, 77 N.W. 167 (1898).

[21] It is interesting to note that in the *Crogster* decision the court found that the contract was severable and held that all parts of the contract were valid except the ones that would bring the city's indebtedness over the debt limitation. This severability doctrine was also followed in *Herman v. City of Oconto,* 110 Wis. 660, 86 N.W. 681 (1901). Quaere: What happens to the last part of the contract, the part held void, especially if it covers an essential element of that for which the contract was made? That element is still needed and thus an uncontracted indebtedness of the city is created for future generations.

In regard to this re-contracting or ratification of the void part of a contract, *Riesen v. School District,* 189 Wis. 607, 208 N.W. 472 (1926), imposes a limitation. There the electors of the school district ratified the contract the following year, at a time when the amount authorized to be paid did not exceed the constitutional limit. The court held that no action could be taken to enforce payment under this ratification, since the contract was void ab initio and could not be ratified. The court, however, added: "We may suggest, however, that another and interesting question would be presented were the electors of the school district, solely in recognition of their moral obligation to pay for the school building, to take appropriate action in that behalf at a time when to do so would not be in violation of the constitutional provision we are considering." *Id.* at 613-14. The court did not rule on this possibility, but merely wondered if, at a time when the electors could not be said to have been influenced by the specter of a void contract, they could compensate a contractor for the improvements which they presently enjoyed and for which they paid nothing.

The fact that there can be no ratification of a contract which would cause the municipality to exceed its constitutional limitation of indebtedness imposes a necessary burden on the one dealing with the municipality to make sure that the contract will be a valid one. In this regard, see: School District v. Marine Nat. Exchange Bank of Milwaukee, 9 Wis. 2d 400, 101 N.W. 2d 112 (1960). . . not only can the contract not be ratified, but there also can be no recovery of principles of unjust enrichment. Shulse v. City of Mayville, 223 Wis. 624, 271 N.W. 643 (1937).

[22] 155 Wis. 1, 143 N.W. 707 (1913).

[23] The statutes involved in the *Janes* case were similar to WIS. STAT. §§197.01-197.09 (1959).

plant was not complete in all its essential details until the commission filed its certificate. The commission made a determination of the proper price to be paid for the utility, and thus there could be no way of knowing whether the purchase price exceeded the constitutional debt limitation until that price was determined.

II. *Lease-financing*

The *Earles v. Wells* decision[24] also curtailed an attempted scheme to by-pass the strictness of the provision. There the city needed a waterworks system and made a contract to have fire hydrants constructed and rented to the city. The lease was to last twenty years and the rent was to be paid from tax receipts. The city issued bonds to the contractor and these bonds were to be paid off by the rental payments. At the end of the lease period, the city was to become the owner of the hydrants. The court saw through this evasive method and considered it merely an indirect way of expressly agreeing to pay the principal and interest on the bonds. The lease-financing agreement was rejected and the total contract price was used to determine whether the city had exceeded the constitutional limitation.

The *Earles* case was distinguished in *Stedman v. City of Berlin.*[25] In the latter case the contract called for the construction of a waterworks system which was to be rented for a period of thirty years, the rent to be paid from tax receipts. The contract also provided that the city had an option to purchase the waterworks system at any time within six months of its completion. An attempt to void this contract was thwarted because the court was unwilling to consider the total rental payments as indebtedness during the year of executing the contract. Only the yearly rental payments were held to constitute indebtedness. Rejecting the *Earles v. Wells* rationale, the court held that as the city had simply stipulated for an option to buy, it was under no obligation to buy the waterworks. The plaintiff also contended that there was a secret agreement that the city would become the owner after the thirty year period, but the court held that there were not enough facts pleaded to establish such a contention.[26]

A bit more complicated method of lease-financing was attempted in *State ex rel. Rogers v. Milligan.*[27] In this case, pursuant to statute,[28] the school district board was authorized to lease and re-lease district lands and improvements to a nonprofit sharing corporation. As a condition of the lease of lands to such corporation, the corporation had to construct a new school building and finance its cost by a mortgage of

[24] Earles v. Wells, 94 Wis. 285, 68 N.W. 964 (1896).
[25] 97 Wis. 505, 73 N.W. 57 (1897).
[26] Quaere: What would the contractor do with the hydrants after the lease expires and what would the city do without them?
[27] 267 Wis. 549, 66 N.W. 2d 326 (1954).
[28] WIS. STAT. §40.035 (1953), repealed in 1955.

the corporation's leasehold interest. The mortgage was to be retired out of rents payable by the district under the re-lease arrangement. After the debt was retired, the corporation would convey the leased premises, including the new building and its equipment, to the district. The court considered that the lease to the corporation, the re-lease back to the district, and the mortgaging of its leasehold interest by the corporation must be viewed as one transaction, and not as three separate occurrences and held that the statute authorized the district to become indebted in a manner contrary to the constitutional inhibition.[29]

III. *Obligation of the city to pay*

In *Fowler v. City of Superior,*[30] the bonds unconditionally and absolutely charged the city to be indebted to the bondholders, but the bonds were to be payable out of the proceeds of improvement assessments. It was argued that payment was to be looked for from the assessment fund and not from the city itself, and therefore the city should not be considered to have incurred a debt. The court answered that the bondholders were not limited to receiving payment only from the assessments. The fact that the bonds were chargeable to something other than the general treasury of the city merely gave more security to the bondholder, but did not change the fact that the debts were still those of the city. The bondholder was held to be entitled to payment out of the general fund of the city and to be able to use the assessments as additional security for the payment of the debt.

Using the loophole of the *Stedman* case, i.e., that the city could be held to have no obligation to pay, *Burnham v. City of Milwaukee*[31] sanctioned a method of purchase which would not constitute the creation of an indebtedness. The city needed land for parks and therefore purchased some land on credit and gave instruments creating a lien on the land to the seller. The court held that a "debt" denotes "not only an obligation of the debtor to pay, but the right of the creditor to receive and enforce payment."[32] The contract did not expressly bind the city to make the payments, as was the case in *Fowler,* but, as the court stated, the city could stop payments and the creditor could not enforce payment out of any city money or lands. The creditor could retake the property, but this was not city property since title to it would not pass until all the installments were paid. The court concluded that

[29] For a complete discussion of lease-financing, see: Magnusson, *Lease-Financing By Municipal Corporations As a Way Around Debt Limitations,* 25 GEO. WASH. L. REV. 337 (1957). Even if the use of lease-financing as a method of acquiring municipal property might be less desirable economically than the use of municipal bonds, the conflict between the needs of the municipality and the debt limitations forces the cities, school district, etc., to chose the former.

[30] 85 Wis. 411, 54 N.W. 800 (1893).

[31] 98 Wis. 128, 73 N.W. 1018 (1897).

[32] *Id.* at 132.

"It will not do to say that [the city] . . . will probably make the payments, or that it would be foolish not to do so, but we must be able to say that it has contracted, either expressly or impliedly, to do so."[33]

In *Connor v. City of Marshfield*,[34] the city purchased property and assumed a $125,000 mortgage existing on the property. The court held that the city, in so doing, did not increase its indebtedness by the amount of the mortgage, since it was not obligated to pay. The creditor could only take back the mortgaged property if the payments were not kept current. Thus, the rationale of the *Burnham* case was extended to the assumption of mortgages.[35]

IV. *Obligation of the city on the purchase of income-producing utilities*

This method of circumventing the debt limitation, an off-spring of the *Burnham* ruling, was first considered in *State ex rel. Morgan v. City of Portgage*.[36] In this case an action was brought to compel the city to comply with an order of the railroad commission directing the making of *improvements* in its waterworks system. The city contended that to do so, it would have to exceed its debt limit, but the petitioner alleged that the city could comply with the order by availing itself of the provisions of a certain statute.[37] The statute provided for the creation of a purchase-money lien on the utility and the application of the revenue it produced for the payment of the expense of its operation, depreciation, and the cost of acquisition or construction, without creating an indebtedness of the city. The court held that insofar as the statute authorized the *acquisition* and *construction* of public utilities by cities and granted them power to provide for the issuance of bonds to be paid out of the income and revenue of such utility in the manner prescribed, this would not create an indebtedness of a city. However, the court disallowed the use of this statute to authorize the issuance of bonds for *improvements* to public utilities, unless such improvements were made simultaneously with its acquisition or construction. The court's reasoning was that once the mortgage for the acquisition or construction of the utility had been paid off, the utility became municipal property and as such could not be mortgaged without the city itself incurring an indebtedness. The holding in this case regarding the

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[33] *Ibid.*

[34] 128 Wis. 280, 107 N.W. 639 (1906).

[35] In reviewing the "no obligation" theory, the language of the *Burnham* decision that it will not do to say that the city will probably pay or would be foolish not to becomes suspect. The fact remains that it is most probable that the city will pay and that the taxpayers will be burdened with this obligation. By not calling it an indebtedness, this allows the city to create another debt and thus subject the taxpayers to increased burdens.

[36] 174 Wis. 588, 184 N.W. 376 (1921). See also: Morris v. Ellis, 221 Wis. 307, 266 N.W. 921 (1936).

[37] WIS. STAT. §927-19b, repealed in 1921.

financing of improvements was changed by the previously mentioned 1932 amendment.[38]

In *Payne v. City of Racine*,[39] the plaintiff contended that the city's proposed plan to extend an existing sewage system could not be financed pursuant to the 1932 amendment. The reason he gave was that the term "public utility," as defined in the statutes, did not include sewage systems. The court rejected this contention and held that, "The term 'public utility,' as used in the foregoing amendment, must be considered to include all plants or activities which the legislature can reasonably classify as public utilities in the ordinary meaning of the term."[40]

Subsequent to the 1932 amendment, a statute was enacted[41] which provided that the city could issue revenue bonds, without incurring indebtedness, for the purpose of restoring to its general fund monies which it had provided by general taxation and disbursed for the purpose of constructing, acquiring, extending, improving, and operating a waterworks system. This statute, and the method it prescribed, were held void in *Roberts v. City of Madison*.[42] The court considered that the 1932 amendment authorized the issue of bonds *solely* for the purposes contained therein and not for the purpose of reimbursing the general fund of the city. Since this method of avoiding indebtedness would not have been valid prior to the amendment and since it was not protected by the amendment, issuance of such bonds would be indebtedness of the city.

There was a strong dissent in the *Roberts* case in which the restrictive interpretation of the purposes for which such bonds could be issued was attacked. It was also pointed out that even if the amendment should be restrictively interpreted, the plan proposed by the statute would fairly come within the category of management. "It is certainly within the realm of managing a public utility to enable that utility to borrow money at a lesser rate, which appears to be what will result if the proposed bonds are issued."[43]

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[38] See article, *circa* note 5.

[39] 217 Wis. 550, 259 N.W. 437 (1935). See also: Flottum v. City of Cumberland, 234 Wis. 654, 291 N.W. 777 (1940).

[40] Payne v. City of Racine, 217 Wis. 550, 555, 259 N.W. 437 (1953). The 1932 amendment was held to authorize the issuance of bonds for a hospital addition, which would not be considered indebtedness of the city, in *Meier v. City of Madison*, 257 Wis. 174, 42 N.W. 2d 914 (1950). The court struck down the plaintiff's contention that since the city leased the hospital to an independent association, the hospital was not operated as a municipal utility and therefore not eligible for financing as such.

[41] WIS. STAT. §66.06(9)(b)(13) (1945), renumbered §66.055(2)(m) by WIS. LAWS 1947, ch. 362, repealed by WIS. LAWS 1951, ch. 560.

[42] 250 Wis. 317, 27 N.W. 2d 233 (1947).

[43] *Id.* at 328. The majority opinion discussed the management theory and held: "The word 'management' is not found in the amendment of 1932. Management is one thing and 'managing a public utility' of a municipality is another. 'Management' is a noun. . . . Managing a public utility is the act performed by the one who is vested with the power of management. The provision of the amendment of 1932 can mean no more than the right to create an indebtedness for the purpose of hiring a manager." *Id.* at 324.

V. *Multiple taxing districts*

In *Lippert v. School District*,[44] the plaintiff sought to enjoin the issuance of the school district's bonds on the theory that since the limits of the school district were coterminous with those of the village of Shorewood, the indebtedness of both should be added together to determine the constitutional debt limit of the district. The court held:

> It is clear that [the language of the constitution] . . . refers to the individual indebtedness of each municipality mentioned and not to the aggregate indebtedness of municipalities.
>
> Each municipality mentioned in the constitution is authorized to borrow up to the limit of its indebtedness, not to that of its and another municipality's indebtedness. Each municipality is a separate entity qualified to borrow and is separately liable for its indebtedness.[45]

The question was again litigated in *Fort Howard Paper Co. v. Town Board*.[46] The plaintiff sought to set aside the action of the town board creating and establishing a storm sewer district.[47] It contended that the statutes authorizing such creation[48] were unconstitutional in that they allowed the sanitary district to borrow money and issue municipal obligations up to the constitutional debt limitation independently from that of the city and thus evade the constitutional provision. The court cited the *Lippert* decision and held:

> In the instant case there can be no valid claim that the town sanitary district was created for the purpose of evading the constitutionally imposed debt limit. Therefore, when the power to create town districts and the power to borrow money and issue municipal obligations is used in strict conformity with legislative standards prescribed in the statutes, there can be no unconstitutional delegation of power.[49]

VI. *Ordinary running expenses of a municipality*

Herman v. City of Oconto[50] is authority for the proposition that

[44] 187 Wis. 154, 203 N.W. 940 (1925).

[45] *Id.* at 155. The *Lippert* case cited State *ex rel.* Marinette, T. & W. Ry. Co. v. Tomahawk Common Council, *supra* note 18, in support of this holding.

[46] 266 Wis. 191, 63 N.W. 2d 122 (1954).

[47] This action of the town board raises an interesting problem of governmental structure. Some consider it a basic tenet that the governing bodies should be kept simple and voter controlled. But, because of the burden of the constitutional limitation, many municipalities must create these additional districts. Quaere: Is it better to cause complexity of governmental structure or to raise the percentage of limitation?

[48] WIS. STAT. §§60.30 to 60.309 (1959).

[49] *Supra* note 46, at 197. In the *Fort Howard Paper Co.* case, the sanitary district sought to be created was a town-wide one. There were other sanitary districts with less coverage already existing in the town, but the court held this to be immaterial, since it did not appear that either of the previously organized districts had ever acted upon or exercised the power of installing stormwater sewers, which was to be the sole purpose of the newly created sanitary district.

[50] 110 Wis. 660, 86 N.W. 681 (1901).

contracts for the ordinary running expenses of a municipality, which bear no interest and which exist for a year or less, do not constitute indebtedness within the constitutional provision. No tax is required to be levied to pay off such contracts. The city incurred an obligation in the *Herman* case, it is true, but the court considered that the type of obligations contemplated by the constitutional provision were obligations which projected payment into the future (over one year) and which were to be paid off from receipts of taxation.

The *Herman* case also considered the problem of whether a contract for a series of years, paid for by annual payments, such as a teacher's contract, is to be taken as a whole in determining the amount of indebtedness. *Stedman v. City of Berlin*[51] held that only the amount that became due within the year was to be included as indebtedness for that year.[52]

In the most recent Wisconsin case dealing with municipal debt limitation law, the school district, pursuant to statute,[53] attempted to procure a short term loan to meet its current operating expenses.[54] The defendant declined to loan the money because the district was already indebted up to its constitutional limitation. The statute provided that when the district had become entitled to taxes levied, it could procure short term loans and secure them by assigning the right to the taxes without incurring indebtedness under the constitutional provision. The city had become entitled to the taxes and the court held that the rule in *Earles v. Wells*[55] made it possible to have such a statute without contravening the constitution. (For a discussion of when the city is entitled to the taxes for debt limitation purposes and the use of taxes as off-sets, see *infra,* under the heading, "VIII. *Taxes as off-sets to indebtedness.")*

VII. *Invading special funds*

In *Rice v. City of Milwaukee,*[56] the city attempted to use money set aside in a special fund as an off-set to its indebtedness. The court disapproved of this method and held that when a fund is established, it could not be used for any other purpose than that for which it was es-

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[51] Stedman v. City of Berlin, *supra* note 25.

[52] See also: Prueher v. City of Bloomer, 241 Wis. 17, 4 N.W. 2d 186 (1942); Meier v. City of Madison, 257 Wis. 174, 42 N.W. 2d 914 (1950). In regard to the ordinary running expenses of the municipality and the municipal debt limitation in Wisconsin, the reader is referred to Hirschboeck, *Municipal Current Expenses and the Debt Limit,* 19 MARQ. L. REV. 59 (1935).

[53] WIS. STAT. §67.12(8a) (1959).

[54] School District v. Marine Nat. Exchange Bank of Milwaukee, 9 Wis. 2d 400, 101 N.W. 2d 112 (1960).

[55] "So long as the current expenses of the municipality are kept within the limits of the moneys and assets actually in the treasury, and the current revenues collected or in process of immediate collection, the municipality may be fairly regarded as doing business on a cash basis, and not upon credit—*even though there may be for a short time some unpaid liabilities.*" 94 Wis. 285, 297, 68 N.W. 964 (1896). [Emphasis added.]

[56] 100 Wis. 516, 76 N.W. 341 (1898).

tablished. By taking money from that fund to pay other debts, a new debt would be created by the city in favor of this special fund.

In an attempt to circumvent the *Rice* rule, the school district, in *Riesen v. School District*,[57] took taxes that were levied for a special purpose and intermingled them in the district's general fund. The court held that these funds could not be used as an off-set to the district's indebtedness, since these funds were earmarked, regardless of the fund in which they were placed.

VIII. *Taxes as off-sets to indebtedness*

The use of taxes as an off-set to indebtedness stems from language in *Earles v. Wells*:

> [T]he moment an indebtedness is voluntarily created 'in any manner or for any purpose' with no money or assets in the treasury, *nor current revenues collected or in process of collection for the payment of the same,* that moment such debt must be considered in determining whether such municipality has or has not exceeded the constitutional limit of indebtedness.[58] [Emphasis added.]

In *Rice v. City of Milwaukee*,[59] the city tried to use anticipated receipts of liquor licenses as an off-set. The court held that they were not in the process of collection and could be collected only at the will of parties seeking certain privileges. "The 'revenues' mentioned in this decision [*Earles* case[60]] had reference only to such revenues as the corporation had levied, and had a legal right to enforce, regardless of any one's will or pleasure. . . . [T]hese unknown and unascertained items of income should not and cannot be considered as offsets against the city's indebtedness."[61]

The "process of collection" was more clearly defined in *Balch v. Beach*:[62] "Taxes in immediate process of collection do not include taxes merely voted. Taxes are not in immediate process of collection till the tax roll shall have been placed in the hands of the proper collecting officer with authority to receive, and with the right of the taxpayer to pay, the tax."[63]

In *City of Eau Claire v. Eau Claire Water Co.*,[64] the amount of the special assessments had been levied and were in the process of enforced

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[57] 192 Wis. 283, 212 N.W. 783 (1927).
[58] *Supra* note 16, at 299.
[59] *Supra* note 56.
[60] [A] municipality's capacity for doing business on a cash basis, with outstanding liabilities, is necessarily measured by the amount of cash on hand and the available assets and resources readily convertible into cash to meet the payment of such liabilities as they become due." Earles v. Wells, *supra* note 16, at 298-99.
[61] *Supra* note 56, at 521-22.
[62] 119 Wis. 77, 95 N.W. 132 (1903).
[63] *Id.* at 82.
[64] 137 Wis. 517, 119 N.W. 555 (1909).

collection. The only thing that cast doubt on the legality of using these taxes as an off-set was the fact that the process of collection was partially protracted over a period of four years. The court questioned whether this constituted "in the process of immediate collection." The court, on the authority of the *Earles* case, held that since the assessments were duly levied upon specific real estate and constituted liens that could be sold by the city, they constituted a present available asset for use as an off-set.

PRESENT WISCONSIN LAW

It is evident from the above discussion that some attempts to evade the constitutional provision have succeeded while others have failed. What can be deduced from the above cases is that there is a continual struggle of municipalities to meet the demands of present day needs and costs and yet remain under the constitutional debt limitation. There are, no doubt, many good reasons for attempting to circumvent the provision, but according to *State ex rel. Rogers v. Milligan,*[65] judicial change is not the proper remedy:

> The limiting of the amount of the indebtedness which may be imposed upon a community is a rule which public opinion at the time of the writing of the constitution required to be written into that instrument. It was the purpose to fix limitations with respect to liabilities within which the representatives of the people were to conduct the government. It was not the intention of the writers of our constitution to finally end things in a definite and static state bound to then existing conditions, but it is apparent that if the people are the authorities over the constitution, we are bound, when moving from one basic plan to another, to move in that direction through the deliberate and thoughtful processes of constitutional amendment.[66]

Since the *Rogers* case in 1954, there has been only one significant case regarding municipal debt limitations, *School District v. Marine Nat. Exchange Bank of Milwaukee,*[67] and this case dealt with a construction of a statute. Conversely, there have been three amendments added to Art. XI, sec. 3, and three more proposed. Thus, present Wisconsin law seems to be a process of constitutional amendment rather than one of judicial interpretation.

Two observations can be made concerning the latest amendments and proposed amendments. First, there seems to be an increasing awareness of the plight of the school districts. The need for schools is much greater now than it was fifty years ago. This need and the rising cost

[65] *Supra* note 27.

[66] *Supra* note 27, at 558. Substantially the same advocation was given in Magnusson, *Lease-Financing by Municipal Corporations As a Way Around Debt Limitations,* 25 GEO. WASH. L. REV. 377, 396 (1957), and in a note in 18 IOWA L. REV. 269, 278 (1933). The basic premise of these advocations is that the integrity of a constitutional provision, as it stands, should be maintained.

[67] *Supra* note 54.

of construction appear to have prompted the provisions increasing the limitation percentages of school districts and towns authorized to issue school bonds.

The second observation concerns the method of valuation of property to determine what the limitation will be. The 1874 amendment provided that the debt could not exceed "five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." Construction of this provision was given in *School District v. First Wisconsin Co.*,[68] where the defendant, in a suit to compel the purchase of bonds issued by the plaintiff, contended that the district had exceeded its constitutional limitation of indebtedness. The facts in the case showed that if the assessment made by the local assessor of Shorewood was to be taken as the basis of computation, the plaintiff had exceeded its limit, but if the assessment as equalized by the county board was to be used, the limit was not exceeded. The district, naturally, contended that the latter assessment was the one referred to in the constitutional provision. On appeal, the court disposed of the plaintiff's contention by citing *State ex rel. Marinette, T. & W. Ry. Co. v. Tomahawk Common Council*,[69] which held that the last assessment for state and county taxes is "The last assessment of the town, city, or village as fixed by the local board of review, upon which county and state taxes may be extended, as well as local taxes. . . ."[70] The court then stated: "We are satisfied that the previous ruling of this court correctly interpreted the constitutional provision in question and should be adhered to."[71] The district also contended that the wording of the statute: "Every reference to the value of the taxable property in a municipality, other than a county, refers to such value according to the last *equalized* assessment thereof for state and county taxes, . . ."[72] supported its contention. The court held: "We are of the opinion that the words 'equalized assessment' . . . means the assessment as fixed, corrected, or equalized by the local board of review. This construction would make the constitution and its interpretation by the court and legislature harmonious."[73]

The 1955 amendment,[74] as well as those that have followed, have changed the 1874 provision so that the debt limit, in most cases, and in all cases if the proposed amendments are added to the constitution, will

[68] 187 Wis. 150, 203 N.W. 939 (1925).
[69] *Supra* note 18.
[70] *Supra* note 18, at 93. This rule was also adhered to in Stedman v. City of Berlin, *supra* note 25.
[71] *Supra* note 68, at 153.
[72] WIS STAT. §67.01(4) (1959). [Emphasis added.]
[73] *Supra* note 68, at 153.
[74] See article, *circa* note 7. The validity of this amendment and the statutory changes in WIS. STAT. §67.03 and §70.57 was established in State *ex rel.* Thomson v. Peoples State Bank, 272 Wis. 614, 76 N.W. 2d 370 (1956).

be determined from a percentage of the taxable property located in the municipality "equalized for state purposes . . . as provided by the legislature." The legislature has so "provided" in Wis. Stat., sec. 67.03 (1959). Basically, it refers to Wis. Stat., sec. 70.57 (1959), which states:

> (1) The department of taxation before September 15 of each year shall complete the valuation of the property of each county, city, village and town of the state. From all the sources of information accessible to it the department shall determine and assess the value of all property subject to general property taxation in each county, city, village and town. It shall set down a list of all the counties, cities, villages and towns, and opposite to the name of each county, city, village and town, the valuation thereof so determined by it, which shall be the full value according of its best judgment.

This change, presumably, has the effect of standardizing the system of evaluation in Wisconsin. Thus, municipalities will no longer be able to regulate their debt limits by using differing systems of valuation. In some instances, the change will result in a higher valuation, allowing the municipality to increase its ability to borrow.

CONCLUSION

It is significant and commendable that Wisconsin has elected to remedy the problems entailed in municipal debt limit law "Through the deliberate and thoughtful process of constitutional amendment,"[75] rather than that "the scrutiny, ingenuity and ability for critical analysis of the bar may hereafter discover some possible meaning [of the constitution] beyond what now appears to be so clearly expressed."[76] Because of this, the integrity of the Wisconsin constitution will be kept intact.

However, the election to proceed in this manner has imposed some added responsibilities, especially on members of the Bar. One of the contentions in *State ex rel. Thomson v. Peoples State Bank*[77] was that the explanation given to the voters before the election on the 1955 amendment was erroneous and misleading. This can be expected since many laymen cannot comprehend the meaning of the language used in statutes and constitutions. Since there is a good possibility that three amendments to Art. XI, sec. 3 will soon be up for a vote, and, if the language in *State ex rel. Rogers v. Milligan*[78] is adhered to, more amendments will be proposed and be subjected to a popular vote in the future, the Bar should inform themselves so as to be able in turn to inform the voting populace of the effect of such amendments. It must be made clear to the voters that regardless of what is proposed, the previously sanctioned methods of avoiding the limitation, especially

[75] State *ex rel.* Rogers v. Milligan, *supra* note 27, at 558.
[76] Hebard v. Ashland County, *supra* note 13.
[77] 272 Wis. 614, 76 N.W. 2d 370 (1956).
[78] *Supra* note 27, at 558.

lease-financing, multiple taxing districts, and contracts for the construction and improvement of income-producing utilities, will still be utilized. It is only in this way that the people can make a rational decision in regard to proposed amendments and thus be true "authorities over the constitution."

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