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MUNICIPAL BORROWING IN WISCONSIN

CHARLES B. QUARLES*

THE subject of municipal borrowing under the Wisconsin laws is very broad in its scope. It will not be the purpose of this article to deal with the subject in general, but to touch on certain phases only of borrowing by means of so-called full faith and credit or general obligation bonds.

Prior to 1921 the Wisconsin Statutes relating to the issuance of bonds by the various municipalities of the state, such as counties, cities, villages, towns, and school districts, were in a great state of confusion. A lawyer employed to draft proceedings for the issuance of bonds was required to study the statutes relating to the particular form of municipality involved, the general statutes, and the constitution. After the bonds had been voted on and authorized, he very frequently found that he had overlooked some statute hidden away where the index could not readily find it. The procedure not only varied as between towns, cities, villages and school districts, but there was very little uniformity even as to special charter and general charter cities and there was some variation for cities of the various classes.

In order to simplify the procedure the legislature by chapter 576 of the laws of 1921 adopted chapter 67 of the statutes codifying and simplifying the procedure for all the municipalities and repealing all inconsistent laws. This legislation was a great improvement over the former chaotic condition. Since that time each successive legislature has attempted to further simplify the procedure and although there has been a constant current toward simplification there have been frequent eddies and cross-currents tending toward diversification and confusion.

In setting up an issue of municipal bonds or in passing on the validity of such bonds there are certain major principles which must be carefully considered.

The Wisconsin constitution in article XI, section 3, limits the indebtedness of all Wisconsin municipalities to an aggregate of 5 per cent of the value of the taxable property therein to be ascertained by the last assessment for state and county taxes. It also provides that before or at the time of incurring any indebtedness provision must

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be made for the collection of a direct annual tax to pay the interest on the debt as it falls due and also to pay and discharge the principal within twenty years from the time of contracting the same. There are certain exceptions to this time limit not applicable here.

It is therefore essential in the first place to ascertain the amount of the existing indebtedness of the municipality and the assessed valuation of all the taxable property in order to determine the legal limit of indebtedness. In the ascertainment of both of these amounts great care must be used. It will be noted that the constitution in limiting the debt makes no exceptions whatever, but includes indebtedness for all purposes. It is essential therefore to ascertain not only the amount of bonds previously issued and outstanding, but the amount, if any, of any other debts that may still be unpaid.

Many municipalities issue so-called special assessment bonds, which, if properly authorized, are not a municipal obligation within the meaning of the constitutional provision last referred to. These bonds while issued by the city or village are payable only out of assessments made against specific real estate and there is no obligation on the part of the municipality other than to collect the assessments and pay them over to the bondholders. Unless these bonds are carefully prepared and authorized, there is danger of their becoming a municipal obligation and thereby limiting the power of the municipality to issue further general obligation bonds. In one case a city authorized such assessments for local improvements and authorized the issuance of bonds that were not intended to be a municipal obligation. A mistake was made in the form of the bond, so that the city by a recital in the bonds admitted its indebtedness and promised to pay the bonds at maturity. Our Supreme Court held that in so doing the city made the bonds a general obligation. (*Fowler v. Superior.*)¹

Wisconsin statutes authorize cities to borrow by means of mortgages against public utilities, the interest and principal to be paid only out of the earnings of the utilities. The statute authorizing such issuance provides that they shall not be general obligations of the city and our Supreme Court has held that if properly authorized they do not limit further indebtedness. Great care must be exercised in the issuance of these bonds to avoid similar recitals. In the case of *State ex rel Morgan v. Portage*,² it was held that the bonds cannot be secured by any previously owned property because to do so would make it necessary for the city to pay the bonds at maturity in order to protect its property, thus incurring a general obligation.

¹ 85 Wis. 411, 54 N.W. 800.

² 174 Wis. 588, 184 N.W. 376.

The writer cites these illustrations to show that in determining the amount of existing indebtedness one must have the records of the municipality carefully examined in order to determine exactly what obligations have already been incurred.

Equal care must be used in order to determine the assessed valuation of the taxable property of the municipality. Until the decision of the Supreme Court in *School District v. First Wisconsin Company*,³ was handed down there was some doubt in the minds of lawyers as to the proper method of determining the value of the taxable property. Although the constitution uses the words "the last assessment for state and county taxes," it is rather difficult to know just what is meant by this language, as strictly there is no assessment for state and county taxes.

Each local assessor makes an assessment of all the taxable property in his district. These assessments are then revised by the local board of review. After this the revised figures are again revised for certain purposes by the county board and for other purposes are again revised by the state tax commission. Having this in mind the legislature apparently assumed that the so-called last assessment might be determined by the character of the bonds to be issued. It therefore provided in section 67.01-(4) that "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, and in a county to such valuation as last established by the tax commission." The statute also provided in section 67.03-(1) for a determination in accordance with the assessment roll in cities of the first class.

In two early decisions, *State ex rel etc., Company v. Tomahawk*,⁴ and *Stedman v. Berlin*,⁵ the Supreme Court said that the last assessment for state and county taxes within the meaning of the constitution 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." It was assumed by many lawyers that this statement was not necessary for the decisions and would not be followed if the question should again be brought to the attention of the court. Following the statute a school district voted a large issue of bonds on the assumption that in doing so it did not bring its indebtedness beyond the constitutional limit. This assumption was based upon the fact that the valuation of the taxable property in the district as equalized by the county board was sufficient to warrant

³ 187 Wis. 150, 203 N.W. 939.

⁴ 96 Wis. 73, 71 N.W. 86.

⁵ 97 Wis. 505, 73 N.W. 57.

the indebtedness. The Supreme Court, however, in the case of *School District v. First Wisconsin Company*,⁶ adhered to the rule as expressed in the earlier decisions and held that the bonds could not legally be issued. This decision made it necessary to revise the statutes and the present law provides: "Every reference to the value of taxable property in a municipality [in these statutes] refers to such value according to the last assessment thereof for state and county taxes."

Relative to the matter of exceeding the constitutional debt limit a very interesting decision was rendered by the Supreme Court of the United States.⁷ Some municipalities are permitted to issue bonds for the purpose of refunding prior indebtedness. The proceeds of such bonds must in many instances be used for the purpose of retiring bonds then outstanding. The general rule of the state courts is that during the interval in which the refunding bonds are outstanding and before the retirement of the other bonds, even though the sum of the two, together with the other indebtedness, will exceed the constitutional limitation, there is no excess in fact because the refunding bonds are really but an extension of the old.

In *Doon Township v. Cummins*,⁸ the Supreme Court held the contrary, ruling that the refunding bonds cannot be issued if the indebtedness thus incurred would bring the municipality beyond the legal limit, notwithstanding the proceeds will immediately be used for the retirement of other bonds.

The Wisconsin Supreme Court, in *Montpelier S. B. & T. Co. v. School District*,⁹ cites the Doon case and cases from the state decisions and indicates its willingness to follow the general rule rather than that of the Supreme Court of the United States, although subsequent portions of the opinion show that it was not necessary to directly pass upon this question.

The third constitutional requirement which must be carefully followed is that a direct annual tax must be levied at or before the time of the incurring of the indebtedness sufficient to repay the principal and interest as it matures. Although the constitution states that *provision* must be made for the levy of a tax, the Supreme Court holds that a tax must be levied in such form that it cannot be repealed and that it is not sufficient for the municipality to merely direct that taxes shall be levied in the future (*Kyes v. St. Croix County*¹⁰ and *Borner v. Prescott*¹¹). This is sound because a mere direction which would

⁶ 187 Wis. 150, 203 N.W. 939.

⁷ — U.S. —

⁸ 142 U.S. 366.

⁹ 115 Wis. 622, 630, 92 N.W. 439.

¹⁰ 108 Wis. 136, 83 N.W. 637.

¹¹ 150 Wis. 197, 136 N.W. 552.

not be binding on a future legislative body would not meet the spirit of the constitution and would not assure the bondholder of the return of the money loaned or of the interest on it.

Any resolution or ordinance authorizing a bond issue must be limited to a single purpose. For instance, if a city should desire to borrow \$100,000 to construct a city hall, and another \$100,000 to build schools, it could not legally vote an issue of \$200,000 for these two purposes, even though the issue of such bonds should be approved at a referendum. This for the reason that the approval of the two combined does not prove that the electors would have approved each separately. Rather than not have the schools, many persons may have voted for the entire issue, who would not have favored the city hall and vice versa (*Neacy v. Milwaukee*,¹² *State v. Williams*¹³).

To vote for one issue for more than one school, has been held to be but a vote for a single purpose (*Muskegon v. Vander Laan*¹⁴).

It might be assumed by readers of this article that municipal bonds may be a dangerous form of investment because of the possibility of error in the adoption of proceedings leading up to the issue or because of the possibility of error in the computation of the legal limit of indebtedness resulting in bonds being held void for want of power on the part of the municipality. This, however, is not the case. Municipal bonds are generally considered to be a very safe form of investment for the reason that investment houses before purchasing the bonds are very careful to have a certified transcript of all proceedings scrutinized by an attorney experienced in that field of law and for the further reason that such institutions insist upon the bonds containing recitals on the part of the borrower to the effect that all statutory and constitutional requirements have been complied with. Such recitals have been held by both the state and federal courts to estop the municipality from contesting the validity of bonds on any such ground after the bonds have come into the hands of innocent purchasers.

Defects in matter of procedure are also of minor importance after the municipality has received the money for the bonds because of apt curative provisions in the statutes.

The pitfalls above referred to and others of similar character are therefore of much greater danger to the banks or other financial institutions interested in initially purchasing the bonds than they are to the public, who may buy the bonds and keep them as innocent holders.

¹² 142 Wis. 590.

¹³ 140 Wis. 634, 640.

¹⁴ 178 N.W. 424, (Mich.)

Although the statutes of Wisconsin have been materially improved by the codification of 1921, there are many details on which further improvement could be made for the benefit of towns, counties, cities, villages, and school districts, as well as for persons interested in purchasing such bonds.

Chapter 67 of the statutes was drafted largely by taking the various provisions of the old statutes relating to borrowing by municipalities and incorporating the material parts thereof and rewording and standardizing the procedure as much as possible. The statutes now permit bonds to be issued by municipal corporations for certain specified purposes only, a long list of purposes being provided for each municipality. If a city council desires to erect a public building or to provide some other municipal improvement, it must examine the statutes and find specific authorization for bonds for that purpose. Otherwise the improvement must be paid for out of the general tax levy or in some other manner. The same is true as to each other municipality.

It would seem that it would be much better to permit any municipality to borrow up to the authorized limit of its indebtedness for any purpose for which it might have justifiable need for money.

Bonds issued by a county must first be approved by the county board and bonds of certain kinds must then be approved by a referendum. Other issues require no referendum. If bonds are voted by a town or village they must in each instance be submitted to a vote of the electors. In cities certain classes of bonds must be approved by the voters and in others there need be no referendum unless a petition is filed with the council within a limited time asking for such a vote. It is hard to see any reason for the referendum being required in certain cases and not in others. In any event it is a very expensive proceeding and entails a great deal of delay which besides being expensive frequently in whole or in part defeats the purpose of the borrowing.

For some reason unknown to the writer the statutes for many years have prohibited school districts to borrow money for a period of more than fifteen years. This limitation was retained in the codification of 1921. There seems to be no reason why the constitutional limit of twenty years should not be just as applicable to a school district as to any other municipality.

As a sample of the cross-current of confusion that keeps coming in there is a statute (Chapter 463, Laws of 1927) which now requires in nearly all school district bond issues that after the electors have voted the bonds a referendum must be held in which the voters of the district are given an opportunity to vote by ballot. This seems to the writer wholly unnecessary in entailing an unwarranted delay and ex-

pense for the reason that when the electors have expressed their desires at a regularly conducted meeting there would seem to be no reason for again submitting the matter to vote.

It seems strange that a simple workable law cannot be adopted by which all municipalities could in a comparatively simple manner vote bonds for any desired public improvement. Such a law could easily be prepared and its adoption would inure to the benefit of the municipalities and consequently to the benefit of all the taxpayers therein.