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County Debt in Kentucky

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COUNTY DEBT DIFFICULTIES IN KENTUCKY

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Prior to 1890 there existed no constitutional restraints on county indebtedness. The Third Constitution contained a prohibition respecting state indebtedness[1] which was carried over as section 49 of the present Constitution, but there was nothing to prevent local subdivisions from plunging indiscriminately into debt. "That they had done so and that the situation had become a grave one is apparent from even a casual reading of the Constitutional Debates of 1890. "[2] The convention gave early consideration to the local debt situation, and, except as amended by section 157a in 1909, present constitutional debt limitations are a result of its deliberations.[3]

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[1] Art. II, sec. 35.

[2] Judge R. P Dietzman, *Constitutional Limitations on Public Indebtedness* (1931), 20 Ky L. J. 75, 77. See also Beard v. Hopkinsville, 95 Ky. 239, 247, 24 S. W 872, 874 (1894), Belknap v. City of Louisville, 99 Ky. 474, 480, 36 S. W 1118, 1119 (1896).

[3] Constitutional Debates of 1890, vol. I, pp. 70, 85, 130, 135, 162, 164, 165, 167, 168, 172, 174, 178, 189, 190, 195, 211, 229, 254, 262, 266, vol. II, pp. 2769-2786, 2884-2904, 2958-2980, vol. III, p. 4315, vol. IV, pp. 5224-5230, 5593-5595, 6039-6040, 6042-6043; Judge Dietzman, *Constitutional Limitations on Public Indebtedness* (1931), 20 Ky. L. J. 75, 77; McDonald v. City of Lexington, 253 Ky. 585, 588, 69 S. W (2d) 1065, 1066 (1934)

I. COUNTY DEBT LIMITATIONS

After setting out a 50-cent maximum tax levy for other than school purposes, section 157 of the present Constitution provides the following limitations

"*No county shall* be authorized or permitted to *become indebted,* in any manner or for any purpose, *in an amount exceeding in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof,* voting at an election to be held for the purpose; *and any indebtedness contracted in violation of this section shall be void.* Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume the same." (Emphasis the writer's.)

Section 158 provides

"*Counties shall not* be authorized or permitted to *incur indebtedness to an amount,* including existing indebtedness, in the aggregate *exceeding (2 per cent) on the value of the taxable property therein,* to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness unless in case of emergency, the public health or safety should so require." (Emphasis the writer's.)

The following sentence was added to safeguard debts existing at the time the Constitution was adopted.

"Nothing herein shall prevent the issue of renewal bonds, or bonds to fund the floating indebtedness of any county"

Section 159 provides

"Whenever *any county* is authorized to contract an indebtedness, it *shall be required,* at the same time, *to provide for the collection of an annual tax sufficient to pay the interest* on said indebtedness, *and* to create a sinking fund for the *principal* thereof, *within not more than forty years* from the time of contracting the same." (Emphasis the writer's.)

The prohibitions contained in these constitutional mandates are clear and definite. With all deference due the courts, if these provisions had been interpreted as they were intended, counties would be forced to live within their incomes and to issue bonds only to meet emergencies and to provide for extraordinary capital outlays. "But the provisions were unfortunately construed in other fashion and that construction has so entered into the warp and woof of the fabric of our Constitution that we cannot get back to an effectual restraint without a revision of these provisions."[4] It is for this reason that

[4] Judge Dietzman, *Constitutional Limitations on Public Indebtedness* (1931), 20 Ky. L. J. 78. Also see dissenting opinion of Judge Rees in City of Frankfort v Fuss, 235 Ky 143, 158, 29 S. W (2d) 603, 610 (1930).

most administrative difficulties have arisen. Fiscal abuses are an accomplished fact, it remains for the debt administrator to cut the "Gordian knot."

No doubt the Court in interpreting these provisions was influenced by judicial precedents relative to constructions placed on constitutional limitations respecting state indebtedness. Recently, however, the state debt has been reduced below the $500,000 constitutional maximum, and legislation has been enacted to moderate the influence of the term "indebtedness" as embodied in section 47 of the Constitution.[5] But the situation as relates to county indebtedness is otherwise. Here, it is almost imperative for the courts to abide by precedents, even though these rarely are consistent and certainly are antithetical to debt limitation motives as originally intended. Until existing county debts have been refinanced, amortized, compromised, repudiated, or retired, the courts probably will continue to experience difficulty in following established interpretations and, at the same time, in employing a logical sequence of reasoning. The status of a debt incurred in accordance with prior holdings of the Court cannot justly be abrogated by subsequent decisions. The sheer force of circumstances impels the Court to perpetuate its own inconsistencies.

NON-VOTED GENERAL FUND DEBT LIMITATIONS

Judicial construction of constitutional provisions concerning county general fund indebtedness has generally been characterized by a divided court. Reversed decisions, vigorous dissents, and irreconcilable opinions have been the rule rather than the exception. Actions of county officials have not always been regular; and county records, in many instances, are non-existent, poorly kept, or designed to be misleading. As a consequence it is impossible to ascertain with absolute certainty the validity of non-voted general fund debts, both floating and funded, of many counties. Many perplexing administrative difficulties will inevitably accompany any attempt to refinance these debts. Certain of the more apparent difficulties which are already evident may now be observed.

Nature of the indebtedness.—Section 157 of the Constitution under which large amounts of general fund debts have been

[5] Acts 1942, chap. 39, sec. 1a, p. 282.

incurred without a vote of the people, was construed in *O'Bryan* v *City of Owensboro*[6] in the same manner as prior prohibitions on state indebtedness had been construed. Consequently, general fund indebtedness in the meaning of this section is of a voluntary contractual nature and does not include necessary governmental expenditures, which are compulsory obligations cast on the county by law.[7] This meaning, however, is restricted somewhat in that total obligations must not exceed the income and revenues provided for the year[8] and debts may not now be contracted to be paid in subsequent years.[9]

The object of the limitation is to "protect the people from their own improvidence and that of their officials,"[10] but the accomplishment of this objective was practically nullified when necessary governmental expenditures were excluded. Experience has shown that the exclusion of so-called necessary expenditures has merely served to weaken debt limitations and to invite administrative difficulties and ineffectual budgetary control. Many counties have consistently made a practice of spending early in the fiscal year available funds for any and all purposes. Then, for the remainder of the year the expense of conducting the necessary functions of government has been met by warrant issues or unpaid claims. Such a practice circumvents all budget requirements and debt limitations, and its continued exercise throughout a series of years has inevitably resulted in the accumulation of large floating debts and financial embarrassment. Where this is the case, counties have experienced, and many are continuing to experience, considerable difficulty in administering their financial affairs.

The court has never defined precisely what is meant by "necessary governmental expenditures." A few examples, however, may serve to illustrate the delineation which has been made between those expenses which are necessary and those which are unnecessary Debts which have been held not prohibited by section 157 include those for protection of life and prop-

[6] 113 Ky. 680, 691, 68 S. W 858, 862 (1902).
[7] Hopkins County v St. Bernard Coal Company, 114 Ky. 153, 158, 70 S. W 289, 290 (1902).
[8] City of Covington v. McKenna, 99 Ky. 508, 514, 36 S. W 518, 520 (1896).
[9] Southern Bitulithic Company v. DeTreville, 156 Ky 513, 522, 161 S. W 560, 564 (1913).
[10] Hopkins County v. St. Bernard Coal Company, 114 Ky. 153, 158, 70 S. W 289, 290 (1902).

erty from mob violence,[11] fixed liabilities as officials' salaries,[12] judgments on verdicts for damages by reason of the unsafe condition of city streets,[13] election expenses and expenses of maintaining county hospitals,[14] and expenses incident to protection of public health and abatement of nuisances.[15] But outlays for employment of farm agents,[16] construction and maintenance of roads and bridges,[17] and erection of courthouses[18] have been deemed unnecessary' governmental expenditures. Obviously the local finance officer, in attempting to ascertain the validity of debts before giving his official approval, will have to search these opinions with extreme diligence to find any principle on which to rely in determining the necessity for any expenditure not included in either of the particular categories outlined above. Furthermore, such distinctions have no common sense basis and bear little, if any, relation to sensible fiscal management.

Limitation measured by "the income and revenues provided for the year"—The decisions of the Court respecting income and revenue estimates are even more unfounded and prejudicial to practicable financial administration and debt control than the obviously arbitrary and categorical classification of the objects for which debts may be legitimately incurred. With the exception of ad valorem taxes, general fund cash balances, and possibly

[11] *Ibid.*

[12] Overall v Madisonville, 125 Ky. 684, 696, 102 S. W 278, 282 (1907), Randolph v Shelby County, 257 Ky 297, 302, 77 S. W (2d) 961, 963 (1934).

[13] Menar v Sanders, 169 Ky 285, 183 S. W 949 (1916).

[14] Randolph v. Shelby County, 257 Ky 297, 302, 77 S. W (2d) 961, 963 (1934).

[15] Francis v City of Bowling Green, 259 Ky 525, 530, 82 S. W (2d) 804, 806 (1935).

[16] Carman and University of Ky. v. Hickman County, 185 Ky. 630, 646, 215 S. W 408, 415 (1919), County Fiscal Court v. Russell County, 246 Ky. 529, 55 S. W (2d) 337 (1932) Adair County Farm Bureau v Fiscal Court of Adair County, 263 Ky. 23, 91 S. W (2d) 537 (1936). In Carman and University of Ky. v. Hickman County, county officers were defined as being those officers who are necessary to carry on the business of the county such as judges, jailers, and the like. A person employed to perform some other service not necessary to the conduct of the affairs of the county and whom the fiscal court may or may not employ in its discretion is not a county officer in the sense that jailers and judges are.

[17] Nelson County Fiscal Court v. McCrocklin, 175 Ky 199, 209, 194 S. W 323, 327 (1917).

[18] Carter v. Kruger and Son, 175 Ky. 399, 408, 194 S. W 553, 557 (1917).

poll taxes, there is uncertainty as to what receipts may be included in income and revenue estimates. The initial interpretation of the Court in 1907 in *Overall* v *City of Madisonville*[19] permitted the inclusion of collectible delinquent taxes of previous years and funds in the city treasury accumulated from license taxes, fines, etc., but monies to be derived by a city during an ensuing year from fines and license fees could not be included in revenue estimates in determining the amount of debt that could be incurred, as these are too uncertain and indefinite. Fortunately, subsequent decisions have not in all particulars adhered closely to the reasoning employed in the Madisonville case.[20]

In 1908, in *Lawrence County* v. *Lawrence Fiscal Court*[21] the Court defined income and revenue for the year as including "resources of the municipality which are reasonably solvent, and which, in ordinary events may be fairly relied on as equivalent to cash." Another definition was given in 1917 when the income and revenue for the year was held to include "something beyond, or in addition to, the taxes collected for such year; but, if so, it must consist of sources owned by the county and in the hands of the county treasurer or fiscal court, which are not only reasonably solvent, but which, in ordinary events, may be fairly relied on as equivalent to cash."[22]

In 1923 it was held permissible to include poll taxes in revenue estimates;[23] and, since *Billeter and Wiley* v. *State Highway Commission*[24] in 1924, which upheld the State Highway Commission in including anticipated revenues from motor vehicle registration fees, the Court has become increasingly lenient in permitting the inclusion of miscellaneous revenue receipts in

[19] 125 Ky. 684, 695, 102 S. W 278, 281 (1907).

[20] Lawrence County v. Lawrence Fiscal Court, 130 Ky 587, 113 S. W 824 (1908) McCrocklin v Nelson County Fiscal Court, 174 Ky. 308, 192 S. W 494 (1917), Wesley v. Tarter, County Judge, 197 Ky. 493, 247 S. W 353 (1923), and especially Billeter and Wiley v. State Highway Commission, 203 Ky. 15, 261 S. W 855 (1924), Premier Construction Company v. Kimmell, 230 Ky. 439, 20 S. W (2d) 77 (1929), Nourse v. City of Russellville, 265 Ky 96, 95 S. W (2d) 1096 (1936), and Coffman v. Central City, 267 Ky. 26, 101 S. W (2d) 204 (1937).

[21] 130 Ky. 587, 591, 113 S. W 824, 825.

[22] McCrocklin v. Nelson County Fiscal Court, 174 Ky. 308, 313, 192 S. W 494, 497.

[23] Wesley v. Tarter, County Judge, 197 Ky. 493, 495, 247 S. W 353.

[24] 203 Ky. 15, 29, 261 S. W 855, 861.

income and revenue estimates. The inclusion of motor vehicle registrations was upheld on the ground that they had become a fairly stable source of revenue. It was possibly with this decision in mind that Judge Dietzman in 1929 reluctantly[25] wrote the decision of the Court which followed earlier decisions and denied to Henderson County the privilege of including anticipated receipts from occupational licenses in its revenue estimates.[26]

More recent decisions continue to indicate the Court no longer intends to abide strictly by precedent. It should be observed, however, that these later decisions also involve the validity of debts to be funded, and that the Court has been more lenient in upholding the validity of debts than in authorizing their incurment. Relative to the right of municipalities to issue funding bonds to pay outstanding floating indebtedness, *Nourse* v *City of Russellville*[27] held that the inclusion of license fees, fines, receipts from sale of cemetery lots, and miscellaneous receipts did not render the indebtedness invalid. The following year, 1937, when both the right to fund existing indebtedness and the authority to incur additional debt were involved, the inclusion of city licenses and occupational taxes was authorized where adequate experience had demonstrated that the return from such sources had become stabilized and dependable, and, where anticipated revenues from ad valorem, poll and license taxes, and actual receipts from fines and miscellaneous items in the aggregate exceed expenditures and obligations assumed each year, these could also be included, notwithstanding the fact that delinquent taxes could not be included.[28]

Perhaps the complete failure of the Court to harmonize its decisions with sound principles of fiscal administration can be made more apparent by singling out for more exhaustive study the treatment accorded a single item of income, delinquent taxes. Sound administration requires deduction of anticipated current year delinquent taxes and the inclusion of expected collections from prior delinquents in making revenue estimates.

[25] His reluctance is evidenced by his personal dissent voiced in the opinion.

[26] Premier Construction Company v Kimmell, 230 Ky 439, 442, 20 S. W (2d) 77, 79.

[27] 265 Ky. 96, 99, 95 S. W (2d) 1096, 1098 (1936).

[28] Coffman v. Central City, 267 Ky. 26, 101 S. W (2d) 204. The Court pointed out, however, that fines and miscellaneous receipts could be considered retroactively, but not prospectively.

The reluctance of the Court to permit the inclusion of expected collections from delinquent taxes in county revenue estimates has been noted. But in respect to revenue estimates for school purposes an entirely different construction has prevailed. School superintendents have not been permitted to make any allowance for expected current year delinquent taxes, and local levying bodies have been upheld in refusing to make the required levies so long as such deductions were included in budget estimates. This construction has been based on the theory that to allow for expected delinquencies would unjustifiably saddle taxpayers who are not delinquent with increased tax levies. In harmony with this interpretation boards of education have been authorized to issue tax anticipation notes to cover revenue deficiencies resulting from uncollected taxes.[29] Seemingly, the treatment accorded the inclusion of delinquent taxes in revenue estimates has been based in the case of counties on maintaining inviolate tax and debt limitations and in the case of school districts on safeguarding the taxpayer from unnecessary levies. Apparently, the Court has failed to realize that tax and debt limitations and safeguards against unnecessary tax levies are merely means of achieving economical and effective administration of county affairs, which is more basic and fundamental. In its earlier decisions, when municipal budgeting was in an embryonic stage of development, the Court was probably justified in taking a stand against providing in school budgets for anticipated tax delinquencies, but the recent decision in the Paducah case would have been more in line with progressive judicial thinking if cognizance had been taken of the significance of modern budgetary progress. At any rate, the fallacious reasoning of the Court respecting the treatment to be accorded tax delinquencies has tended to inhibit the incurring of debt by counties, to encourage school districts to create debts, and to hamstring both concerning sensible fiscal administration.

Judicial encouragement to maladministration of county

[29] City of Owensboro v. Board of Trustees of Owensboro Public Schools, 10 Ky. L. R. 40 (1888), City of Lexington v Board of Education of City of Lexington, 23 Ky L. R. 1663, 65 S. W 827, 98 A. L. R. 501 N. (1901), Board of Education of Newport, Ky v City of Newport, 171 Ky 234, 188 S. W 360 (1916), Board of Council of the City of Winchester v. Board of Education of City of Winchester, 171 Ky. 692, 699, 188 S. W 755, 757 (1916), City of Paducah v. Board of Education of Paducah, 289 Ky. 284, 158 S. W (2d) 615 (1942)

general funds.—In addition to having excluded necessary governmental expenditures from debt limitations in 1902, continued laxity by the Kentucky Court of Appeals prior to 1938[30] in construing section 157 of the Constitution went a long way toward removing all restraints and limitations on county expenditures and the creation of general fund indebtedness. Beginning with *City of Providence* v. *Providence Electric Light Co.*,[31] the amount of indebtedness which a county could incur during any one year was to be ascertained by the *maximum permissible tax levy* of 50 cents per $100 of assessed valuation and *not by the actual levy*. The long line of decisions which for over 30 years adhered to this reasoning savor of legislation by judicial construction. This view is also supported by continued dissents by a minority of the Court.[32] What relation the maximum permissible tax levy of a county bears to its actual revenues is incomprehensible. The complete lack of such a connection is so obvious that Judge Thomas in writing the majority opinion of the Court in *Hill* v *Covington*,[33] which followed the Providence case, took the unusual position of giving a personal dissent and explained that he and others had disagreed with the majority of the Court throughout their tenure as members.

In 1917, in *McCrocklin* v *Nelson County Fiscal Court*[34] and *Nelson County Fiscal Court* v *McCrocklin*[35] constitutional restraints on county indebtedness were again mitigated considerably when the Court of Appeals sanctioned the practice of fiscal courts of forwarding general fund deficits to succeeding years for payment. This sanction, at least in theory, was weakened somewhat in holding that fiscal courts must have acted in good faith in overestimating receipts or in underestimating tax delinquencies, and that account must be taken of the amount necessary to defray current and fixed expenses for essential gov-

[30] The tendency of the Court in more recent years has been to revert to a more stringent construction of debt limitations.

[31] 122 Ky. 237, 243, 91 S. W 664, 665 (1906). Judge Thomas, in Hockensmith v County Board of Education of Franklin County, 240 Ky. 76, 79, 41 S. W (2d) 656, 657 (1931), pointed out that the Court in following the decision in the Providence case had never mentioned or referred to section 4281u-4 of the statutes which limits county expenditures to taxes "actually levied and collected for that year."

[32] Judge Dietzman, *Constitutional Limitations on Public Indebtedness* (1931), 20 Ky. L. J. 75, 78.

[33] 264 Ky. 618, 623, 95 S. W (2d) 278, 280 (1936)

[34] 174 Ky. 308, 321, 192 S. W 494, 500.

[35] 175 Ky. 199, 205, 194 S. W 323, 326.

ernmental purposes. Counties were also denied the authority to fund floating debts and were directed to recall existing bonds and reduce them to interest-bearing warrants.

Whatever restraining influence these latter interpretations may have had on the creation of floating debts was swept away ten years later in *Vaughan* v. *City of Corbin*[36] when it was held that under authority of the last sentence in section 158 of the Constitution counties could fund floating debts. No doubt this provision was intended to have application to floating debts existing at the time the Constitution was adopted.[37] Otherwise, it would have authorized the very thing which section 157 was designed to prohibit without a vote of the people. That this was in effect what happened is evidenced by Judge Dietzman who later wrote that there resulted "a steady procession of cases to our court, most of them very friendly indeed, asking in effect the validation of refunding bonds issued without a vote of the people."[38] The decision in the Vaughan case has been followed consistently, but not without vigorous minority dissents.[39] However, since the 1938 decision in *Payne* v. *Covington*,[40] which held invalid all debts in excess of annual revenue receipts, the authority of counties to fund subsequent floating debts may again be denied.

Apparently, 1938 marked a turning point in the Court of Appeals' interpretation of section 157 of the Constitution. In the Covington case and in subsequent cases[41] the Court has brought its decisions more in accord with those of other jurisdictions and with those of the federal courts. In addition to removing any legal justification for debts in excess of constitutional limits it has held the maximum indebtedness which a

[36] 217 Ky. 521, 523, 289 S. W 1104, 1105 (1927).

[37] First Trust Co. of St. Paul v. Board of Education of Whitley County, Ky., 5 F Supp. 49 (E. D. Ky. 1934).

[38] See Judge Dietzman and cases cited, *Constitutional Limitations on Public Indebtedness* (1931), 20 Ky. L. J. 75, 82 note 6.

[39] See City of Frankfort v. Fuss, 235 Ky. 143, 151, 29 S. W (2d) 603, 607 (1930), Elliott v. Fiscal Court of Pike County, 237 Ky. 797, 804, 36 S. W (2d) 619, 622 (1931); Hall v. Fiscal Court of Fleming County, 239 Ky. 425, 428, 39 S. W (2d) 656, 657 (1931), Hill v. City of Covington, 264 Ky. 618, 623, 95 S. W (2d) 278, 280 (1936).

[40] 276 Ky. 380, 123 S. W (2d) 1045 (1938).

[41] Henderson v. Town of Mt. Vernon, 279 Ky. 829, 132 S. W (2d) 322 (1939), Fulton County Fiscal Court v. Southern Bell Telephone and Telegraph Co., 285 Ky. 17, 146 S. W (2d) 15 (1940), Moss v. City of Paducah, 285 Ky. 100, 147 S. W (2d) 59 (1941), Chestnut v. City of Bowling Green, 285 Ky. 800, 149 S. W (2d) 523 (1941).

county may incur during any one year must be governed by revenues actually realized. In overruling all cases adhering to the decision laid down in the Providence case, the Court remarked that these decisions had let down "the barriers to the mischief obviously intended by the framers of the Constitution to be prohibited, and invited an orgy of maladministration(,) waste of public funds(,) and accumulation of indebtedness in counties and municipalities of alarming and in many instances ruinous proportions."[42] No doubt this is a strong statement of the mischief that had been wrought, but the language of the Court clearly implies that it had been influenced by the propensity of county officials to abuse the administrative freedom and discretion permitted under prior decisions.

Notice was served in the Covington case that the decision was not to have any retroactive effect but that its prospective effect would be adhered to with scrupulous exactitude. Later cases, where similar issues have been involved, have borne out this note of warning.[43] All officials charged in any manner with duties even remotely connected with local debts and all bondholders and individuals concerned may do well to give these recent cases studious consideration. If implications in the Covington case are, as subsequent decisions would indicate, as potent as they appear, they are virtual reservoirs of forewarnings. For instance, may the inference be drawn that all actions of county officials will be upheld, where reliance was placed on former decisions of the Court? Also, is the judicial notice to be equally applicable to varying interpretations of the Court respecting other debt limitations?

Administrative quandaries.—Presumably, no question of doubt can exist respecting the validity of funding bonds properly issued since 1932,[44] as these have been issued under court

[42] Payne v Covington, 276 Ky. 380, 388, 123 S. W (2d) 1045, 1049 (1938)

[43] World Fire and Marine Ins. Co. v Tapp; Home Insurance Co. v Same, 279 Ky 423, 431, 130 S. W (2d) 848, 852 (1939) Henderson v. Town of Mt. Vernon, 279 Ky. 829, 830, 132 S. W (2d) 322, 323 (1939) Payne v City of Covington, 283 Ky. 848, 850, 143 S. W (2d) 727, 728 (1940); Chestnut v. City of Bowling Green, 285 Ky 800, 801, 149 S. W (2d) 523, 524 (1941)

[44] Henderson v. Town of Mt. Vernon, 279 Ky 829, 830, 132 S. W (2d) 322, 323 (1939), Fulton County Fiscal Court v Southern Bell Telephone and Telegraph Co., 285 Ky. 17, 28, 146 S. W (2d) 15, 21 (1940), Moss v City of Paducah, 285 Ky 100, 102, 147 S. W (2d) 59, 61 (1941), Chestnut v. City of Bowling Green, 285 Ky. 800, 801, 149

validation, but, in the words of the local finance officer, "few funding bonds antedating 1932 will bear close scrutiny"[45] Respecting the latter, which constitute the bulk of county general fund indebtedness, it has been necessary for the Court of Appeals on a few occasions complacently to assume or allege, in the absence of definite evidence to the contrary, the validity of certain debts.[46] The local finance officer, though, is not to assume but is to determine the validity of all debts to be funded. This is expressly required of him by law. When this requirement is considered along with the frequent irregular fiscal practices of county officials and the varying interpretations of the courts, some grasp may be obtained of the administrative difficulties incident to refinancing.

No attempt has been made to treat exhaustively the many administrative problems which promise to emerge from judicial constructions of non-voted general fund county debt limitations. It is hoped, however, that some of the most apparent problems have been indicated, others may be observed in connection with constructions of different constitutional debt limitations to be noted later.

VOTED GENERAL FUND DEBT LIMITATIONS

With the assent of "two-thirds of the voters, voting at an election to be held for the purpose" counties may create indebtedness in excess of the income and revenues provided for the year. This exception to the income limitation, together with many other interesting questions arising in connection with attempts of the Court to harmonize different constitutional pro-

S. W (2d) 523, 524 (1941). Also, see Hall v. Fiscal Court of Fleming County, 239 Ky 425, 39 S. W (2d) 656 (1931).

[45] H. Clyde Reeves, *Report of the State Local Finance Officer* (1941), p. 13.

[46] Dietzman, *Constitutional Limitations on Public Indebtedness* (1931), 20 Ky L. J. 75, 80 and Southern Bitulithic Company v De Treville, 156 Ky. 513, 517, 161 S. W 560, 562 (1913). Also, see O'Bryan v. Owensboro, 24 Ky. L. R. 469, 475, 68 S. W 858, 862 (1902), Morris v. Hoagland, 116 S. W 684, 686 (not officially reported) (1909) City of Louisville v. Gosnell, 22 Ky. L. R. 1524, 1525, 61 S. W 476 (1901) City of Frankfort v Morgan, 33 Ky. L. R. 297, 301, 110 S. W 286, 288 (1908), Lankford v. Burton, 165 Ky. 835, 839, 178 S. W 1094, 1096 (1915), Bosworth v. City of Middlesboro, 190 Ky. 246, 253, 227 S. W 170, 173 (1921) City of Marion v Haynes, 157 Ky 687, 693, 164 S. W 79, 82 (1914), Gevedon v. Fiscal Court of Carlisle Co., 263 Ky. 465, 469, 92 S. W (2d) 746, 748 (1936).

visions applicable to voted general fund debt limitations, have caused considerable difficulty, and the facility with which many of these debts may be refinanced will depend in large measure on future clarification of doubtful issues which have arisen.

Requisite majority of voters.—Originally the Court was of the opinion that the question concerning the creation of debts in excess of the income and revenues provided for the year was to be submitted at special elections held expressly for the purpose.[47] But one year later, 1896, it was held unnecessary to hold special elections for this purpose, as such elections could be held along with general elections. At the same time the Court also decided that the assent of two-thirds of all electors voting at the general election was necessary to authorize the indebtedness.[48] But two years later it was deemed sufficient if two-thirds of those voting on the proposition voted for it, regardless of the number of votes cast for other purposes.[49] Apparently, there is no longer any doubt as to the manner and time of holding elections, as the holding of the Montgomery case appears to be well established.

Tax rates to pay indebtedness.—The maximum county tax rate for other than school purposes authorized by section 157 of the Constitution is 50 cents per $100 assessed valuation, but section 159 provides that whenever a county is authorized to incur indebtedness it shall be required to levy a tax sufficient to amortize the obligation within not more than 40 years. Decisions as to which of these provisions is applicable to general fund debts created by a vote of the people, have tended to confuse rather than to clarify the issue. The first construction placed on the 50-cent tax limit was in 1901, when that portion of the general tax levy of Nicholas County in excess of 50 cents was held void.[50] This construction was held applicable to general fund indebtedness until 1917 when, in *City of Winchester* v. *Nelson,*

[47] Fidelity Trust and Safety Vault Co. v. City of Morganfield, 96 Ky. 563, 567, 29 S. W 442, 443 (1895).

[48] Belknap v City of Louisville, 99 Ky. 474, 481, 36 S. W 1118, 1120 (1896), McGoodwin v. City of Franklin, 18 Ky. L. R. 324, 37 S. W 1129 (1896).

[49] Montgomery County Fiscal Court v. Trimble, 104 Ky. 629, 47 S. W 773 (1898)

[50] Whaley and others v. Commonwealth; Ratcliff, Sheriff v. Same; and Same v. Nicholas County, 110 Ky. 154, 165, 61 S. W 35, 38 (1901). Also, see Town of Bardwell v. Harlin and others, 118 Ky. 232, 80 S. W 773 (1904).

all prior decisions were expressly overruled and counties were permitted to levy a tax rate in excess of 50 cents to service voted general fund indebtedness.[51] Prior to this decision, however, the Court had remarked in a few instances, while deciding other issues, that counties were privileged to levy taxes in excess of 50 cents per $100 to pay interest and to create sinking funds for the retirement of debts authorized by a vote of the people.[52] Counties were thus confronted with the paradoxical situation of the 50-cent levy serving as a limitation on the power to incur indebtedness but not as a tax rate limitation as intended. However, with respect to general fund obligations created since *Payne* v. *City of Covington* in 1938[53] it appears that the opinion in the Winchester case is no longer controlling and that counties may not now incur general indebtedness with the expectation of meeting it out of the proceeds of an additional levy.[54]

An interesting question arises respecting the general application of the authorized 50-cent levy in those counties with bonded indebtedness created prior to enactment of statutes withdrawing, in whole or in part, certain properties from local taxation. For instance, section 171 of the Constitution as amended in 1915 authorizes a classification of property for taxation. Pursuant thereto the legislature from 1917 to 1924 withdrew in whole or in part many types of property from local taxation.[55] Particular reference is made here to the withdrawal from local taxation in 1916 of shares of stock in bank and trust companies.[56]

[51] 175 Ky. 63, 70, 193 S. W 1040, 1043 (1917). This same conclusion had been reached about two months earlier in McCrocklin v. Nelson County Fiscal Court, 174 Ky. 308, 323, 192 S. W 494, 501 (1917), but this decision did not expressly overrule prior opinions. As this decision appears to have had reference to a hearing on a temporary injunction and was not an appeal from a final judgment, technically, anything said in the opinion has only the legal effect of dicta.

[52] Hammond v. Lester, 159 Ky. 310, 314, 166 S. W 976, 978 (1914), McCrocklin v. Nelson County Fiscal Court, 174 Ky. 308, 323, 192 S. W 494, 501 (1917).

[53] 276 Ky. 380, 123 S. W (2d) 1045.

[54] Fulton County Fiscal Court v. Southern Bell Telephone and Telegraph Co., 285 Ky. 17, 28, 146 S. W (2d) 15, 21 (1940).

[55] Particular mention is made of the following classes of property: (a) unmanufactured agricultural products in manufacturing plant or in hands of producer, (b) stored agricultural products, (c) building and loan associations' stock and bank deposits, (d) other intangibles except franchises, (e) live stock, and (f) machinery used in manufacturing, raw materials, and goods in process.

[56] Acts 1906, chap. 22, p. 88, Art. IV, subdiv. ii, sec. 1 as amended by Acts 1924, chap. 117, p. 415; Carroll's Ky. Stats. (1936), sec. 4092; Ky. Rev. Stats., 136.270.

In 1929 the sheriff of Ohio County was enjoined from collecting a tax bill from the Citizens' Bank of Hartford, Kentucky, insofar as the exemption of the bank shares from local taxation by the 1924 act affected a special levy of 20 cents on each $100 of taxable property for the benefit of road and bridge bonds issued under section 157a of the Constitution prior to enactment of the exemption statute.[57] The decision was based on the ground that (a) the constitutional provision authorizing the levy did not provide any means or machinery for assessment of property, but simply conferred authority to levy taxes within limits defined in accordance with provisions of section 159, requiring an annual levy sufficient to discharge the obligation within 40 years, and (b) the determination of what property is or is not subject to local taxation is a proper subject of legislative power when authorized by the Constitution. What position the Court would take under similar circumstances should contractual rights of bondholders be questioned is not known. The federal courts have repeatedly held a state may not withdraw from a local government power necessary to carry out valid contractual obligations.[58] For example, under authorization of state legislative enactments, Quincy, Illinois, issued bonds and provided for special taxes to pay the interest thereon. Subsequently, the acts were repealed and local areas were denied the power to levy these special taxes, but the Court held that this withdrawal of power was a nullity in so far as it affected contractual relations between the city and its bondholders.[59] If the contractual rights of creditors were at stake, what position would the Kentucky courts take? It is surprising that the issue has not been presented for adjudication.

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[57] Jones, Sheriff v Citizens' Bank of Hartford, 228 Ky. 699, 15 S. W (2d) 468 (1929)

[58] Benjamin Fletcher Wright, *The Contract Clause of the Constitution*, Howard University Press (1938), pp. 226 ff., John Babry Mathews, *The American Constitutional System*, McGraw-Hill Book Company (1940), pp. 420-421. Also, see Wolff v New Orleans, 103 U. S. 358, 364, 26 Law Ed. 395, 398 (1880), Louisiana v. Pilsbury, 105 U. S. 278, 286, 26 Law. Ed. 1090, 1092 (1881), Ralls County Court v. United States, 105 U. S. 733, 738, 26 Law. Ed. 1220, 1222 (1881); Nelson v Police Jury of St. Martin's Parish, 111 U. S. 716, 720, 28 Law. Ed. 574, 576, 4 Sup. Ct. 648 (1884), Fish v. Jefferson Police Jury, 116 U. S. 131, 29 Law. Ed. 587, 6 Sup. Ct. 329 (1885), Hubert v New Orleans, 215 U. S. 170, 175, 54 Law. Ed. 144, 147, 30 Sup. Ct. 40 (1909).

[59] Von Hoffman v Quincy, 4 Wall. 535 (1867).

Limitation measured by assessed valuation.—The second important county debt limitation is measured by 2 per cent of the assessed valuation of all taxable property The Court has never given a complete answer as to what is included in the assessed valuation of taxable property, but it has remarked that the value of property is shown by the assessment[60] as finally equalized,[61] including real and personal property[62] and franchise assessments.[63] Supposedly, all properties subject to local taxation may be included in ascertaining the amount of indebtedness that may be incurred under the 2 per cent assessed value limitation.[64] At least, there is nothing to indicate the contrary So far, no question has been raised relative to the local finance officer's using this measure in approving refunding bonds.

Exceptions to assessed valuation limitation.—"Unless in case of emergency, the public health or safety so require" the 2 per cent limit in section 158 of the Constitution may not be exceeded. With two other exceptions, one of which is no longer of material significance, this constitutes a limitation beyond which even the people may not go.[65] Additional indebtedness may be created for road and bridge purposes under section 157a, and where indebtedness existed prior to the adoption of the Constitution in 1890 a further exception is made. Otherwise, 2 per cent of the assessed value constitutes an overall ceiling above which debts of any character may not be incurred.

Emergencies—

"When an emergency arises such as is named in section 158, then certain limits fixed in that section are removed. But section 157 is still in force, and, while the emergency indebtedness may be incurred, the provisions of section 157 still provide how it may be incurred; that is, by a vote of the people."[66]

"And while we will not undertake to lay down a rule by which

[60] Frost v. Central City, 134 Ky. 434, 442, 120 S. W 367, 369 (1909)

[61] City of Winchester v. Nelson, 175 Ky 63, 66, 193 S. W 1040, 1041 (1917)

[62] Wilkerson v. City of Lexington, 188 Ky. 381, 384, 388, 222 S. W 74, 75, 77 (1920).

[63] City of Winchester v. Nelson, 175 Ky. 63, 66, 193 S. W 1040, 1041 (1917).

[64] Gillis v. Anderson, 256 Ky 472, 479, 76 S. W (2d) 279, 283 (1934), Whitley County v. Hermann, 263 Ky. 440, 445, 92 S. W (2d) 797, 799 (1936).

[65] Knipper v. City of Covington, 109 Ky. 187, 191, 58 S. W 498, 499 (1900).

[66] Knipper v. City of Covington, 109 Ky 187, 192, 58 S. W 498, 500 (1900).

an emergency is to be determined in every case, it is apparent that such an emergency is some sudden or unexpected occasion for action; some unfor(e)seen occurrence, condition, or pressing necessity, that requires immediate attention."[67]

The strictness with which the Court has construed the emergency provision contrasts strikingly with its liberality in construing other debt limitations. Indebtedness in excess of constitutional limitations has been sustained under the emergency provision on only two occasions neither of which involved county debts.[68] In both instances existing water works had failed and no other means of obtaining water was available. But the mere need of water works and a system of sewage in the smaller cities does not constitute an emergency.[69] Other pressing circumstances which have been construed not to constitute an emergency include construction of urgently needed courthouses,[70] the necessity for an electrical lighting plant and system in third and fifth class cities,[71] overcrowding of schools and lack of adequate facilities,[72] and even the burning of a school house.[73]

Devices to avoid debt limitations.—Numerous counties have resorted to a complicated and ingenious device, commonly known as "the holding company plan," in order to escape debt limitations imposed by sections 157 and 158 of the Constitution. The courts have repeatedly upheld the validity of the scheme, and it has been resorted to widely in the construction of schools, courthouses, and hospitals. Since the plan has been upheld on the ground that it did not constitute indebtedness of the county,

[67] City of Marion v. Haynes, 157 Ky. 687, 698, 164 S. W 79, 84 (1914).

[68] Samuels v. Clinton, 184 Ky. 97, 211 S. W 567 (1919), same, 188 Ky. 300, 221 S. W 1075 (1920), Harris v. Morganfield, 201 Ky. 588, 592, 257 S. W 1032, 1034 (1924).

[69] City of Marion v. Haynes, 157 Ky. 687, 698, 164 S. W 79, 84 (1914), Hurst v. Millersburg, 220 Ky. 108, 111, 294 S. W 788, 789 (1927). Though not stated expressly the implication is left that such a state of affairs might constitute an emergency in larger cities.

[70] Fiscal Court of Franklin County v Commonwealth, 139 Ky. 307, 117 S. W 301 (1909), Bradford v Fiscal Court of Bracken County, 159 Ky. 544, 553, 167 S. W 937, 941 (1914).

[71] Samuels v. City of Clinton, 184 Ky. 97, 105, 211 S. W 567, 570 (1919), Ky. Utilities Co. v. Ginsberg, 255 Ky. 148, 163, 72 S. W (2d) 738, 744 (1934).

[72] Buckner v Board of Education of Owensboro City School District, 236 Ky 768, 34 S. W (2d) 236 (1930).

[73] Nelson v. Board of Education, 213 Ky 714, 281 S. W 808 (1926)

a discussion of it here would be largely irrelevant. Though there is no decision to indicate that the device will ever be invalidated, it is mentioned because of the possibility that, since the reinterpretation of section 157 in the Payne case,[74] the courts might regard such a plan as a mere subterfuge to avoid constitutional limitations.[75] The Court might logically consider some county contractual relationships with holding companies to constitute county obligations not essentially different from other county debts. It is a well known fact that the public generally has looked on the device as being a mere subterfuge and has refused to distinguish between obligations incurred under its protection and those incurred through direct bond flotations.

Time Limitation.—The limitations imposed by sections 157 and 158 of the Constitution on the power of counties to create indebtedness have been observed. The first, except as prostituted by the courts, provides a tax rate limitation and a barrier against any character or amount of indebtedness for any purpose beyond the income and revenues provided for the year, and the second provides an additional assessed valuation limitation against the creation of indebtedness in the aggregate. The third major constitutional limitation is provided by section 159, which limits debts to such amounts as may be paid within 40 years and requires levying sufficient taxes and the creation of a sinking fund for the effectuation of this purpose. This limitation "applies to any indebtedness which is transmuted into bonds payable over a period of years."[76]

Duties and privileges inherent in the authority to create indebtedness.—Section 159 as construed is self-executing,[77] and may not be limited by legislative action. The General Assembly in 1932 attempted to restrict the character of bonds

[74] Payne v. Covington, 276 Ky. 380, 123 S. W (2d) 1045 (1938).

[75] For a discussion of the holding company device see John C. Lovett, *"Device for Avoiding Constitutional Limitations on the Indebtedness of School Districts in Kentucky,"* (1941) 29 Ky. L. J. 195.

[76] Herd v City of Middlesboro, 266 Ky. 488, 492, 99 S. W (2d) 458, 460 (1936).

[77] With the exception of Holzhauer v. City of Newport, 94 Ky 396, 407, 22 S. W 752, 754 (1893), which held enabling legislation is required to make section 159 operative, this section has been held consistently to be self-executing; but, since no such consistency has marked constructions of other constitutional debt limitations, construction of 159 may not be firmly established.

which could be issued to serial bonds with annual maturities,[78] but this portion of the act was invalidated as running counter to section 159 of the Constitution. The Court reasoned that the Constitutional "limitation is mandatory, and is addressed to the Legislature as well as to the local legislative bodies. It is not competent for the General Assembly to nullify the plan of financing authorized by the Constitution, or to lessen the range of discretion left to the local governments in such matters."[79] Apparently, little consideration was given to the power of the legislature to prescribe, define, and regulate the powers and duties of fiscal courts.

Though counties apparently are relieved of legislative interference with their privilege of incurring indebtedness, the privilege carries with it certain imperatives duties. One of these is the requirement that within constitutional limits taxes must be levied sufficient to pay interest and to retire the debt within 40 years.[80] Similarly, sinking funds must be provided,[81] beginning with the creation of the debt and continued in force throughout the life of the indebtedness.[82] Should a county fail either to levy sufficient taxes or to create and maintain the required sinking fund, *mandamus* will lie to compel compliance.[83]

[78] Acts 1932, chap. 23, p. 126; Carroll's Ky. Stats. (1936), sec. 186c-8.

[79] Fox v Boyle County, 245 Ky. 27, 30, 53 S. W (2d) 192, 194 (1932). Compare this construction, however, with that of section 158 in County Debt Commission v. Morgan County, 279 Ky 476, 481-482, 130 S. W (2d) 779, 782 (1939) and in Clere v Board of Education of Ashland, 211 Ky. 130, 133, 277 S. W 335, 336 (1925), where it was held that the constitutional provision was merely a limitation on legislative power.

[80] City of Louisville v. Zimmerman, 101 Ky. 432, 439, 41 S. W 428, 430 (1897), Woolley v City of Louisville, 114 Ky. 556, 571, 71 S. W 893, 898 (1903). Also, see Burkhart v. Vine Grove Common School District, 26 Ky L. R. 262, 80 S. W 1128 (1904), Trustees Common School District v Kane, 27 Ky L. R. 983, 985, 87 S. W 321, 323 (1905).

[81] O'Bryan, City Clerk v City of Owensboro, 113 Ky. 680, 689, 68 S. W 858, 861 (1902), E. T. Lewis Co. v. City of Winchester, 140 Ky 244, 247, 130 S. W 1094, 1095 (1910)

[82] McDonald v City of Lexington, 253 Ky 585, 591, 69 S. W (2d) 1065, 1067 (1934), Fulton County Fiscal Court v Southern Bell Telephone and Telegraph Co., 285 Ky. 17, 31, 146 S. W (2d) 15, 22 (1940).

[83] City of Frankfort v. Fuss, 235 Ky 143, 148, 29 S. W (2d) 603, 605 (1930), McDonald v City of Lexington, 253 Ky 585, 591, 69 S. W (2d) 1065, 1067 (1934) Herd v City of Middlesboro, 266 Ky. 488, 493, 99 S. W (2d) 458, 461 (1936), Fulton County Fiscal Court v. Southern Bell Telephone and Telegraph Co., 285 Ky. 17, 31, 146 S. W (2d) 15, 23 (1940).

BASIC UNDERLYING ISSUES OF CONSTITUTIONAL CONSTRUCTION

Two basic underlying difficulties of constitutional construction are discernable in the Court's attempt to interpret county debt limitation provisions. One such issue relates to the proposition whether the constitutional limitations are self-executing and binding on the legislative branch, or whether the legislature may impose additional restrictions within the limits prescribed by the Constitution. The other basic issue concerns the Court's attempt to collate the different constitutional provisions, especially as amended by section 157a. Certain difficulties in this respect have been observed in connection with road and bridge bond limitations. Others will be observed later.[84]

Are debt limitations self-executing?—With one exception —construction of section 159—no consistency has marked the Court's interpretations relative to the self-executory nature of constitutional debt provisions. The failure of the Court to reach a definite conclusion respecting this issue appears to be responsible for many inconsistencies relative to other questions. Space forbids adequate discussion of all such decisions, but perhaps a few of the more significant ones should be noted briefly [85]

Section 2854 of the Kentucky Statutes and a Louisville city ordinance provided that incurring indebtedness for the improvement of land for park property must be authorized by a two-thirds majority of all votes cast at the general election. These enactments were in pursuance of section 157 of the Constitution which provides for a two-thirds vote of those voting at an election held for the purpose. In construing the statute and ordinance in connection with the constitutional provision the Court in *Belknap* v. *Louisville*[86] held that the constitutional provision was restrictive and that the legislature or city authorities could impose additional restrictions. This decision, however, should be contrasted with *Board of Education of Winchester* v *City of Winchester,*[87] where, under similar circumstances, the Court

[84] See discussion of "permissible maturity dates" which is to appear in the continuation of this article in a subsequent issue.

[85] The cases mentioned below are referred to because of their significance as precedent-establishing decisions. No attempt is made to follow their treatment in subsequent cases.

[86] 99 Ky. 474, 488, 36 S. W 1118, 1122 (1896).

[87] 120 Ky. 591, 594, 87 S. W 768 (1905)

said that "every provision of the Constitution is mandatory The Legislature can neither subtract from nor add to the constitutional requirement. The constitutional provision regulates the subject, and removes it entirely from legislative control."

In *Clere* v. *Board of Education of the City of Ashland,*[88] the Court upheld a legislative act[89] limiting bonded indebtedness of second class cities for school purposes from 10 per cent of assessed value as prescribed by section 158 of the Constitution to 2 per cent of the value of taxable property This was on the ground that the former "simply fixes a limit beyond which the legislature may not go, and leaves intact the already existing power to provide how far a city may go within that limit. In other words, the provision is simply a limitation on the legislative power and not a grant of power to the municipality" In *County Debt Commission* v *Morgan County*[90] the Court held that the County Debt Act of 1938 "in forbidding the county to incur an indebtedness in excess of 0.5 per cent of the assessed valuation without the approval of the County Debt Commission does not contravene section 158, which permits an indebtedness not exceeding 2 per cent of the assessed valuation. Section 158 fixes the limit beyond which the Legislature cannot go, but the section cannot be construed as preventing the Legislature from fixing a lower limit." Compare these decisions, however, with *Winchester* v *Nelson*[91] and with *Estill County* v. *County Debt Commission.*[92] In the former, subsection 34 of section 3490 of the Kentucky Statutes, insofar as it required bond issues to be redeemed within 20 years instead of 40 years as provided by section 159 of the Constitution, was declared unconstitutional. The latter decision overruled the Clere and Morgan County cases and denied to the legislature the power to limit to 30 years maturities of road and bridge bonds issued under section 157a of the Constitution.

A more detailed study of the Estill County case in respect to the issue noted above, together with other related decisions,

[88] 211 Ky. 130, 277 S. W 335 (1925).
[89] Acts 1926, chap. 78, p. 266; Carroll's Ky Stats. (1930), sec. 3235a-28.
[90] 279 Ky. 476, 481, 130 S. W (2d) 779, 782 (1939).
[91] 175 Ky 63, 72, 193 S. W 1040, 1044 (1917).
[92] 286 Ky 114, 149 S. W (2d) 735 (1941)

will be made later.[93] However, it might be well to indicate here that it also upheld the principle announced in the Morgan County case to the effect that "the legislative power to regulate procedure does not offend the constitutional provisions relating to debt limitations." When this holding is read in connection with the denial in the same opinion of legislative power to lower the debt contracting limit, it appears to imply that the local finance officer may not withhold approval of county bonds which meet constitutional requirements and are otherwise issued according to law. One constitutional lawyer has taken the following view: "It never has been clear to me how the Court can deny the power of the legislature to fix a lower debt contracting limit and still hold that in contracting debts above this limit the county must comply with the provisions of the County Debt Act as a matter of procedure."[94] This view suggests that if the legislature may restrict procedure that it may also restrict debt contracting limits or, else, that it may restrict neither. Of the two alternatives, the former is the more tenable. Mr. Eblen continues by stating "I still think the Clere and Morgan cases were sound. The Court appears to have overlooked that the pertinent constitutional provisions read that 'no county, etc., shall be authorized or permitted to incur an indebtedness in excess of a certain sum.' I think that the 'authorized or permitted' refers to authorization or permission by the legislature since it is the source of the power of the county to contract debts. If that be correct, then the Estill case is wrong."[95] Should the view be taken that the legislature may not restrict either debt contracting limits or administrative procedures, it would appear that debt enabling acts and provisions for court validation of county bond issues are also restrictive and prohibited by constitutional mandate. Similarly, the 5 per cent maximum interest rate and the minimum selling value of par imposed by the legislature would also be unconstitutional. Such a stand inevitably leads to numerous other inconsistencies and absurdities.

[93] See discussion of "permissible maturity dates" which is to appear in a continuation of this article in a subsequent issue. Also see discussion of Fox v. Boyle County, *supra*, p 140.

[94] Letter of July 31, 1942, from Amos H. Eblen, Law Offices, Smith and Leary, Frankfort, Kentucky

[95] *Ibid.*, letter of August 15, 1942.

ROAD AND BRIDGE BOND LIMITATIONS

With the advent of the automobile as a common means of traffic throughout the state the people demanded improved highway facilities. Because of existing constitutional taxing and debt limitations counties generally lacked fiscal capacity to meet increased demands for highway construction and maintenance. In order to meet this demand the Constitution was amended in 1909 so as to enlarge the taxing and borrowing powers of counties for road and bridge purposes.

Section 157a, amending section 157, provides as follows

" Any county may be permitted to incur an indebtedness not in excess of five percentum of the value of taxable property therein, for public road purposes provided said *additional indebtedness* is submitted to the voters of the county for their ratification or rejection at a special election held for said purpose, in such manner as may be provided by law and when such indebtedness is incurred by any county *said county may levy, in addition to the tax rate allowed under section 157* of the Constitution of Kentucky, an amount not exceeding twenty cents (20 cents) on the one hundred dollars ($100.00) of the assessed valuation of said county for the purpose of paying the interest on said indebtedness and providing a sinking fund for the payment of said indebtedness." (Emphasis the writer's.)

With the possible exception of one issue, constructions placed on this section of the Constitution have not been subject to such violent shifts in precedent as those placed on other constitutional debt limitations, but this exception probably has caused more administrative difficulty than all other judicial constructions combined. Apparently, the Court has never known whether section 157a is to be construed as being in effect an extension of section 157 or whether it is to be construed as being separate and apart from the original instrument. Variations in interpretations here have resulted in litigation having far-reaching social and economic implications.

Difficulties in construing section 157a are clearly discernible in the language of the Court when its opinions are placed in juxtaposition. On March 24, 1916, in *Gatton* v. *Fiscal Court of Daviess County*[96] the Court held that an amendment to the constitution or statute should not be considered as a part of the original, but as having the effect of a "codicil to a will." Three months later in *Bird* v *Asher*[97] this interpretation was weak-

[96] 169 Ky 425, 432, 184 S. W 1, 3.
[97] 170 Ky. 726, 735, 186 S. W 663, 666 (1916).

ened somewhat when the Court remarked that "Section 157a . . must be treated independent of any other section in the Constitution. It is a complete section in itself." But in 1921, *Hughes* v. *Eisen*[98] held that section 157a "enlarges and extends section 157." Subsequently, each of the two latter views has at different times been relied on in resolving other constitutional issues.

One result of the view that section 157a is separate and independent of other constitutional provisions is discernible in litigation respecting elections authorizing indebtedness for road purposes. There is nothing in section 157a or in section 4307 of the statute putting it into operation[99] to indicate what proportion of votes constitutes the requisite majority Had section 157a been conceived of as it later was in *Hughes* v. *Eisen,* as being an enlargement and an extension of section 157, the Court would have been constrained to follow precedents set under 157 and to construe the prescribed majority of votes to mean a two-thirds majority Instead, section 157a was held to be entirely independent of other constitutional provisions. As a result, elections under its provisions may be held at any time, and a mere majority of the votes cast is sufficient to authorize the issuance of road and bridge bonds.[100] Thus, it happens that the organic law governing elections to authorize the issuance of general fund bonds and that governing the authorization of road and bridge bonds is as different in each instance as if the authority therefor flowed from different legal instruments.

Other vital issues such as negotiability, permissible maturity dates, and contractual rights of holders of road and bridge bonds have hinged on whether section 157a was to be considered as being a separate and independent provision or as being an addition to and an integral part of other constitutional provisions. However, these issues can be discussed more advantageously in the continuation of this article in connection with refinancing difficulties. It will suffice at this stage that both constructions have been employed alternately, and, as respects

[98] 190 Ky. 661, 664, 228 S. W 676, 677.

[99] Acts 1914, chap. 80, sec. 21, p. 338; Ky. Rev. Stats. secs. 178.010, 178.170.

[100] Albright v Ballard County Judge, 164 Ky 747, 748, 176 S. W 185, 186 (1915) Armstrong v. Fiscal Court of Carter County, 169 Ky. 433, 184 S. W 4 (1916), Cleary v. Pieper, 169 Ky 434, 435, 184 S. W 4 (1916), Crick v. Rash, 190 Ky. 820, 824, 229 S. W 63, 65 (1921)

negotiability, the attempt to collate section 157a with sections 157 and 159 led to a rehearing and a complete reversal in the Court's decision.[101]

[101] Pulaski County v. Ben Hur Life Association, 286 Ky. 119, 149 S. W (2d) 738 (1941).