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instruments.[18] Hence, the intrinsic characteristics of the instrument itself will be of little evidentiary consequence. However, the clear evidence of the manner of use indicates that these are weapons with which death may be easily and readily produced and that death or serious bodily harm must be the ultimate result of such use under the circumstances (use upon a defenseless infant). Therefore, there was not sufficient doubt as to the quality of deadliness of the instruments in order to justify submission of this question to the jury, and the court in the instant case was justified in concluding that the hands may be and were deadly weapons as a consequence of the manner of their use.

J. WIBT TURNER, JR.

PROSPECTIVE OVERRULING OF CONSTITUTIONAL CONSTRUCTION

The city of Covington over a period of years had levied a tax at at a lower rate[1] than the maximum provided for local units by Kentucky Constitution 157. The revenue thereby procured had been insufficient to pay the city's total indebtedness for these fiscal years and a city ordinance authorized the issuance of bonds to fund the floating indebtedness. Ky. Const. 157 also provides that:

> "No county, city, town, taxing district, or other municipality, shall be authorized or permitted to become indebted, in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year . . . and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made."

In an action to secure judicial approval of the bond issue, as provided for by Ky. Stat. 186c, the city was given approval and the defendant taxpayer appealed, claiming that the floating debt was invalid as being an amount exceeding the income and revenue provided for the preceding years. The Court of Appeals affirmed the decision of the chancellor approving the bond issue, but stated in its decision that appellant's contentions were correct, that previous decisions approving similar bond issues had misconstrued the purpose and intent of the constitutional provision, that the instant issue was approved only because prior decisions of the court had misled the parties into the establishment of property rights, and that in the future the constitu-

[18] Clark and Marshall, *The Law of Crimes* (3rd ed. 1927) 294. Cf. State v. Sayles, 175 Iowa 314, 155 N. W. 837 (1916).

[1] Kentucky Constitution 157 provides a maximum tax rate for cities of the class of Covington of $1.50 per $100.00, and that cities may become indebted in any one year to an amount in excess of that produced by the maximum tax rate providing such indebtedness was approved by a two-thirds vote of the citizens at an election called for that purpose. Section 158 provides a limit on gross indebtedness of local units regardless of the manner in which acquired. The city of Covington had levied a tax at an average rate of only $1.29 for several years.

tion would be interpreted so as to make any debt above that provided by the annual levy invalid. *Payne* v. *City of Covington*, 276 Ky. 380, 123 S. W. (2d) 1045 (1938).

The Kentucky Court in this decision reached the conclusion that section 157 of the Constitution was inserted by the Constitutional Convention of 1890 for the purpose of forcing local units to conduct their affairs on a sound economic basis, using the "pay as you go" plan. A minority of the court had supported that construction in the cases of *City of Frankfort* v. *Fuss*,[2] and *Hill* v. *City of Covington*.[3]

In prior decisions, the court construed this section to mean that a local political unit could figure its annual budget and levy a tax at a lower rate than the maximum provided in section 157 (thus being able to claim a low tax rate) and then meet the customary deficit with a bond issue, so long as the total floating debt did not exceed the maximum indebteness allowed by section 158 of the Constitution.[4] That construction was a torturous one, apparently brought about by the reluctance of the court to allow creditors of the local unit to lose their investment. It was announced first in the case of *City of Providence* v. *Providence Electric Co.*[5] At that time sec. 186c of the statutes had not been enacted, and by the time the validity of city bonds was tested, they had already been purchased by investors who stood to lose their entire investment should the issue be declared invalid.

The court in the *Providence* case said,

> "It will not do to say that a city that is authorized to levy an ad valorem of 75 cents may contract an indebtedness that can be assumed and paid within the constitutional limit (sec. 157), and then by refusing to levy the full amount of tax authorized, or by levying only a small tax, defeat the collection of the debt upon the ground that the revenue for the year is less than the amount of indebtedness created."[6]

The court's interpretation was a go-ahead sign to local units to exceed their budgets and to make up deficits by bond issues which had not been voted on by two-thirds of the citizens of the unit. The result was, as pointed out in an article by Judge Dietzman written when he was a member of the Court of Appeals,[7] that a lower tax rate than needed was levied by local authorities and current expenses could not be met by the revenue produced. A floating debt was created that got larger and larger as the years progressed. Probably as a result of Judge Dietzman's article, the Legislature in 1932 passed an act pro-

[2] 235 Ky. 143, 29 S.W. (2d) 603 (1930).

[3] 264 Ky. 618, 95 S.W. (2d) 278 (1936).

[4] Sec. 158 provides for the maximum amount of gross indebtedness for cities, towns, etc., limiting all cities of more than 15,000 population to a total indebtedness of not more than 10% of the value of the taxable property within the unit. See *supra*, n. 1.

[5] 122 Ky. 237, 28 Ky. Law Rep. 1016, 91 S.W. 664 (1906).

[6] *Id.* at 243.

[7] Dietzman, *Limitations on Public Indebtedness*, (1931) 20 Ky. L. J. 75.

viding that a local unit must receive the approval of the courts before it can issue bonds to fund indebtedness.

This provision of itself probably would have remedied the situation[9] had the court not already committeed itself to the principle that indebtedness was valid up to the limit provided in section 157 even though the tax levied was insufficient to meet the debt and was below the maximum rate fixed.[10] Judges Thomas, Rees, and Dietzman, who dissented in the *Frankfort* case,[11] were still of the opinion that previous construction of the section was wrong, but in the *Covington* case,[12] Judge Thomas in validating a bond issue to fund floating indebtedness stated that the other members of the court felt that the law of *stare decisis* compelled them to continue the past interpretation, even though several of them did not believe it correct. But as the court points out in the instant case, the doctrine of *stare decisis* does not apply where it is shown that the law has been misunderstood or misapplied.[13]

With respect to the overruling of its prior decisions, the court says,

> ". . . in overruling our prior opinions . . . we do so with the express reservation that all rights heretofore created and accrued in favor of all persons interested . . . shall be preserved and the principles of this opinion will not apply to any transaction begun or in the course of completion, or finished before this opinion becomes final." And further, ". . . the withholding of any retro-

[8] Carroll's Ky. Stat. (1936) 186c-6, 186c-7.

[9] It is suggested that the County Debt Act [Carroll's Ky. Stat. (1939 Supp.) 938q-1 et seq.; Ky. Acts 1938, 1st ex. s., chap. 31] in itself remedies the situation as far as the counties alone are concerned. This act provides for the setting up of a commission to approve or disapprove the issuance of county bonds. All indebtedness in excess of one-half of one per cent of the taxable property within the county must secure the approval of the local Finance Officer before it is contracted. This approval will not be given if it appears that the financial prospects of the county for paying the indebtedness are slim, if the bonds will not serve the best interest of the county, or if the bonds or their issuance will be invalid. His decision is reviewable by the Commission providing the Attorney General certifies that the issue is valid. A decision by the Attorney General that the issue is invalid is reviewable by the courts. The establishment of county sinking funds to pay off bonds and for investment purposes is also provided. The act is not retroactive. See also, Peak, *Constitutional Limitations on County Indebtedness*, (1939) 28 Ky. L. J. 32, and cases cited.

[10] City of Providence v. Providence Electric Co., 122 Ky. 237, 91 S. W. 664 (1906); Overall v. City of Madisonville, 125 Ky. 684, 31 Ky. Law Rep. 278, 102 S. W. 278, 12 L. R. A. (N.S.) 433 (1907); Carter v. Krueger & Sons, 175 Ky. 399, 194 S. W. 553 (1917); Vaughan v. City of Corbin, 217 Ky. 521, 289 S. W. 1104 (1927); City of Frankfort v. Fuss, 235 Ky. 143, 29 S. W. (2d) 603 (1930); Hill v. City of Covington, 264 Ky. 618, 95 S.W.(2d) 278 (1936).

[11] City of Frankfort v. Fuss, 235 Ky. 143, 29 S. W. (2d) 603 (1930).

[12] Hill v. City of Covington, 264 Ky. 618, 95 S.W. (2d) 278 (1936).

[13] See also Liberty Natl. Bank v. Loomis, 275 Ky. 445, 448, 121 S.W. (2d) 947, 949 (1938); Cooley, Constitutional Limitations (8th ed. 1927) vol. 1, p. 120.

active effect of this opinion requires an affirmance of the judgment, since compliance is shown with the erroneous interpretations heretofore made. Wherefore, the judgment of the lower court is affirmed."[14]

In other words, the actual holding of the case is that the bond issue of the city of Covington is valid. That was the question ultimately to be decided, and the court upheld its "erroneous interpretations". If this is true, the statements to the effect that prior decisions are overruled are pure dictum in the truest sense of the word.

The court also says,

". . . the various taxing units of the Commonwealth embraced by the two sections (157, 158) of the Constitution shall after this opinion becomes final, observe and be governed by the interpretation herein made . . . And this opinion shall have a prospective effect only."[15]

But since this opinion holds in fact that such a bond issue floated in conformity with past interpretations is valid, the above words can be a mere threat at most, that like indebtedness might be held invalid in the future.

The court cites many cases delineating the principle that a court may, in overruling a prior decision, preserve in the overruling opinion all rights accrued under the prior declaration.[16] An examination of these cases shows that in all but one (the *Great Northern* case[17]) the decision of the court actually overruled the prior decisions. They furnish no foundation for the court's action in the instant case. With the principle that the doctrine of *stare decisis* may be discarded when past decisions are shown to be clearly erroneous there is no argument. The *Great Northern* case is an example of a similar attempt by a state court to prospectively overrule prior decisions, those decisions being affirmed in the principal case. Justice Cardozo states in his decision,[18]

". . . We may say of the earlier decision that it has not been overruled at all. It has been tranlated into a judgment of affirmance and recognized anew. Accompanying the recognition is a prophecy, *which may or may not be realized* in conduct, that transactions which arise in the future will be governed by a different rule." (Italics added.)

Suppose then, that a case similar to the instant case came before the Court of Appeals after this decision. Relying on prior decisions of the court in cases already enumerated and upon the actual holding in the instant case, the city issuing bonds to fund floating indebtedness without a two-thirds vote of its citizens would be justified in insisting

[14] 276 Ky. 380, 392, 123 S.W. (2d) 1045, 1051 (1938).

[15] Ibid.

[16] 276 Ky. 380, 392, citing among others, Great Northern Ry. v. Sunburst Oil Co., 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A. L. R. 254 (1932); Oliver Co. v. Louisville Realty Co., 156 Ky. 628, 161 S. W. 570, 51 L. R. R. (N.S.) 293, Ann. Cas. 1915C 565 (1915).

[17] Great Northern Ry. v. Sunburst Oil Co., 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A. L. R. 254 (1932).

[18] 287 U. S. 358, 365 (1932).

that the former construction is still in force. Thus the court would be faced with the same problem that it had here, and to be consistent would have to validate the issue, since it had been made in conformity with the court's construction of section 157 of the Constitution.

The court argues that property rights having arisen under former decisions, they should not be disturbed. But the former court-approved bonds would not be invalidated by a decision overruling the prior construction.[19] And no property rights have arisen under these bonds, since the rights have not been determined until the issue is approved or disapproved. The only ones who could validly assert an interference with property rights are the creditors of the city who were to be paid with the funds realized from the bonds. But the Supreme Court has stated many times that the obligation of contracts may be impaired by judicial decision;[20] and that "the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law".[21] There being no valid constitutional objection, therefore, it would seem that the court should have actually overruled its prior decisions by reversing the judgment of the lower court approving the bond issue. As the case now stands, in spite of the strong language of the court, it overrules nothing.

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CONSTRUCTION OF STATUTES—"EJUSDEM GENERIS".

A statute[1] provided:

> "The fiscal court shall have jurisdiction to appropriate county funds authorized by law to be appropriated; to erect and keep in repair necessary public buildings, secure a sufficient jail and a comfortable and convenient place for holding court at the county seat; to erect and keep in repair bridges *and other structures* [italics ours]. . ."

By the doctrine of *ejusdem generis* the court held this statute did not give the fiscal court the authority to appropriate money to obtain rights-of-way for a flood wall,[2] the wall to be built by the Department of War under an Act of Congress[3] requiring assurance that the rights-of-way be furnished without cost to the United States. "And other structures" does not include "flood walls" for the reason that it is not

[19] Gelpcke v. Dubuque, 68 U. S. (1 Wall.) 175, 17 L. Ed. 520 (1863); Douglas v. Pike County, 101 U. S. 677, 25 L. Ed. 968 (1879).

[20] See Tidal Oil Co. v. Flanagan, 263 U. S. 444, 451 (1923), and long list of cases there cited. See also Ann. Cas. 1915 578.

[21] Tidal Oil Co. v. Flanagan, 263 U. S. 444, 450, 68 L. Ed. 382, 44 S. Ct. 197 (1923), and cases there cited.

[1] Ky. Statutes (Carroll, 1936) sec. 1840.

[2] Jefferson County Fiscal Court v. Jefferson County, 278 Ky. 68, 128 S.W. (2d) 230 (1939).

[3] Public Act No. 738 of 74th Congress of the United States, 49 Stat. 1570, 33 U.S.C.A., sec. 701a *et seq.*