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The number and the monetary size of industrial development bonds attest to the success of this means of attracting industry to a particular municipality. Mr. Abbey here discusses the development of the various types of industrial aid bonds, the provisions of the enabling legislation, the legal instruments involved, and the problems encountered.

Several years ago a national business magazine carried an article styled "You Gotta Have A Golf Course."[1] The article outlined the efforts of a small town to attract new industry and the awkward realization by the city fathers that they were losing out to the competition because their community lacked such a recreational facility. After this finding, several public spirited citizens raised the necessary funds and constructed a nine-hole course. These efforts were soon rewarded when a large industrial concern located a new manufacturing plant in their city. Industrial development bonds are essentially intended to serve the same purpose as this golf course, and, at least from the point of view of the issuer, this paper could be sub-titled "You Gotta Have the Money."

One of the principal problems facing any industrial concern that may be considering the addition of a new facility is financing the cost of this venture. Therefore, when the municipality concerned presents a ready-made and expense-saving solution to this problem, a major obstacle is cleared and the relative bargaining position of the municipality is proportionately increased. In recent years, and with a marked increase during the past decade, many states have authorized their counties and municipalities to issue "industrial development bonds" for the declared purpose of providing increased and more diversified employment.[2]

Various studies have been made on the factors affecting an industry's choice of a new location and almost all have reached the conclusion that municipal financing is far surpassed by such economic factors as the availability of labor, raw materials, transportation, and similar important considerations to the sound location of any manufacturing

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1. Business Week, June 25, 1955, p. 86.

2. See CHAMBER OF COMMERCE OF THE UNITED STATES, WHAT NEW INDUSTRIAL JOBS MEAN TO A COMMUNITY (1963).

plant.[3] However, such studies may be somewhat misleading since municipal financing is now available in many locations and therefore will not be a major factor affecting the choice of any particular city, or even any particular state. Consider the example of the town that did not have a golf course. Several cities competing for the new industry offered industrial aid financing, but the final choice of location was based on the availability of an adult recreational facility. On the other hand, the availability of industrial aid financing may well have been the most decisive factor affecting the primary decision of the company, *i.e.*, whether it would add a new plant in any location. Judging by the rapid growth in both the number and size of the issues that have been marketed, it would appear that industrial development bonds have been successful in achieving their stated purpose.[4]

The purpose of this paper will be to discuss the development of the various types of industrial aid bonds, the provisions of the enabling legislation, the legal instruments involved, and some of the problems that may be encountered.

I. LEGISLATIVE DEVELOPMENT

In basic form, industrial development bonds are municipal bonds issued to finance a city's acquisition of a suitable site and the construction of an industrial building thereon. Under the terms of firm contracts made prior to the sale of the bonds, this facility will be leased to a private industrial concern with rentals at least sufficient to cover the debt service and all costs connected with the bond issue. The bonds are secured by a pledge of the rentals and, in most cases, by a mortgage on all property acquired or constructed with the proceeds of the bonds. In some states, the full faith and credit of the municipality involved may be pledged to the payments of the bonds, or they may be additionally secured by a pledge of surplus revenues from other municipal projects.[5]

3. See, *e.g.*, Bergin & Eagan, *How Effective are Industrial Development Programs?* Mich. Bus. Rev., Jan. 1960.

4. Total issues were variously estimated at $200,000,000 through 1961, but this figure is no longer of real significance in view of several very large issues of more recent date. The amount is still small by comparison with a total state and municipal debt of $80,000,000,000 on June 30, 1962, and issues during 1962 in excess of $8,000,000,000. MOODY, MUNICIPAL & GOV'T MANUAL 16-19 (1963).

5. Throughout this paper, reference is made to powers granted to cities or municipalities. The same authority has usually been granted to counties and other political subdivisions, and frequently two or more governmental units are authorized to act in concert. For an interesting application where two distinct bond issues were made under separate enactments to finance the same project, see Wayland v. Snapp, 232 Ark. 57, 334 S.W.2d 633 (1960).

A. *Tax Supported Bonds*

The grandfather of modern day legislation authorizing the issuance of industrial development bonds was an emergency measure enacted in Mississippi in 1936 and designed to help relieve the acute economic distress of the depression. This statute, known as the "Balance Agriculture with Industry Law,"[6] authorized the municipalities of that state to acquire suitable land, to construct commercial, industrial, agricultural and manufacturing enterprises, and to operate the completed enterprise. Prior to exercising such powers, the municipality was required to obtain a certificate of public convenience and necessity from the Mississippi Agricultural and Industrial Board created under the act. This Board was directed to investigate the proposed undertaking and to issue the requisite certificate upon finding that sufficient natural resources were available, that a specified labor supply was available, and that the total outstanding bonds did not exceed certain limits. Before authorizing any municipality to actually operate the enterprise, the Board was further required to find that,

> said enterprise is well conceived, has a reasonable prospect of success, will provide proper economic development and employment, and will add materially to the general welfare of the municipality, and will not become a burden upon the taxpayers of the municipality.[7]

The city was also required to hold a special election in which the ballot would contain a brief statement of the plan and the voters would be given an opportunity to indicate whether they were "for the proposed enterprise" or "against the proposed enterprise." The act required that two-thirds of those voting approve the plan and that at least a majority of the qualified electors in the municipality shall have voted. After obtaining the approval of the Board and the electorate, the city was authorized to finance the enterprise by the use of any available funds and by the issuance of general obligation bonds pledging the full faith and credit of the municipality to their payment. Almost incidentally, the act empowered the Board to authorize the municipality to sell, lease or otherwise dispose of any enterprise thus acquired. All income from any such lease or funds received on any other disposition of the project were to be paid into a special sinking fund and used solely for the retirement of the bonds.

In the first test case under the Mississippi act, the proposed bond issue was 35 thousand dollars. This humble beginning can be compared with a revenue bond issue of 50 million dollars recently approved in Kentucky. The original Mississippi enactment provided for

6. MISS. CODE ANN. §§ 8936-24 (1956) (as re-enacted).
7. MISS. CODE ANN. § 8936-08 (1956).

a life of four years from 1936. It was extended in 1940, and reenacted in permanent form in 1944.

B. *Revenue Bonds*

There was no further legislation in this field until the end of World War II, when, in 1946, revenue bonds, payable solely from the rents derived from the particular project, were authorized in Kentucky.[8] As distinguished from the earlier Mississippi legislation allowing a municipality to operate the plant, the Kentucky act specifically provides that the plant must be leased to an industrial concern. The Kentucky act does not provide for submission of the proposed undertaking to a state board nor for voter approval, and the only requirement is that there shall be a municipal ordinance specifying the essential features of the particular undertaking.

While almost all subsequent legislation on this subject, particularly those acts directing the use of revenue bonds, provide that the bonds may be secured by a mortgage on the project, the Kentucky act provides only for a pledge of the income and revenue from the industrial building. In the event of default in the payment of principal or interest on any bond, a receiver may be appointed to administer the project.

C. *Local Development Corporations*

Another new form was introduced by a 1949 Alabama act providing for the creation of local development corporations which issue their own bonds to finance the acquisition of new industrial facilities.[9] These corporations are formed under the specific provisions of this act and not under the general corporation laws of the state. Any three or more natural persons are authorized to apply to the governing body of the municipality for permission to form an industrial development corporation. After the governing body has approved the certificate of incorporation by appropriate resolution, the certificate is filed with the probate judge of the county in which the municipality is located and the applicants are then constituted a public corporation.

All powers of the corporation are vested in a board of directors of not less than seven members, each of whom must be a duly qualified elector and taxpayer in the municipality. The act provides that the directors shall serve without compensation, that they shall be elected by the governing body, and, if possible, chosen from the membership of the local chamber of commerce or similar civic organizations. The act also specifies that any corporation so formed shall

8. KY. REV. STAT. §§ 103.200-85 (1963).
9. ALA. CODE tit. 37, §§ 815-30(1) (1958).

be a non-profit enterprise; that all earnings shall be paid to the municipality after sufficient provision is made for payment of the bonds and other obligations of the corporation; and that, upon dissolution, the title to all corporate funds and property shall be immediately vested in the municipality. The expression of legislative intent states that the corporation may not operate the project. All bonds issued by the corporation are payable solely out of the revenues and receipts derived from the leasing and sale of its projects. The bonds may be secured by a pledge of revenues and a mortgage on all or any part of the projects. There is no requirement for the approval of any state board or agency nor for a municipal election. After the corporation has been formed, the nature and scope of its projects and the bonds to be issued need be approved only by its board of directors meeting in public session.

D. *Adoption in Other States*

Starting in 1951, the concept of municipally financed industrial construction expanded rapidly, and by 1965 industrial development bonds had been authorized in twenty-three states.[10] The enabling legislation and, in some cases, constitutional amendments, have authorized the use of either revenue bonds, general obligation bonds, or various combinations of both. The revenue bonds have been by far the most popular, both in the legislative enactments and in the bond issues actually sold.

Revenue bonds were authorized in Tennessee in 1951, and general obligation bonds in 1955. Both acts require the approval of three-fourths of those voting at a special election called for this purpose, and the general obligation bonds can be issued only after a certificate of public purpose and necessity has been obtained from the Tennessee Industrial and Agricultural Development Commission upon findings corresponding to those set out in the Mississippi act. A separate 1955 act provided for the creation of local industrial development corporations similar to the 1949 Alabama act. Like the Alabama statute, this act provides that the municipality shall not be liable for the debts of its corporate satellite; but the Tennessee act goes on to provide that the municipality may pledge its full faith and credit as surety for the bonds. In the latter event, the requirements for a certificate of public purpose and necessity and for voter approval are the same as for the direct general obligation bonds. During the period the three Tennessee acts have been in force, the revenue issues have exceeded the general obligation issues by a margin of seven to one.[11]

10. The statutory references and citations to the leading cases in the states where industrial development bonds have been approved are set out in the appendix *infra*.

11. The Tennessee Taxpayer, July 1, 1962.

In 1958, a self-executing constitutional amendment was adopted in Arkansas which authorized municipalities to issue industrial development bonds and to guarantee payment by a special tax levy not to exceed five mills. A 1960 revenue bond act in the same state empowered the issuing municipality to further secure the bonds by a pledge of its surplus revenues from other projects and utilities.

Although having Southern origins and sometimes referred to as the "second war between the states,"[12] industrial development bonds have been authorized in such non-Southern states as Illinois, Vermont, North Dakota, and Nebraska.

E. *Use of State Funds*

Direct financial aid to industrial development has taken other forms, particularly in the northeastern area. A 1958 Rhode Island statute established a state-wide industrial building authority which can pledge the full faith and credit of the State to guarantee payment of first mortgages on industrial projects owned and leased by local development corporations.[13] This guarantee closely resembles the mortgage insurance operation of the Federal Housing Administration. Similar legislation has been adopted in Maine,[14] New Hampshire[15] and Connecticut.[16]

An even more direct use of state funds for industrial development is contained in the Pennsylvania Development Authority Act adopted in 1956.[17] This act created a state authority with an initial appropriated capital of five million dollars for the purpose of making direct loans to local industrial development agencies. Under the original terms of the act, the authority could lend the local agency up to thirty per cent of the cost of the project on the security of a second mortgage when the following conditions were met: (1) the community is a "critical economic area" under standards set forth in the statute; (2) the community provides not less than twenty per cent of the cost of the project; (3) an institutional investor provides the balance of the financing under a first mortgage; and (4) a responsible tenant or buyer is ready to take over the project. A significant 1961 amendment enabled the state authority to purchase or make payments on the first mortgage. This amendment also changed the required percentage of local funds to ten per cent and raised the maximum loan from the state authority to forty per cent.

12. Pilcher, *Industrial Aid Bonds: Low Cost Capital for Private Business*, Mich. Bus. Rev., Nov. 1961, p. 34.
13. R.I. GEN. LAWS ANN. §§ 42-34-1 to -18 (Supp. 1964).
14. ME. REV. STAT. ANN. ch. 10, §§ 701-852 (1964).
15. N.H. REV. STAT. ANN. § 162-A:14-a to -c (1964).
16. CONN. GEN. STAT. REV. §§ 32-10 to -22 (1961).
17. PA. STAT. ANN., tit. 73, §§ 301-14 (1960).

The 1961 New York Job Development Authority Act[18] created a state authority similar in purpose and scope to the Pennsylvania plan except that the initial capitalization was 100 million dollars to be provided by the sale of the authority's bonds with half of the bonds being unconditionally guaranteed by the State. This act also provided for annual appropriations to support its purposes. The New Jersey State Area Redevelopment Assistance Act, adopted in 1962,[19] also follows the general plan of the earlier Pennsylvania program but requires that the project be located in an area declared eligible for federal assistance and limits the amount of the state's second mortgage to 10 per cent of the cost of the project. The capitalization of the New Jersey authority is in the form of a non-interest bearing, thirty-year loan from the state escheat account.

II. Constitutional Background

A. *Federal*

Like most innovating social legislation, the statues authorizing the issuance of industrial development bonds have been tested on several constitutional grounds. In *Albritton v. City of Winona*,[20] the first test case, the Mississippi statute was upheld by the Supreme Court of Mississippi, and an appeal was taken to the Supreme Court of the United States. This appeal was dismissed per curiam "for the want of a substantial federal question." There have been no other modern cases on this subject in the Supreme Court, and the effect to be given the per curiam dismissal of the appeal in *Albritton* can only be judged in the light of its historical background, particularly in view of three earlier decisions that were very much to the contrary.

1. *The Late Nineteenth Century Cases.*—The Supreme Court's decision in *Citizens' Savings & Loan Ass'n. v. Topeka*[21] is probably the forebear of all judicial precedents considering the use of municipal bonds to aid local industry, and for many years it was the principal authority on the constitutional question involved. Pursuant to enabling acts of the Kansas legislature, Topeka had "donated" 100 thousand dollars of its bonds to an iron works company in order to encourage its establishment in the city. In an action brought after the bonds had defaulted, it was conceded that they had been regularly issued and that the plaintiff was a bona fide purchaser so that the sole question was the authority of the Kansas legislature to pass the

18. N.Y. Pub. Auth. Law §§ 1800-34.
19. N.J. Rev. Stat. §§ 13:1B-15.13 to -15.22 (Supp. 1964).
20. 181 Miss. 75, 178 So. 799, *appeal dismissed per curiam*, 303 U.S. 627 (1938); Annot., 115 A.L.R. 1436 (1938).
21. 87 U.S. 655 (1875).

enabling statute. The opinion recites that there were no existing funds from which the bonds could be paid, and that necessarily they would have to be paid, if at all, from tax revenues. It was held that a tax can only be levied for *a public purpose* and that a contribution to the aid of any manufacturer was not such a purpose. Hence, these bonds were void.

In making its decision, the Court did not cite any specific constitutional restrictions, either federal or state, but appears to hold that the rule of levying taxes for a public purpose only is an inherent limitation on government. Considering the merits of the specific statute before it, the Court stated that if the door was open to the aid of a manufacturing company it could be extended to merchants, builders, bankers and others, and could "open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."[22] A noteworthy dissenting opinion stated that it was not competent for a federal court to adjudge a state statute void unless it conflicted with some provision of the Constitution of the United States or of the state.

In *Parkersburg v. Brown*,[23] suit was brought against the city by the holders of certain defaulted bonds to recover the principal and interest due. The bonds had been issued under an act of the West Virginia legislature which authorized the city to lend its bonds to manufacturers locating in the city. This "loan" was evidenced by the manufacturer's notes to the city and secured by a deed of trust on its property. The manufacturer had become bankrupt and the city had failed to enforce the deed of trust. The suit asked for a receiver to take charge of the remaining property and for a deficiency judgment against the city. Citing *Topeka*, the Court had little difficulty in holding that the enabling legislation was invalid and the bonds void since they were not issued for a public purpose. Again the Court seemed to base its decision on an unwritten but inherent limitation on any legislature, and further stated:

> There was no provision in the Constitution of West Virginia of 1862 authorizing the levying of taxes to be used to aid private persons in conducting a private manufacturing business. This being so, the legislature has no power to enact the act of 1868.[24]

The same question was before the Court two years later in a suit against the City of La Grange, Missouri.[25] The bonds then in question

22. *Id.* at 665.
23. 106 U.S. 487 (1883).
24. *Id.* at 501. The quoted material is contrary to the principle that a state constitution is a limitation on the plenary power of the state and not a grant of power. 16 AM. JUR. 2d *Constitutional Law* § 17 (1964) Annot., 46 A.L.R. 609 (1927).
25. Cole v. La Grange, 113 U.S. 1 (1885).

had been issued pursuant to an act authorizing the city to "donate" its bonds to railroad and manufacturing companies under specified conditions. Citing the two earlier decisions, the Court stated:

> The general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject.[26]

Unfortunately for the innocent holders involved in the *Topeka, Parkersburg* and *La Grange* cases, these decisions were not rendered prior to the sale of the bonds but several years later when suit was brought for their payment. The recent decisions on this subject have all been the result of some type of test case with expert bond counsel usually employed for such purpose.

2. *The Court's Changing Approach.*—In a long series of subsequent decisions, the Supreme Court appears to have gradually taken a complete about-face in its approach to the validity of state legislation which authorizes a departure from the historical concepts of governmental functions. This was first indicated in *Fallbrook Irrigation District v. Bradley,*[27] an 1896 case testing the constitutionality of a California act creating an irrigation district and providing for special assessments on property located within its boundaries. In upholding the act, the Court seemed to follow the theory of the dissent in the *Topeka* case:

> We should not be justified in holding the act to be in violation of the state constitution in the face of clear and repeated decisions of the highest court of the State to the contrary, under the pretext that we were deciding principles of general constitutional law. If the act violate any provision, expressed or properly implied, of the Federal Constitution, it is our duty to so declare it; but if it does not, there is no justification for the Federal courts to run counter to the decisions of the highest state courts upon questions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law.[28]

The *Topeka* case was actually distinguished on the ground that "there had been no decision of the highest state court upon the

26. *Id.* at 6.
27. 164 U.S. 112 (1896).
28. *Id.* at 155.

question of whether the act violated the constitution of Kansas. . . ."[29] However, the strong language of the earlier opinion nowhere indicates any such qualification of that decision.

In *Jones v. Portland*,[30] the Court considered an act of the Maine legislature authorizing any city to establish a municipal coal and fuel yard where such necessities could be sold at cost. Portland had voted to establish such a yard and to raise the necessary money by taxation. This endeavor was approved and the Court added:

> While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular State is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information. In that view the judgment of the highest court of the State upon what should be deemed a public use in a particular State is entitled to the highest respect.[31]

Three years later in *Green v. Frazier*,[32] the Court upheld North Dakota legislation which created a state industrial commission to operate several business enterprises. Large bond issues had been authorized to provide capital and the full faith and credit of the state was pledged to their payment. Referring to its own role, the Court stated that the broad taxing power of a state was unrestrained by any federal authority prior to the adoption of the fourteenth amendment; but that under the due process clause of this amendment "it has come to be settled that the authority of the States to tax does not include the right to impose taxes for merely private purposes."[33] After noting that the people, the legislature, and the highest court of North Dakota had declared these acts to be for a public purpose, the Court concluded: "With this united action of people, legislature and court, we are not at liberty to interfere unless it is clear, beyond reasonable controversy that rights secured by the Federal Constitution have been violated."[34]

In 1923 the Court in *Milheim v. Moffat Tunnel Improvement District*,[35] considered a Colorado act creating a tunnel improvement district. The bonds sold to finance the cost of the tunnel were to be paid in part by a special assessment on property within the district. The plaintiffs, as affected land owners, challenged the proposed tax

29. *Ibid.*
30. 245 U.S. 217 (1917).
31. *Id.* at 221.
32. 253 U.S. 233 (1920).
33. *Id.* at 238. However, the 14th amendment was not mentioned in the *Topeka, Parkersburg* and *La Grange* decisions. See also Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 257 (1905) (Holmes, J., dissenting).
34. *Id.* at 239-40.
35. 262 U.S. 710 (1923).

levy under the due process clause. On the question of public purpose, the Court stated:

> The nature of a use, whether public or private, is ultimately a judicial question. However, the determination of this question is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State . . . . And like respect should be accorded to the declarations of the legislative body of the State.[36]

The next major step in the Court's gradually evolving approach to the public purpose question is illustrated in *Carmichael v. Southern Coal & Coke Co.*[37] This landmark decision upheld the Alabama State Unemployment Compensation Act, which in turn was based on federal standards and, in effect, had been coerced by the tax provisions of the 1935 Social Security Act. The Court clearly recognized the fourteenth amendment requirement that the taxing power of a state can only be exerted to effect a public purpose, but added:

> The states, by their constitutions and laws, may set their own limits upon their spending power . . . but the requirements of due process leave free scope for the exercise of a wide legislative discretion in determining what expenditures will serve the public interest.
>
> The existence of local conditions which, because of their nature and extent, are of concern to the public as a whole, the modes of advancing the public interest by correcting them or avoiding their consequences, are peculiarly within the knowledge of the legislature, and to it, and not to the courts, is committed the duty and responsibility of making choice of the possible methods . . . . [W]hether the present expenditure serves a public purpose is a practical question addressed to the law-making department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court.[38]

This case is of particular importance since the tax measure under attack was concerned with the relief of the miseries of unemployment. On the merits, the Court cited several surveys and census reports showing the problems caused by unemployment in Alabama. The following observations should be equally significant in the consideration of any legislation designed to curb unemployment:

> Apart from poverty, or a less extreme impairment of the savings which afford the chief protection to the working class against old age and hazards of illness, a matter of inestimable consequence to society as a whole, and apart from the loss of purchasing power, the legislature could have concluded that unemployment brings in its wake increase in vagrancy and crimes against property, reduction in the number of marriages, deterioration of family life,

36. *Id.* at 717.
37. 301 U.S. 495 (1937).
38. *Id.* at 514-15.

> decline in the birth rate, increase in illegitimate births, impairment of the health of the unemployed and their families and malnutrition of their children.
>
> Expenditure of public funds under the present statute, for relief of unemployment, will afford some protection to a substantial group of employees, and we cannot say that it is not for a public purpose.
>
> When public evils ensue from individual misfortune or needs, the legislamay strike at the evil at its source. [Footnotes omitted.][39]

3. *The Present Scope of the Federal Inquiry.*—Less than a year after *Carmichael,* the Court in *Albritton* disposed of the constitutional challenge to the Mississippi industrial bond act in a memorandum opinion which cited *Jones, Green, Milheim,* and *Carmichael* without further comment.[40] The decisions from *Topeka* to *Albritton* illustrate a gradual but ever widening change in the Court's approach to the public purpose doctrine. The *Topeka* case was decided on the basis of some general constitutional principle or inherent common law limitation on state action. In *Fallbrook Irrigation District,* the Court limited its right of inquiry to the specific requirements of the federal constitution and also mentioned the great weight to be accorded the judgment of state courts. In *Jones* and *Green,* the Court spoke of the united action of the state legislature and judiciary in setting the public purpose issue, and in *Carmichael,* it flatly stated that the state legislature should choose the means of attacking a public evil.

While the *Topeka, Parkersburg* and *La Grange* cases have never been specifically overruled, there seems to be little authority left in those decisions. It is true that the Court has continuously maintained the basic principle that the power of a state, and specifically the power to tax, can be used only for public purposes. However, it seems well settled that a state legislature's determination of what constitutes a public purpose, if upheld by the highest court of the state, will not be set aside under the federal constitution except for the most clear and convincing reasons. The final blow to the rationale of the *Topeka* case probably came in *Erie R.R. v. Tompkins,* decided in the same term as *Albritton,* where the Court firmly declared that "there is no federal general common law."[41]

Possibly the most significant recent statement of the Supreme Court on the public purpose doctrine appeared in *Everson v. Board of Education,*[42] which involved a New Jersey statute authorizing publicly financed bus transportation of students to both public and private schools. In addition to the first amendment question, it was

39. *Id.* at 516-18.
40. *Supra* note 20.
41. 304 U.S. 64, 78 (1938).
42. 330 U.S. 1 (1947).

also charged that the statute violated the fourteenth amendment by authorizing the expenditure of public funds for a private purpose. Citing the *Topeka* case, the Court stated:

> It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one . . . . But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution . . . . Otherwise, a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states. Changing local conditions create new local problems which may lead a state's people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people.
>
> Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program . . . . Subsidies and loans to individuals such as farmers and homeowners, and to privately owned transportation systems, as well as many other kinds of businesses, have been commonplace practices in our state and national history.[43]

B. *State Constitutions*

The various state courts considering the validity of industrial development bonds have had much more difficulty resolving the problems presented under the state constitutions than in satisfying the requirements of the fourteenth amendment. In addition to the universally implied requirement that the taxing and borrowing powers of a state are subject to the public purpose doctrine, almost every state constitution specifically prohibits the use of the credit of the state or any of its political subdivisions for the aid of any private party.[44] Typical of this latter limitation, the Alabama Constitution provides:

> The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise.[45]

1. *The Theory Upholding the Bonds.*—These dual hurdles were first met in Mississippi where the use of general obligation bonds

43. *Id.* at 6-7.

44. Note, 108 U. PA. L. REV. 95 (1959).

45. ALA. CONST. art. 4, § 94. In many cases, these provisions were the direct result of the financial disasters suffered by several communities in the 19th century as a consequence of having used their borrowing power to give financial aid to railroad companies. For an analysis in depth on this question, see Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265 (1963).

was upheld in a lengthy opinion.[46] This court stressed the theory that a constitution cannot remain static and must be interpreted in the light of changing economic and social conditions. In satisfying the public purpose requirement, the court reasoned as follows: (1) It is a duty of government to provide for the needs of the poor and to relieve unemployment; (2) no one can deny that the government has authority to do this by the direct use of tax funds to furnish food and shelter in kind or money to buy these necessities; (3) the state can also accomplish this same purpose indirectly by providing employment and the opportunity to earn a livelihood; (4) can the state and municipality not engage the assistance of private industry to operate the municipally owned plant, *i.e.*, can it not use private industry as a means to a public end?

The Court of Appeals of Kentucky had little difficulty upholding a specific arrangement under that state's revenue bond act as a valid exercise of the city's proprietary powers.[47] In describing the act as an "ingenious plan of paying for the property," the court found that no use of the municipality's money or taxing power was involved and thus avoided the public purpose doctrine. The court recognized the specific constitutional prohibition against the loan of the city's credit to private persons or corporations, but declared that the mere use of the city's name and its agreement to collect rents and perform other services as trustee was not a loan of its credit.

In an advisory opinion, the Supreme Court of Alabama stated that the constitutional limitation was directed at actual pecuniary expenditures and that revenue bonds issued by a public corporation were not public indebtedness.[48]

2. *Rejection of the Bonds and Constitutional Amendments.*—The first contrary decision was reached in Florida where the court not only found that a proposed revenue bond arrangement violated the specific constitutional prohibition against the lending of credit but added that any financing of private enterprise by the use of public funds was entirely foreign to our constitutional system no matter how worthwhile the undertaking.[49] As opposed to the decisions in Kentucky and Alabama, this court did not place any significance on the fact that revenue bonds would not involve any municipal liability or tax. On the contrary, it stated that, once the bonds were sold, the proceeds would be public funds and could not be expended in aid of any private enterprise.[50] There had been no enabling legislation nor any vote

46. Albritton v. Winona, *supra* note 20.
47. Faulconer v. City of Danville, 313 Ky. 468, 232 S.W.2d 80 (1950).
48. Opinion of the Justices, 254 Ala. 506, 49 So. 2d 175 (1950).
49. State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952).
50. This reasoning was followed in Ohio where the court invalidated an industrial

of the electorate on the Florida proposal. However, the court took pains to avoid any implication that a specific legislative determination of public purpose would have changed its decision, stating that:

> There are certain limits beyond which the Legislature cannot go. It cannot authorize a municipality to spend public money or lend or donate, directly or indirectly, public property for a purpose which is not public. A legislative determination may be persuasive, but it is not conclusive.[51]

The Florida decision was followed in Nebraska[52] and Idaho.[53] The Nebraska court felt that the decisions in three of its sister states approving revenue bonds were based on "fundamental fallacies of reasoning," and that the proposed arrangement "would constitute a death blow to the private enterprise system and reduce the Constitution to a shambles in so far as its protection of private enterprise is concerned."[54] In Idaho, the act was held to violate the constitutional proscription against any "liability" which the court felt was broader in scope than "indebtedness." This court criticized the earlier decisions upholding the bonds as apologies dictated by expediency.

On the other hand, the Supreme Court of Maryland, in approving an issue of general obligation bonds, stated that the constitution does not write the doctrine of *laissez faire* into the law and expressly rejected the reasoning of the Florida and Nebraska cases.[55] The Nebraska decision was overridden by a specific constitutional amendment. Similar amendments have been adopted in four other states, and the bonds upheld without amendment in at least twelve states.[56]

3. *The Problem of Contrary Precedents.*—The constitutional development in Tennessee presents an interesting sequence. A private act of 1925 authorized the City of Lebanon to issue its general obligation bonds to finance the construction of a factory for lease to a private manufacturer. This act was held to be unconstitutional under the public purpose test.[57] In 1949, a similar proposal without the benefit of enabling legislation was held unconstitutional under the authority of the earlier decision.[58] In the latter case, the court mentioned the "plausible theory" followed in Mississippi—that the reduction of unemployment through such an arrangement was a public

mortgage program financed by *state* revenue bonds. See note 77 *infra.*

51. State v. Town of North Miami, *supra* note 49, at 785.

52. State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957).

53. Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960).

54. State *ex rel.* Beck v. City of York, *supra* note 52, at 231, 82 N.W.2d at 274.

55. City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957). This case contains an excellent summary of the several constitutional problems involved.

56. The amendments and decisions are set out in the appendix.

57. Ferrell v. Doak, 152 Tenn. 88, 275 S.W. 29 (1925).

58. Azbill v. Lexington Mfg. Co., 188 Tenn. 477, 221 S.W.2d 522 (1949).

purpose, but stated that Tennessee was committed to the contrary majority rule. Two years later, the same court upheld a revenue bond act of general application, and had little difficulty distinguishing its earlier decisions since no tax moneys were involved.[59]

Not satisfied with the revenue bond act, the Tennessee legislature added a new chapter in 1955 authorizing the use of general obligation bonds. The court was asked to pass on the validity of this act in 1958, and the resulting judicial gymnastics would be well read by any student of the logical dilemma.[60] In a three to two decision, the act was upheld without overruling any prior precedent. The majority opinion contains a recitation of facts taken from the city's answer to the complaint which set out to show the loss of adult population, the lower wage scales prevailing in the state, and the great financial loss incurred in educating children who, upon coming of age, were forced to migrate to other states where more job opportunities were available and pay scales more attractive. After acknowledging the traditional concept that any taxation in aid of private enterprise would be unconstitutional under the public purpose doctrine, the court distinguished its earlier decision on the following grounds: (1) This was a public rather than a private act and therefore expressed the public policy of the state.[61] (2) Since the certificate of the state board and the vote of the electorate are required, standards are set out and checks placed upon the authorities in charge of making the contracts. (3) There was no indication of any crisis in the 1925 factual situation. The third point was expanded as follows:

> It is the difference between a mere incident and a virtual crisis. Thus becomes applicable the principle of constitutional law that a legislative enactment may be held unconstitutional under one set of facts and constitutional under another set of facts. . . .[62]

In *Albritton v. Winona*, the Supreme Court of Mississippi dis-

59. Holly v. City of Elizabethton, 193 Tenn. 46, 241 S.W.2d 1001 (1951).

60. McConnell v. City of Lebanon, 203 Tenn. 498, 314 S.W.2d 12 (1958). Whether by choice or accident, this case involved the same city whose private act had been declared unconstitutional in 1925.

61. *But see* State v. Southern Bell Tel. & Tel. Co., 204 Tenn. 207, 319 S.W.2d 90 (1958), where, in applying a similar constitutional limitation on the use of *state* funds, the same court said: "If the Legislature is without authority under the Constitution to enact a law, the situation is the same as though there were no attempt enactment." *Id.* at 212, 319 S.W.2d at 93.

62. McConnell v. City of Lebannon, *supra* note 60, at 514, 314 S.W.2d at 19. It has been suggested that this opinion leaves open the necessity of a judicial determination that a "local crisis" exists for each bond issue under the 1955 act. Note, 14 VAND. L. REV. 621, 627 (1961). However, the court did not make any such determination in the next case considering this act and indicated that the findings of the state board would probably be controlling. Mayor and Aldermen of the City of Fayetteville v. Wilson, 212 Tenn. 55, 367 S.W.2d 772 (1963).

tinguished a contrary precedent in much the same manner.[63]

4. *Local Constitutional Amendments.*—In Georgia, industrial development bonds have been issued under the authority of "local constitutional amendments." The adoption of such amendments by a referendum in only the county concerned was authorized by a 1952 general amendment to the constitution, and the procedure for determining its applicability was further clarified by a 1956 amendment.[64] When the General Assembly of Georgia proposes a constitutional amendment, the Governor, Attorney General and Secretary of State are to determine whether it is of general or local application. If it is not general, it is submitted to a vote only in the political subdivision directly affected, and if ratified, it becomes a local constitutional amendment. Under this procedure fourteen counties were authorized to issue revenue bonds or revenue anticipation certificates for industrial building purposes in 1960,[65] and an even larger number of industrial building development authorities were created in 1962.[66]

5. *State Financed Plans.*—The constitutional aspects of the other forms of financial aid to industrial development have had a similar history. Advisory opinions in Rhode Island[67] and New Hampshire[68] have approved the FHA type guaranty acts in those states. Similar legislation has been upheld in Maine[69] and Connecticut,[70] with the supreme court of the latter state making the following observation: "The legislature was aware that Connecticut, the most industrialized state in the nation, faced competition in retaining its present industries and attracting new industries."[71]

However, the Delaware court, in considering a comparable act,[72] severed as unconstitutional the provision which authorized the state treasurer to pay any deficiencies in the guaranteed bonds.[73] The

63. See Carothers v. Booneville, 169 Miss. 511, 153 So. 670 (1934).

64. GA. CONST. art. XIII, § 1. See also Smith v. State, 217 Ga. 94, 121 S.E.2d 113 (1961).

65. GA. CODE ANN. § 2-6005 (Supp. 1963).

66. GA. CODE ANN. § 2-3505 (Supp. 1963).

67. Opinion to the Governor, 88 R.I. 202, 145 A.2d 87 (1958). The act was approved in a 1958 referendum under R.I. CONST. art. XXXI, § 1.

68. Opinion of the Justices, 103 N.H. 258, 169 A.2d 634 (1961). More recently this court approved proposed legislation that followed the early Alabama program of industrial financing through revenue bonds issued by local development corporations except that established criteria of ecouomic need must be met and the lessee is required to make tax equivalent payments. Opinion of the Justices, 209 A.2d 474 (N.H. 1965).

69. Martin v. Maine Savings Bank, 154 Me. 259, 147 A.2d 131 (1958). This program was authorized by a 1957 constitutional amendment. ME. CONST. art. IX, § 14-A.

70. Roan v. Connecticut Indus. Bldg. Comm., 150 Conn. 333, 189 A.2d 399 (1963).

71. *Id.* at 339, 189 A.2d at 402.

72. DEL. CODE ANN. tit. 6, §§ 7001-09 (Supp. 1964).

73. Opinion of the Justices, 177 A.2d 205 (Del. 1962). After severing the state

New York Job Development Authority Act, which followed the format of the Pennsylvania plan, was preceded by a constitutional amendment which specifically approved the lending of state funds to finance industrial development,[74] and the New Jersey adaptation was upheld without such an amendment.[75] An Illinois act creating a state industrial development authority was held unconstitutional as involving a continuing appropriation.[76] The Illinois authority was to obtain its principal financing through the sale of revenue bonds, but was initially capitalized with 500 thousand dollars in a form of revolving fund. In considering an analogous authorization of industrial financing with state revenue bonds, the Ohio court held that the contemplated action would clearly violate the constitutional provision that the credit of the state may not be given or lent in aid of any private party.[77]

6. *Approval of Each Statute Required.*—The constitutional arguments in the state courts have almost all followed the same pattern, and the difference between those decisions upholding the acts and those declaring them invalid appears to be a matter of emphasis. The question has been whether the public benefit is an incident of the aid to the private enterprise, or whether the use of private enterprise is merely an aid to the municipality in accomplishing the real purpose of the bonds. This difference is one of degree and more of an economical debate that has been, and presumably will continue to be, a matter of some controversy. Although the greater number of courts have upheld the bond issues, there is a clear conflict in the state decisions and no statute could be safely implemented without the approval of the highest court of the particular state.

III. LEGISLATION

While there is a certain amount of uniformity in the enabling legislation and constitutional amendments authorizing the use of

guaranty, the court upheld the remaining provisions of the act which provide for industrial financing through bonds issued by local development corporations. In net effect, this may leave a self-sufficient revenue type enactment. However, the act specifically prohibits any sale of the property in the event of default and the obvious original intent was to depend on the state guaranty as the primary attraction in marketing the bonds. A 1963 amendment, which is still to be tested, provides that the state may make good any deficiency if the general asembly appropriates the necessary funds.

74. N.Y. CONST. art. VII, § 8.

75. Roe v. Kervick, 42 N.J. 191, 199 A.2d 834 (1964). This lengthy decision traces the constitutional history and purpose of the several industrial aid programs. While industrial development bonds, as such, were not before the court, the opinion strongly supports those cases which have upheld their constitutionality.

76. Bowes v. Howlett, 24 Ill. 2d 545, 182 N.E.2d 191 (1962).

77. State *ex rel.* Saxbe v. Brand, 176 Ohio St. 44, 197 N.E.2d 328 (1964).

industrial development bonds, several variations appear in the specific requirements. These differences may have been dictated by a concern for certain constitutional limitations or other applicable legislation in the particular state, and possibly, the liberal or conservative tendencies of the draftsmen. Some of the acts are relatively short, while others are very detailed in setting both the terms of the bonds and the circumstances under which they can be issued.

A. *Principal Provisions*[*]

1. *Purpose and Policy.*—The declared purpose of the legislation is usually to balance the state's economy, to relieve unemployment, and to encourage the development of industry within the state. The permanent re-enactment of the Mississippi law and the Kentucky statute include the relief of the problems attendant on the reconversion from a wartime economy to peace time pursuits, while the Tennessee revenue bond act will aid the rehabilitation of returning veterans. Such obsolete clauses could have a negative value in any present validation proceeding. The declaration of policy frequently includes a statement that the act is to be liberally construed for the purposes intended and, in the case of revenue bonds, a provision that any project undertaken is to be self-liquidating without the municipality incurring any liability whatsoever.

2. *Definitions.*—Most of the acts define such terms as "municipality," "governing body" and "industrial project." The latter definition is particularly important in describing the type of facility that may be constructed or acquired, and in stating whether or not personal property, including machinery and equipment, may be included in the financing.[78]

3. *Powers of a Municipality.*—The special powers include the right to acquire or construct one or more industrial projects, to issue bonds for this purpose and to secure their payment, and to lease or sell the projects so acquired. The early Mississippi act permits the municipality to actually operate the project, but almost all other acts specifically prohibit such action.

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[*] The principal provisions are described in this section, and the statutory references are collected in the appendix to this paper.

78. The inclusion of machinery and equipment has also been approved by court decision. See, *e.g.*, Miller v. Police Jury, 226 La. 8, 74 So. 2d 394 (1954); Holly v. City of Elizabethton, 193 Tenn. 46, 241 S.W.2d 1001 (1951). In the *Elizabethton* case, the court observed that "four walls, floors and roof cannot accurately be termed an 'industrial building.'" 193 Tenn. at 49, 241 S.W.2d at 1003. In North Dakota, the reference to personal property was deleted by a 1961 amendment and returned by a 1965 amendment. However, another section of the same act provides that the city may only acquire real property. N.D. CENT. CODE § 40-57-03(1) (Supp. 1965).

4. *Special Elections or Referendums.*—Except in Maryland, the use of general obligation bonds must be approved by the electorate. A similar requirement appears in about half of the revenue acts, but is omitted where local development corporations are used. The 1960 Mississippi revenue bond act uses the negative approach. Here the municipality is required to publish the authorizing resolution for a stated period and to hold a special election only if a written protest is filed by twenty per cent of the qualified voters. A similar provision in the Michigan statute requires a referendum only if a petition is filed by five per cent of the registered electors.

Where an election is required, the necessary approval runs from a majority to three-quarters of those voting. The first Mississippi act required the favorable decision of two-thirds of those voting and also that a majority of the qualified electors in the affected territory shall have voted. In Missouri, general obligation bonds may be issued in the smaller counties with two-thirds approval, while revenue bonds may be issued in any municipality with the consent of four-sevenths of the voters. The act normally specifies the form of the required notices, the period of notice, the terms of the ballot, and the method of certifying the result. The Tennessee statute contains a saving clause providing that the entry of the results of the election on the minutes of the governing body shall be conclusive evidence in any proceeding to contest the validity of the election. A similar provision appears in the Arkansas statute.

5. *Terms of Bonds and Restrictions on Sale or Amount.*—A common provision is that the bonds will be sold at such interest rate, for such term, and on such other conditions as the municipality may determine. In several states, the maximum interest rate and term are specifically limited. The statute may also require a sinking fund or specify the percentage of the total issue that must be retired each year. In Louisiana, the bonds cannot be sold at less than par and in several states a public sale is required. All the statutes authorizing the use of general obligation bonds place some top limit for indebtedness of this type based on the total assessed property values in the municipality. This varies from two-tenths of one per cent in Maryland to twenty per cent in Louisiana and in Mississippi. The limitation is five per cent in North Dakota and ten per cent in Missouri and Tennessee. In Arkansas, the tax levy for this purpose is limited to a rate of five mills. An almost standard provision declares that any bonds issued under the act shall be negotiable instruments.

6. *Security for the Bonds.*—In every case, the rentals and other income from the projects are pledged to the direct payment of

principal and interest on the bonds or to a sinking fund established for that purpose. Most revenue bond acts provide for a mortgage or deed of trust in favor of the bondholders, but Kentucky, Maryland and Missouri are exceptions. The general obligation act in Tennessee deleted the mortgage authorization that was contained in the earlier revenue bond act, and there is no provision for a mortgage in Louisiana or Maryland. The Arkansas act provides that the municipality may also pledge its surplus revenues from other industrial facilities and from its utilities. The use of a receiver in the event of default may also be specifically authorized.

7. *Application of Bond Proceeds.*—A fairly standard provision is that the bond proceeds shall be used to finance all costs of the project including architects' and engineers' fees, the purchase price of any part of the project acquired by direct purchase, construction costs including installation of machinery and equipment, all expenses in connection with the issuance and sale of the bonds, and interest during the construction period and for six months thereafter. The Kentucky act authorizes the financing of interest for the first three years, while the Arkansas act provides that a portion of the proceeds may be placed in a reserve to provide for debt service until sufficient revenues are available. This act also provides that the proceeds may be used for the payment of "any other costs of whatever nature." Several of the revenue bond acts provide that any unneeded portion of the bond proceeds shall be applied to the payment of principal and interest.[79]

8. *Lease and Rentals.*—A standard requirement is that the municipality must lease the project for rentals at least sufficient to cover the required debt service on the bonds. One city's attempt to build and hold an industrial plant in anticipation of finding a lessee has been held invalid.[80] The Mississippi and Alabama acts require the governing body of the municipality to make specific findings on certain enumerated costs and to provide for rentals sufficient to meet them. The Iowa statute further requires that the rent be not less than the average per square foot rental for like facilities within the competitive commercial area.[81]

9. *State Tax Exemptions.*—The provisions on this subject contain

79. See, *e.g.*, the revenue bond acts in Alabama, Iowa, Mississippi, Nebraska and West Virginia cited in the Appendix, *infra.*

80. City of Corbin v. Johnson, 316 S.W.2d 217 (Ky. 1958).

81. This requirement could present administrative problems due to the unique layout of many industrial plants and the primary intent of attracting a lessee with a favorable lease. However, when this question was raised the court merely stated that the governing body should be able to determine the proper rental with reasonable certainty. Green v. City of Mt. Pleasant, 131 N.W.2d 5 (Iowa 1964).

almost as many variances as the number of acts passed. The Mississippi revenue bond act provides that the bonds and the income therefrom, the mortgage and lease agreement, the project, and the revenues derived from any lease thereof shall be exempt from all taxation in the state. The earlier act exempted the bonds from all taxation except gift and inheritance taxes. In Tennessee, the bonds are exempt from all state and local taxes except inheritance, transfer and estate taxes, while the Arkansas act provides that the bonds are exempt from income and inheritance taxes but not from the property tax.

Most statutes declare that the project itself shall be exempt from taxation as any other municipal enterprise. However, the Nebraska constitutional amendment and the Wyoming act provide that the property shall be taxed in the same manner as private property while leased. This type provision raises the interesting question of whether the city's tax lien would take precedence over the mortgage given as security for the revenue bonds issued by the city. With considerable foresight, the Michigan act provides that the taxes applicable to an industrial project shall be a direct debt from the lessee to the taxing unit and shall not become a lien against the property. The Maine statute provides that the leasehold interest of the lessee is taxable, while a 1965 amendment to the North Dakota act grants the lessee a tax exemption for the first five years of its occupancy. A recent act of general application in Georgia provides that local industrial development authorities are "institutions of purely public charity," that all their property and income are exempt from taxation, and that their bonds shall be exempt from all taxation within the state.

10. *Other Provisions.*—Several acts provide for the establishment of a special state board with supervisory powers, and set out the criteria or standards under which it will issue a certificate approving any municipal undertaking. Where local industrial development corporations are authorized, the act will contain the special incorporation procedures required, the powers of the corporation, and the procedures for dissolution and disposition of its property. The Missouri act requires competitive bids on all construction contracts, and Oklahoma has a similar provision.[82] Under the constitutional amendment adopted in Louisiana, any "existing similar and directly

82. Where the statute was silent, two courts held that competitive bids were not required for industrial projects financed by revenue bonds even though another statute of general application required open competitive bidding on all municipal construction contracts. See Green v. City of Mt. Pleasant, *supra* note 81; Gregory v. City of Lewisport, 369 S.W.2d 133 (Ky. 1963).

competing industry" situated in the municipality must give its written consent before any bond election may be called.

An amendment to the North Dakota act authorized the use of general obligation bonds where the net worth of the lessee is at least five times the city's investment in the project. The only unusual feature of this limitation is the complete absence of a similar requirement in the other statutes. An equally unique, but nevertheless desirable provision, is contained in the Arkansas eminent domain laws. In the event of the condemnation of "all or substantially all" of an industrial development project in the state, the award must be at least sufficient to cover all expenses and the amount necessary to satisfy the outstanding bonds with interest to the next call date and whatever prepayment premium may be applicable.[83]

The West Virginia act authorizes the city to pay preliminary expenses incident to the development of the project out of any available surplus to be reimbursed from the proceeds of the bond sale. A corresponding provision in a 1963 amendment to the Alabama Industrial Development Board Act authorized the issuance of short term notes for temporary borrowing in anticipation of the sale of the long term revenue bonds.

IV. The Lease and Other Documents

A. *In General*

The legal documentation supporting an issue of industrial development bonds will include: (1) a transcript of the proceedings of the governing body of the municipality covering its meetings and resolutions together with the election proceedings and certificate of the state board, if required; (2) the indenture, which would normally include the terms of each bond in the recital paragraphs; (3) the lease; and (4) the opinion of bond counsel. Many of the provisions in these instruments have become fairly standardized, but there are several areas that warrant consideration by any interested investor.

The opinion of bond counsel is usually limited to a statement that the bonds have been regularly issued and are valid and binding special obligations, that the indenture is a first lien on the property described therein, and that the bonds are exempt from federal income tax under existing statutes and regulations. In referring to the municipality's title to the property and the lien of the indenture, this opinion will normally rely upon an opinion of the city attorney or another local attorney engaged for such purpose. The use of title insurance has not been widespread in this field. If mentioned at all, the only

83. Ark. Stat. Ann. § 35-918 (1962).

expression concerning the lease will usually be a statement that it is legally binding and effective in accordance with its terms. However, the investor must consider that the lease and frequently the indenture have been drafted to the lessee's specifications. The employment of special counsel for the bondholders appears to have been limited to only a few issues where especially large amounts were involved. Unfortunately, a tendency has developed to consider the lease and indenture as satisfactory when sufficient rentals have been pledged to the payment of the bonds. In some cases, there has also been a drift away from the primary purpose of the enabling legislation and, quite possibly, the purpose of the tax exemption.

1. *The City's Problem.*—The difficult position of counsel for the city in objecting to the terms desired by the lessee is illustrated in a damage action brought against Springfield, Tennessee, where it was alleged that the city had defaulted on a contract to purchase property for a proposed industrial development.[84] The city had entered negotiations with the complainant and with Wilson Athletic Goods Manufacturing Company whereby the city would purchase complainant's property and lease it to Wilson after making certain improvements thereon. The undertaking was to be financed by the sale of revenue bonds. A contract of purchase and sale was made between the city and complainant conditioned on the requisite approval of the voters and the city's entering into a lease contract with Wilson. The city and Wilson executed a contract to make a lease with a copy of the proposed lease attached and conditioned only on voter approval. The voter approval was almost unanimous, but Wilson became dissatisfied with the proposed site. The city then agreed with Wilson to abandon the original contracts and entered into a new transaction for an alternate location. The opinion suggests that the city chose not to sue Wilson for performance rather than antagonize this prospective employer, and risk creation of a climate in the community adverse to new industry. However, the court held that the city could not avoid its own obligation by refusing to enforce its contract with Wilson and awarded substantial damages to the property owner.

B. *Specific Provisions*

1. *Commencement Date.*—In the usual transaction, the lease is executed and the bonds sold well in advance of the construction of the industrial building. However, the lease must provide for rentals to commence on a certain date in order to meet the required

84. Springfield Tobacco Redryers Corp. v. Springfield, 41 Tenn. App. 254, 293 S.W.2d 189 (M.S. 1956).

debt service regardless of whether or not the building has been completed and delivered to the lessee. A common provision is that the lease term shall begin on the completion date or on the fixed date, whichever shall be earlier. The lessee should also be required to complete the project at its own expense if for any reason the bond proceeds are insufficient.

2. *Rentals.*—It has become fairly standard to provide for semi-annual rents payable immediately prior to the due date of the bond payments. The lease may require fixed rentals, but it has become more common to use a formula provision whereby each rental payment will be an amount equal to the next maturing installments of principal and interest on the bonds. Since the bonds are normally sold in series with annual maturities, there would be a correspondingly high and low rent payment in each year. The lease should also provide for the tenant to pay, as additional rents, all trustee's fees and any similar expenses that may be incurred.

While unusual when compared with the more conventional methods of specifying rental payments, the formula method should not be objectionable in and of itself. However, it has been combined with an increasing number of credit provisions which could seriously dilute the security value of the property. These credits can arise from excess bond proceeds, hazard insurance proceeds, condemnation awards, or even from the lessee's exercise of a purchase option, and will be discussed under those topics.

3. *Net Lease.*—The lease must provide that the rents shall be absolutely net to the lessor, and that the obligation of the lessee to make the rental payments and perform its other agreements under the lease shall be absolute and unconditional so long as any part of the bond indebtedness is outstanding and unpaid. The following provision has been used:

> Until such time as the principal and interest on the bonds shall have been fully paid or provision for the payment thereof shall have been made in accordance with the indenture, the lessee will not suspend or discontinue any payment provided for in this lease and will not fail to perform and observe any of its other agreements and covenants as contained herein and will not terminate this lease for any cause, including, without limiting the generality of the foregoing, failure of the lessor to complete the project, any acts or circumstances that may constitute an eviction or constructive eviction, failure of consideration or commercial frustration, any damage to or destruction of the leased premises, the taking of the leased premises or any portion thereof by eminent domain or otherwise, any change in the tax or other laws of the United States or of any state or other governmental authority, or any failure of the lessor to perform and observe any agreement or covenant, whether express or implied, or any duty, liability or obligation arising out of or connected with this lease.

4. *Disbursement of Bond Proceeds.*—The indenture will normally provide that the sum necessary to meet interim interest requirements shall be allocated to a "bond fund" and that the remainder of the proceeds shall be placed in a "construction fund," both funds being held by the trustee. At this point, however, there is a marked departure from normal methods of financing. Rarely, if ever, are approved, final plans and specifications attached to any document, but rather the lessee is given the right to prepare the plans and specifications after the bonds have been sold and to make such changes and amendments as it may desire. One lessee did agree to design a plant of a stated minimum productive capacity, but only after the insistence of special counsel for the bondholders.[85]

It is commonly provided that the trustee will make disbursements from the construction fund to reimburse the lessee for costs incurred in constructing and equiping the project upon the certificate of one of its designated officers. A more desirable provision is that the trustee will make disbursements upon the joint certificate of a representative of the city and of the lessee. Although seldom mentioned, it would seem entirely in order to require the further certificate of the supervising architect.

Since the bonds are normally marketed on the basis of the lessee's financial strength and general reputation, the absence of an agreement to build a specific structure may be accepted as a business necessity. However, a common indenture provision is that any excess moneys in the construction fund will, at the option of the lessee, be used to retire outstanding bonds or paid into the bond fund. Under the formula clause, any moneys in the bond fund can be a credit on future rentals. Combined with the absence of definite plans and specifications, this option, in effect, gives the lessee the right to finance so much of its future rentals as it may desire. A more proper provision would be that any excess moneys in the construction fund should be held in a special fund to retire bonds of the latest maturities by lot at the first call date.[86] This would also operate to give the lessee a credit on rentals, but only at the end of the lease term when all bonds have been retired rather than at the beginning of the term.

5. *Fire, Casualty and Condemnation.*—Every lease must neces-

85. An amendment to the North Dakota act authorizes the city to give the lessee sole control of the acquisition, construction and installation of the industrial building. N.D. CENT. CODE § 40-57-03(11) (Supp. 1965). Apparently the legislature could foresee no difficulty in completely abrogating any governmental responsibility for the physical facility.

86. The net result of using the excess bond proceeds as a credit on the first maturing rental payments would certainly appear to violate the intent of several statutes. See note 79 *supra*.

sarily provide that there will be no abatement or reduction of rent in the event of property damage, and that the premises will be promptly repaired or restored by the lessee. If the insurance proceeds or condemnation award should be insufficient, the funds necessary to complete restoration must be provided by the lessee. Where there is a major condemnation that would render the remaining portion of the premises unsuitable for the lessee's purposes, the lessee usually has the option to purchase the property and terminate the lease upon payment of an amount sufficient to retire all outstanding bonds and, possibly, an additional sum (usually nominal) that will be paid to the city after the bonds have been retired. A similar option is frequently provided in the case of major damage or destruction. In either event, the proceeds of any hazard insurance or the condemnation award would be credited on the purchase price. In some cases, the definition of the purchase price will include whatever call premium may then be applicable under the bonds; but in others, the bonds may be callable without premium in such event.

Where the premises are to be restored, the lease should provide for the funds to be held by the trustee and disbursed upon appropriate certificates as the work progresses. A frequent provision is that insurance proceeds below a stated amount, *e.g.*, 25,000 dollars may be paid directly to the lessee. Another common provision is that any excess portion of the insurance proceeds or condemnation award will be paid into the bond fund. Since the lessee normally has the privilege of revising the plans and specifications during restoration, this raises the same problem as the excess moneys in the construction fund. Some leases have even provided that any such excess will be paid directly to the lessee. As already suggested, a more proper provision would direct that any unused insurance proceeds or condemnation award be used to retire bonds of the later maturities.

6. *Insurance.*—A fairly standard clause requires the lessee to furnish hazard coverage for the amount necessary to satisfy all outstanding bonds or the full insurable value of the premises, whichever is less. One proposed lease added the further qualification of "the amount obtainable." Since there is normally no question of being able to obtain coverage to full insurable value, this qualification could indicate a particularly hazardous operation. In addition to the exposure of the property, a substantial loss in such circumstances could seriously affect the financial position of the lessee and this provision should not be accepted.

Considering the primary purpose of the bond issue, a preferred insurance requirement would be full replacement cost. It is also suggested that the lease provide for war damage insurance where

obtainable. The insurance clause should require the lessee to provide general liability insurance in acceptable limits and workmen's compensation coverage.

7. *Temporary Investments.*—The lease and indenture will often provide that moneys held by the trustee may be temporarily invested at the lessee's request with the earnings being credited on the rental obligations. Such investments should be limited to short term obligations of the United States or equally liquid securities, and the lessee should be required to make up any loss incurred.

8. *Use of the Premises—Assignment and Subletting.*—In addition to the right to use the premises for any lawful purpose, the lessee may have the privilege of assigning the lease or subletting the premises without obtaining the consent of the lessor. Considering the purpose of the enabling legislation, at least a qualified restriction similar to the following should be appropriate:

> Insofar as practicable during the term of this lease, the premises shall be used primarily for manufacturing operations and related functions including administrative, sales and transportation functions, and shall not be used solely for warehousing, it being the purpose of this lease to provide employment for a substantial number of persons.

For like reason, it would seem proper to limit the rights of assignment and subletting to a tenant against whom the lessor has no reasonable objection.[87] In a case arising in Mississippi, suit was brought by the county for cancellation of the lease where the lessee had ceased manufacturing operations and was using the premises as a warehouse.[88] The court did not allow cancellation, but held that the lessor could obtain an injunction restraining any use of the premises other than as a factory. A dissenting opinion would have allowed cancellation on the theory that the lessee had breached the spirit of the lease and of the enabling legislation.

9. *Expansion Rights.*—The parties to the lease will normally want to provide some method of expanding the project if business conditions should so warrant. This has been done either through a provision authorizing the issuance of parity bonds or by allowing certain land

87. Such limitations on the use of the premises were strongly suggested in a concurring opinion in Albritton v. Winona, 181 Miss. 75, 113, 178 So. 799, 810 (1938). *Contra,* State *ex rel.* County Court v. Bane, 135 S.E.2d 349 (W. Va. 1964), where the court approved the financing of a warehouse in an opinion that did not discuss the "public purpose" requirement. The Rhode Island court was asked whether a luxury motel could be an industrial project under that state's guaranty type act. Appropriately, it held that it could not. Opinion to the Governor, 90 R.I. 135, 155 A.2d 602 (1959).

88. Greenfield v. Perry County, 205 F.2d 323 (5th Cir. 1953).

to be removed from the lien of the indenture and used as the basis for a separate bond issue. Where provision is made for parity bonds, the investor should be satisfied as to both the amount that may be issued and the purpose for which they may be used. It has been suggested that placing a limit on the amount of parity bonds would be unavailing since the primary security is the financial stability of the tenant who could always lease an entirely separate project. However, this overlooks the fact that the investor is also interested in the security value of the site and the quantum of improvements that can be sustained at the particular location. Even where a mortgage is not used and only the rentals pledged, it may be easier to find a new tenant for a smaller facility if the original lessee should not remain in possession.

Several leases provide that the lessee may obtain the release of unimproved land from both the lease and the indenture where the released land will be separately leased from the city and additional improvements constructed thereon. In some cases, the only requirement has been the certificate of an independent engineer that the released land is not needed for the operation of the project and that the usefulness of the remaining land will not be impaired. A few indentures have contained the additional requirement that the fair market value of the released property, as certified by an independent appraiser, must be paid to the trustee. In any event, the lessee's expansion option should be conditioned on the attainment of a specified payroll or some other appropriate limitation.

10. *Purchase and Renewal Options.*—At the end of the original term and after all bonds have been retired, the lessee usually has several renewal options at a nominal rent or an option to purchase the project for a relatively minor sum. While the use of only renewal options would allow the city to eventually obtain the property without investment on its part, the city's purposes may be better served by granting only a purchase option. This would have the effect of returning the property to the tax rolls if exercised. These options could raise additional problems under certain constitutional and statutory provisions. Viewing the plan as a whole, however, the courts considering the question have upheld such options as an appropriate part of the entire transaction between lessor and lessee.[89]

89. See, *e.g.*, Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629 (1952) (renewal option); Bennett v. City of Mayfield, 323 S.W.2d 573 (Ky. 1959); State *ex rel.* Meyer v. Lancaster, 173 Neb. 195, 113 N.W.2d 63 (1962); Darnell v. County of Montgomery, 202 Tenn. 560, 308 S.W.2d 373 (1957). *But see* State *ex rel.* City of El Dorado Springs v. Holman, 363 S.W.2d 552 (Mo. 1962), where a possible drafting oversight may prohibit a purchase option in any Missouri project financed by revenue bonds.

The lessee may also have an option to purchase the property prior to the retirement of the bonds in the event of major loss by condemnation or other casualty. A similar option may be provided in the event of commercial frustration, *e.g.*, removal of a protective tariff. The principal concern here is that the purchase price must include whatever amount is necessary to redeem all outstanding bonds with accrued interest and prepayment premium if applicable.

11. *Financial Statements.*—A standard lease provision requires the lessee to furnish audited financial statements covering its operations to the trustee at least annually. The instruments should provide that copies of such statements will be made available to any bondholder on request.

12. *Property Taxes or Equivalent Payments.*—Even though most statutes specifically provide that the property is exempt from state and local taxation as municipally owned property, the lease should require the lessee to pay whatever taxes may become payable. It is possible that the law may be changed during the term of the lease or the tax exemption removed by judicial decision. Depending on the relative bargaining position of the city and the inducements held out, the lease may provide for the lessee to make tax equivalent payments to cover whatever municipal services may be provided.[90]

13. *Financial Restrictions.*—Several of the earlier leases included specific restrictions on further financing or cash outlays by the lessee. However, such provisions have all but disappeared in the more recent issues. Considering the nature of the primary security, limitations on additional debt, lease commitments and dividend payments may be appropriate in some cases.

14. *Amendment of the Lease and Indenture.*—The lease should provide that it cannot be amended without the trustee's consent. Under the indenture, the trustee is usually authorized to consent to technical changes in any of the instruments and to make other changes not affecting the essential financial features of the bonds with the consent of the holders of two-thirds of the outstanding bonds. It is frequently provided that no change may be made in the *indenture* without the consent of the lessee. This requirement should be limited to matters affecting the lessee's interest.

90. The Iowa act requires that tax equivaleuts be paid from the revenues of the project and advisory opinions in New Hampshire held that a proposed act would be unconstitutional if such payments were not a mandatory requirement. IOWA CODE ANN. § 419.11 (Supp. 1964); Opinion of the Justices, 207 A.2d 574 (N.H. 1965); Opinion of the Justices, 209 A.2d 474 (N.H. 1965).

V. Federal Income Taxation

In most cases, the key to the successful financing of industrial development projects is provided by the several federal income tax advantages afforded. These involve not only the exempt status accorded municipal securities, but also the deduction taken by the lessee for its payments under the lease and the fact that the lessor is not a taxpaying entity.

A. *Exempt Status of the Bonds*

With rare simplicity, the Internal Revenue Code merely provides that gross income does not include interest on the obligations of a state or any of its political subdivisions.[91] However, it seems well settled, under both court decisions and existing rulings of the Service, that revenue bonds and bonds issued by a municipally owned corporation or authority are "obligations" for the purposes of this section.[92] In 1954, the Revenue Service ruled that bonds issued by or in behalf of a municipality to finance the acquisition of an industrial plant for lease to private enterprise constitute obligations of a political subdivision within the meaning of the Code.[93] This ruling held that the interest was exempt notwithstanding the purpose for which the bonds were issued or that the promise to pay was limited to the revenues from the project. Specifically referring to the Alabama Industrial Development Act, a 1957 ruling stated that bonds issued by an industrial development board created under that act would be considered as issued on behalf of a political subdivision of the state and the interest thereon exempt from the federal tax.[94]

A related 1959 ruling held that bonds issued by a non-profit corporation formed under the general laws of a state to finance the acquisition of a waterworks system would be exempt where no part of the earnings could accrue to any private individual and the title to the corporation's property must vest in the municipality when the indebtedness was retired.[95] The ruling noted that the city had approved all contracts including the revenue bonds, that the city would automatically obtain title when the indebtedness was paid in full, that the city council had control of the corporation, and that any surplus receipts were to be paid into the city's general fund. A

91. Int. Rev. Code of 1954, § 103.

92. Commissioner v. Shamberg's Estate, 144 F.2d 998 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945); Commissioner v. White's Estate, 144 F.2d 1019 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945); Bryant v. Commissioner, 111 F.2d 9 (9th Cir. 1940). Rulings on many authority obligations and revenue issues are collected in 2 P-H Fed. Tax Serv. ¶¶ 8240, 8244 (1965).

93. Rev. Rul. 54-106, 1954-1 Cum. Bull. 28.

94. Rev. Rul. 57-187, 1957-1 Cum. Bull. 65.

95. Rev. Rul. 59-41, 1959-1 Cum. Bull. 13.

similar ruling had been issued in 1954 in the case of debentures issued by a non-profit corporation formed under the general corporation laws of the state for the purpose of providing a community civic and recreational facility.[96]

The use of local development corporations may have been somewhat limited by a recent ruling which appears to depart from the basic viewpoint of its predecessors.[97] Setting forth five specific requirements for exemption, this ruling held that bonds issued by a non-profit corporation *formed under the general corporation laws of a state* for the purpose of financing the acquisition, lease and sale of industrial facilities would not be considered as having been issued "on behalf of" a political subdivision within the meaning of the Code where: (1) the municipality did not have a beneficial interest in the corporation while its bonds were outstanding; (2) although the articles of incorporation provided that the corporate property would be transferred to the county upon retirement of the bonds or dissolution of the corporation, there would not necessarily be a vesting of full legal title in the county since the corporation may never be dissolved or the bonds retired; and (3) neither the state nor any political subdivision had approved the specific bonds issued by the corporation even though they may have authorized the creation of the corporation and approved its general objectives. The prior rulings were distinguished on various grounds noting, among other things, that the Alabama act provided special incorporation procedures.[98] However, most of the distinctions mentioned appear to be matters of form rather than substance. This recent pronouncement could indicate a tightening-up attitude by the Service or, possibly, it may have been the result of a bad factual situation.

Critics of the general exemption for municipal securities have been particularly emphatic in the case of industrial development bonds, pointing out that the state's advantage of a lower interest cost is being passed on to private enterprise.[99] There can be little argument with this latter proposition. However, in this day of even less subtle use of the tax laws to spur industrial development and the general economy, it seems unlikely that the exemption for these bonds will be removed without a complete overhaul of the entire structure of

96. Rev. Rul. 54-296, 1954-2 CUM. BULL. 59.

97. Rev. Rul. 63-20, 1963-1 CUM. BULL. 24.

98. The partially invalidated Delaware act provided for creation of the local development corporations under the general laws relating to non-profit corporations. See notes 72 & 73 *supra*.

99. Ratchford, *Revenue Bonds and Tax Immunity*, 7 NAT'L TAX J. 40 (1954). See also Gelfand, *Tax Exempt Securities and The Doctrine of Reciprocal Immunity*, 32 TEMP. L.Q. 173 (1959); Ratchford, *Intergovernmental Tax Immunities in the United States*, 6 NAT'L TAX J. 305 (1953).

inter-governmental tax exemptions.[100]

In 1953, a bill was introduced by Congressman Multer of New York which would have denied exemption in the case of obligations issued in connection with the development of property to be operated by a non-public enterprise and not secured by the general credit of the issuer.[101] This bill was not reported out of committee. A different approach was used by the drafters of the 1954 Code. The House bill would have denied a deduction to the lessee for rental payments made to municipalities where the property was acquired by revenue bonds and leased to private enterprise. However, this limitation was rejected by the Senate and finally deleted in the conference committee, where it was pointed out that, as written, it would adversely affect airports and similar facilities in addition to industrial plants.[102] In 1961, Senator McNamara of Michigan introduced a bill similar to Congressman Multer's except that it was not limited to revenue bonds.[103] This bill also died in committee. In 1963, Congressman Multer put his earlier bill back into the legislative hopper,[104] but it was not picked up in the administration's general tax bill. Both Congressman Multer's and Senator McNamara's bills would have applied only to obligations issued after their enactment.

B. *The Lessee's Rental Payments*

In view of the liberal purchase and renewal options generally granted to the lessee of a municipally developed industrial building, the lessee's rent deduction would appear to be the weakest link in the chain of desirable income tax attributes. The Internal Revenue Code provides for deducting, as a business expense:

> [R]entals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of *property to which the taxpayer has not taken or is not taking title or in which he has no equity.*[105]

In the only reported case on this specific question, however, the decision has been for the taxpayer. In *Gem, Inc. v. United States*,[106] the taxpayer had leased a plant developed under Mississippi's act.

100. For a full discussion of the arguments on both sides of the basic constitutional question, see 1 COMPENDIUM OF PAPERS ON BROADENING THE TAX BASE SUBMITTED TO THE HOUSE COMMITTEE ON WAYS AND MEANS 679-791 (1959).

101. H.R. 2734, 83d Cong., 1st Sess. (1953).

102. H.R. REP. No. 1337, 83d Cong., 2d Sess. 33 (1954); S. REP. No. 1622 83d Cong., 2d Sess. 40 (1954); H.R. REP. No. 2543, 83d Cong., 2d Sess. 33 (1954); 1954 U.S. CODE CONG. & AD. NEWS 4058, 4671-72, 5293.

103. S. 2042, 87th Cong., 1st Sess. (1961).

104. H.R. 517, 88th Cong., 1st Sess. (1963).

105. INT. REV. CODE OF 1954, § 162(a)(3). (Emphasis added.)

106. 192 F. Supp. 841 (N.D. Miss. 1961).

The lease provided for rentals sufficient to completely amortize the bonds over its original twenty-year term, and also provided for three twenty-year renewal options and one nineteen-year renewal option at an apparently nominal rental. The government's position was that the sharply reduced rental payments during the renewal terms, coupled with the fact that the property would also be exempt from local taxes, indicated that the alleged rental payments during the original term were really payments for the acquistion of an equity and should be amortized over the life of the property. The court, however, felt that the question was governed by the regulation dealing with the write-off of a lessee's improvements, where it is provided:

> As a general rule, unless the lease has been renewed or the facts show with reasonable certainty that the lease will be renewed, the cost or other basis of the lease, or the cost of improvements shall be spread only over the number of years the lease has to run without taking into account any right of renewal.[107]

On facts that must have been very ably presented on behalf of the taxpayer, the court found that there was no reasonable certainty that the lease would be renewed in view of the highly competitive nature of the lessee's business and the potential burdens of the lessee under other provisions of the lease, *i.e.*, to continue a manufacturing operation, to make repairs and maintain the premises, and to provide satisfactory insurance.[108]

The presence of a purchase option at an annually reducing price did not prevent the taxpayer from obtaining a rental deduction in *Breece Veneer & Panel Co. v. Commissioner*,[109] where the property had been leased and eventually purchased from the Reconstruction Finance Corporation. The opinion emphasized the fact that the agreement had been made in an arm's length bargain. On the other hand, where the option price was extremely low when related to total rents and the transaction between related parties, an alleged lease of land and buildings was held to be a sales contract.[110]

The basic position of the Internal Revenue Service on this subject has been outlined in a 1955 ruling, which holds that the transaction will be classified as a purchase and sale if, the total "rentals" plus the option price, if any, are approximately equal to the regular purchase price plus interest.[111] In general, the Commissioner's efforts

107. Treas. Reg. § 1.162-11(b)(2) (1963).
108. Compare ¶¶ (3), (6), (8) & (12) of section IV. B *supra*.
109. 232 F.2d 319 (7th Cir. 1956).
110. Frito-Lay, Inc. v. United States, 209 F. Supp. 886 (N.D. Ga. 1962).
111. Rev. Rul. 55-540, 1955-2, CUM. BULL. 39. For related rulings finding that the transaction was a sale, see Rev. Rul. 55-541, 55-542, 1955-2 CUM. BULL. 19, 59; Rev. Rul. 57-371, 1957-2, CUM. BULL. 214.

on this question have met with at best mixed success.[112] Sometimes little more than a moral victory has been achieved. While holding for the government in an equipment rental case, the Court of Appeals for the Ninth Circuit concluded its opinion with the following observation:

> We do not criticize the commissioner. It is his duty to collect the revenue and it is a tough one. If he resolves all questions in favor of the taxpayers, we soon would have little revenue. However, we do suggest that after he has made allowance for depreciation, which he concedes, and an allowance for interest, the attack on many of the 'leases' may not be worthwhile in terms of revenue.[113]

C. *Tax Exempt Status of the Municipality*

One writer has suggested that the use of industrial development bonds would be seriously hampered if the municipality itself was required to pay federal income taxes.[114] It is possible that after deducting interest and depreciation from the rentals received, the municipality may derive some net income from the project. However, this would seem very difficult to measure where there are purchase or renewal options at nominal rates. As important as this question may be, and particularly in view of the great weight accorded the subject in a long series of Supreme Court decisions involving other taxes,[115] there is surprisingly little authority or precedent available. The Code provides that gross income does not include:

> [I]ncome derived from any public utility or the exercise of any *essential governmental function* and accruing to a State or Territory, or any political subdivision thereof, or the District of Columbia.[116]

There are no Treasury regulations on the subject, and it only appears to have been directly considered in two General Counsel memorandums published in 1934 and 1935. Both memorandums concerned a state's liability for income tax on the operation of controlled liquor stores, and both reached the conclusion that the income was not taxable although for entirely different reasons. While recognizing that this particular operation was a proprietary rather than a governmental function, the earlier memorandum held that it was

112. See, *e.g.*, Western Contracting Corp. v. Commissioner, 271 F.2d 694 (8th Cir. 1959) (for taxpayer); Arkansas Bank & Trust Co. v. United States, 224 F. Supp. 171 (W.D. Ark. 1963) (for taxpayer-collects cases); Friedman, *Lease or Purchase of Equipment: Sale and Leaseback*, 14TH N.Y.U. INST. ON FED. TAX. 1427 (1956).

113. Starr's Estate v. Commissioner, 274 F.2d 294, 296-97 (9th Cir. 1959).

114. Armstrong, *"Municipal Inducements"—The New Mexico Commercial and Industrial Project Revenue Bond Act*, 48 CALIF. L. REV. 58 (1960).

115. New York v. United States, 326 U.S. 572 (1946); Ohio v. Helvering, 292 U.S. 360 (1934); South Carolina v. United States, 199 U.S. 437 (1905).

116. INT. REV. CODE OF 1954, § 115(a)(1).

still nontaxable on finding that the profits would be used for the relief of the indigent—an essential governmental function.[117]

The next question in logical sequence was presented the following year where the facts showed that the profits would be placed in the state's general fund and not earmarked for any particular purpose.[118] In a rather remarkable bit of statutory construction, this memorandum concluded that the Code provision related only to passive income and not to income from a direct state operation. Having thus mitigated the theory of its predecessor, this memorandum went on to say that a state is neither an individual nor a corporation, as such taxpaying entities are defined in the Code, and also placed considerable weight on the fact that the Internal Revenue Service had never made any effort to obtain income tax returns from a state even though the law had then been in effect for some twenty-two years. *Quaere*, where would this reasoning leave the tax status of activities that are direct operations of *municipalities* and other *corporate* political subdivisions?

D. *A Piéce de Résistance*

There is one recent case upholding a proposed issue which merits consideration in any discussion of the federal tax features of industrial development bonds. By virtue of special enabling legislation,[119] Covington, Kentucky proposed to issue revenue bonds for the purpose of financing the acquisition of a large industrial tract which was to be leased to a substantial employer at a rental of one dollar per year. A bond issue in the amount of 2.5 million dollars was approved to cover the cost of the site. The improvements, which eventually would become the property of the city, were to be constructed by the lessee at its own expense.

Since no rents were available for the payment of the bonds, they were secured by a pledge of the surplus revenues from the city's water and sewer systems, and, additionally, by a special allocation of the city wage tax collected from the employees of this new enterprise. The substantial employer in this case, who would in effect acquire the use of this costly site, rent free, by the device of passing a part of the cost on to a tax on its own employees, was none other than the Internal Revenue Service.[120]

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117. G.C.M. 13745, XIII-2, CUM. BULL. 76 (1934).

118. G.C.M. 14407, XIV-1, CUM. BULL. 103 (1935).

119. Ky. Acts 1962, ch. 178; KY. REV. STAT. §§ 82.105-.180 (1963).

120. Grimm v. Moloney, 358 S.W.2d 496 (Ky. 1962). The site will be occupied by a data processing center. Subsequent to the court's decision, the city revised its offer and agreed to convey the property to the United States.

VI. Related Statutes

A. *The Federal Bankruptcy Act*

While claims for anticipatory breach of contract including unexpired leases are provable in bankruptcy, a landlord's claim for damages resulting from the rejection of an unexpired lease or for indemnity under a specific covenant is limited to an amount not exceeding the rent reserved for the year next succeeding the date of surrender or the date of re-entry, whichever first occurs, plus the unpaid rent accrued to such date.[121] In the case of a reorganization proceeding under Chapter X of the Bankruptcy Act or an arrangement under Chapter XI, the limitation is the amount of rent reserved for the next three years.[122] In any case, however, the lessor cannot automatically file claim for the statutory maximum but rather must prove the actual loss sustained. The measure of damages would normally be the difference between the rental value of the remainder of the term and the rent reserved, both discounted to present worth.[123]

Another section of the act provides that the trustee must assume or reject an unexpired lease within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later.[124] However, the court may extend or reduce the time for cause shown. The same section also provides that an express covenant terminating the lease or giving either party an election to terminate in the event of bankruptcy or of an assignment by operation of law will be enforceable. Under these limitations of the Bankruptcy Act, the holder of industrial development bonds would not be in the same position as the holder of the lessee's direct obligations; but rather would be limited to a prorata share of whatever amount may be recovered by the lessor in the event of the financial failure of the lessee.

B. *Federal Securities Acts*

The Securities Act of 1933 automatically exempts any security issued or guaranteed by any state, or any political subdivision thereof or any instrumentality of one or more states.[125] The original act limited the exemption for public instrumentalities to those "exercising an essential governmental function."[126] However, this limitation was deleted in a 1934 amendment which indicated that Congress intended the exemption to be liberally applied to municipal securities.

121. 49 Stat. 1475 (1938), 11 U.S.C. § 103(a)(9) (1964).
122. 52 Stat. 893 (1938), 11 U.S.C. 602 (1964) (reorganization); 52 Stat. 910 (1938), 11 U.S.C. § 753 (1964) (arrangement).
123. Annot., 129 A.L.R. 701, 715 (1940).
124. 52 Stat. 879 (1938), 11 U.S.C. § 110(b) (1964).
125. 48 Stat. 74 (1933), 15 U.S.C. § 77c(a)(2) (1964).
126. Securities Act of 1933, §§ (a)(2), 48 Stat. 76, 15 U.S.C. § 78C (1964).

According to the House committee report, the definition of a "political subdivision" for purposes of the Securities Act should correspond with the line drawn by the courts on the question of federal tax exemption.[127] In general, the Commission has accepted the apparently liberal intent of Congress and considers industrial development bonds, including both revenue and general obligation bonds, to be exempt from the requirements of the act.[128]

The definition of an exempted security in the Securities Exchange Act of 1934 includes:

> [S]ecurities which are direct obligations of or obligations guaranteed as to principal or interest by a State or any political subdivision thereof or any agency or instrumentality of a State or any political subdivision thereof or any municipal corporate instrumentality of one or more States.[129]

A liberal construction has been given to the term "direct obligations" as used in this act, and the Commission considers state and municipal revenue bonds to be exempt.[130] Municipal securities are also exempt from filing under the Trust Indenture Act of 1939.[131]

C. *The Negotiable Instruments Law and the Uniform Commercial Code*

The Negotiable Instruments Law provides that an order or promise to pay out of a particular fund is not an unconditional promise, and, under this limitation, any revenue bond would not be a negotiable instrument.[132] Undoubtedly recognizing this limitation, most of the enabling acts covering municipal industrial development bonds include a specific provision declaring that the bonds shall be negotiable instruments.[133] In some states, the NIL was modified to provide that obligations of the state or any political subdivision shall be negotiable even though payable out of a particular fund.[134]

The latter modification was one of the few changes in the earlier Negotiable Instruments Law made by the Uniform Commercial Code. Under the Code, a promise or order is not made conditional by the fact that it is limited to payment out of a particular fund or the proceeds of a particular source *if* the instrument is issued by a govern-

127. H.R. REP. No. 85, 73d Cong., 1st Sess. 14 (1933).
128. 1 Loss SECURITIES REGULATION 563-64 (2d ed. 1961).
129. 48 Stat. 74 (1933), 15 U.S.C. § 78c(a)(12) (1964).
130. 2 Loss, *op. cit. supra* note 128, at 798.
131. 53 Stat. 1153 (1939), 15 U.S.C. § 77ddd(a)(4) (1964).
132. UNIFORM NEGOTIABLE INSTRUMENTS LAW § 3; 43 AM. JUR. *Public Securities and Obligations* § 163 (1942).
133. See, *e.g.*, KY. REV. STAT. § 103.230 (1963); MISS. CODE ANN. § 8936-59 (Supp. 1964).
134. TENN. CODE ANN. § 47-103 (1956).

ment or governmental agency or unit.[135] In any Code state, however, a regular issue of industrial development bonds should come under Article 8—"Investment Securities." This article specifically provides that all securities governed by its provisions are negotiable instruments.[136]

D. *Eminent Domain*

While more properly a part of the discussion of constitutional law, one might well ponder the question of whether the theory supporting the use of industrial development bonds could be extended to allow the municipality to acquire a plant site under its power of eminent domain. In a Maryland case upholding the issuance of general obligation bonds, the dissenting judge felt that the term "public purpose" was equivalent in the law of taxation and the law of eminent domain; and that the majority opinion would, in effect, authorize a city to exercise the power of eminent domain for industrial development. Thus, if *A* owned a parcel of land on which he proposed to erect a shoe factory, could the parcel be condemned and leased to *B* for the erection of a shirt factory?[137] With this unhappy possibility suggested, it would not be too difficult to picture the cold hand of Uriah Heep reaching out of a Dickensian law office to tap the shoulder of any owner of a desirable industrial site.

It is, however, generally accepted that the power of condemnation is the most severely restricted and guarded power of any government. The statutes and cases considering the power of taxation generally use the phrase "public purpose" or even "public benefit," while those referring to the power of eminent domain use the more restrictive term "public use." No case has been found considering this question under the laws authorizing industrial development bonds.[138] The general law has been summarized as follows:

> It may be taken as established law that the incidental benefit accruing to the public from the establishment of a large factory, mill, department store, or other industrial or commercial enterprise is not a valid ground for ranking such an enterprise as a public use and intrusting it with the power of acquiring a suitable site by eminent domain.[139]

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135. UNIFORM COMMERCIAL CODE § 3-105(1)(g).

136. UNIFORM COMMERCIAL CODE §§ 8-102(1) -105(1).

137. City of Frostburg v. Jeukins, 215 Md. 9, 19, 136 A.2d 852, 861 (1957) (dissenting opinion).

138. Acquisition of specific industrial sites by condemnation is authorized by statute in four states. KY. REV. STAT. § 103.245 (Supp. 1965); MISS. CODE ANN. § 8936-09 (1956); N.Y. PUBLIC AUTHORITIES LAW § 1827 (Supp. 1965); TENN. CODE ANN. § 6-2819 (Supp. 1965). On the other hand, this use of the power of eminent domain is prohibited in at least three enactments. IOWA CODE ANN. § 419.14 (Supp. 1964); MD. ANN. CODE, art. 41, § 266B (Supp. 1965); NEB. CONST. art. XV, § 16.

139. 18 AM. JUR. *Eminent Domain* § 45 (1938).

Somewhat related cases are those considering the constitutionality of the urban redevelopment laws, which authorize the acquisition of slum areas through condemnation, and the resale or leasing of the cleared property to private enterprise for industrial and commercial purposes. These statutes have been enacted in almost every state on the impetus of modern municipal needs and the financial assistance available from the federal government.[140] They have been all but unanimously upheld when attacked on constitutional grounds.[141] While these cases are sometimes described as exceptions to the rule that private property cannot be condemned for only a "public benefit," they could be classified as an exercise of the state's police power rather than the power of eminent domain.

Another limitation on any municipality's right to condemn property for an industrial building site would be the principle that land may not be taken by eminent domain for an indirect public benefit where the proposed use is not limited to a particular location.[142] One authority in this field has made the obvious suggestion that the use of tax money to aid private industry can be distinguished from the power of eminent domain on grounds of public repugnancy.[143] The use of tax money is a much more impersonal affair than the taking of private property. While the average citizen may well rebel at the latter thought, he has undoubtedly come to expect increasingly novel expenditures from the public till.[144]

VII. CRITICISMS AND PLAUDITS

The use of industrial development bonds has been the subject of considerable controversy in financial as well as in economic and legal circles. Frequent reference is made to the disastrous consequences that attended the extension of municipal credit to developing railroad and transportation companies, a practice that was prevalent in the mid-nineteenth century. The bonds, as such, have been officially criticized by the Investment Bankers Association of America, the Municipal Finance Officers Association, and the Municipal Law Section of the American Bar Association.[145] In an appearance before

140. Housing Act of 1949, 63 Stat. 413, 12 U.S.C. § 1701h (1964); Housing Act of 1954, tit. III, 68 Stat. 622, 12 U.S.C. § 1716 (1964); Area Redevelopment Act of 1961, 75 Stat. 47, 42 U.S.C. §§ 1441-64, 2501-25 (1964).

141. *Compare* Berman v. Parker, 348 U.S. 26 (1954), *with* Edens v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280 (1956). Annot., 44 A.L.R.2d 1414 (1955).

142. Annot., 54 A.L.R. 7, 28 (1928).

143. 2 NICHOLS, EMINENT DOMAIN § 7.61 (3d ed. 1963).

144. For a decision very close in point wherein the attempted condemnation was held unconstitutional, see Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959).

145. INVESTMENT BANKERS ASSOCIATION OF AMERICA, REPORT ON INDUSTRIAL AID

the House Committee on Ways and Means, the director of research for the Textile Workers Union of America emphasized the "evil of plant pirating."[146] A principal criticism has been that the use of municipal bonds in aid of private industry is an abuse of the tax exemption for municipal securities that could lead Congress and possibly the Supreme Court to take another look at the general exemption afforded.

Other critical observations have pointed out the potential unfairness to a competing industry. It has also been suggested that even in the field of revenue bonds, a municipality may expose itself to liability for negligence and related matters.[147] The unhappy experience of Springfield, Tennessee in defaulting on its contract to purchase an industrial site is one example,[148] but the instances of such liability should be very rare.

Sharp reprimands have also appeared in judicial opinions. The Supreme Court of Florida felt that any form of public financing of private enterprise would be an encroachment on our constitutional system that "will lead inevitably to the ultimate destruction of the private enterprise system." The Nebraska court termed the use of bonds "a death blow to the private enterprise system." After that decision had been overridden by constitutional amendment, the same court referred to the enabling legislation as a "sham." In Alabama where the bonds were upheld, a dissenting judge felt that "the present drift is leading to socialism."

On the other hand, the Kentucky Court of Appeals termed the enabling statute an "ingenious plan." In approving that state's revenue bond act, the Supreme Court of Tennessee quoting from an early decision said: "[I]t may be asked, is there anything wrong in this? Is there anything against the public good in this? Is there anything against law in this? Surely not."

Describing the bonds as "the most effective technique yet devised for rebuilding local economy," one writer summed up most of the pro arguments as follows:

> The primary public purpose served by industrial aid bonds is the increase in employment as workers are hired to staff the new plant. A second advantage flows to business generally as increased payrolls circulate in the community. Public morale and private incentive are enhanced, civic pride is reawakened, and real estate values (and tax rolls) are stabilized and

FINANCING (1961). However, this opinion is not unanimous. See GOODBODY & Co., INDUSTRIAL REVENUE BONDS, A FRANK DISCUSSION (1962); MORE ABOUT INDUSTRIAL REVENUE BONDS, A CALL FOR REALISM (1963).

146. COMPENDIUM, *op. cit. supra* note 100, at 733-34.

147. Fordham, *Revenue Bond Sanctions*, 42 COLUM. L. REV. 395 (1942).

148. See note 84 *supra* and accompanying text.

> enlarged. Industry begets industry, moreover, and satellite plants often spring up to meet the needs of the acquired manufacturer.[149]

Referring to twenty years of experience in his state, a Mississippi attorney concluded: "Whatever criticisms may be made concerning Mississippi's BAWI laws, one thing is certain and that is, it works."[150]

VIII. CONCLUSION

Like any other tool available to city and financial planners, industrial development bonds can be either wisely employed or severely abused. An outstanding example of an abuse would be the purchase and leaseback of an existing facility—of what avail is this endeavor in providing new employment opportunities?[151] The potential of a form of blackmail is also involved. What are the city fathers to do when an existing industry suggests that it may relocate unless provided with a new, municipally financed plant?[152] Consider also the possibility of two existing and competing enterprises vying with the local administration for the advantage of public financing. The financial strength of one such industry may well support the bond sale while the other would not.

The constitutional arguments and the basic theory of the enabling legislation should be constantly kept in mind by all parties concerned. State governments could undertake studies of the experience in this field and make whatever changes in their own laws appear warranted. Considering the rapid growth that has occurred, the establishment of a permanent state board with regulatory authority may be advisable in every state where the use of such bonds has been authorized. Even if such a board functioned only in an advisory capacity, it may well render valuable assistance to the municipalities in the preparation of the legal documents and in several other areas.[153] Consideration might also be given to the repeal of legislation authorizing the use of general obligation bonds. While such bonds possibly

149. Note, 15 U. FLA. L. REV. 262, 296 (1962).

150. Bell, *Legal Problems That May Be Encountered in the Administration of Mississippi's BAWI Program*, 29 MISS. L.J. 22, 40 (1957).

151. However, the acquisition of any existing building bas been upheld. Massey v. City of Franklin, 384 S.W.2d 505 (Ky. 1964). In what appears to be special purpose legislation, the West Virginia act provides that the bonds may be delivered in exchange for an existing industrial plant. W. VA. CODE ANN. § 1093(28) (Supp. 1965). *Contra*, ME. REV. STAT. ANN. ch. 30, § 5331.2 (Supp. 1965).

152. This possibility may have been invited by a 1961 amendment to the Tennessee act which authorizes the use of municipal financing to induce industry "to locate in *or remain in* this state." TENN. CODE ANN. § 6-2802 (Supp. 1965). (Emphasis added.)

153. At least one statute contains such a provision. ME. REV. STAT. ANN. ch. 30, § 5328.2 (Supp. 1965). See Note, 70 YALE L.J. 789 (1961).

merit a smaller interest cost, this would seem to be far outweighed by the potential disadvantages involved.

Certainly, a city should hesitate to consider any enterprise that could not be carried by the credit of the proposed lessee.[154] In addition to the basic financial terms, the lessor's representatives should be very much concerned with the remainder of the lease. The mere presence of a large, non-taxpaying corporation could become a political football after the initial joy of acquiring a new industry has subsided. The lessee should also recognize that it is entering into a long term relationship, and that whatever initial advantage may be gained from an overly liberal lease could be outweighed by subsequent developments.[155] Clearly, the underwriter has a major responsibility in determining what type of "package" should be offered for sale. And finally, every investor should carefully consider the purpose of the issue and the terms of the instruments in addition to evaluating the financial position of the lessee.

The censures leveled at the use of industrial development bonds have emphasized the possible loss of the municipal tax exemption and the potential of unfortunate defaults. Hopefully, such consequences can be avoided through careful planning and the exercise of a wise discretion. Even though not subscribing to the suggested specter of socialism, the users, issuers, sellers and buyers of these bonds should recognize that this device does at least tinker with the norms of the private enterprise system. It is a long way from a small, depression-born measure in Winona, Mississippi to the multi-million dollar project in a large, already prosperous city.

APPENDIX

The year given with statutes and constitutional amendments is the year of original enactment or adoption.

ALABAMA

Local Development Corporations:

ALA. CODE tit. 37, §§ 815-30(1) (1949);
Opinion of the Justices, 254 Ala. 506, 49 So. 2d 175 (1950).

Revenue Bonds:

ALA. CODE tit. 37, §§ 511(20)-(32) (1951);
Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629 (1952).

154. The lessee's credit resources and operational experience were considered in Gripentrog v. City of Wahpeton, 126 N.W.2d 230 (N.D. 1964), where the court stated that such arguments should be addressed to the city council and not to the court.

155. *Cf.* Gem, Inc. v. United States, *supra* note 106.

ARKANSAS

Limited General Obligation Bonds:
ARK. CONST. amend. 49 (1958) (self-executing);
Myhand v. Erwin, 231 Ark. 444, 330 S.W.2d 68 (1959).

Revenue Bonds:
ARK. STAT. ANN. §§ 13-1601 to -1614 (1960);
Wayland v. Snapp, 232 Ark. 57, 334 S.W.2d 633 (1960).

Joint Action of Two or More Subdivisions:
ARK. STAT. ANN. §§ 14-801 to -804 (1960);
Hackler v. Baker, 233 Ark. 690, 346 S.W.2d 677 (1961).

DELAWARE

Local Development Corporations:
DEL. CODE ANN. tit. 6, §§ 7001-09 (1961);
Opinion of the Justices, 177 A.2d 205 (Del. 1962);
see text accompanying notes 72 & 73 *supra.*
See also note 98 *supra.*

GEORGIA

Revenue Bonds and Local Development Corporations:
Local Constitutional Amendments (see text accompanying notes 64-66 *supra*—presumably could also cover general obligation bonds);
Smith v. State, 217 Ga. 94, 121 S.E.2d 113 (1961).

Local Development Corporations:
GA. CODE ANN. §§ 69-1501 to -1513 (1963).
No reported case.

ILLINOIS

Revenue Bonds:
ILL. ANN. STAT., ch. 24, §§ 11-74-1 to -13 (Smith-Hurd 1951).
No reported case. A test case brought prior to the required referendum was held premature in Slack v. City of Salem, 31 Ill. 2d 174, 201 N.E.2d 119 (1964).

IOWA

Revenue Bonds:
IOWA CODE ANN. §§ 419.1—.14 (1963);
Green v. City of Mt. Pleasant, 131 N.W.2d 5 (Iowa 1964).

KANSAS

Revenue Bonds:
KAN. GEN. STAT. ANN. §§ 12-1740 to -1749 (1961);
State *ex rel.* Ferguson v. City of Pittsburgh, 188 Kan. 612, 364 P.2d 71 (1961).

KENTUCKY

Revenue Bonds:

KY. REV. STAT. §§ 103.200-.285 (1946);

Gregory v. City of Lewisport, 369 S.W.2d 133 (Ky. 1963) (covers several specific questions);

Dyche v. City of London, 288 S.W.2d 648 (Ky. 1956) (approves tax supported bonds under general constitution after election);

Faulconer v. City of Danville, 313 Ky. 468, 232 S.W.2d 80 (1950) (leading case).

LOUISIANA

General Obligation Bonds:

LA. CONST. art. 14, § 14 (b.2) (1952) (self-executing);

Miller v. Police Jury, 226 La. 8, 74 So. 2d 394 (1954).

MAINE

Revenue Bonds:

ME. REV. STAT. ANN. ch. 30, §§ 5325—44 (1965);

Opinion of the Justices, 210 A.2d 683 (Me. 1965) (limited approval).

MARYLAND

General Obligation Bonds:

MD. ANN. CODE art. 45A, §§ 1-3 (1960).

See City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957) (upholding a 1953 private act)

Revenue Bonds:

MD. ANN. CODE art. 41, § 266A to I (1963).

No reported case.

MICHIGAN

Revenue Bonds:

MICH. STAT. ANN. §§ 5.3533(21)—(33) (1963).

No reported case.

MISSISSIPPI

General Obligation Bonds:

MISS. CODE ANN. §§ 8936 to -24 (1936);

Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, *appeal dismissed*, 303 U.S. 627 (1938).

Revenue Bonds:

MISS. CODE ANN. §§ 8936-51 to -69 (1960).

MISSOURI

Revenue and General Obligation Bonds:

Mo. CONST. art. 6, §§ 23(a), 27 (1960);
Mo. ANN. STAT. §§ 71.790-.850 (1961);
State *ex rel.* City of El Dorado Springs v. Holman, 363 S.W.2d 552 (Mo. 1962).

NEBRASKA

Revenue Bonds:

NEB. CONST. art. XV, § 16 (1960);
NEB. REV. STAT. §§ 18-1614 to -1623 (1961);
State *ex rel.* Meyer v. County of Lancaster, 173 Neb. 195, 113 N.W.2d 63 (1962).

NEW MEXICO

Revenue Bonds:

N.M. STAT. ANN. §§ 14-31-1 to -13 (1955);
Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).

NORTH DAKOTA

Revenue and General Obligation Bonds:

N.D. CENT. CODE §§ 40-57-01 to -20 (Revenue 1955, General Obligation 1961);
Gripentrog v. City of Wahpeton, 126 N.W.2d 230 (N.D. 1964) (revenue bonds).

OKLAHOMA

Revenue Bonds:

OKLA. STAT. ANN. tit. 62, §§ 651-64 (1961);
Harrison v. Claybrook, 372 P.2d 602 (Okla. 1962).

SOUTH DAKOTA

S.D. Acts 1964, ch. 148;
No reported case

TENNESSEE

Revenue Bonds:

TENN. CODE ANN. §§ 6-1701 to -1716 (1951);
Holly v. City of Elizabethton, 193 Tenn. 46, 241 S.W.2d 1001 (1951).

General Obligation Bonds:

TENN. CODE ANN. §§ 6-2901 to -2916 (1955);
McConnell v. City of Lebanon, 203 Tenn. 498, 314 S.W.2d 12 (1958).

Local Development Corporations:

TENN. CODE ANN. §§ 6-2801 to -2820 (1955);
West v. Industrial Development Board, 206 Tenn. 154, 332 S.W.2d 201 (1960).

VERMONT

Revenue Bonds:

VT. STAT. ANN., tit. 24, §§ 2701-14 (1955).
No reported case.

WEST VIRGINIA

Revenue Bonds:

W. VA. CODE ANN. §§ 1093(22)-(41) (1963);
State *ex rel.* County Court of Marion County v. Demus, 135 S.E.2d 352 (W. Va. 1964).

WYOMING

Revenue Bonds:

WYO. STAT. ANN. §§ 15-628.16 to .24 (1963).
No reported case.