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CONSTITUTIONAL LIMITATIONS ON MUNICIPAL TAXATION IN MISSOURI

A JUDICIAL STRUGGLE.

A goodly number of the best lawyers in Missouri sat in the Convention which framed the Constitution of 1875. Yet their work, like the Will of that other great lawyer, Samuel J. Tilden, has been found not to be flawless. In particular, two Sections of Article Ten have given the courts no end of trouble. They both relate to Municipal Taxation. Section 11 classified the counties, cities and towns of the State—the counties, according to the amount of taxable property in each; the cities and towns according to the number of inhabitants in each; and it provided what should be the maximum rate of taxation allowable for county, city, town and school purposes, in the several municipalities, in each of these classes, and in school districts. Section 12 regulated these municipalities in the matter of incurring debts, and provided for the levying of a tax to pay the interest and principal of every such debt. The question that long troubled the courts was whether the tax provided in Section 11 was the only tax that could be levied for municipal purposes, or whether an additional tax might be levied to pay debts.

As to counties, the provision of Section 11 is:

For county purposes, the annual rate on the property in counties having $6,000,000 or less, shall not in the aggregate exceed 50c on the $100 valuation; in counties having $6,000,000 and under $10,000,000, said rate shall not exceed 40c on the $100 valuation; in counties having $10,000,000, and under $30,000,000, said rate shall not exceed 50c on the $100 valuation, and in counties having $30,000,000 or more, said rate shall not exceed 35c on the $100 valuation.

As to cities and towns, the provision of Section 11 was that:

For city and town purposes, the annual rate on property in cities and towns having 30,000 inhabitants or more, shall not, in the aggregate, exceed 100 cents on the $100 valuation; in cities and towns having less than 30,000, and over 10,000 inhabitants, shall not exceed 60c on the $100 valuation; in cities and towns having less than 10,000 and more than 1,000 inhabitants, said rate shall not exceed 50c on the 100 valuation; and in towns having 1,000 inhabitants or less, said rate shall not exceed 25c on the $100 valuation.

As to school districts, provision was also made for a maximum rate, which however, might be increased upon a vote of the people. The Section closed with these words:

Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing or bonds which may be issued on renewal of such indebtedness.

Section 12 provided that no municipality should be allowed to become indebted, in any sum beyond the income and revenue of the year, without the assent of two-thirds of the qualified voters, and that the amount of indebtedness that might

be incurred should not in the aggregate exceed "five per centum on the value of the taxable property therein."

This section closed with these words:

Any county, city, town, township, school district or other political corporation or subdivision of the State incurring any indebtedness requiring the assent of the voters as aforesaid shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for payment of the principal thereof, within twenty years from the time of contracting the same.

In 1890, Columbia was a town of about 6,000 inhabitants. It, therefore, fell into the third class, and under Section 11, had power to levy taxes for town purposes to the amount of 50c on the $100. In that year, after levying a tax of 50c, the Board of town trustees passed, and the citizens at an election duly held, by a two-thirds vote, approved an ordinance providing for the issuance of $45,000 of bonds for water-works and electric light purposes. The ordinance provided for an additional levy each year of 37½c on the $100, to pay the interest and create a sinking fund to pay the principal of these bonds. The Prosecuting Attorney of Boone County sued out an injunction to prevent the issue of these bonds, alleging as a reason that the tax provided by the ordinance, was a tax over and beyond the rate permitted by the Constitution.

The trial Court granted the injunction, and this, on appeal to the Supreme Court, was affirmed.

State *ex rel* Rebinson v. Town of Columbia, 111 Mo. 365.

The opinion in this case was delivered by Judge Black, who had been a member of the Convention of 1875. Construing Section 11, Judge Black said:

"The last clause says: 'Said restrictions as to rates shall apply to all taxes of every kind and description, whether general or special.' The tax which the trustees propose to

levy to pay the interest on these bonds, and to create a sinking fund is a special tax within the meaning of the clause of Section 11 just quoted. It is, therefore, perfectly clear that the annual tax to pay current expenses and to pay the interest on these bonds, and to create a sinking fund cannot exceed, in the aggregate, fifty cents on the $100 valuation. Now the ordinances in this case contemplate, and indeed, provide that this debt, evidenced by the bonds, shall be paid by a tax additional to the levy of fifty cents on the $100 valuation. To the fifty-cent tax it is proposed to add an interest tax and a sinking-fund tax to pay the bonds, amounting to an annual levy of at least thirty-seven and one-half cents on the $100. As this additional tax is in excess of the constitutional limit it will be illegal, and its collection may be enjoined. Book v. Earl, 87 Mo. 246; Arnold v. Hawkins, 95 Mo. 569; Black v. McGonigle, 103 Mo. 192.

"Nor is there anything in Section 12 which modifies the result just stated. * * * These two sections relate to the same subject, are consistent with each other, and they must be construed together. They deny to towns like Columbia the power to levy a tax exceeding fifty cents on the $100 valuation for any such purpose as that contemplated by the ordinances in question. As before stated, the tax to pay current expenses and to pay this proposed waterworks and electric-light plant debt must not, in the aggregate, exceed fifty cents on the $100 valuation. The town has no right or power to increase its tax levy beyond that amount for the purpose of building waterworks or lighting the streets and highways. Perhaps the town could pay these bonds out of the fifty-cent tax and the revenue derived from the waterworks, but that fact does not, nor is it claimed that it can, aid the defendants; for the ordinances in question provide for a tax to pay the bonds over and above the fifty-cent annual tax. The town has no power to levy or collect such a tax.

"Although the entire indebtedness of the town, including these proposed bonds, does not reach five per cent of the value of the taxable property, still it is proposed to levy a tax exceeding fifty cents on the $100. One constitutional limita-

tion is just as binding as the other. The town will not be allowed to violate either. Whether the bonds, if issued and sold, could or would be held payable out of the fifty-cent tax, and, therefore, valid, is a question not discussed in the briefs nor considered by this court. The bonds should not be issued, under the ordinances in question, because the ordinances provide for their payment by a tax which the constitution says the town cannot levy."

This decision was a staggering blow to the growth of the minor cities. By denying them the power to provide themselves with urban facilities, at that time becoming usual in many states, it tended to check the flow of population into these cities. Per contra, it tended to keep the rural population at home, a beneficent result as we now realize. Perhaps it would have been well if the decision had never been changed. But that was not to be its fate.

About the same time that Columbia was planning her improvements, the City of Lamar in Barton County was likewise planning for herself. She was a City of 3,000 inhabitants, was limited by Section 11 to a tax of 50c on the $100, and wished to provide water-works. To that end, the Mayor and Board of Aldermen, in 1890, enacted an ordinance submitting to a vote of the people, the question whether or not the City should enter into a contract for the construction of a system of water-works. The ordinance provided that the City should rent sixty fire hydrants, for twenty years, at $50 each, per year. To pay these rentals, the ordinance further provided that there should be levied and collected annually, during the twenty-year period, a tax of 40c on the $100 valuation. An election was held, and the people, by a two-thirds vote, gave consent, and the contract was duly entered into. The works were constructed and put into operation, and water was furnished to the City and its inhabitants for several years.

During this period, the City, for its general purposes, each year levied a tax of 50c on the $100, and for a time a further tax of 40c, to pay these hydrant rentals. In 1893, the City

ceased to levy this latter tax, the rentals went unpaid, and the Water Company sued to recover them.

Lamar Water Co. v. City of Lamar, 128 Mo. 188.

Besides other defenses not necessary to be noticed here, the City set up in this action, that the ordinance and contract on which it was based, were void because the tax to pay the hydrant rentals, was and was intended to be over and beyond the regular 50c tax, and was therefore beyond the constitutional limit. The ordinance did not state that the water tax was intended to be an additional tax, but it was in fact so intended, and both sides agreed in presenting the case on that theory. The identical question decided in the Columbia case was thus presented for re-examination. The case came up in Division No. 1 of the Supreme Court, and Judge Black delivered the opinion, affirming and elaborating the decision rendered in the Columbia case. (See 128 Mo. 190-203).

The Water Company filed a motion for re-hearing. This was overruled. But one of the Judges dissented and this gave the Company the right to have the case transferred from the Division to the Court en banc. Here the case was again fully argued, the earlier decision was reversed and the Columbia case was overruled. It thus became established law, that a municipal corporation incurring debt, might levy a tax to pay the debt over and above the tax permitted by Section 11.

On behalf of the Water Company, it was contended that this might be done, because: (1) Section 12 requires a *sufficient* tax to be levied when a municipality incurs debt, and a tax levied under and within the limits of Section 11, will always prove insufficient, when the City undertakes to go in debt, as Section 12 says she may, to the full extent of five per cent of her taxable values. (2) The concurrent expressions of the members of the constitutional Convention, who took part in the debates on the adoption of Sections 11 and 12, show that they understood Section 11 to provide taxation for ordinary purposes, and Section 12 to authorize additional

taxation to pay debts voted by the people. (3) This was the legislative understanding of the subject: Many statutes passed after the adoption of the Constitution and before this case was decided, went upon the theory that the entire tax provided by Section 11 was to be used to pay ordinary current expenses, and that an extraordinary tax had to be levied when debt was incurred.

In support of the first of these propositions, counsel laid down as indisputable, two others. (a) that the power of permitting the municipalities to incur debt is inherent in the Legislature and is not granted by the Constitution, and that Section 12 operates a limitation upon that power, fixing five per cent as the limit of amount; (b) that the framers of the Constitution must have intended that to this extent the power should be available, whenever there was a legitimate need, and the qualified voters by a two-thirds majority declared in favor of incurring debt. He pointed out that in Missouri, according to the census of 1890, there were three cities of the first class as defined by the Constitution, three of the second class, 129 of the third class and 100 of the fourth class; and that Section 12 applied to all the cities of all these different classes, the one rule of limitation of five per cent of the taxable values; and also declared, as to all alike, that when a debt is incurred provision shall be made for the levy of an annual tax sufficient to pay the interest and discharge the principal within twenty years.

He then argued that the framers of the Constitution, in using the term "interest," must have had in mind the rates of interest with which they were familiar. Pointing to numerous statutes of 1875 and prior years, he showed that the rates of interest on municipal debts allowed by law, varied from ten per cent down to six per cent, but in no case less than six; and such rates, he said, must have been in the minds of the framers, as rates which the municipalities would be likely to have to pay in the future. He then showed, that since Section 12 required a sinking fund to be provided, sufficient to pay the debt within twenty years,

it would be necessary to collect each year, for the sinking fund, a sum equal to five percent of the debt; so that if the rate of interest should be ten percent, it would be necessary to collect each year, for interest and sinking fund, an amount equal to fifteen percent of the debt, and if the rate should be six percent, an amount equal to eleven percent of the debt. To show that it would not be possible for any County or town and hardly any city in the State to incur debt to the amount of five per cent of its taxable values, and to pay the debt and interest within twenty years, out of the taxes permitted by Section 11, he constructed a table, in which he classified the counties, cities and towns as they are classified in the Constitution, selecting one of each class as a type and describing it by the amount of its taxable property, as set out in the column headed "Valuation." Under the head "Tax Rate" was indicated the maximum rate leviable under Section 11, in a municipality of that class. Under the head "Amount of tax" was indicated the maximum amount of taxes leviable under Section 11. Under the head "Amount of debt" was indicated the maximum amount of debt that could be incurred under Section 12. Under the head "Interest and Sinking Fund" was indicated the amount that was required to be collected each year, under Section 12, to pay these charges.

The table is as follows:

Counties	Valuation	Tax Rate	Amount of tax	Amount of Debt	Int. 6% Sink. Fund 5% Total 11%	Int. 10% Sink. Fund 5% Total 15%
First Class......	$ 5,000,000	50c	$ 25,000	$ 250,000	$ 27,500	$ 37,500
Second Class....	8,000,000	40c	32,000	400,000	44,000	60,000
Third Class......	20,000,000	50c	100,000	1,000,000	110,000	150,000
Fourth Class.....	50,000,000	35c	175,000	2,500,000	275,000	375,000
CITIES						
First Class......	100,000,000	100c	1,000,000	5,000,000	550,000	750,000
Second Class....	10,000,000	60c	60,000	500,000	55,000	75,000
Third Class......	2,000,000	50c	10,000	100,000	11,000	15,000
Fourth Class.....	200,000	25c	500	10,000	1,100	1,500

This table shows that in every municipality in the State, except cities of the first and second classes, the total tax leviable under Section 11, would be insufficient to pay a five percent debt bearing six percent interest; and that in cities

of the first class only, would the total tax be sufficient to pay a five percent debt, bearing ten percent interest.

In other words, every county in the State, and nearly every city, if it undertook to avail itself of its constitutional privilege of going in debt to the extent of five percent of its taxable values, would find itself unable to comply with the constitutional injunction to provide a sufficient tax, if the provision had to be made out of the rate permitted by Section 11.

But this is not all. The government of the municipality must be maintained. It is therefore obvious that the whole tax leviable under Section 11 could not be used in the payment of the debt. If it were, Municipal Government would go to pieces. The taxes authorized by Section 11 are intended for ordinary current expenses; and as a rule, it is notorious, they are not more than sufficient for that purpose.

It comes to this, then, as counsel argued: Either the whole municipal revenue must be used to pay debt, if the municipality desired or were compelled to incur it, in which event municipal government must go to pieces; or else no debt could in general be incurred, in which event the constitutional guarantee in favor of creating debt up to the five percent limit would fail. It is certain that the framers of the Constitution did not intend that either of these alternatives should occur.

The views of the members of the Constitution of 1875 were ascertained by examination of the manuscript reports of the proceedings of that body. About twenty extracts were quoted, and these showed that the speakers, when discussing Section 11, had in mind only ordinary current expenses, and intended to provide for them, but only within narrow limits. A few allusions made to Section 12 indicated that members understood that the two sections should not interfere with each other, but the consideration of the subject of taxation to pay debt was scant and was not enlightening.

As to the Legislation of the fifteen years following 1875, it was shown that it all went on the assumption that no tax leviable under Section 11, was intended to pay debt. An act

of 1879, (Page 185) expressly called it "The tax for current County Expenditures." And another act of the same year. (Page 191) expressly directed that all such taxes should be divided into five funds, to-wit: Pauper, Road and Bridge, Salary, Jury and Election, and Contingent, and should be used for these purposes and no other, leaving nothing for debt, either previously incurred or thereafter to be incurred.

These are the views which finally prevailed.

Lamar Water Company v. City of Lamar, 128 Mo. 209.

After the question was ultimately settled, Judge Brace once said to the writer of this paper: "You are entitled to the credit or *the discredit* of having overturned the Columbia decision. That little table of figures did the work. This was no doubt true, and this review is written in its present form in order to present this table. The original error of the court was due to the fact that the judges discussed only the language of Sections 11 and 12, and overlooked altogether the figures. In determining the meaning of constitutional provisions, courts rarely have to consider figures. But these sections are unique; they bristle with figures. Argument on the language may lead in either direction. It is the figures which are decisive, and they leave no alternative but to adopt the view which prevailed.

Two years later the Lamar case came up on a second appeal, and its principle was reaffirmed, Judge Barclay saying that the former decision ought to be taken as closing the question. But Judges Brace, Macfarlane and Burgess adhered to their dissent.

Lamar Water Co. v. City of Lamar, 140 Mo. 145.

In the meantime, another case had come up and been decided by unanimous vote of Division No. 2, Judge Sherwood delivering the opinion, and holding to the view that the tax to pay debt was independent of the tax leviable under Section 11. Judge Burgess had a chance to adhere to his dissent, but he seems to have overlooked it.

Water Company v. City of Aurora, 129 Mo. 540.

Three years after the great struggle, the question came up again, in Division No. 1, and the Lamar case was unanimously approved, a new judge, Williams, delivering the opinion.

City of Stansberry v. Jordan, 145 Mo. 371.

Three years later still, the Court again approved the Lamar case. But Judges Brace and Burgess continued their dissent.

State *ex rel* v. M. K. & T. R. R. Co., 164 Mo. 208.

At the same term of Court, the question was again presented and argued, but the Court refused to consider it, a new judge, Valliant, speaking for the Court.

City of Lexington v. Lafayette County Bank, 165 Mo. 671.

The latest case affirming the doctrine is:

State *ex rel* v. Hackman, 275 Mo. 534.

The Columbia case was decided by Division No. 1, and the decision was unanimous, Judge Black delivering the opinion and Judges Barclay, Sherwood and Brace concurring. The Lamar case was also decided by Division No. 1, upon the first hearing, and the decision was likewise unanimous, Judge Black again delivering the opinion, and Judges Barclay, Brace and Macfarlane concurring. In this case, the motion for rehearing filed by the Water Company was overruled. Judge Barclay, however, changed his mind and dissented and this gave the Water Company the right to have the case transferred to the Court en banc, before the seven judges. In the meantime, Judge Black had left the bench, and Judge Robinson had taken his place. The final decision was written by Judge Barclay, with whom concurred Judges Gantt, Sherwood and Robinson. Judges Brace, Macfarlane and Burgess dissented.

From the foregoing recital, it will be seen that the question at issue came up for discussion and decision, in the Supreme Court, four times, once in the Columbia case, and three times in the Lamar case, namely on the hearing in Division No. 1,

on the motion for rehearing, and on the hearing en banc. Calling the vote in favor of the proposition that the tax leviable under Section 11 was the only lawful tax an aye vote, the record of the individual judges was as follows:

Judge Black—three ayes.
Judge Brace— four ayes.
Judge Macfarlane—three ayes.
Judge Burgess—two ayes.
Judge Barclay—two ayes, two nays.
Judge Sherwood—one aye, one nay.
Judge Gantt—one nay.
Judge Robinson—one nay.

This dissent was so strong that it at first seemed doubtful whether the decision in the Lamar case would stand, and it undoubtedly encouraged litigants to continue to fight.

For nine years, the question vexed the courts, and the decisions are scattered through fifty-four volumes of reports. A little care on the part of the framers of the Constitution, as by adding a few words to Section 12, could have made the matter plain and avoided all this trouble. May we hope that the members of the new Constitutional Convention soon to assemble in this State, will take warning by this example

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