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FINANCING OF CAPITAL IMPROVEMENTS BY TEXAS COUNTIES AND CITIES

by

*Elbert M. Morrow**

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The first constitutional provisions in Texas were drafted to regulate the affairs of cities, towns, and counties at a time when the largest city in the state was Galveston, with a population of 13,000; Dallas was the center of the wheat belt, but not enumerated as an incorporated city in the federal census; the fame of the city of Houston was spread by the demand for the innovative barbed wire fencing material, "Cinchona Tonic," and the willingness of a savings bank to accept deposits of "up to \$5,000"; quality mattresses contained hair, moss, or hay; efforts were being made to colonize the "pan handle or Northwest Texas"; the city of Weatherford was advertised as the "emporium of the frontier"; and 151 counties had been organized.¹

In the chaos that followed the close of the Civil War, fiscal irresponsibility was evident at all levels of government, the state treasury had been looted, and the elected governor of the state could hold office only by reason of the armed militia until the President of the United States repudiated the "former" carpet-bag governor.² One of the first acts of the newly elected governor was to advise the assembled legislature that county and city taxation was oppressing the people beyond all endurance, and that constitutional barriers were needed to protect the people from the abuses of county, city, and state government.³

When work of the Constitutional Convention was completed in 1875 the finished document imposed severe restrictions on local government.⁴ There have been a series of amendments which have modified those initial constitutional restrictions on cities and towns, but changes with respect to counties have been less pronounced.⁵

It has been observed that cities and towns have been treated as adults, and

¹ BURKE'S TEXAS ALMANAC AND IMMIGRANTS HANDBOOK (1879).

² 1 W. WEBB, HANDBOOK OF TEXAS 469 (1952).

³ HOUSE JOURNAL 10-93 (1875); W. BYARS, LONESTAR EDITION OF WORLD'S BEST ORATIONS 96-105 (1923).

⁴ See notes 87-88 *infra*, and accompanying text.

⁵ See note 90 *infra*, and accompanying text.

county government as a minor child.⁶ When considering the development of their powers, a sense of history is essential.

I. HISTORY AND EARLY CONCEPTS OF MUNICIPAL GOVERNMENT

A. Formal Distinctions—Counties, Cities, Towns, and Villages

By constitution, counties are "legal subdivisions" of the state.⁷ Although they are sometimes called "municipal corporations,"⁸ they lack the power normally conferred on municipal corporations and are not of that class.⁹ They are "quasi corporations."¹⁰ Counties are created by the sovereign will of the state, without regard to the will of the residents, to discharge the local duties of the state toward its inhabitants¹¹ and to aid in the administration of government.¹² Their functions are political and administrative, and the powers conferred upon them are "rather duties imposed than privileges granted."¹³ Thus, as an arm or agent of the state in the administration of the interest of state government, a county is an involuntary public corporation designed to carry out the policy of the state, and where the county is given power (duty) to act, it is performing a public (governmental) function. This is not so with a city, town, or village, for each has public (governmental) as well as private (proprietary) functions.¹⁴

⁶ *Bennett v. Brown County Water Improvement Dist. No. 1*, 153 Tex. 599, 614 n.11, 272 S.W.2d 498, 507 n.11 (1954) (dissenting opinion).

⁷ TEX. CONST. art. XI, § 1. *Bexar County v. Linden*, 110 Tex. 339, 220 S.W. 761 (1920), contains a discussion of other constitutional provisions to the same effect. It should be noted that TEX. CONST. art. IX, § 3 makes provision for county home-rule government, but the provisions have never been utilized, since the procedures for adoption are cumbersome and uncertain and such charter provision may not "inconsonantly affect" general laws relating to the "judicial, tax, fiscal, education, police, highway and health systems or any other department of the State's superior government," nor may any charter provision be "inconsistent with . . . established public policies" of the state. These prohibited areas of activity cover most of the traditional scope of county government.

⁸ *Childress County v. State*, 127 Tex. 343, 92 S.W.2d 1011 (1936); *Limestone County v. Robbins*, 120 Tex. 341, 38 S.W.2d 580 (1931); *Hamilton County v. Garrett*, 62 Tex. 602 (1884); *City of Galveston v. Posnainsky*, 62 Tex. 118 (1884); *City of Abilene v. State*, 113 S.W.2d 631 (Tex. Civ. App.—Eastland 1938), *error dismissed*.

⁹ *City of Abilene v. State*, 113 S.W.2d 631 (Tex. Civ. App.—Eastland 1938), *error dismissed*.

¹⁰ *Bexar County v. Linden*, 110 Tex. 339, 220 S.W. 761 (1920); *Heigel v. Wichita County*, 84 Tex. 392, 19 S.W. 562 (1892); *Hamilton County v. Garrett*, 62 Tex. 602 (1884); *Stratton v. Commissioners' Court*, 137 S.W. 1170 (Tex. Civ. App.—San Antonio 1911), *error ref.*; *Connor v. Zackry*, 54 Tex. Civ. App. 188, 117 S.W. 177 (Texarkana 1909).

¹¹ *Bexar County v. Linden*, 110 Tex. 339, 220 S.W. 761 (1920); *Heigel v. Wichita County*, 84 Tex. 392, 19 S.W. 562 (1892); *City of Galveston v. Posnainsky*, 62 Tex. 118 (1884); *Coleman v. Thurmond*, 56 Tex. 514 (1882); *Orndorff v. State*, 108 S.W.2d 206 (Tex. Civ. App.—El Paso 1937), *error ref.*; *Chambers v. Gilbert*, 17 Tex. Civ. App. 106, 42 S.W. 630 (Dallas 1897), *error ref.*

¹² *Hamilton County v. Garrett*, 62 Tex. 602 (1884); *Orndorff v. State*, 108 S.W.2d 206 (Tex. Civ. App.—El Paso 1937), *error ref.*

¹³ *Heigel v. Wichita County*, 84 Tex. 392, 19 S.W. 562 (1892); *Orndorff v. State*, 108 S.W.2d 206 (Tex. Civ. App.—El Paso 1937), *error ref.*

¹⁴ The distinction between governmental and proprietary functions is one of long standing. *City of Galveston v. Posnainsky*, 62 Tex. 118 (1884), and *Heigel v. Wichita County*, 84 Tex. 392, 19 S.W. 562 (1892), are unquestionably the most important cases drawing the distinction, holding there is liability for damages for negligence while performing proprietary functions and denying liability when performing a governmental function. It has been observed that some of the distinctions look "pretty silly." Greenhill, *Should Governmental Immunity for Torts Be Re-examined, and, if so, by Whom?*, 31 TEX. B.J. 1036, 1066 (1968). When a county supplies water or natural gas service, under the traditional view, it acts in a governmental capacity; a city providing the same service acts in a pro-

A city, town, or village is a political subdivision of the state,¹⁵ voluntarily formed, primarily for advantages to its citizens;¹⁶ when performing these functions, it acts in a proprietary capacity.¹⁷ A town has been described as a collection of inhabited houses, carrying with it the idea of a considerable aggregation of people living in close proximity.¹⁸ A village has been defined as a "small assemblage of houses, less than a town or city and inhabited chiefly by farmers and other laboring people" and such "houses [are] for dwellings or business or both in the country, whether they are situated upon regularly laid out streets and lots or not."¹⁹ A city has been defined as an incorporated town,²⁰ and the terms "city" and "town" have been treated as synonymous.²¹ The statute under which the municipality is incorporated *and operates* determines the power of the city. Whether it is called a city, town, or village is immaterial since by the simple expedient of adopting an ordinance, a town incorporated under the general law may become known as a city, even though its powers are not changed.²²

B. *Inherent Right of Self-Government*

One of the more interesting and important phases of the development of Texas municipal law was the raging conflict between our highest appellate courts on the question of the inherent right of local self-government as against the doctrine of legislative supremacy. By special law a home-rule charter was granted to the city of Galveston with a provision for three members of the governing body to be appointed by the Governor and two additional members to be elected.²³ The court of criminal appeals held a penal ordinance adopted by the commissioners void on the grounds that a legally constituted governing body had not adopted it. The court based its decision on alternative grounds: (1) that article I, section 2 of the Texas Constitution had reserved all political power to the people, not the Legislature, since it was provided that "all political power is inherent in the people"; that history and tradition showed municipal corporations to have preceded the constitution, and that in such predecessors there had been elective officials; therefore, there was an inherent right (by implication) to elect a governing body; and (2) that article VI, section 3 of the Texas Constitution provided that electors "shall have the right to vote

proprietary capacity. *Ostrom v. City of San Antonio*, 94 Tex. 523, 524, 62 S.W. 909, 910 (1901). The functions of county government were originally limited to roads, taxes, administration of judicial, peace-keeping, and other duties normally reposed in the state.

¹⁵ *City of Goose Creek v. Hunnicutt*, 120 Tex. 471, 39 S.W.2d 617 (1931); *Corporation of San Felipe de Austin v. State*, 111 Tex. 108, 229 S.W. 845 (1921); *Faulk v. City of Tyler*, 389 S.W.2d 706 (Tex. Civ. App.—Tyler 1965), *error ref. n.r.e.*; *City of Abilene v. State*, 113 S.W.2d 631 (Tex. Civ. App.—Eastland 1938), *error dismissed*.

¹⁶ *Heigel v. Wichita County*, 84 Tex. 392, 19 S.W. 562 (1892).

¹⁷ *Ostrom v. City of San Antonio*, 94 Tex. 523, 524, 62 S.W. 909, 910 (1901).

¹⁸ *State v. Eidson*, 76 Tex. 302, 13 S.W. 263 (1890).

¹⁹ *Mikael v. Equitable Securities Co.*, 32 Tex. Civ. App. 182, 74 S.W. 67, 68 (1903), *error ref.*

²⁰ *Noble v. State*, 112 Tex. Crim. 676, 18 S.W.2d 619 (1929) (upholding the sufficiency of an indictment alleging commission of a crime in a "city" wherein it was proven that the entity was a "town"; *Borders v. State*, 66 S.W. 1102 (Tex. Crim. App. 1902).

²¹ *Holguin v. Villalobos*, 212 S.W.2d 498 (Tex. Civ. App.—El Paso 1947).

²² TEX. REV. CIV. STAT. ANN. art. 1153(a) (1963).

²³ Act of Apr. 18, 1901, ch. 12, §§ 1-95, [1901] Tex. Laws 104-46.

for mayor and other elective officers," which required election of the governing body.²⁴

The issue was quickly joined in *Brown v. City of Galveston*, and the supreme court, in upholding an ordinance adopted by the same governing body, held that article I, section 2 of the Texas Constitution does "not mean political power is inherent in a part of the people, but in the body, who have the right to control, by proper legislation, the entire state and all of its parts."²⁵ The court explained that by distribution of powers to three coordinate departments of government, the people did not part with their power, "but it remains with them, to be exercised by the departments according to the limitations which are expressed or implied in the Constitution for their government and direction."²⁶ The court answered the second argument of the court of criminal appeals, saying that article VI, section 3 of the Texas Constitution does not guarantee an election will be held for officials, but if an election is required by law to be held, the qualification of the electors is therein prescribed.²⁷ For a number of years the civil and criminal courts each waxed eloquently in the denunciation of the other's position, but the view of the supreme court as expressed in *Brown* prevailed; and it is now recognized as elemental that a municipality has no inherent right of self-government, as distinguished from written constitutional rights.²⁸

Insofar as counties are concerned, it has been, and is, axiomatic that a commissioners court has only such powers as are expressly conferred or by necessary implication given it by the constitution and statutes.²⁹

II. CLASSES OF INCORPORATED CITIES, TOWNS, AND VILLAGES

The first general law to provide a procedure for the incorporation of cities and towns was adopted in 1858.³⁰ From 1836 to 1858 the Legislature (or Congress of the Republic) provided for incorporation and powers of municipalities by special law.³¹ From 1858 until the latter part of 1912, municipal corpora-

²⁴ *Ex parte Lewis*, 45 Tex. Crim. 1, 73 S.W. 811 (1903). The inherent right of self-government was viewed as independent of any constitutional guaranty and beyond legislative control. See McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 190 (1916).

²⁵ 97 Tex. 1, 15, 75 S.W. 488, 495 (1903).

²⁶ *Id.*

²⁷ *Id.* at 11, 75 S.W. at 493.

²⁸ For additional consideration of the "Cooley" doctrine (adopted by the court of criminal appeals) and the "Dillon" doctrine (adopted by the supreme court), see Rudd, *Legislative Jurisdiction of Texas Home Rule Cities*, 37 TEXAS L. REV. 682 (1959), and the dissenting opinion in *Bennett v. Brown County Water Improvement Dist. No. 1*, 153 Tex. 599, 608, 272 S.W.2d 498, 503 (1954). See also T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 225-27 (8th ed. 1927); J. DILLON, *MUNICIPAL CORPORATIONS* § 11 (3d ed. 1881); *Ex parte Levine*, 46 Tex. Crim. 364, 81 S.W. 1206 (1904); *Ex parte Anderson*, 46 Tex. Crim. 372, 81 S.W. 973 (1904) (following the "Cooley" doctrine); *Trend v. Randolph*, 130 S.W. 737 (Tex. Civ. App.—Austin 1910); *Callaghan v. Tobin*, 40 Tex. Civ. App. 441, 90 S.W. 328 (1905), *error ref.*; *Kettle v. City of Dallas*, 35 Tex. Civ. App. 632, 80 S.W. 874 (1904), *error ref.* (following the "Dillon" doctrine).

²⁹ *Canales v. Laughlin*, 147 Tex. 169, 214 S.W.2d 451 (1948).

³⁰ An Act to Provide for the Incorporation of Towns and Cities, ch. 61, §§ 1-43, [1858] Tex. Laws 69-74, 4 H. GAMMEL, *LAWS OF TEXAS* 941-48 (1898). Cities previously incorporated were given the right to reorganize, which served as a renunciation of the powers and privileges under the act of incorporation. *Id.* § 42.

³¹ O'Quinn, *History, Status and Function of Cities, Towns and Villages*, 2A TEX. REV. CIV. STAT. ANN. XIII, XXI (1963). The author's reliance upon this source for much of the material in this section is obvious.

tions were of two distinct legislative classes, being either incorporated "under the general law" or under "special law."³² With the adoption of the home-rule amendment in 1912 a third, distinct class of cities was added—*i.e.*, those incorporated under home-rule charter.³³ The distinction between classes of cities is vital. A law applicable to cities incorporated under the general law is *not* applicable to a city incorporated under a home-rule charter.³⁴ A municipality which moves from one class to another remains the same public corporate entity even though its powers may be changed.³⁵

A. *Special-Law Cities*

Article III, section 56 of the constitution of 1876 prohibited the passage of special laws regulating the affairs of cities or towns "except as otherwise provided in this Constitution." While article XI, section 4 (a part of the same constitution) provided that municipalities could be incorporated only under general laws, article XI, section 5 provided that cities having a population in excess of 10,000 could have charters granted or amended by special laws. In 1909 the 10,000-population requirement was reduced to 5,000; so cities having such population could still be governed by special law or general laws.

With the adoption of the home-rule amendment in 1912 came the prohibition against the granting³⁶ or amending³⁷ of charters by special law. A charter previously granted by the Legislature may be changed by the enactment of a general law³⁸ or by the adoption of a new charter or amendment following the procedure specified in the enabling act adopted pursuant to the home-rule amendment.³⁹ Special-law cities are antiquated and will not be considered further.

³² *City of Sherman v. Municipal Gas Co.*, 133 Tex. 324, 127 S.W.2d 193 (1939).

³³ TEX. CONST. art. XI, § 5.

³⁴ In *City of Sherman v. Municipal Gas Co.*, 133 Tex. 324, 127 S.W.2d 193 (1939), the act in question had been adopted in 1907 and was applicable only to general-law cities. Sherman had operated under a special legislative act and then under a home-rule charter, having never been incorporated under the general law, and, therefore, the law could not apply to the city. See also *Forwood v. City of Taylor*, 147 Tex. 161, 214 S.W.2d 282 (1948); *Leach v. Coleman*, 188 S.W.2d 220 (Tex. Civ. App.—Austin 1945), *error ref. w.o.m.* For an example of a converse holding, a law applicable to home-rule cities does not apply to general-law cities, see *City of Munday v. First State Bank*, 66 S.W.2d 775 (Tex. Civ. App.—Eastland 1933), *error ref.* Of course, a law may be made applicable to all classes of municipalities, but the legislative intent so to do must be clear. 66 S.W.2d at 776.

Care should be exercised to specify that the home-rule city is operating as (1) a municipal corporation under a home-rule charter or (2) a municipal corporation under the general laws of Texas and the home-rule amendment to the constitution. It is now common for legislation to be drafted specifying "all cities, towns and villages (including home-rule cities)" to avoid the limitation of application to a single class of cities.

³⁵ See *Germany v. Pope*, 222 S.W.2d 172 (Tex. Civ. App.—Fort Worth 1949), *error ref. n.r.e.*, in which a general-law city became a home-rule city. Under TEX. REV. CIV. STAT. ANN. arts. 967, 968 (1963) a municipality incorporated under a law of the Republic of Texas may adopt provisions of title 28 and "continue to be a body corporate."

³⁶ *Vincent v. State ex rel. Wayland*, 235 S.W. 1084 (Tex. Comm'n App. 1921), *judgment adopted*.

³⁷ *Ex parte Norton*, 113 Tex. Crim. 306, 21 S.W.2d 663 (1929); *King v. State*, 105 Tex. Crim. 416, 289 S.W. 69 (1926).

³⁸ *Susholtz v. City of Houston*, 37 S.W.2d 728 (Tex. Comm'n App. 1931), *judgment adopted*; *Ex parte Norton*, 113 Tex. Crim. 306, 21 S.W.2d 663 (1929).

³⁹ See TEX. REV. CIV. STAT. ANN. art. 1165 (1963); *Eastham v. Steinhagen*, 111 Tex. 597, 243 S.W. 457 (1922). See also TEX. REV. CIV. STAT. ANN. art. 1153 (1963), applicable to "Towns and Villages" incorporated by the legislature or the Congress of the Republic.

B. *General-Law Cities*

1. *Incorporation.* Three different population requirements are established for incorporation under the general law: (1) Cities, towns, and villages having a population of not less than 200 nor more than 10,000 may be incorporated under chapter 11 of title 28.⁴⁰ (2) Cities and towns having a population of over 500 and less than 5,000 or a town or village of more than 200 and less than 1,000 may be incorporated under chapter 12 of title 28.⁴¹ (3) A city or town having a population of 600 or more may be incorporated under chapter 1 of title 28.⁴²

The procedure for incorporation under the general law is basically the same in all instances:

(1) A proper application (petition) is presented to the county judge which follows the statutory requirements:

(a) describing the boundaries (the boundaries must form a closure),
 (b) stating the name by which the municipality is to be known if established,

(c) alleging that the petition is properly executed and the area has the requisite number of inhabitants,

(d) representing that no territory is included except that which is intended to be used for strictly municipal purposes, and

(e) attaching the plat of the proposed municipality.

(2) It is suggested the application for incorporation election should also allege:

(a) that no other election has been held to incorporate such town within one year,

(b) that the territorial limitations of article 971 have not been exceeded,⁴³ and the area to be incorporated lies in one tract, and

(c) that the area of the proposed municipality is not within the extra-territorial jurisdiction of another municipality.

(3) The election is called by the county judge and notice of election is posted by the sheriff.

(4) Returns are made to the county judge, who canvasses the returns and enters the canvass order on the records of the commissioners court.

(5) If the election carries, the canvass order and the plat are recorded in the deed records.⁴⁴

⁴⁰ TEX. REV. CIV. STAT. ANN. art. 1133 (1963).

⁴¹ *Id.* art. 1154.

⁴² *Id.* art. 961.

⁴³ *Id.* art. 971:

No city or town in this State shall be hereafter incorporated under the provisions of the general charter for cities and towns contained in this title with a superficial area of more than two square miles, when such town or city has less than two thousand inhabitants, nor more than four square miles when such city or town has more than two thousand and less than five thousand inhabitants, nor more than nine square miles, when such city or town has more than five and less than ten thousand inhabitants.

⁴⁴ *Id.* art. 966 relates to those cities or towns having a population in excess of 600 sought to be incorporated under the provisions of chapter 1 of title 28 and refers to chapter 11 of the same title, the distinction being that (1) the application for incorporation must be signed by 50 electors who are residents of the area and (2) upon the entry of the canvass order, the city has "all of the rights and privileges of such cities conferred by" title

In order to accomplish financing, it must be shown that the municipality was properly created and established. When the Attorney General approves the issuance of bonds, he, in the same opinion, approves the incorporation of the political subdivision. Where a municipality has outstanding bonds that have been approved by the Attorney General, it is reasonably assumed (because of the long practice of the Attorney General) that the incorporation proceedings have been reviewed and found to be proper. Once such proceedings have been examined and approved by the Attorney General, they will be filed with the Comptroller of Public Accounts together with the transcript of proceedings pertaining to the first series of bonds issued by the municipality. Whether the municipality has previously issued bonds should be shown in the proceedings relating to the issuance of bonds submitted to the Attorney General. If the municipality has no outstanding bonds, the Attorney General will ask for the proceedings relating to the incorporation of the municipality. There are instances, when a city has been incorporated for a long period of time and has retired bonds, where it is easier (in point of time and expense) to prove again proper incorporation, rather than search the archives of the Comptroller's office to determine if the incorporation proceedings were previously approved. The records of that office that are readily available begin with the year 1947.

If the election is to be held to incorporate a municipality under chapter 12 of title 28, officials of the city are elected at the incorporation election;⁴⁵ otherwise a separate election is called by the county judge after the canvass of the returns of the incorporation election. There is currently no statutory procedure designed to enable candidates to have their names printed on the ballot at the initial election of city officials. The statutes providing for the election of city officials are silent on the matter, and the provisions of the Election Code are

28. With those two exceptions, the procedure for incorporation under chapters 1 and 11 are identical. For the requirements mentioned, see the following statutes:

| | <i>Chapters 1, 11</i> | <i>Chapter 12</i> |
|--|--|-------------------|
| boundaries stated | art. 1134 | * |
| name of municipality in application | art. 1134 | * |
| inhabitants | art. 1133 | art. 1155 |
| signatories on application | arts. 966, 1334 | * |
| territory for municipal purposes | art. 1134 | * |
| no other election within year | art. 1134 | * |
| territorial limitation | art. 971 | art. 971 |
| one tract of land | Thompson v. City of West Lake Hills, 457 S.W.2d 398 (Tex. Civ. App.—Austin 1970), <i>error granted</i> . | |
| not in extraterritorial jurisdiction of another municipality | art. 970(a)(8) | art. 970(a)(8) |
| calling of election | art. 1136 | art. 1155 |
| notice of election | art. 1136 | * |
| returns canvassed | art. 1139 | art. 1157 |
| recording of plat and canvass | | |
| order in deed records | art. 1139 | * |

* art. 1155 refers to the procedure for incorporating cities and towns. As to home-rule cities situated along or upon a navigable stream, see the annexation provisions of arts. 1183-87 (extraterritorial jurisdiction).

⁴⁵ TEX. REV. CIV. STAT. ANN. art. 1158 (Supp. 1970).

inadequate. It is suggested that the safer procedure is to provide ballots upon which all candidates' names may be written in by each elector. All elective offices prescribed by law should be filled in the initial election, even if the office of marshal is subsequently abolished.

2. Powers Under Chapter of Incorporation.

(a) *Chapter 11, Title 28.* An incorporated municipality that operates only under the provisions of chapter 11 of title 28 may levy a tax of not to exceed twenty-five cents on the 100-dollar valuation, which may be used only for maintenance and operation of the city.⁴⁶ Such a city may not issue bonds payable from taxation, since the purpose of the tax is restricted. It has been questioned whether revenue bonds for utility system purposes may be issued by such a municipality. Traditionally, the Attorney General has requested a showing of the adoption of the provisions of chapters 1 through 10 of title 28 by any chapter 11 municipality before approving the issuance of revenue bonds sought to be issued under chapter 10. While article 961⁴⁷ would seem to support this position, article 1111 provides utility system revenue bonds may be issued by "all cities and towns including home-rule cities *operating under this title.*"⁴⁸

(b) *Chapter 12, Title 28.* A municipality incorporated under the provisions of chapter 12 of title 28, or adopting the commission form of government,⁴⁹ has the powers of a city under chapters 1 through 10 of title 28 (except where there is conflict, when the provisions of chapter 12 prevail)⁵⁰ if it has a population in excess of 500 and less than 5,000. Such a city may also adopt the provisions of chapters 1 through 10 of title 28 by following the procedures of article 961 or article 961b-1.⁵¹ If the town or village incorporated under chapter 12 has a population of more than 200 and less than 500, such municipality is also given the authority and powers of a municipality incorporated under chapter 11 of title 28 (except where there is a conflict with chapter 12, in which event the latter controls).⁵²

(c) *Chapter 1, Title 28.* A municipality incorporated under the provisions

⁴⁶ *Id.* art. 1145 (1963); *Ford v. Town of Coppel*, 407 S.W.2d 304 (Tex. Civ. App.—Dallas 1966), *error ref. n.r.e.* In *Dill v. City of Rising Star*, 269 S.W. 769 (Tex. Comm'n App. 1925), *judgment adopted*, the court observed that the statute (now art. 1027) conferred the power upon "any city or town" having a population of less than 5,000 to levy an ad valorem tax of not to exceed 1½% of the taxable property in the city. In that case the city was operating under chapters 1 through 10 of title 28 as shown by the opinion of the lower court.

⁴⁷ TEX. REV. CIV. STAT. ANN. art. 961 (1963) prescribes the procedure: a population of at least 600 or at least one manufacturing establishment and the adoption of an ordinance by a two-thirds vote of the council at a regular meeting. The ordinance is then to be filed in the deed records of the county.

⁴⁸ *Id.* art. 1111 (emphasis added). The words "operating under this title" were a part of the statute prior to the addition of the words "including Home Rule Cities," and art. 1111 is a later statute than art. 961 and should prevail, being later in time and a specific rather than general provision. The position of the Attorney General is justified on the grounds that his records should show the power to issue all types of obligations so the unwary will not be trapped.

⁴⁹ By election under *id.* art. 1154.

⁵⁰ *Id.* art. 1163.

⁵¹ Under *id.* art. 961b-1 the assessed valuation of \$500,000 is substituted for the population requirements notwithstanding other requirements of art. 961 or art. 1163.

⁵² *Id.* art. 1163.

of chapter 1 of title 28 has the powers conferred by the title without the necessity for further action by reason of the provisions of article 966.⁵³

As can be seen, under some statutes the existence of power is dependent upon meeting population requirements as of the date of the exercise of the power. Prudence would seem to dictate the adoption of the provisions of chapters 1 through 10 of title 28, for once such procedure has been accomplished, the city retains the requisite power to act—irrespective of its population.

3. *Powers Under Chapters 1 through 10, Title 28.* Originally each chapter 11 or 12 municipality was expected to confine the exercise of its powers to those specifically granted in the chapter under which it was incorporated, unless it had the population (at the time of the exercise of the additional powers) to permit the exercise of those powers granted in chapters 1 through 10 of that title.⁵⁴ Later a procedure was provided by which a municipality originally incorporated under other provisions of law could acquire the powers of one originally incorporated under chapter 1 of title 28, and that statute provided that "the provisions of this title shall not apply to any city, town or village until such provisions have been accepted by the council in accordance with this article."⁵⁵

Article 962 reads in part:

All the inhabitants of each city, town, or village so accepting the provisions of this title *shall continue* to be a body corporate, with perpetual succession, by the name and style by which such city, town, or village was known *before such acceptance*, and as such they and their successors by that name shall have, exercise and enjoy all the rights, immunities, powers, privileges and franchises possessed and enjoyed by the *same at the time of said acceptance*, and those hereinafter granted and conferred, and shall be subject to all the duties and obligations pertaining to or incumbent on the same as a corporation at the time of said acceptance, and *may ordain and establish such acts, laws, regulations and ordinances, not inconsistent with the Constitution and laws of this State*, as shall be needful for the government, interest, welfare and good order of said body politic⁵⁶

Article 1011 provides that the governing body of the city shall have the right to prescribe ordinances, rules, and regulations as may be "necessary or proper to carry into effect the powers vested by this title [title 28] in the corporation."⁵⁷

4. *Source of Other Powers.* Whether a general-law municipality has adopted the provisions of chapters 1 through 10 of title 28 is not the exclusive test of its powers. Many statutes governing affairs of municipalities were adopted prior to the home-rule amendment and by their terms apply only to general-law cities (for example, chapters 2 and 3 of title 28). Other statutes have been

⁵³ *Id.* art. 966 provides that such city or town "shall be vested with all rights and privileges of such cities conferred by this title." *City of Rising Star v. Dill*, 259 S.W. 652 (Tex. Civ. App.—Fort Worth 1924), *aff'd*, 269 S.W. 769 (Tex. Comm'n App. 1925), *judgment adopted*. Such a city has the requisite population to adopt the provisions of title 28 by reason of incorporating under chapter 1 of title 28.

⁵⁴ See *Harness v. State*, 76 Tex. 566, 13 S.W. 535 (1890).

⁵⁵ TEX. REV. CIV. STAT. ANN. art. 961 (1963).

⁵⁶ *Id.* art. 962 (emphases added).

⁵⁷ *Id.* art. 1011.

amended or, as enacted, apply to all incorporated municipalities.⁵⁸ As stated in a recent decision:

When Chapter 11 was first enacted by the Legislature more than one hundred years ago the powers of municipalities created thereunder were very limited indeed. But in the meantime the Legislature has passed many laws enlarging the powers of the various classes of cities and towns. Consequently some of the cases decided prior to these later enactments, though doubtless decided correctly at the time, are not decisive of the powers of cities and towns under existing present statutes. For example, appellant cites and quotes from the opinion of our supreme court in *City of Waxahachie v. Brown*, 67 Tex. 519, 4 S.W. 207, decided in 1887. The statute here under consideration, Art. 1182c-1, V.A.C.S., was not enacted by the Legislature until 1947 and has been amended five times since its enactment. Obviously the above cited case should not control our decision here.⁵⁹

As a general rule, a city incorporated under the general law, like a county, has such powers as are expressly conferred by statute or necessarily implied from such powers as are so conferred.⁶⁰

C. Home-Rule Cities

Subject to the limitations of the home-rule amendment⁶¹ that: (1) the city have a population in excess of 5,000; (2) the charter (or amendment thereto) of the city is adopted at an election, and is not amended, altered, or repealed more often than each two years; (3) the charter contains no provision which is contrary to the general law; and (4) the constitutional limitation on tax power is observed, a home-rule city is given the power to establish its own format of local government. The purpose of the home-rule amendment was to bestow full power of local self-government upon the cities, giving them the right and power to determine the framework of their own charters.⁶² Perhaps one of the more difficult points of this constitutional provision was the reservation to the Legislature of the right to change existing charter provisions by the enactment of general laws. In *Dry v. Davidson* this was considered at length, the court observing:

In *City of Beaumont v. Fall*, 116 Tex. 314, 291 S.W. 202, 205, the Supreme Court descends to such particularity in the statement of that doctrine that nothing remains unsettled about it, saying this: 'As long as the state does not, in its Constitution or by general statute, cover any field of activity of the cities of this state, any given city is at liberty to act for itself. But, when the state itself steps in and makes a general law and applies such law to all cities of a certain class, then we submit that no city of the same class is authorized, under our Constitution, to enact contrary legislation. If this principle has not already been adopted as the settled law of this state, then it should be so understood from this time forward.'

In the *McCutcheon v. Wozencraft Case* also, 116 Tex. 440, 294 S.W. 1105, this like declaration was made: 'City charters and ordinances must conform to

⁵⁸ O'Quinn, *supra* note 31, at XXVIII-XXXVII.

⁵⁹ Ford v. Town of Coppell, 407 S.W.2d 304, 306 (Tex. Civ. App.—Dallas 1966), error ref. n.r.e.

⁶⁰ See Ball v. Texarkana Water Corp., 127 S.W. 1068 (Tex. Civ. App. 1910).

⁶¹ TEX. CONST. art. XI, § 5.

⁶² City of Houston v. State *ex rel.* City of West University Place, 142 Tex. 190, 176 S.W.2d 928, appeal dismissed, 322 U.S. 711 (1943).

Constitution and general laws of state, as provided by enabling act putting Home Rule Amendment (Const. art. 11, sec. 5), in effect.'

In *Hunt v. Atkinson*, on motion for rehearing 18 S.W. 2d 594, the Commission of Appeals finally concluded the matter with this further and fuller pronouncement, the italics being ours: 'The point now made is that, since the adoption of the home rule amendment to the Constitution (article 11, sec. 5), the Legislature is without power to grant a charter to a city such as Houston, and that therefore it has no power to do indirectly that which it cannot do directly, to wit, pass a law validating the boundaries of the city established in a way confessedly had at the time. . . . Now, article 1165 [the enabling act of the Home Rule Amendment] of the Revised Statutes 1925, declares, with reference to the right of the people of a municipality to select their charter, that the same shall be '*subject to such limitations as may be prescribed by the Legislature,*' and *shall contain nothing inconsistent with the Constitution or general laws of this State.*' If the last clause by way of limitation stood alone, it might with great force be argued that home rule cities possess exclusive powers superior to that of the Legislature with respect to all municipal matters not inconsistent with the Constitution, since the term 'general laws' might be construed to mean laws of the state other than municipal laws. There is excellent authority elsewhere throughout the country for this contention. But this is not the sole limitation imposed upon the municipality. Their charters must be '*subject to such limitations as may be prescribed by the Legislature.*' This clearly shows that the legislative power is in all things supreme; that the power of the municipality is subject in all respects to '*such limitations*' as may be prescribed by the Legislature, without distinction as to those limitations then existing or arising through subsequent legislature enactments. We take it to be that the power of the municipality of home rule cities is not supreme in matters of legislation, but is at all times subject to any and all limitations that may be prescribed by the Legislature.'⁶³

Charters granted by special legislative act, a procedure no longer authorized by the constitution, are governed by the same rules.⁶⁴ Prior to the provisions of the home-rule amendment it was held that a charter provision granted by act of the legislature could contain no provision contrary to the general law, since this would amount to the suspension of the state law, prohibited by article I, section 28 of the Texas Constitution.⁶⁵ Thus, in this sense, the home-rule provision appears to be declaratory of pre-existing law.

In the field in which a home-rule city may constitutionally legislate, its power is not dependent upon a grant from the Legislature;⁶⁶ it derives its power from the sovereign people.⁶⁷ A city operating under the home-rule amendment is limited only by the provisions of the federal and state constitutions and the

⁶³ 115 S.W.2d 689, 691 (Tex. Civ. App.—Galveston 1938), *error ref.* (emphasis in original). See also *Smith v. City of Dallas*, 163 S.W.2d 681 (Tex. Civ. App.—Dallas 1942), *error ref.* (to the effect ordinances and charters yield to a subsequent law).

⁶⁴ *Smith Bros. v. Lucas*, 15 S.W.2d 27 (Tex. Civ. App.—Dallas 1928), *aff'd*, 26 S.W.2d 1055 (Tex. Comm'n App. 1930); *Massachusetts Bonding & Ins. Co. v. McKay*, 10 S.W.2d 770, 771 (Tex. Civ. App.—Austin 1928), *error ref.*; *Davis v. Holland*, 168 S.W. 11 (Tex. Civ. App.—Dallas 1914), *error ref.*

⁶⁵ *Brown Cracker & Candy Co. v. City of Dallas*, 104 Tex. 290, 137 S.W. 342 (1911).

⁶⁶ *Le Gois v. State*, 80 Tex. Crim. 356, 190 S.W. 724 (1916); *City of El Paso v. State ex rel. Town of Ascarate*, 209 S.W.2d 989 (Tex. Civ. App.—El Paso 1947), *error ref.*; *Yellow Cab Transit Co. v. Tuck*, 115 S.W.2d 455 (Tex. Civ. App.—Dallas 1938), *error ref.*; *Murphy v. Wright*, 115 S.W.2d 448 (Tex. Civ. App.—Fort Worth 1938).

⁶⁷ *Murphy v. Wright*, 115 S.W.2d 448 (Tex. Civ. App.—Fort Worth 1938); *Xydias Amusement Co. v. City of Houston*, 185 S.W. 415 (Tex. Civ. App.—Galveston 1916), *error ref.*

general law.⁶⁸ The constitutions, enabling act, and general laws are *in pari materia*.⁶⁹ While these general rules are repeatedly stated, their application is not uniform, perhaps because, in part, of the understandable desire to predicate a decision upon alternative grounds of lack of statutory or charter authority,⁷⁰ but in older cases express delegation of power to a city was considered a condition precedent to the exercise of the power.⁷¹

While the Legislature may control the manner of adopting or amending a home-rule charter, it cannot destroy that right preserved by the constitution.⁷² The enabling act under the home-rule amendment, article 1175,⁷³ was not adopted until 1913, and with respect to procedures for the adoption of a charter it remains basically unchanged, although the procedure for amendments to a charter have been simplified.⁷⁴ The act reads in part: "Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among other powers that may be exercised by any such city the following are enumerated for greater certainty"⁷⁵

The Attorney General requires submission of the various proceedings relating to the adoption of a home-rule charter when bonds are sought to be issued. Once the proceedings relating to the adoption of a home-rule charter have been reviewed and approved by the Attorney General (in connection with

⁶⁸ Denman v. Quin, 116 S.W.2d 783 (Tex. Civ. App.—San Antonio 1938), *error ref.*

⁶⁹ Municipal Gas Co. v. City of Sherman, 89 S.W.2d 436 (Tex. Civ. App.—Dallas 1935), *aff'd*, 133 Tex. 324, 127 S.W.2d 193 (1939).

⁷⁰ City of Arlington v. City of Grand Prairie, 451 S.W.2d 284 (Tex. Civ. App.—Fort Worth 1970), *error ref. n.r.e.*, considered an annexation prior to the effective date of the Municipal Annexation Act, TEX. REV. CIV. STAT. ANN. art. 970a (1963). The court observed that a city *could not* annex land not adjacent to its limits, citing art. 1175 and the city charter (the latter admittedly was applicable only to annexation of adjacent land). The annexation was upheld based upon a validating act which clearly established that the original power to annex nonadjacent land could constitutionally be conferred. Although arts. 1175 and 1176 expressly state that the enumeration of powers in art. 1175 is not meant to be exclusive, even prior to the Municipal Annexation Act it was held the territory annexed had to be adjacent to the annexing city. See City of Irving v. Dallas County Flood Control Dist., 383 S.W.2d 571, 576 (Tex. 1964).

⁷¹ With respect to art. 1175, the doctrine of *expressio unius est exclusio alterius* was expressly applied. City of Arlington v. Lillard, 116 Tex. 446, 294 S.W. 829 (1927).

⁷² State *ex rel.* Rose v. City of La Porte, 386 S.W.2d 782 (Tex. 1965); City of Houston v. City of Magnolia Park, 115 Tex. 101, 276 S.W. 685 (1925).

⁷³ TEX. REV. CIV. STAT. ANN. art. 1175 (1963).

⁷⁴ For adoption of a charter, see *id.* arts. 1165-69; amendments are covered by arts. 1165 and 1170; arts. 1172-74 relate to both the adoption of a charter and amendments. Filing of the charter and any amendments with the Secretary of State (art. 1173) permits a court to take judicial knowledge of the charter provisions (see cases in Note of Decisions under that statute and art. 1174), but no charter is adopted until the official order is entered on the records of the city in accordance with art. 1169. The recording of a charter or amendments under art. 1174 is written in mandatory language, but failure to comply may only affect the right to rely upon the court's taking judicial notice, as distinguished from the right to exercise powers.

The procedures prescribed for the adoption or amendment of home-rule charters must be followed with a great deal of care or the entire amendment may be declared void. In Turner v. Lewie, 201 S.W.2d 86 (Tex. Civ. App.—Fort Worth 1947), *error dismissed*, the court held that an election to amend the charter of a city was a nullity for failure to comply with the statutory requirements with respect to the giving of notice of the election: (1) to give notice of intention to submit the charter amendment at an election (as required by art. 1171, repealed in 1961, ch. 500, § 2, [1961] Tex. Laws 1108) and (2) to give proper notice of the election itself under arts. 1174 and 1166 (these requirements have been changed by the amendment to art. 1174). The decision points out the necessity for the ballot to identify the character and purpose of the amendment proposed to be made—an essential element of notice.

⁷⁵ TEX. REV. CIV. STAT. ANN. art. 1175 (1963) (emphases added).

the approval of the first series of bonds issued following the adoption of the charter), it is necessary to submit only the proceedings relating to the amendment adopted since the city last issued bonds, since a review of such proceedings is considered incident to the approval of the bonds.

III. CONSTITUTIONAL LIMITATIONS ON TAXING POWER—

THE POWER TO CREATE INDEBTEDNESS

A. *Source of Taxing Power*

Most of the constitutional provisions relating to taxation are limited in their application to ad valorem taxes,⁷⁶ although there is also a limit on the power of a city, town, or county to levy an occupation tax.⁷⁷ We are not here concerned with "taxes" that find support in the police power, as distinguished from taxing power, for their primary purpose is to license or regulate the exercise of a privilege. These, more correctly designated as license fees, are regulatory in nature, and the revenue received must bear a reasonable relation to the cost of the administration of the measure and not the collection of revenue.⁷⁸

It appears to be well established that the Texas Constitution is not the source of power insofar as taxing power of the state is concerned.⁷⁹ From the standpoint of counties and municipalities, however, the source of the taxing power has been clouded. Do constitutional provisions serve as (1) a limitation upon the power of the legislature to provide for local taxation, (2) a limitation of the delegation of taxing power, or (3) a grant of power with an implied limitation against other taxes? That question is not merely academic, as illustrated by the three opinions in a recent case, *Shepherd v. San Jacinto Junior College Dist.*,⁸⁰ which undoubtedly will be one of the more important decisions of the decade. In *Shepherd* the power of a junior college district to levy an ad valorem tax for local maintenance purposes (that had been approved at an election) was brought into question. On direct appeal to the Supreme Court of Texas a sharply divided court upheld the tax. A majority of the court stated that two theories had been advanced for the validity of the tax: (1) that the Texas Constitution contained no express or implied limitation to prohibit the Legislature from establishing junior college districts with taxing power; and (2) that legislative power to authorize a junior college district to levy a tax finds support in the provisions of article VII, section 3 of the constitution. The opinion of the

⁷⁶ *City of Wichita Falls v. Williams*, 119 Tex. 163, 26 S.W.2d 910 (1930). TEX. CONST. art. VIII, § 3 (prohibiting taxation by local law) is one provision applicable to all taxes. *Harris County v. Shepperd*, 156 Tex. 18, 291 S.W.2d 721 (1956); *Meyenberg v. Ehlinger*, 224 S.W. 312 (Tex. Civ. App.—Galveston 1920).

⁷⁷ TEX. CONST. art. VIII, § 1, limits such local occupation tax to one-half that levied by the state for the same period.

⁷⁸ *Harris County v. Shepperd*, 156 Tex. 18, 291 S.W.2d 721 (1956); *Payne v. Massey*, 145 Tex. 237, 196 S.W.2d 493 (1946); *Hurt v. Cooper*, 130 Tex. 433, 110 S.W.2d 896 (1937); *Brown v. City of Galveston*, 97 Tex. 1, 75 S.W. 488 (1903); *Booth v. City of Dallas*, 179 S.W. 301 (Tex. Civ. App.—Dallas 1915), *error ref.*; *Ex parte Gregory*, 20 Tex. Ct. App. R. 210, 54 Am. R. 516 (Galveston 1886).

⁷⁹ *Friedman v. American Sur. Co.*, 137 Tex. 149, 151 S.W.2d 570 (1941); *State v. Wynne*, 134 Tex. 455, 133 S.W.2d 951 (1939); *Ex parte Townsend*, 64 Tex. Crim. 350, 144 S.W. 628 (1912); *Preston v. Anderson County Levee Improvement Dist. No. 2*, 261 S.W. 1077 (Tex. Civ. App.—Texarkana 1924), *error ref.*; *Stratton v. Commissioners' Court*, 137 S.W. 1170 (Tex. Civ. App.—San Antonio 1911), *error ref.*

⁸⁰ 363 S.W.2d 742 (Tex. 1962).

court upholds the validity of the tax on the last-mentioned theory. The concurring opinion adopted the first theory, and the strongly worded dissenting opinion rejects both theories and the theory that other provisions of the constitution confer such power to levy local ad valorem taxes on the Legislature (which in turn may be delegated by it). The dissent adopts the view that the power of taxation by political subdivisions is impliedly limited by the constitution; *i.e.*, that the constitutional provisions relating to political subdivisions of the state are both a grant and limitation of the power of taxation, that without constitutional authority no ad valorem tax may be levied by any political subdivision of the state.⁸¹

While the court in *Shepherd* did not find it necessary to pass upon the direct question of whether the constitution grants or limits, or both, the ad valorem taxing power of political subdivisions of the state, it seems inevitable that the question will soon be squarely before the court because the "stacking" of various political subdivisions with differing special or limited powers appears to be the trend as an alternative to substantial revision of those constitutional provisions which now govern and restrict political subdivisions. In due time a situation will arise in which the Legislature will attempt to confer ad valorem taxing power on one of its political subdivisions when there is no mention of such political subdivision or its power of taxation in our outmoded constitution.

In some instances the constitution provides that a county or city shall have ad valorem taxing power within certain limits,⁸² the exercise of taxing power being made dependent upon a favorable vote at an election.⁸³ It has been held that in the latter instance, the power of taxation has been delegated to the electors who participate in the election;⁸⁴ but it has also been stated that the constitution delegated a conditional power of taxation, the favorable vote at the election being the condition precedent to the exercise of the power.⁸⁵ This distinction may be of importance in those instances where the constitution appears to delegate taxing power, and the Legislature endeavors to restrict or impose conditions upon the exercise of that power.⁸⁶ If express constitutional

⁸¹ Indicative of the confusion on the matter is that in *Shepherd* reference was made (in all three opinions) to an opinion of the Attorney General of Texas issued in 1927 to the effect that the Legislature had the requisite power to establish junior college districts with taxing power. TEX. ATT'Y GEN. OP. No. 2663 (1927). Another opinion of the Attorney General's office has denied the existence of such power where an airport was involved (prior to the Airport Authorities constitutional provision, TEX. CONST. art. IX, § 12). TEX. ATT'Y GEN. OP. No. 0-3310 (1941). And in at least one case before the supreme court the Attorney General advanced the same view of an implied limitation of taxing power as contained in the dissenting opinion in *Shepherd*. *Harris County v. Shepperd*, 156 Tex. 18, 291 S.W.2d 721 (1956) (mandamus denied on other grounds).

⁸² TEX. CONST. art. XI, § 4 (relating to cities having a population of less than 5,000)—tax limit: \$1.50 on the \$100 valuation; *id.* art. XI, § 5 (relating to cities having a population in excess of 5,000)—tax limit: \$2.50 on the \$100 valuation; *id.* art. VIII, § 9 (relating to counties)—tax limit: 80¢ for county purposes; *id.* art. VIII, § 1a (relating to the 30¢ Farm-to-Market Road, Flood Control tax).

⁸³ TEX. CONST. art. III, § 52 (relating to road bonds of counties and certain reclamation purposes); *id.* art. VIII, § 9 (insofar as it relates to the special 15¢ road tax, in addition to the 80 cents for other county purposes).

⁸⁴ *San Saba County v. McCraw*, 130 Tex. 54, 108 S.W.2d 200 (1937); *Crabb v. Celeste Ind. School Dist.*, 105 Tex. 194, 146 S.W. 528 (1912).

⁸⁵ *Shepherd v. San Jacinto Junior College Dist.*, 363 S.W.2d 742 (Tex. 1962) (concurring opinion).

⁸⁶ TEX. CONST. art. VIII, § 1a states that from Jan. 1, 1951, the several counties "are authorized" to levy the tax. By statute, TEX. REV. CIV. STAT. ANN. art. 7048a, § 7 (1960),

authority is required for a political subdivision to have the power of taxation, then it would seem that the Legislature lacks the power to restrict power constitutionally conferred. If the constitution is a limitation on the power of the Legislature to provide for taxation by its political subdivisions, then restrictions by the Legislature might well be upheld.

B. Rate and Other Limitations

1. Basic Provisions.

(a) *History.* Article XI, section 4 of the Texas Constitution originally provided that cities and towns having a population in excess of 10,000 could levy an annual ad valorem tax of one-quarter of one per cent (twenty-five cents of the 100-dollar valuation) to "defray the current expense of their local government."⁸⁷ In 1909, the provision was made applicable to cities and towns having a population of 5,000 or less, and in 1920 the present provision was adopted.

For a time, article VII, section 9 of the constitution provided that taxes could be levied to defray current expenses, and it was held there was no power to issue bonds payable from such taxes.⁸⁸ When the constitution was amended to provide that taxes could be levied "for the payment of debts already incurred and for the erection of public buildings," the rule remained unchanged until statutory authority was given to issue bonds payable from such taxes.⁸⁹ Article VIII, section 9 of the constitution was amended in 1883, 1890, and 1907, and in each amendment the purposes for which a municipality could levy taxes were broadened by the addition of one or more purposes. Following the amendment in 1967, the section still contains a provision which purports to limit *city* taxes for some purposes, but then contains a provision that the section will not be construed as a limitation of powers "delegated" to cities or towns by other provisions of the constitution.⁹⁰

it is provided that the power to levy the tax must be conferred at an election held within the county. The Attorney General has taken the position that the Legislature has the power to require the election as a reasonable mode of procedure, TEX. ATT'Y GEN. OP. NO. V-1077 (1951), and while the validity of this reasoning may be open to question (imposing a condition where the constitution does not), most attorneys follow the statutory procedure to avoid a belated attack upon the authority to levy the tax, that might wreak havoc on the financial position of a county which had budgeted the use of such tax revenues. Provision is also made whereby this tax may not be levied by the county to the extent the state tax had been previously donated, TEX. CONST. art. VIII, § 1a, and since the period for such remission of the state tax has, in most instances, expired, this provision is of decreasing significance.

⁸⁷ TEX. CONST. art. XI, § 4.

⁸⁸ *Dean v. Lufkin*, 54 Tex. 265 (1881).

⁸⁹ *Gould v. City of Paris*, 68 Tex. 511, 4 S.W. 650 (1887); *Texas Water & Gas Co. v. City of Cleburne*, 21 S.W. 393 (Tex. Civ. App. 1892). See also *Brenham v. German Am. Bank*, 144 U.S. 173 (1892), in which there was authority, under a home-rule charter, to borrow money for general purposes of the city, but this was not sufficient to confer the power to issue negotiable bonds.

⁹⁰ There appear to be no reported cases taking the position that TEX. CONST. art. VIII, § 9 (following the 1967 amendment) allows a city tax of 80 cents on the 100-dollar valuation in addition to the tax which a city may levy and collect under TEX. CONST. art. XI, §§ 4 or 5. In the light of the history of the constitutional provisions it would seem that such a position could not be sustained. It has been held that art. VIII, § 9 is a general provision relating to cities and that the 1920 amendment to art. XI, § 4 is a special and controlling provision; so the former limitations of art. VIII, § 9 (limiting a tax to 25 cents) would not be controlling. *Bass v. City of Clifton*, 261 S.W. 795 (Tex. Civ. App.—Waco 1924), *error ref.* The fact that the provisions of art. VIII, § 9 of the constitution then pro-

(b) *Cities of Less Than 5,000 Population.* Article XI, section 4 of the constitution (since 1920) reads in pertinent part: "Cities and towns having a population of five thousand or less may be chartered alone by general law. They may levy, assess and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful for any one year which shall exceed one and one-half per cent of the taxable property of such city." It should be noted that a city to which this constitutional provision applies has the authority to levy taxes *as may be authorized* by law, but not to exceed one and one-half per cent of the taxable property within the city (\$1.50 on the 100-dollar taxable valuation), and the former express limitation upon the purposes for which the tax may be utilized has been removed.⁹¹

Article 1027 is clearly applicable only to general-law cities and reads in part as follows:

The governing body of any incorporated city or town having a population of not more than five thousand inhabitants, shall have power, by ordinance, to levy and collect an annual ad valorem tax of not exceeding one and one-half per cent on the one hundred dollars valuation of taxable property within such city or town for the erection, construction or purchase of public buildings, streets, sewers, and other permanent improvements within the limits of such city or town⁹²

This law is a part of chapter 5 of title 28, and has application only to those cities and towns which became incorporated under chapter 1 of title 28, or attained the requisite population (as of the time of the exercise of the power) or adopted the provisions of chapters 1 through 10 of title 28.

(c) *Cities of More Than 5,000 Population.* Article XI, section 5 of the constitution provides in part as follows:

Cities having more than five thousand inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature . . . said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent of the taxable property of such city

The corresponding statute states:

The governing body of any city in this State having more than five thousand inhabitants, unless otherwise provided in its special charter granted by the Legislature or adopted by the people, shall have power by ordinance to levy, assess and collect such taxes as such governing body may determine, not to exceed for any one year two and one-half per cent of the taxable property of such city, for current expenses and for the purpose of construction or the purchase of public buildings, water works, sewers, and other permanent improvements, and for the construction and improvement of the roads, bridges and streets of such city, within its limits.⁹³

vided that no other tax could be levied except as provided in other provisions of the constitution seems to have been given weight by the court. See *Lufkin v. City of Galveston*, 63 Tex. 437 (1885).

⁹¹ See notes 88-89 *supra*, and accompanying text.

⁹² TEX. REV. CIV. STAT. ANN. art. 1027 (1963).

⁹³ *Id.* art. 1028.

The charter of a home-rule city may restrict the amount of tax which may be levied to less than \$2.50 on the 100-dollar valuation of taxable property. If a city or town has a population in excess of 5,000 but is incorporated under the general law, the taxing limit of article XI, section 5 of the constitution (and article 1028) has been held to apply to such city.⁹⁴

(d) *Counties*. Article VIII, section 9 of the constitution provides in part:

[N]o county, city or town shall levy a tax rate in excess of Eighty Cents (80¢) on the One Hundred Dollars (\$100) valuation in any one (1) year for general fund, permanent improvement fund, road and bridge fund and jury fund purposes; provided further that the time the Commissioners Court meets to levy the annual tax rate for each county it shall levy whatever tax rate may be needed for the four (4) constitutional purposes; namely, general fund, permanent improvement fund, road and bridge fund and jury fund so long as the Court does not impair any outstanding bonds or other obligations and so long as the total of the foregoing tax levies does not exceed Eighty Cents (80¢) on the One Hundred Dollars (\$100) valuation in any one (1) year. Once the Court has levied the annual tax rate, the same shall remain in force and effect during that taxable year; and the Legislature may also authorize an additional annual ad valorem tax to be levied and collected for the further maintenance of the public roads; provided, that a majority of the qualified property taxpaying voters of the county voting at an election to be held for that purpose shall vote such tax, not to exceed Fifteen Cents (15¢) on the One Hundred Dollars (\$100) valuation of the property subject to taxation in such county. Any county may put all tax money collected by the county into one general fund, without regard to the purpose or source of each tax.

Very basic changes have been made in this constitutional provision since 1876, but perhaps the most far-reaching ones were made in 1906, 1944, 1956, and 1967. In 1906 counties were given the power to levy a tax of 80 cents on each 100 dollars of taxable property for the four "constitutional fund" purposes (*i.e.*, general, jury, road and bridge, and permanent improvement funds), and the amount of tax that could be levied for each purpose within the 80-cent limit was specified. In 1944 a procedure was provided whereby the amount that could be levied for each of the four constitutional funds could be reallocated for a six-year period (as the result of an election held within the particular county). At the expiration of the six-year period, the amount which could be levied for each fund was as provided in the constitution (twenty-five cents for each of the general and permanent improvement funds and fifteen cents for the jury and road and bridge funds) unless there was another reallocation election. In 1956 this provision was again changed to provide the eighty cents could be levied for the four constitutional funds, the commissioners courts to determine annually (at the time of the annual tax levy) the amount to be apportioned between the four funds.

In the case of *Carroll v. Williams*,⁹⁵ the court held that money in one constitutional fund could not be transferred to another constitutional fund since the taxes levied could be expended only for the purposes for which the tax was levied. This strait jacket on county finance was removed in 1967 when it was

⁹⁴ TEX. ATT'Y GEN. OP. No. 0-7392 (1946).

⁹⁵ 109 Tex. 155, 202 S.W. 504 (1918).

specifically provided that all tax money collected could be deposited into one general fund without regard to the purpose or source of such tax.⁹⁶

While article XI, sections 4 and 5 and article VIII, section 9 of the constitution contain limitations upon the power of ad valorem taxation by cities, towns, and counties, the total tax rate of \$1.50, \$2.50, and eighty cents on the 100-dollar valuation so provided relates to the basic powers to provide for the general purposes of these political subdivisions.

2. *Other Provisions.* Other ad valorem taxes that may be levied by cities, towns, and counties find express foundation in the following constitutional provisions:

(a) *Counties.* (1) The special fifteen-cent road tax mentioned in article VIII, section 9 "for the further maintenance of roads" may be voted.⁹⁷ No bonds may be issued payable from this tax, but additional revenues are provided for road purposes that ordinarily will free funds in the road and bridge fund (out of the eighty cents), which may then be used for the payment of bonds.

(2) Under article VIII, section 1a up to thirty cents may be levied either for flood control, farm-to-market roads, or both. Counties were authorized to levy this tax simultaneously with the prohibition of the use of the ad valorem tax for state "general revenue purposes" so the exemption of the first \$3,000 value of "residential" homestead was retained in the amendment of 1948 as to this county tax.⁹⁸

(3) Of limited interest, article III, section 52d, applicable only to Harris County or road districts therein, authorized elections to vote an additional tax for permanent roads and bridges for a period of not to exceed five years. Article XI, section 7 provides that cities and counties on the coast may, upon two-thirds vote, collect a tax for the "construction of seawalls, breakwaters, or sanitary purposes," but the question arises as to whether this is a tax "in addition" to the tax which such political subdivisions are permitted to levy. Article XI, section 10 relates to cities when acting as independent school districts.⁹⁹

(b) *Cities and Counties.* (1) Article III, section 52 of the constitution was

⁹⁶ *Lewis v. Nacogdoches County*, 461 S.W.2d 514 (Tex. Civ. App.—Tyler 1970); TEX. ATT'Y GEN. OP. NO. M-369 (1969). As a matter of convenience it has been, and undoubtedly will continue to be, a common practice to budget county expenditures for the four constitutional fund purposes separately and levy the tax for such funds separately. Clearly, the constitution authorizes the consolidation of such funds as collected. Under existing statutes, however, not all counties may consolidate the officer's salary fund with the resultant consolidated general fund of the county. TEX. ATT'Y GEN. OP. NOS. M-369, M-438 (1969). While counties may levy taxes for the four constitutional funds, it is expressly provided that the total rate may not exceed 80 cents nor may the county impair any outstanding bonds or other obligations. Thus, as to obligations payable from the 80 cents, it appears that holders thereof may have a claim against such tax revenues superior to operating expenses of the county. The authority of a county to place "all tax funds" into one general fund may well be limited in its application to the basic 80-cent levy since this section retained the language of the 1890 amendment authorizing a special road tax of 15 cents for the "further maintenance of the public roads," conditioned upon legislative authorization and authorization by an election. As to any election to authorize the 15-cent tax held prior to the 1967 amendment, it seems clear that the special road tax may be used only for the purpose for which it was voted. *San Saba County v. McCraw*, 130 Tex. 54, 108 S.W.2d 200 (1937). When a tax can be levied only after approval at an election, the use of the tax for the voted purpose should be required, and the deposit into the general fund would not be consistent with the theory that such tax collections are a trust fund.

⁹⁷ The statutory procedure is found in TEX. REV. CIV. STAT. ANN. arts. 6790-93 (1963).

⁹⁸ See Interpretive Commentary, 2 TEX. CONST. 472, 473 (1955).

⁹⁹ See also TEX. CONST. art. VII, § 3 with reference to schools.

last amended as the result of an election held in November 1970.¹⁰⁰ Again we have an illustration of our propensity to attack problems on the fringe without going to the basic problem. As the result of an election held in 1968, Dallas County had been given authority to issue bonds for road purposes upon a majority vote (rather than two-thirds vote) of the resident qualified property taxpaying electors,¹⁰¹ and this power was given to all counties by the 1970 amendment to article III, section 52. The amendment to article III, section 52 provides no other change, continuing the prohibition against the lending of credit and the making of grants to individuals, associations, and corporations, with section (b) containing a repetition of the former provision of the constitution but effecting a change with respect to county authorization to issue bonds for road purposes by the addition of a new paragraph (c). These provisions read as follows:

(b) Under Legislative provision, any county, any political subdivision of a county, any number of adjoining counties, or any political subdivision of the State, or any defined district now or hereafter to be described and defined within the State of Texas, and which may or may not include, towns, villages or municipal corporations, upon a vote of two-thirds majority of the resident property taxpayers voting thereon who are qualified electors of such district or territory to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory, except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of this Constitution, and levy and collect taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the Legislature may authorize, and in such manner as it may authorize the same, for the following purposes to wit:

(1) The improvement of rivers, creeks, and streams to prevent overflows, and to permit of navigation thereof, or irrigation thereof, or in aid of such purposes.

(2) The construction and maintenance of pools, lakes, reservoirs, dams, canals and waterways for the purposes of irrigation, drainage or navigation, or in aid thereof.

(3) The construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof.

(c) Notwithstanding the provisions of Subsection (b) of this Section, bonds may be issued by any county in an amount not to exceed one-fourth of the assessed valuation of the real property in the county, for the construction, maintenance, and operation of macadamized, graveled, or paved roads and turnpikes, or in aid thereof, upon a vote of a majority of the resident property taxpayers voting thereon who are qualified electors of the county, and without the necessity of further or amendatory legislation. The county may levy and collect taxes to pay the interest on the bonds as it becomes due and to provide a sinking fund for redemption of the bonds.¹⁰²

Several matters are of interest and should be noted. First, under this provision there is no limit on the rate or amount of tax that may be levied. Secondly, there *is* a limitation on the amount of debt that may be incurred under this provision—*i.e.*, it may not exceed one-fourth of the real property valuations.

¹⁰⁰ See Proposed Amendments, 1 TEX. CONST. 5-6 (Supp. 1970).

¹⁰¹ TEX. REV. CIV. STAT. ANN. art. III, § 52e (Supp. 1970).

¹⁰² Proposed Amendments, 1 TEX. CONST. 5-6 (Supp. 1970).

Thirdly, although the counties have the authority to issue bonds or otherwise lend their credit with respect to three programs, it is only in the last listed (road projects) that the two-thirds vote requirement is reduced to a simple majority—and then only when the county issues its road bonds. The two-thirds majority vote requirement does not necessarily contravene the equal protection clause of the federal Constitution.¹⁰³

With respect to cities, another interesting problem is presented (preserved by the 1970 amendment) by the language "except the total *bonded indebtedness* of any city or town shall never exceed the limits imposed by other provisions of this Constitution." This limitation was added in 1904. There appears to have been no constitutional provision then or now that would limit the *amount* of indebtedness of a city *except* the limit on the tax rate.¹⁰⁴

It seems clear that the tax-rate limitation upon cities operates indirectly as a limit upon the indebtedness a city may incur. If this is the limitation intended, then a city, by reason of this constitutional provision, obtains express additional powers it may utilize, but obtains no assistance in the form of additional taxing power to provide the funds for the exercise of those additional powers. The only alternative is to recognize there was and is no other provision in the constitution limiting the amount of indebtedness a city may incur, and the limitation added nothing to our law.¹⁰⁵ Perhaps this difficulty has accounted for the legislative acts to avoid establishing procedures for a city to function under this constitutional provision, while a number of statutes have been adopted applicable to counties or defined districts.¹⁰⁶

(2) Article XVI, section 59 of the constitution was added primarily to remove the limitations of article III, section 52, *viz.*, the debt limitation of one-fourth the real property valuation and the two-thirds vote requirement. The first limitation was removed and the two-thirds vote requirement was reduced to a majority. This provision is limited in its application to conservation and reclamation. Statutory provision has been made for cities and counties to

¹⁰³ Extraordinary majority requirements have been held to offend the equal protection clause of the United States Constitution unless there is a compelling state interest to protect. *Rimarck v. Johansen*, 310 F. Supp. 61 (D. Minn. 1970); *Westbrook v. Mihaly*, 87 Cal. Rptr. 839, 471 P.2d 487 (1970), *judgment vacated and remanded*, 91 S. Ct. 2224 (1971). *Contra*, *Gordon v. Lance*, 39 U.S.L.W. 4719 (U.S. June 7, 1971), *reversing* *Lance v. Board of Educ.*, 170 S.E.2d 783 (W.Va. 1969), *distinguishing* *Cipriano v. City of Houma*, 395 U.S. 701 (1969), *and* *Gray v. Sanders*, 372 U.S. 368 (1963); *Bogert v. Kinzer*, 93 Idaho 515, 465 P.2d 639 (1970). In those states which recognize the inherent right of local self-government extraordinary voting requirements may unconstitutionally interfere therewith. *Thomas v. Reid*, 142 Okla. 38, 285 P. 92 (1930).

¹⁰⁴ *City of Palestine v. Royall*, 16 Tex. Civ. App. 36, 40 S.W. 621 (1897), *error ref.*

¹⁰⁵ This alternative has definite appeal. Limitations on *indebtedness* as distinguished from limitation on *rate* of taxation are found only in TEX. CONST. art. III, § 52.

¹⁰⁶ *As to road bonds*, TEX. REV. CIV. STAT. ANN. art. 752a (1964), defines "political subdivision" to exclude a city. In reviewing chapter 3 of title 22, care must be used to distinguish between those provisions which apply only to a county and those which apply to other "political subdivisions" or defined districts and those which apply to both. As to bond issuing procedures for a county see arts. 752b, 752f-752l and arts. 717k-2 (where in conflict with art. 752i) and 752s; as to other subdivisions or districts see arts. 752c to 752e, 752f-1 to 752i (modified by art. 717k-2 where in conflict with art. 752i), arts. 752m to 752n, and 752t. As to reclamation and irrigation projects, two of the purposes provided by TEX. CONST. art. III, § 52(b) (2), a county may proceed under chapter 6 of title 22 (arts. 803 to 821). This chapter is also applicable where the county proceeds for such purpose under the provisions of art. XVI, § 59 of the constitution. As to navigational aid, a part of the purpose provided by the newly amended art. III, § 52(b) (1), a county may proceed under chapter 6A of title 22 (arts. 822a to 822f).

operate under article XVI, section 59, with taxing power in addition to that possessed under other constitutional provisions.¹⁰⁷ Under this constitutional provision, there is no limit to the rate or amount of tax that may be levied, but the Legislature is prohibited from authorizing the issuance of bonds or the incurring of any indebtedness against the reclamation district unless approved at an election.

Other constitutional provisions require that taxes be levied for a public purpose,¹⁰⁸ on an equal and uniform basis,¹⁰⁹ and under a general (as distinguished from a special) law.¹¹⁰ The lending of credit or the making of a grant of public funds is prohibited in a number of constitutional provisions, and the prohibition applies to all funds, not just those obtained from taxation.¹¹¹ At one time these provisions were essential to prevent the public treasury from being raided, but now we find the broad language also restricts (and properly so) some of the activities between political subdivisions. One political subdivision lacks the power to levy taxes for the benefit of or to make contributions to another political subdivision of the state.¹¹² This is true even if the contribution is intended as a loan from one political subdivision to another pending the receipt of tax collections by the debtor¹¹³ or a payment in lieu of taxes on property that has been acquired by one political subdivision.¹¹⁴ Perhaps one of the better definitions of the term "lending credit," condemned by the constitution, is "the creation of the debtor-creditor relationship."¹¹⁵ A constitutionally prohibited grant has been defined as a gratuity, there being no public purpose.¹¹⁶

C. Provision for Payment of Debt

1. *Definition of a Debt.* Article XI, section 5 of the constitution reads in part: "[N]o debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent thereon." Article XI, section 7 of the constitution contains the same basic provision, being therein made applicable to *both* cities and counties.

Any obligation payable from tax revenues to be collected beyond the budget year of its creation is a debt.¹¹⁷ An obligation payable from: (1) money on

¹⁰⁷ In the light of the restricted application of this constitutional provision these unusual statutes are not considered in detail. In addition to the statutes mentioned in the preceding note, see Water Code, ch. 58, § 51.052, [1971] Tex. Laws 288.

¹⁰⁸ TEX. CONST. art. VIII, § 3.

¹⁰⁹ *Id.* art. VIII, § 1.

¹¹⁰ *Id.* art. VIII, § 3.

¹¹¹ *Id.* art. III, §§ 50, 51, 52, 52b; art. XI, § 3.

¹¹² *City of Rockdale v. Cureton*, 111 Tex. 136, 229 S.W. 852 (1921); *City of Fort Worth v. Davis*, 57 Tex. 225 (1882).

¹¹³ *City of El Paso v. Carroll*, 108 S.W.2d 251 (Tex. Civ. App.—El Paso 1937), *error ref.*

¹¹⁴ *San Antonio Ind. School Dist. v. Board of Trustees*, 204 S.W.2d 22 (Tex. Civ. App.—El Paso 1947), *error ref. n.r.e.*

¹¹⁵ TEX. ATT'Y GEN. OP. No. V-1067 (1950).

¹¹⁶ *City of Aransas Pass v. Keeling*, 112 Tex. 339, 247 S.W. 818 (1923); TEX. ATT'Y GEN. OP. No. V-1163 (1951).

¹¹⁷ *McClellan v. Guerra*, 152 Tex. 373, 258 S.W.2d 72 (1953); *T. & N.O. Ry. v. Galveston County*, 141 Tex. 34, 169 S.W.2d 713 (1943); *Ault v. Hill County*, 102 Tex. 335, 116 S.W. 359 (1909); *Pendleton v. Ferguson*, 99 Tex. 296, 89 S.W. 758 (1905); *City of Tyler v. Jester*, 97 Tex. 344, 78 S.W. 1058 (1904); *Howard v. Smith*, 91 Tex. 8, 38 S.W. 15 (1896); *Edwards County v. Jennings*, 89 Tex. 618, 35 S.W. 1053 (1896); *McNeill v. City of Waco*, 89 Tex. 83, 33 S.W. 322 (1895); *Biddle v. City of Terrell*, 82 Tex. 335,

hand or money that the municipality may reasonably expect to derive from current income,¹¹⁸ or (2) future revenues from a self-liquidating revenue project,¹¹⁹ creates no "debt" under the meaning of the aforementioned constitutional provisions, and no tax must be levied at the time of creating the obligations.

While the statement of the general rule appears reasonably uncomplicated, these constitutional provisions have been the subject of so many cases that some statement of the general principles is essential.

With respect to pleading, it has been said that every pecuniary obligation attempted to be created is a prima facie debt, and it is incumbent upon the party seeking to recover to show compliance with the constitutional provision or allege facts falling within one of the exceptions noted.¹²⁰ Several matters are considered important when the "exceptions" to the rule are considered: (1) Was the expense incurred by the contractual obligation an ordinary operating or maintenance expense?¹²¹ (2) How was the cost of it set aside?¹²² An obliga-

18 S.W. 691 (1891); *City of Terrell v. Dissaint*, 71 Tex. 770, 9 S.W. 593 (1888); *City of Corpus Christi v. Woessner*, 58 Tex. 462 (1883); *City of Tyler v. Tyler Bldg. & Loan Ass'n*, 82 S.W. 1066 (Tex. Civ. App. 1904), *conforming to answers to certified questions in* 98 Tex. 69, 81 S.W. 2 (1904); *Peck-Smead Co. v. City of Sherman*, 26 Tex. Civ. App. 208, 63 S.W. 340 (1901); *Mineralized Rubber Co. v. City of Cleburne*, 22 Tex. Civ. App. 621, 56 S.W. 220 (1900).

¹¹⁸ Where all payments under a contract are to be made out of current funds and within the same fiscal year as the execution of the contract, no debt is created. *Rains v. Mercantile Nat'l Bank*, 144 Tex. 466, 191 S.W.2d 850 (1946); *Guerra v. Rodriguez*, 274 S.W.2d 715 (Tex. Civ. App.—Austin 1955), *error ref. n.r.e.* In a case in which the money was on hand the parties contemplated that it would be used to pay the contract obligation, but in fact it was not so paid; the obligation was held enforceable, not being classed as a debt within the constitutional provision. *Winston v. City of Fort Worth*, 47 S.W. 740 (Tex. Civ. App. 1898), *error ref.* If the parties act in good faith with reasonable ground to believe current revenues will be sufficient, but they are not, the contract is still valid, *City of Tyler v. Jester & Co.*, 97 Tex. 344, 78 S.W. 1058 (1904); *McNeill v. City of Waco*, 89 Tex. 83, 33 S.W. 322 (1895), and the obligation may be paid from revenues of future years in excess of the current expenses for such years. *City of Tyler v. Jester & Co.*, 97 Tex. 344, 78 S.W. 1058 (1904); *City of Corpus Christi v. Woessner*, 58 Tex. 462 (1883). A governing body may not dissipate current funds set aside for the payment of an obligation and then defeat recovery by denying the validity of the contract. *City of Houston v. Potter*, 41 Tex. Civ. App. 381, 91 S.W. 389 (1906), *error ref.* Current expenses have priority of payment out of current revenues over the debt of, and to the exclusion of, a general creditor. *Pendleton v. Ferguson*, 99 Tex. 296, 89 S.W. 758 (1905), *answering certified questions*, 90 S.W. 1182 (Tex. Civ. App. 1905), *conforming to certified questions*; *Capps v. Citizens' Nat'l Bank*, 134 S.W. 808 (Tex. Civ. App. 1911).

¹¹⁹ *City of Houston v. Allred*, 123 Tex. 334, 71 S.W.2d 251 (1934); *City of Richmond v. Allred*, 123 Tex. 365, 71 S.W.2d 233 (1934); *City of Dayton v. Allred*, 123 Tex. 60, 68 S.W.2d 172 (1934) (utility systems); *City of Corpus Christi v. Woessner*, 58 Tex. 462 (1883) (wharf income).

¹²⁰ *McNeill v. City of Waco*, 89 Tex. 83, 33 S.W. 322 (1895); *Biddle v. City of Terrell*, 82 Tex. 335, 18 S.W. 691 (1891).

¹²¹ *Dwyer v. City of Brenham*, 65 Tex. 526 (1886). A printing and binding contract is a current expense, as is publication of a delinquent tax record. *Boesen v. County of Potter*, 173 S.W. 462 (Tex. Civ. App.—Dallas 1915), *error ref.* A contract to be performed over a period of years may not be a debt. See *City of Cleburne v. Cleburne Water Co.*, 37 S.W. 655 (Tex. Civ. App. 1896), *error ref.*, in which a contract to supply the city with water and fire hydrants over a three-year period provided that the amount of water to be supplied was subject to change. Although price was established according to the amount used, the obligation was considered a current expense. *Accord*, *Broussard v. Wilson*, 183 S.W. 814 (Tex. Civ. App.—Galveston 1916) (purchase of road materials). In *Dallas Elec. Co. v. City of Dallas*, 23 Tex. Civ. App. 323, 58 S.W. 153 (1900), *error ref.* a contract was entered into whereby electric services would be supplied to the city for a period of three years. The payment was to be for electricity as supplied to the city, and current funds were budgeted. It was held not to be a debt within the meaning of the constitution, citing and relying upon *Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1 (1898), which in-

tion incurred to pay current expenses, in order to be valid, must run concurrently with current revenues.¹²³ If payments are to be made in future years, it would be apparent that the money is not on hand in the treasury or anticipated to be there in the same fiscal year in which the obligation was incurred.¹²⁴ Ordinary expenses incurred in excess of the amount on hand or anticipated to be on hand during the current fiscal year are void as being in contravention of the constitution.¹²⁵ In estimating the revenues for the current fiscal year, the true test is the ability to raise revenue at the time *the indebtedness* is created.¹²⁶ This includes: (1) taxes levied (assuming 100 per cent collection excluding

volved a formal contract with the city to supply water for a twenty-five year period. A city may stipulate for the payment of annual rental for gas or water supplied each year even though the total amount of such rentals for the life of the contract may exceed the amount of the indebtedness which may be incurred under a charter. Thus, an absolute debt is not created until the consideration has been furnished. In *Dallas Electric* the rental did not become an indebtedness until the water required to be furnished in that year had been furnished, and if there was a failure to furnish the water, the rental would not have been payable at all. Also, provisions against the creation of indebtedness normally will not apply to salaries of municipal officers or employees to whom the city necessarily becomes indebted in the ordinary conduct of municipal affairs. 15 E. MCQUILLAN, *THE LAW OF MUNICIPAL CORPORATIONS* § 41.24 (3d ed. 1970).

An architect's fee may be a current expense, if the parties so intended. *City of Houston v. Glover*, 40 Tex. Civ. App. 177, 89 S.W. 425 (1905). Contracts for commissions on sales of land (payable from general funds of the county) do not create "debt." *Sandifer v. Foard County*, 63 Tex. Civ. App. 651, 134 S.W. 823 (1911), *aff'd*, 105 Tex. 420, 151 S.W. 523 (1912). Where a contract for the purchase of a fire hose provided for payment out of current funds and a right to extend the obligation, the court reviewed the evidence of the general tax levy, the amount of general funds and delinquent taxes, and the fact the fire hose was necessary, and upheld the finding of the lower court that it was a current expense. *City of Aransas Pass v. Eureka Fire Hose Mfg. Co.*, 227 S.W. 330 (Tex. Civ. App.—San Antonio 1921). Certificates of special assessment are *not* an indebtedness within the meaning of the constitutional provisions. *City of Fort Worth v. Bobbitt*, 121 Tex. 14, 41 S.W.2d 228 (1931); *City of Beaumont v. Masterson*, 142 S.W. 984 (Tex. Civ. App.—Galveston 1911), *error ref.*

Where contractor was to build a cistern and be paid upon completion, held to be a debt (not a matter of ordinary expense) for which provision should have been made. *McNeill v. City of Waco*, 89 Tex. 83, 33 S.W. 322 (1895).

¹²² *Mineralized Rubber Co. v. City of Cleburne*, 22 Tex. Civ. App. 621, 56 S.W. 220 (1900), involved a contract for \$3,000. \$1,000 was in the treasury, but not set aside for payment of the obligation, held: a debt and void. Where it was "planned" to transfer money in order to pay a contractual obligation (there not otherwise being sufficient funds), the contract would be void where the transfer of funds could not legally be made. *Ault v. Hill County*, 102 Tex. 335, 116 S.W. 359 (1909). Time of entry of a contract may be of significance, as where the contract was executed five days after tax levy was made, indicative of the ability to pay out of current revenues. *Broussard v. Wilson*, 183 S.W. 814 (Tex. Civ. App.—Galveston 1916). Where sufficient funds were on hand to pay an item of current expense, other ordinary expenses of the county may not be valid under the constitution; statutes providing for classification of claims and their registration and numbering offer a method of determining whether the county could have reasonably anticipated payment of the obligation out of current funds. *Brazeale v. Strength*, 196 S.W. 247 (Tex. Civ. App.—Texarkana 1917). The ability to pay the indebtedness does not alter the requirement that the county take affirmative action to set aside the funds. *Case Threshing Mach. Co. v. Camp County*, 218 S.W. 1 (Tex. Civ. App.—Texarkana 1919). Proper budgeting of the expenditure may affect the right to spend current funds, but does not affect the validity of the contract where constitutional requirements are met. *Lewis v. Nacogdoches County*, 461 S.W.2d 514 (Tex. Civ. App.—Tyler 1970), and cases cited therein.

¹²³ *City of Terrell v. Dissaint*, 71 Tex. 770, 9 S.W. 593 (1888).

¹²⁴ *Rogers Nat'l Bank v. Marion County*, 181 S.W. 884 (Tex. Civ. App.—Texarkana 1915), *error ref.* (obligation payable two years from date held void); *Noel v. City of San Antonio*, 11 Tex. Civ. App. 580, 33 S.W. 263 (1895), *error ref.* (cash transaction providing for consideration to be paid in ten years with a good rate of interest "would be an absurdity and a contradiction of terms").

¹²⁵ *City of Terrell v. Dissaint*, 71 Tex. 770, 9 S.W. 593 (1888); *Brazeale v. Strength*, 196 S.W. 247 (Tex. Civ. App.—Texarkana 1917).

¹²⁶ *Foard County v. Sandifer*, 105 Tex. 420, 151 S.W. 523 (1912).

interest and sinking-fund levies);¹²⁷ (2) delinquent taxes, *anticipated* to be collected;¹²⁸ (3) license fees or other money coming to the general fund;¹²⁹ and (4) surplus utility revenues, if any, or any revenue-producing facility owned by the issuing agency and any other receipts which are not pledged.¹³⁰

When a city executed a contract for the performance of work and extra services were to be performed, the performance of the extra work was held to create a debt.¹³¹ Engineers and architects often overlook this vital point, assuming they are agents for the municipality in all respects, but article 2368a¹³² provides that only the governing body may change a contract; and, as to increases in the contract, it is obvious that only the governing body may make provision for payment of the added amount to become due. An agreement to issue bonds to pay for improvements six months after work is completed also has been held to create a debt.¹³³

The extension of time for the payment of an existing indebtedness is not prohibited by the "debt clause" of the constitution, but this does not permit the renewal of a debt barred by limitation, an increase in interest rate, or provision for attorneys' fees for collection without compliance with the constitutional provision.¹³⁴

Where an agreement was executed for the acquisition of land at a fixed price, with an agreement to match the per-acre price paid other owners of land, the arrangement created a debt and there must be allegations of compliance with the constitution.¹³⁵

In one case it was observed that when an obligation is imposed by law (publication of delinquent tax record) there is no requirement that a county comply with the constitutional provisions relating to the creation of debt.¹³⁶

The decision was predicated on different grounds (an obligation payable from current funds), but it seems there is authority for the proposition that the constitutional "debt" provisions apply only where a debt *is created or contracted* by the municipality, and the legislature may require a municipality to assume indebtedness incidental to its exercise of other power (such as annexation).¹³⁷

2. *Type of Provision Required.* The framers of the constitution sought protection from long-term debt by requiring that provision be made for its payment at the outset.¹³⁸ At the time of the adoption of this constitutional limita-

¹²⁷ *Id.*

¹²⁸ *McCrocklin v. Nelson County*, 192 S.W. 494 (Ky. Ct. App. 1917), the presumption normally being against collection.

¹²⁹ *City of Cleburne v. Gutra Percha Co.*, 127 S.W. 1072 (Tex. Civ. App. 1910).

¹³⁰ *City of Corpus Christi v. Woessner*, 58 Tex. 462 (1883); *Toole v. First Nat'l Bank*, 168 S.W. 423 (Tex. Civ. App.—Galveston 1914), *error ref.*

¹³¹ *City of Dallas v. Brown*, 10 Tex. Civ. App. 612, 31 S.W. 298 (1895).

¹³² TEX. REV. CIV. STAT. ANN. art. 2368a (1971).

¹³³ *Howard v. Smith*, 91 Tex. 8, 38 S.W. 15 (1896).

¹³⁴ *City of Tyler v. Jester*, 74 S.W. 359 (1903), *aff'd*, 78 S.W. 1058 (1904).

¹³⁵ *City of Fort Worth v. Reynolds*, 190 S.W. 501 (Tex. Civ. App.—Fort Worth 1916), *error dismissed*.

¹³⁶ *Boesen v. County of Potter*, 173 S.W. 462 (Tex. Civ. App.—Amarillo 1915), *error ref.*

¹³⁷ *Wheeler v. City of Brownsville*, 148 Tex. 61, 220 S.W.2d 457 (1949).

¹³⁸ TEX. CONST. art. XI, § 5.

tion, long-term indebtedness (bonds) were authorized to be issued over a period of not to exceed fifty years, thus the two per cent limitation was appropriate. In most instances statutes now provide for bonds to mature within forty years of their date, so provision must now be made *annually* for the payment of the principal and interest on the obligation (1) as it becomes due, or (2) to pay the interest and create a sinking fund of two per cent of the principal amount of indebtedness, whichever is greater. Such provision is to be made at the time of the creation of the debt.

Perhaps the problem is best explained by the illustration of an issuer seeking to authorize the issuance of bonds payable from taxation, all of the bonds being scheduled to become due in the tenth tax year following. In addition to the provision for payment of interest on the indebtedness, a tax levy would be required to produce at least two per cent of the principal amount in each of the tax years preceding the due date. This should be taken into account each budget year until the final principal maturity of the bonds. For the dedication of the tax money to be considered sufficient, the levy of the tax should be made for each year that the indebtedness is to be outstanding, and should be phrased so that each year the inclusion of the appropriate amount (in the annual tax levy) for the payment of the indebtedness is merely a ministerial duty. The Attorney General will refuse to approve any tax obligations sought to be issued if he feels the tax levy does not comply with the foregoing requirements.

The illustrative situation also points up another consideration—the attitude of the Treasury Department. The Internal Revenue Code now contains limitations upon the issuance of bonds for arbitrage purposes.¹³⁹ An illustration of arbitrage sought to be prevented is the issuance of tax exempt securities at a lower rate of interest in order to purchase government obligations or other securities with a higher yield. The difference in coupon rates would produce a “profit” to an issuing body not required to pay federal income taxes. The Treasury Department has extended the statutory rule to apply to any accumulation of money, whether in an interest and sinking fund or in a reserve fund, taking the position that interest on the obligation for which the funds are being accumulated to pay might be subject to federal income tax.¹⁴⁰

There have been decisions to the effect that a debt may be created only by the issuance of bonds or warrants and the levying of a tax to pay such obligations,¹⁴¹ but a contract has been upheld when a tax was levied to pay the obligation under a contract specifically authorized.¹⁴²

¹³⁹ INT. REV. CODE of 1954, § 103(d).

¹⁴⁰ Occasionally the balloon maturity serves a definite governmental purpose, particularly where all debt service requirements payable from the same source are on, and are to continue to be on, a debt-level basis. The objections of the Internal Revenue Service might be met by the circumstances themselves (which would negate any intention of arbitrage), by restrictions upon investments (not considered palatable), by mandatory redemption provisions when accumulated funds reach a certain level, or some similar device.

¹⁴¹ *T. & N.O. Ry. v. Galveston County*, 141 Tex. 34, 169 S.W.2d 713 (1943); *Lasater v. Lopez*, 110 Tex. 179, 217 S.W. 373 (1919); *San Patricio County v. McClane*, 44 Tex. 392 (1876).

¹⁴² *San Antonio River Auth. v. Shepperd*, 157 Tex. 73, 299 S.W.2d 920 (1957).

IV. THE ISSUANCE OF BONDS AND DEBT SECURITIES

A. *General Principles*

The power to borrow money does not imply the power to issue bonds.¹⁴³ There is no inherent power or right of a city or county to issue bonds,¹⁴⁴ even though the governing body may have been given the power to manage and direct the financial affairs of the municipality.¹⁴⁵

It is axiomatic that the proceeds of bonds may be used only for the purpose for which the bonds were voted.¹⁴⁶ Proceeds of bonds voted for the purpose of "constructing, building, equipping and improving pleasure grounds, parks, and playgrounds" are available for the construction of an auditorium and buildings for the exhibition of livestock.¹⁴⁷ When bonds are voted to construct a municipal building, the proceeds may not be used to remodel an existing building.¹⁴⁸ When bonds are voted for a purpose stated in general terms, the governing body must exercise discretion in devising improvements to accomplish the voted purpose,¹⁴⁹ but when the discretion is exercised before the election is held by official action of the governing body, the issuing agency will be bound by such action.¹⁵⁰ While a municipality may provide a public building, it must be for a public use or purpose¹⁵¹ and in the furtherance of municipal business.¹⁵² The power to determine whether a building is necessary for the conduct of county business is within the discretionary powers of the commissioners court.¹⁵³ Bonds issued for a purpose not authorized by law have been held void although this may no longer be true.¹⁵⁴

¹⁴³ This was the rule long prior to the adoption of the home-rule amendment to the constitution. *Brenham v. German Am. Bank*, 144 U.S. 173, *modified*, 144 U.S. 549 (1892); *City of Waxahachie v. Brown*, 67 Tex. 519, 4 S.W. 207 (1887); *Robertson v. Breedlove*, 61 Tex. 316 (1844); *Peck v. City of Hempstead*, 27 Tex. Civ. App. 80, 65 S.W. 653 (1901), *error ref.*

¹⁴⁴ *Lasater v. Lopez*, 110 Tex. 179, 217 S.W. 373 (1919); *Foster v. City of Waco*, 113 Tex. 352, 255 S.W. 1104 (1923); *Keel v. Pulte*, 10 S.W.2d 694 (Tex. Comm'n App. 1928), *judgment adopted*.

¹⁴⁵ *Looscan v. Harris County*, 58 Tex. 511 (1883); *Colorado County v. Beeche*, 44 Tex. 447 (1876); *Baily v. Aransas County*, 46 Tex. Civ. App. 547, 102 S.W. 1159 (1907).

¹⁴⁶ *Lewis v. City of Fort Worth*, 126 Tex. 458, 89 S.W.2d 975 (1936); *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 83 S.W.2d 935 (1935); *City of Beaumont v. Cartwright Land & Imp. Co.*, 224 S.W. 589 (Tex. Civ. App.—Beaumont 1920), *error ref.* When bonds have been voted for seawalls and breakwaters pursuant to an unconstitutional statute, the bonds may not then be issued as harbor improvement bonds. *TEX. ATTY GEN. OP. No. 0-5482* (1947).

¹⁴⁷ *Lewis v. City of Fort Worth*, 126 Tex. 458, 89 S.W.2d 975 (1936).

¹⁴⁸ *TEX. ATTY GEN. OP. No. 0-5482* (1947).

¹⁴⁹ *Barrington v. Cokinos*, 161 Tex. 136, 338 S.W.2d 133 (1960); *Clark v. Greer*, 232 S.W.2d 876 (Tex. Civ. App.—Dallas 1950); *City of Beaumont v. Cartwright Land & Imp. Co.*, 224 S.W. 589 (Tex. Civ. App.—Beaumont 1920), *error ref.*

¹⁵⁰ *Black v. Strength*, 112 Tex. 188, 246 S.W. 79 (1922); *Moore v. Coffman*, 109 Tex. 93, 200 S.W. 374 (1918); *Board of Trustees v. Woodrow Ind. School Dist.*, 90 S.W.2d 333 (Tex. Civ. App.—Amarillo 1935).

¹⁵¹ *Dancy v. Davidson*, 183 S.W.2d 195 (Tex. Civ. App.—San Antonio 1944), *error ref.*; *TEX. ATTY GEN. OP. No. 0-1314* (1939), to the effect that the test is whether the building is for the ultimate advantage to the public, as distinguished from an individual or private advantage.

¹⁵² *TEX. ATTY GEN. OP. No. 0-1681* (1939) (county courthouse not a "municipal business").

¹⁵³ *Dancy v. Davidson*, 183 S.W.2d 195 (Tex. Civ. App.—San Antonio 1944), *error ref.*

¹⁵⁴ "Toilet seats and accompanying equipment, designed for use in connection with a pit dug in the ground" were sold to a city which in turn issued "revenue bonds" payable from rentals to be obtained when an individual citizen sought to rent and install the facilities. The court observed that the benefits to the general public were incidental and that the pit

Where there is power to use bond proceeds to construct a building, the use of such proceeds for the acquisition of the necessary site and equipment is implied,¹⁵⁵ and it would seem that in the exercise of reasonable discretion a governing body may expend bond proceeds for the construction of improvements on leased land.¹⁵⁶

While bonds may be issued only in strict conformity with the law,¹⁵⁷ some provisions are considered merely directory; *e.g.*, the time for the sale of bonds.¹⁵⁸ When the proposition submitted at the election provided interest on the bonds would be payable annually, they may nevertheless be issued with semiannual interest payments—such variance not being material.¹⁵⁹ Bonds may not be issued to pay existing debts,¹⁶⁰ but the improper use of bond proceeds does not affect the legality of the bonds.¹⁶¹

One of the difficulties encountered is the danger of submitting a dual proposition to the electorate. When an election is called, the electorate should have the right to approve projects separately. Each utility system (for the purpose of voting bonds) is considered by the Attorney General as a separate system, so bonds voted for waterworks system improvements constitute one proposition, while bonds for a sewer system constitute a separate proposition. The use of the proceeds, *not* the source of payment, is determinative of the purpose of the bond issue. The fact that the city may have previously elected to operate the utility systems jointly does not, according to the view of the Attorney General, change the right of the electorate nor the obligation of the city.¹⁶² Bonds voted

toilets did not constitute sanitary disposal equipment and appliances as contemplated by art. 1111; the bonds and mortgage sought to be foreclosed were held void. *American Nat'l Ins. Co. v. Donald*, 125 Tex. 597, 83 S.W.2d 947 (1935). It should be noted that these bonds were not submitted to or approved by the Attorney General.

¹⁵⁵ *Moon v. Alred*, 277 S.W. 787 (Tex. Civ. App.—Eastland 1925), *error dismissed*.

¹⁵⁶ When necessary to promote its public purposes a municipal corporation is empowered to become the lessee of real property as in *City of Mission v. Richards*, 274 S.W. 269 (Tex. Civ. App.—San Antonio 1925), *error dismissed*, where the city leased a building for use as a city hall and fire station and then subleased a portion. The power to acquire land usually implies the power to lease the land and improve it. TEX. ATTY GEN. OP. No. 0-6911 (1945), citing 10 E. MCQUILLAN, *THE LAW OF MUNICIPAL CORPORATIONS* § 1215 (3d ed. 1966).

¹⁵⁷ *Nolan County v. State*, 83 Tex. 182, 17 S.W. 823 (1891); *Polly v. Hopkins*, 74 Tex. 145, 11 S.W. 1084 (1889); *Russell v. Cage*, 66 Tex. 428, 1 S.W. 270 (1886); *Robertson v. Breedlove*, 61 Tex. 316 (1884).

¹⁵⁸ TEX. REV. CIV. STAT. ANN. art. 709 (1964) provides for the approval of bonds by the Attorney General before they are sold. The provision has been held to be directory. *Gibson v. Davis*, 236 S.W. 202 (Tex. Civ. App.—Galveston 1921).

¹⁵⁹ *City of Vernon v. Montgomery*, 265 S.W. 188 (Tex. Civ. App.—Amarillo 1924), *error ref.* This case also held it was unnecessary to vote a maturity date on the bonds. Neither must the amount of tax be specified. *Hunter v. Rice*, 190 S.W. 840 (Tex. Civ. App.—Dallas 1916), *error dismissed*. When the proposition submitted specified that the bonds would be optional at one time and they were issued with a different option, the bonds were not void, since they had been approved by the Attorney General. *Simpson v. City of Nacogdoches*, 152 S.W. 858 (Tex. Civ. App.—Galveston 1913), *error dismissed*.

¹⁶⁰ *Simpson v. City of Nacogdoches*, 152 S.W. 858 (Tex. Civ. App.—Galveston 1913), *error dismissed* (the bonds were not voted for that purpose). The same rule was applied in a case in which certificates of assessment were issued to reimburse the city for bond funds expended; the certificates were held void. *Celaya v. City of Brownsville*, 203 S.W. 153 (Tex. Civ. App.—San Antonio 1918), *error ref.*

¹⁶¹ *Road Dist. No. 4 v. Home Bank & Trust Co.*, 5 F.2d 625 (5th Cir. 1925); *American Surety Co. v. Hill County*, 267 S.W. 265 (Tex. Comm'n App. 1924), *judgment adopted*.

¹⁶² In *Texsan Serv. Co. v. City of Nixon*, 158 S.W.2d 88 (Tex. Civ. App.—San Antonio 1942), *error ref.*, six propositions were respectively submitted (three tax and three revenue bonds) for waterworks, sewer, and gas system purposes. It was contended that the city would issue (1) tax bonds for the combined total of bonds voted for water and sewer purposes,

for street improvement purposes would include incidental drainage as well as a right-of-way, but if the drainage improvements are not incidental to the street improvements, such bonds should be voted separately.¹⁶³ Bonds voted in a single proposition for courthouse and jail purposes will not be considered a dual proposition when only one building is to be constructed,¹⁶⁴ nor will a proposition be considered misleading when bonds are voted for purchasing or constructing a facility (it being assumed the governing body will exercise its discretion if given the power to proceed)¹⁶⁵ or when the city does not inform the electorate of its motives in issuing bonds voted.¹⁶⁶

It has often been contended that the power of a city or county to finance its improvements by one means excludes the power to finance in some other way, but it is clear that each of the methods provided are intended to be used as alternatives or in conjunction with each other. For utility system purposes, either tax or revenue bonds, or both, may be issued.¹⁶⁷ Obtaining authority to issue bonds does not operate to repeal the power to issue warrants to accomplish the same purpose,¹⁶⁸ nor does the power to issue bonds for road purposes under article III, section 52 of the constitution operate to prohibit the county from issuing bonds under article VIII, section 9 of the constitution for road purposes.¹⁶⁹

B. Bonds Payable from Taxation

1. *Cities, Towns, and Villages.* Article 823, applicable only to general-law cities, is the most general statute to provide coupon bonds may be issued "for the purpose of the construction or purchase of public buildings, waterworks,

(2) revenue bonds for the gas system, and (3) revenue bonds for the combined total voted for waterworks and sewer system purposes. The court held that there could be no injury unless it was assumed these would be an improper diversion of funds and that such course would not in any way affect the obligation of the city to pay the bonds.

¹⁶³ The location of the drainage improvements may be a factor to consider, but would not be the sole consideration in the determination of whether they are incidental to street improvements. Relative costs and whether from the engineering standpoint the drainage improvements would be required irrespective of the street improvements should also be considered. If an entire creek is being made to flow through a new channel, it is doubtful the project is primarily designed to afford protection for the street improvements. In *First Nat'l Bank v. City of Port Arthur*, 35 S.W.2d 258 (Tex. Civ. App.—Austin 1931), it was held that a storm drain was a necessary part of a seawall, and thus bonds voted for seawall purposes could be used for such storm drains.

¹⁶⁴ *Moon v. Alred*, 277 S.W. 787 (Tex. Civ. App.—Eastland 1925), *error dismissed*; *Adams v. Mullen*, 244 S.W. 1083 (Tex. Civ. App.—San Antonio 1922), *error ref.* (to the effect that the language of TEX. CONST. art. III, § 52 is not multiple purpose for a bond issue); *Alley v. Mayfield*, 62 Tex. Civ. App. 231, 131 S.W. 295 (1910).

¹⁶⁵ *Simpson v. City of Nacogdoches*, 152 S.W. 858 (Tex. Civ. App.—Galveston 1913), *error dismissed*.

¹⁶⁶ *Texsan Serv. Co. v. City of Nixon*, 158 S.W.2d 88 (Tex. Civ. App.—San Antonio 1942), *error ref.* In *Texsan* it was also contended that it was the city's intention to adopt an ordinance to prohibit the city from thereafter encumbering or selling the system. Art. 1112 would have effectively provided this protection to the city—unless an election was held as provided therein—and an ordinance in contravention of the statute would have been void. The court merely observed that if the invalidity of such position were to be conceded, it would be nothing more than an unenforceable covenant.

¹⁶⁷ *Andrus v. Crystal City*, 265 S.W. 550 (Tex. Comm'n App. 1924), *judgment adopted*; *Williams v. City of Borger*, 340 S.W.2d 864 (Tex. Civ. App.—Amarillo 1960), *error ref. n.r.e.*; *Texsan Serv. Co. v. City of Nixon*, 158 S.W.2d 88 (Tex. Civ. App.—San Antonio 1942), *error ref.*

¹⁶⁸ *Lasater v. Lopez*, 110 Tex. 179, 217 S.W. 373 (1919); *Keel v. Pulte*, 10 S.W.2d 694 (Tex. Comm'n App. 1928), *judgment adopted*; *Stratton v. Commissioners' Court*, 137 S.W. 1170 (Tex. Civ. App.—San Antonio 1911), *error ref.*

¹⁶⁹ *Robbins v. Limestone County*, 114 Tex. 345, 268 S.W. 915 (1925).

sewers, and other permanent improvements within the city limits, and for the construction and improvement of the roads, bridges, and streets of such city or town"¹⁷⁰

With respect to home-rule cities, article 1175(10) enumerates "for greater certainty" the power to issue bonds "for the purpose of making permanent public improvements or for other public purposes in the amount and to the extent provided by such charter, and consistent with the Constitution"¹⁷¹

Other statutes are more limited in scope, but should be noted. Article 835n¹⁷² confers power upon some general-law cities¹⁷³ to issue bonds to purchase fire-fighting equipment, but is not made applicable to home-rule cities. Under the statute home-rule cities would have the power to issue such bonds since they are for a public purpose, general-law cities being restricted to enumerated purposes followed by the general provision for "permanent improvements." Other statutes provide for the issuance of bonds to acquire land for a hospital site,¹⁷⁴ or for acquisition of a site and its improvement for park purposes,¹⁷⁵ acquisition of airports and their improvement,¹⁷⁶ and harbor improvements.¹⁷⁷

2. *Counties.* While cities have authority to issue bonds for "permanent improvements" or for "permanent public improvements or for a public purpose" as may be provided by charter, a county has no such authority. The early pattern of authorizing a county to issue bonds for a specific purpose has continued. The basic authority for a county to issue bonds payable from the eighty-cent provision of article VIII, section 9 of the constitution is to be found in chapter 2 of title 22, with election procedures being provided by chapter 1 of title 22.

Article 718 provides that after having been approved at an election, bonds may be issued by a county:

1. To erect the county courthouse and jail, or either;
2. To purchase suitable sites within the county and construct buildings thereon to provide homes or schools for dependent and delinquent boys and girls or for either;
3. To establish county poor houses, farms, and homes for the needy or indigent in the county;
4. To purchase and construct bridges for public purposes within the county or across a stream that constitutes a boundary line of the county; or
5. To improve and maintain the public roads in the county.

¹⁷⁰ TEX. REV. CIV. STAT. ANN. art. 823 (1964). Art. 823 is applicable only to general-law cities by reason of art. 824, unless adopted in the charter of a home-rule city. *Cameron v. City of Waco*, 8 S.W.2d 249 (Tex. Civ. App.—Waco 1928).

¹⁷¹ TEX. REV. CIV. STAT. ANN. art. 1175(10) (1963). The home-rule charter of a city must be consulted to determine if there is power to issue bonds. See *Lewis v. City of Fort Worth*, 126 Tex. 458, 89 S.W.2d 975 (1936); *Amstater v. Andreas*, 273 S.W.2d 95 (Tex. Civ. App.—El Paso 1954), *error ref. n.r.e.*; *Cameron v. City of Waco*, 8 S.W.2d 249 (Tex. Civ. App.—Waco 1928).

¹⁷² TEX. REV. CIV. STAT. ANN. art. 835n (1964).

¹⁷³ This statute is made applicable to cities and towns of *less* than 5,000 population. General-law cities having a population of *more* than 5,000 may not use this statute, but are required to proceed under TEX. REV. CIV. STAT. ANN. arts. 2368a or 2368a.1 (1971) in the issuance of time warrants or certificates and then refund such warrants or certificates through the issuance of refunding bonds.

¹⁷⁴ TEX. REV. CIV. STAT. ANN. art. 835c (1964).

¹⁷⁵ *Id.* art. 6081f (1970).

¹⁷⁶ *Id.* arts. 46d-10 (1969), 1269h, 1269j (1963).

¹⁷⁷ *Id.* arts. 835, 835h (1964), 1187f (1963).

When the Commissioners Court shall deem it advisable to issue bonds for both the purchase or construction of bridges and improvement and maintenance of the public roads, both questions may be submitted and voted on as one proposition.¹⁷⁸

Article 723¹⁷⁹ limits the amount of tax that may be levied for some *types of bonds* authorized to be issued, using the same limitations imposed on the *specific funds* in effect in the Texas Constitution when the statute was adopted.¹⁸⁰ Since the constitution has been amended the need for this statute is questionable.¹⁸¹

Article 722¹⁸² provides an additional limitation upon the *amount of bonds* that may be issued under chapter 2. The total amount of indebtedness under the chapter may not exceed five per cent of the taxable values, while the amount of indebtedness incurred for courthouse purposes may not exceed two per cent; for jails, not to exceed one and one-half per cent; for courthouse and jails, not to exceed three and one-half per cent; and for roads and bridges, not to exceed one and one-half per cent. It should be emphasized that these percentage limitations apply only to bonds issued under chapter 2. As would be expected, procedures are provided to avoid this limitation and those of article 720.¹⁸³

Article 720 is a restriction placed on the issuance of bonds under chapter 2, that has proved to be an expensive one.¹⁸⁴ It has been construed to allow the county to redeem bonds issued under chapter 2 after five years, unless the

¹⁷⁸ *Id.* art. 718 (1964).

¹⁷⁹ *Id.* art. 723.

¹⁸⁰ Courthouse and jail bonds (25 cents on each 100-dollar valuation for permanent improvement purposes); road and bridge bonds (15 cents on each 100-dollar valuation—road and bridge fund). This statute was adopted in 1893. Act of May 3, 1893, ch. 84, § 5, [1893] Tex. Laws 113.

¹⁸¹ TEX. CONST. art. VIII, § 9 (in effect at the time of the passage of art. 723) provided 25 cents per 100-dollar valuation for county purposes and 15 cents for the road and bridge fund, and the 15-cent special road tax (no jury-fund supplement). *See also* the provisions of art. 2352 which provide that a county may levy 25 cents for general fund, 25 cents for permanent improvement fund, 15 cents for road and bridge fund, and 15 cents for the jury fund. While the constitutional provision has been amended several times, the statute has not changed. One of the opinions of the United States Supreme Court in *Avery v. Midland County*, 390 U.S. 474, 503 (1968) (Fortas, J., dissenting), indicates there is a conflict between art. 2352 and TEX. CONST. art. VIII, § 9.

¹⁸² TEX. REV. CIV. STAT. ANN. art. 722 (1964).

¹⁸³ *Id.* art. 720. As to courthouse and jail improvements, see art. 2370b, which provides for the issuance of bonds without reference to the limitations of chapter 2 of title 22; as to homes or schools for delinquent boys and girls, see art. 5138(c), which authorizes certificates of indebtedness (without an election) in certain counties. Time warrants may also be issued and are not classed as being authorized under chapter 2, and if refunded the refunding bonds are not subject to the limitations of chapter 2. *Frio County v. Security State Bank*, 207 S.W.2d 231 (Tex. Civ. App.—Waco 1947).

¹⁸⁴ In modern municipal finance most investment bankers agree that an option to redeem bonds fifteen years from the date of issuance may cost an issuing agency (in the form of interest cost to maturity) a relatively small amount, and in some instances the interest rate would not be affected. But virtually all investment bankers agree that an option to redeem bonds prior to maturity after twenty years does not normally increase interest costs. By the same token, all investment bankers agree that an option to redeem bonds ten years from the date of issuance always increases the interest cost to the issuing municipality that sells bonds in the open market. The reasons assigned are plausible; *i.e.*, yield on bonds is normally calculated to the option date, and institutional investors normally use those calculations to determine the book value of the investment even when they intend to hold the obligation to final principal maturity, and most institutional investors want longer maturities for their portfolio.

county provides that the bonds are to be optional after any period not to exceed ten years.¹⁸⁵

Limitations of the nature mentioned may have served a useful purpose at the time of their adoption but they are difficult to justify now if counties are expected to be vibrant and responsive units of government.

Article 721,¹⁸⁶ limiting the rate of interest to six per cent, has been changed by article 717k-2,¹⁸⁷ which gives the commissioners court the power to determine the maximum rate. Article 725¹⁸⁸ relating to "substitution" or refunding of bonds has in effect been replaced, but not repealed, by article 717k-3. The requirement of article 721 that interest on bonds be represented by interest coupons is another archaic provision because of the increasing popularity of fully registered bonds.¹⁸⁹

In the light of the restrictions of chapter 2 of title 22 it is not surprising that many of the statutes authorizing counties to issue bonds refer to chapter 1 of title 22 for the election procedure to be followed in issuing bonds, or prescribe their own procedures to be followed. While each statute should be examined as to its applicability and constitutionality,¹⁹⁰ a partial listing of the statutes authorizing counties to issue bonds demonstrates the problem:

Buildings:

| | |
|--|-------------------------|
| Courthouse, jail, county branch office buildings | article 725b |
| Branch office buildings | articles 1605a, 1605a-1 |
| Branch office buildings and jail or either | article 1605a-2 |
| Buildings other than courthouse | article 2370 |
| Office building (now expired) | article 2370a |
| County office building, court buildings | article 2370b |
| County workhouses | article 2370c |
| Crime detection facilities (no election) | article 2370c-1 |
| Public health administration | article 2370d |

¹⁸⁵ Bexar County v. Sellers, 142 Tex. 290, 178 S.W.2d 505 (1944); Cochran County v. Mann, 141 Tex. 398, 172 S.W.2d 689 (1943); Norton v. Tom Green County, 182 S.W.2d 849 (Tex. Civ. App.—Austin 1944), *error ref., cert. denied*, 325 U.S. 861 (1945). The statute is confined to bonds issued under chapter 2 of title 22. Road Dist. No. 1 v. Sellers, 142 Tex. 528, 180 S.W.2d 138 (1944).

¹⁸⁶ TEX. REV. CIV. STAT. ANN. art. 721 (1964).

¹⁸⁷ *Id.* art. 717k-2.

¹⁸⁸ *Id.* art. 725.

¹⁸⁹ Government agencies have become purchasers of many bonds in recent years, and their standard terms and conditions specify fully registered bonds, preferably a single bond with installment-principal payments, are to be delivered where it is legally permissible to do so.

¹⁹⁰ Many of the statutes are made applicable only to counties of a requisite population, and therein lies one of the greatest difficulties. One authority has indicated that "[t]he Texas Legislature persists in enacting classified legislation of dubious validity. A high percentage of the statutes dealing with municipal corporations found in Volume 2A of Vernon's Texas Civil Statutes are of this nature." E. ELIAS, LAW OF TEXAS MUNICIPAL CORPORATIONS—CASES—TEXT—PROBLEMS 45 (1969). Such an appraisal seems accurate. Where the constitution prohibits local and special laws regulating affairs of cities or counties, population brackets or other limitations should be used sparingly, it not always being clear that the segregation of the class bears a reasonable relationship to the object sought to be accomplished by the particular act. Cameron County v. Wilson, 160 Tex. 25, 326 S.W.2d 162 (1959); Rodriguez v. Gonzales, 148 Tex. 537, 227 S.W.2d 791 (1950); Miller v. El Paso County, 136 Tex. 370, 150 S.W.2d 1000 (1941); Bexar County v. Tynan, 128 Tex. 223, 97 S.W.2d 467 (1936); City of Fort Worth v. Bobbitt, 36 S.W.2d 470 (Tex. Comm'n App. 1931), *aff'd on rehearing*, 41 S.W.2d 228 (1931).

| | |
|--|---|
| Exhibition buildings, coliseum, auditorium | article 2372d-2 |
| County public health unit (no election) | article 4436a-4 |
| Homes and schools for delinquents | articles 5138a, 5138c (no election) |
| Parks | articles 6079c, 6081e, 6083e |
| <i>Buildings and related facilities, either or both:</i> | |
| Airports | articles 46(d), 1269h |
| Hospital | articles 4478, 4478a, 4493, 835c |
| County library | article 1696a |
| Housing facilities and land acquired from United States | article 2351 |
| <i>Roads, etc:</i> | |
| Causeway, viaduct, bridges and approaches | article 785 |
| Causeway | articles 795a, 6795b (Gulf Coast article 6795b) |
| Bridges, roads and bridges | articles 6812b, 2356 |
| (Some limited to counties on Gulf Coast only) | article 6079c-1 |
| <i>Others:</i> | |
| Pools, lakes, reservoirs, dams, canals, waterways, drainage, etc. | articles 803-821 |
| Navigation or in aid thereof | article 822a |
| Flood control and drainage | article 1109k |
| Fire fighting equipment | article 2351a-4 |
| Water supply | article 2352e |
| Dumping and garbage disposal (no bonds) | article 2351g-1 |
| Seawall, breakwater | articles 6830, 6839a, 6839g |
| Voting machines | article 7.14, section 6—Election Code |
| Surveys, maps and plats | article 717h |
| <i>Refunding:</i> | |
| article 717k-3 | article 2368a, section 7 |
| article 717a-1 | article 725 |
| article 796 | article 752y-2 |
| article 752x | |

C. Revenue Bonds by Cities

1. *Utility Systems.* The issuance of revenue bonds by incorporated cities for utility system purposes had been one of reasonably slow development until 1949, but since that time this avenue of financing has increased in geometric progression.

Prior to 1949 a city was empowered to issue bonds payable from the "net revenues" of its utility system under the provisions of chapter 10 of title 28. A city was authorized to issue revenue bonds to purchase, build, improve, enlarge, extend, or repair such systems with the provision that the bonds would not be an obligation of the city, but solely an obligation of the system whose revenues were pledged.¹⁹¹ It was provided that such bonds could be issued after

¹⁹¹ TEX. REV. CIV. STAT. ANN. art. 1111 (1963) was (and is) restricted in its application to "light systems, water systems, sewer systems or sanitary disposal equipment and appliances, or natural gas systems, parks and/or swimming pools."

an election,¹⁹² but all income and revenues received from the operation of the system were required to be used in connection with the system.¹⁹³ Thus, revenue bonds issued prior to 1949 were classed as "closed lien" revenue bonds since they had an exclusive lien on the net revenues of the system. If it was determined that additional bonds (payable from the same source) were required in order to construct improvements, then it was necessary to simultaneously refund the outstanding bonds and combine them with the "new money" bonds proposed to be issued. As an alternative, attempts were made to authorize "additional parity bonds"¹⁹⁴ or "junior lien bonds,"¹⁹⁵ but such attempts were unsuccessful—as being an impairment of the contract rights of the holders of the outstanding bonds who are entitled to have all funds set aside until the indebtedness against the system is paid. The making of firm banking arrangements to provide principal and interest on outstanding bonds to maturity or option date was held to be equivalent to final payment.¹⁹⁶

In 1949, however, the Legislature made major changes in the former procedure to permit "additional bonds" and "junior lien bonds" for improving or extending a system.¹⁹⁷ In recognition of the court decisions on the impairment of contractual rights of the holders of outstanding bonds, it was provided that such additional parity bonds could be issued only to the extent permitted by the ordinances authorizing the revenue bonds then outstanding or to be outstanding.

The Attorney General took the position (and still does) that under the post-1949 statutes a municipality could not relinquish or contract away its power to issue junior lien bonds, that such right, under the statutes, is one the city must retain.¹⁹⁸

¹⁹² *Id.* art. 1112. The statute also contains exceptions to the requirement of an election as where (1) purchase money is involved, (2) the encumbrance is less than \$5,000 (raised to \$10,000 by the 1953 amendment), (3) extensions are to be made to an existing system, or (4) where refunding of existing indebtedness is involved.

¹⁹³ *Id.* art. 1113 provides in part: "No part of the income of any such system shall ever be used to pay any other debt, expense or obligation of any such city or town except payments made in lieu of ad valorem taxes previously paid by the private owners of the plant or systems mentioned above until the indebtedness so secured shall have been finally paid."

¹⁹⁴ *City of Houston v. Mann*, 139 Tex. 640, 164 S.W.2d 548 (1942).

¹⁹⁵ *City of Houston v. Allred*, 123 Tex. 334, 71 S.W.2d 251 (1934); TEX. ATT'Y GEN. OP. No. 0-2353 (1940).

¹⁹⁶ *City of McAllen v. Daniel*, 147 Tex. 62, 211 S.W.2d 944 (1948).

¹⁹⁷ TEX. REV. CIV. STAT. ANN. art. 1111a (1963) conferred such power with respect to a water or sewer system, or both, while art. 1111b conferred such power with respect to electric light and power systems. But in 1951 art. 1111b was amended to apply to electric light and power systems, gas systems, water systems, sewer systems, or any combination of two or more such systems. Act of March 17, 1951, ch. 23, § 1, [1951] Tex. Laws 30-31. The terms of the statutes (since 1951) are identical except, of course, for the systems to which they apply. The two statutes (rather than one) were presented to the Legislature in 1949 because of the fear that legislative opposition to municipal electric systems would defeat the entire reform of municipal utility financing.

The term "junior lien bond" is not used in the statutes, but the language employed in § 1 of both statutes is that "such bonds shall constitute a lien upon the revenues . . . inferior to the lien securing the payment of any and all issues and series of bonds previously issued." TEX. REV. CIV. STAT. ANN. arts. 1111a, 1111b (1963).

¹⁹⁸ This position finds support in the first sentence of § 1 of arts. 1111a and 1111b, wherein it is stated that the city "shall have the power" to issue inferior lien revenue bonds, while the last sentence of art. 1111a, § 1 provides the city "may prescribe . . . restrictions, covenants and limitations" upon the right to issue additional bonds.

In *City of Killeen v. Shepperd*, 155 Tex. 13, 291 S.W.2d 728 (1953), the city had authorized the issuance of first-lien revenue bonds prior to the 1949 Act and then sought to issue junior-lien bonds for improvements to the system. The mandamus suit resulted

The Attorney General's bond division has taken the position that the provisions of an ordinance authorizing the issuance of revenue bonds are matters to be determined by contract between the city and its bondholders, provided the mandatory provisions of law are met. This gives wide latitude to the issuing municipality, and, as revenue bonds have become a more acceptable and reliable mode of financing, there have been changes in the traditional covenants made by a municipality. It was not uncommon in the early 1950's for an initial issue of revenue bonds to provide the coverage factor for additional parity bonds for each of two preceding fiscal years to be twice the average annual debt service requirements for bonds payable from the same source, after giving effect to the issuance of the proposed additional bonds. Twenty years later, the factor is normally one and one-half times either the average of such requirements for the preceding fiscal or calendar year, and in some instances the factor is one and one-quarter times the debt service requirements.

Once a municipality has authorized and delivered a series of revenue bonds it is apparent that the holder of the bonds has acquired contractual rights not subject to a unilateral change,¹⁹⁹ and when additional parity bonds are issued those contractual rights are extended to apply to the newly authorized series—otherwise the bonds would not be on a parity (equal dignity) with the outstanding bonds.

Section 2 of articles 1111a²⁰⁰ and 1111b²⁰¹ contain provisions relating to refunding of revenue bonds, but for practical purposes, these provisions are no longer used, since other statutes provide the same authority with fewer restrictions.²⁰² It should be noted that refunding of outstanding revenue bonds can be accomplished by exchange,²⁰³ advance refunding,²⁰⁴ or by making firm bank-

when the Attorney General refused to approve the bonds. The city contended that the contractual obligation of the holders of the outstanding bonds would not be impaired since the lien of the proposed bonds was inferior. The Attorney General maintained that the holders of the outstanding bonds retained their right to the revenues of the system until their bonds had been finally paid. The court held that the holders of the outstanding bonds had to be joined as parties, indicating they had some rights to be protected, and the suit was dismissed for failure to join these necessary parties. While the questions presented are interesting from the academic viewpoint, the city quite properly was not willing to endanger its position by an argument with the holders of their outstanding bond obligations.

¹⁹⁹ *City of Killeen v. Shepperd*, 155 Tex. 13, 291 S.W.2d 728 (1953); *City of McAllen v. Daniel*, 147 Tex. 62, 211 S.W.2d 944 (1948); *City of Houston v. Mann*, 139 Tex. 640, 164 S.W.2d 548 (1942); *City of Houston v. Allred*, 123 Tex. 334, 71 S.W.2d 251 (1934); *City of Houston v. Allred*, 123 Tex. 35, 66 S.W.2d 655 (1934).

²⁰⁰ TEX. REV. CIV. STAT. ANN. art. 1111a, § 2 (1963).

²⁰¹ *Id.* art. 1111b, § 2.

²⁰² Prior to 1949 refunding of revenue bonds was accomplished under the provisions of TEX. REV. CIV. STAT. ANN. art. 2368a (1971). Now the most popular statutory authority for refunding is *id.* art. 717k-3 (1964).

²⁰³ In an exchange refunding the city authorizes the issuance of the refunding bonds, which are submitted to the Attorney General, and upon approval by him, are delivered to the Comptroller. If the outstanding bonds are optional for redemption prior to maturity (and have been called for such redemption), the Comptroller will be instructed by the Attorney General to register bonds only as a like principal amount of outstanding bonds are presented to him and cancelled. If the outstanding bonds are not so optional, or have not been called for redemption, the instructions issued by the Attorney General to the Comptroller will be not to register any of the refunding bonds until all outstanding bonds being refunded have been presented to him and cancelled. Banking arrangements are required to be made (except where the holder of the outstanding bonds agrees to accept the refunding bonds) whereby funds are made available to pay the redemption price of the bonds being refunded, and the person who provides such funds is delivered the outstanding bonds with the attendant responsibility of making the arrangements for the exchange to be made in the Comptroller's Office.

ing arrangements.²⁰⁵

Article 1113²⁰⁶ requires that maintenance and operating expenses shall be a first charge against the revenues of the system and provides for installation of a proper system of accounts. Article 1113a²⁰⁷ permits the transfer of excess revenues of the system²⁰⁸ to the general funds "to the extent they may be authorized or permitted" by the instrument authorizing the issuance of revenue bonds. This statute was first adopted in 1949 and was applicable to cities having a population in excess of 200,000. In 1953 the statute was made applicable to cities having a population in excess of 10,000, according to the preceding federal census, and in 1965 the population bracket was removed.²⁰⁹

Most cities utilize "excess revenues" made available to them under the provisions of article 1113a for the payment of the debt service requirements on tax obligations issued for utility purposes, and while this practice is to be encour-

²⁰⁴ Under advance refunding, the refunding bonds are sold for cash, and when approved by the Attorney General, they are delivered to the Comptroller with instructions to register the bonds without cancellation of the outstanding or underlying securities. The proceeds from the sale of the bonds are then transmitted to the proper paying agent for the final payment of the underlying securities. Since there must be time to transmit funds, under these circumstances refunding bonds are normally dated prior to the maturity of the underlying securities. While the city thus will pay double interest by paying interest of two series of bonds to represent the same debt (and be obligated to pay the fees of the state treasurer), the city is in a position to control the time required to deliver its bonds—an extremely important factor. Art. 1118n-5 provides the statutory procedure by which outstanding bonds payable from revenues of the water system or water and sewer system are to be refunded. Art. 717k applies to all bonds. Slight procedural differences should be noted. Reference should also be made to the Internal Revenue Code to ascertain that there is no arbitrage which would make interest on the refunding bonds subject to federal income taxation.

It should be noted that under § 1 of art. 1118n-5 (applicable to bonds payable from revenues of the water or water and sewer systems), a city may remove the lien of the outstanding bonds without refunding if it has sufficient money on hand to redeem the outstanding bonds and follows the procedures of that law.

²⁰⁵ *City of McAllen v. Daniel*, 147 Tex. 62, 211 S.W.2d 944 (1948), as previously mentioned, held that firm banking arrangements for payment of principal and interest would be equivalent to final payment of outstanding bonds. One of the former members of the Attorney General's bond division took the position that this procedure would not now be available in the light of the provisions of art. 1118n-5 and 717k; *i.e.*, the legislative provisions adopted since the *McAllen* case provided the exclusive procedure. Fortunately, this does not appear to be the current view of the department since the procedures and mechanics of accomplishing the objective are different, even though the result is the same. This procedure is perhaps of decreasing importance as the statutory procedures are normally adequate.

²⁰⁶ TEX. REV. CIV. STAT. ANN. art. 1113 (1963).

²⁰⁷ *Id.* art. 1113a.

²⁰⁸ The first charge against the gross revenues of a system is maintenance and operating expenses (art. 1113); then provision is made in the authorizing proceedings to provide for the payment and security of bonds. Normally this would consist of an interest and sinking fund for the payment of principal and interest on the bonds, and a reserve fund to be used for the same purpose, in the event the interest and sinking fund is not sufficient. Most often the reserve fund is accumulated over a five-year period and then maintained as the average annual debt-service requirement. Often a repair and replacement fund (or contingency fund) is established to be used for unusual maintenance expenses or extensions.

²⁰⁹ The general rule is that all provisions of the law in force and effect at the time of the issuance of bonds form a part of the contract, but the phrasing of this statute might well indicate the intent of the statute be given retroactive effect, *if* the proceedings authorizing the revenue bonds (prior to its being applicable to a particular city by reason of the population bracket) provided for transfers of excess revenues for other purposes. There could be no impairment of contract if the bondholder accepts delivery of bonds where the ordinance contemplated and permitted such a transfer prior to the applicability of the authorizing statute. Prior to 1953 it was not uncommon for an ordinance authorizing revenue bonds to provide that such excess revenues could be used for any purpose connected with the utility system, but this has gradually been replaced by the provision now common, *viz.*, the redemption of bonds prior to their maturity, or for any other lawful purpose.

aged, a measure of caution should also be observed since appropriate action by a council would be required before there would be authority to discontinue the levy of taxes on the general obligation bonds.²¹⁰

While provision is made to additionally secure the payment of utility system revenue bonds with a mortgage or deed of trust upon the physical properties of the system,²¹¹ these provisions are not widely used, it having been determined that the foreclosure proceedings are often more burdensome than any additional security afforded.²¹²

Like other statutes, those relating to utility system financing must be carefully reviewed to determine their applicability to a given situation. For example, articles 1115²¹³ and 1116²¹⁴ allow the operation of a utility system by a board of trustees appointed by the governing body of the city, but these statutes apply only to a general-law city, having been adopted in 1911 prior to the home-rule amendment. Many home-rule charters either adopt the general law or make specific provision for a board of trustees to operate the system. As indicated, a home-rule city has such powers as not denied them—and in this connection it would seem that provisions different from those in these statutes could be employed by a home-rule city.

One of the more troublesome provisions with respect to revenue bonds for utility purposes is whether an election is required as a condition precedent. The general rule in article 1112²¹⁵ is that an election is required in order to encumber a system by more than \$10,000 except (1) for purchase money, (2) for extensions, or (3) for refunding outstanding debt. Other exceptions have been created to cover specific situations,²¹⁶ but at the moment it is uncommon to find reliance being placed upon those exceptions (except for acquisition). Whether improvements to a utility system constitute "extensions" so as not to require an authorizing election has been the subject of litigation. Bonds may be issued without an election to provide additional service lines, but providing additional water supply facilities is an improvement, not an extension, so the bonds must be voted.²¹⁷ Bond issues normally provide for both improvements and extensions, so most attorneys recommend the voting

²¹⁰ TEX. REV. CIV. STAT. ANN. art. 1106 (1963); *Moon v. Thomas*, 261 S.W. 476 (Tex. Civ. App.—Fort Worth 1924).

²¹¹ TEX. REV. CIV. STAT. ANN. arts. 1111, 1111a, 1111b, 1117, 1118, 1118a (1963).

²¹² A mandamus action to require the city to meet its contractual obligations has proved more economical than attempting to operate the system after foreclosure of mortgage, particularly since a city has "exclusive" control of its streets. *City of San Antonio v. United Gas Pipeline*, 388 S.W.2d 231 (Tex. Civ. App.—San Antonio 1965), *error ref. n.r.e.*; *Davis v. State ex rel. Incorporated Town of Anthony*, 298 S.W.2d 219 (Tex. Civ. App.—El Paso 1956), *error ref. n.r.e.*

²¹³ TEX. REV. CIV. STAT. ANN. art. 1115 (1963).

²¹⁴ *Id.* art. 1116.

²¹⁵ *Id.* art. 1112.

²¹⁶ Art. 1118a provides for a mortgage on electric and gas systems or water and gas systems or sewer and gas, and authorizes encumbrances for repair or reconstruction of the system without an election. *See also* art. 1118n-7 (a city meeting the tests of § 1 may issue new money bonds to the amount of bonds then issued for refunding purposes); art. 1118s (for improvement of sewer system outside limits of the city); art. 1118t (extending and improving an electric and gas system).

²¹⁷ *City of Corpus Christi v. Hayward*, 111 F.2d 637 (5th Cir.), *cert. denied*, 311 U.S. 670 (1940); *City of Hamlin v. Brown-Crummer Inv. Co.*, 93 F.2d 680 (5th Cir.), *cert. denied*, 303 U.S. 664 (1938); *Radford v. City of Cross Plains*, 126 Tex. 153, 86 S.W.2d 204 (1935).

of bonds for all improvements and extensions to avoid the questioning of the validity of bonds.

2. *Other Types.* A home-rule city has the authority to issue revenue bonds to provide telephone service.²¹⁸ Statutory authority exists for a city to issue revenue bonds to provide a street transportation system,²¹⁹ parks and swimming pools,²²⁰ a butane gas system,²²¹ airport revenue bonds,²²² and toll bridges,²²³ civic centers, auditoriums, museums, and opera houses.²²⁴ The same basic pattern is provided for the security and payment of these bonds as is provided for utility system revenue bonds.

D. Revenue Bonds by Counties

Counties have recently been authorized to issue revenue bonds since in their exercise of governmental functions there are not many revenue-producing projects. At the present time there appear to be three statutes of general application whereby county revenue bonds may be issued; *viz.*, for airport,²²⁵ hospital,²²⁶ and garbage disposal facilities.²²⁷ Illustrative of the acts of limited application are those which permit a county to issue revenue bonds for toll bridges²²⁸ or parking stations.²²⁹

Generally the same format with respect to the issuance of the city utility system revenue bonds is observed in the statutes relating to county revenue bonds, but the variations appear to provide a wider market for such revenue bonds. As an example, with airport revenue bonds the provision in article 46d-11²³⁰ requires all airport revenues be used for airport purposes; article 46d-8²³¹ provides for the levy of a tax of not to exceed five cents on the 100-dollar valuation to improve, operate, maintain, and conduct airports or airport

²¹⁸ TEX. ATT'Y GEN. OP. No. 0-4039 (1941).

²¹⁹ TEX. REV. CIV. STAT. ANN. art. 1118w (1963).

²²⁰ *Id.* art. 1111a.

²²¹ *Id.* art. 1015d.

²²² *Id.* arts. 46d-1 to -22 (1969), 1015c, 1269h-2, 1269i, 1269j-5, 1269j-5.1, 1269j-5.2 (1963).

²²³ *Id.* art. 1015g (1963).

²²⁴ *Id.* art. 1269j-4.1.

²²⁵ The Municipal Airports Act was adopted in 1947. Ch. 114, §§ 1-22, [1947] Tex. Laws 184-91 (codified at TEX. REV. CIV. STAT. ANN. arts. 46d-1 to -22 (1969)). Art. 46d-1-d defines the term "municipality" to include a county. Art. 46d-9 authorizes the issuance of either tax or revenue bonds, and by reason of the reference to art. 701, the Attorney General takes the position that any bonds issued under this act must be approved at an election. Bonds issued under this law are to be distinguished from those issued by an Airport Authority created pursuant to TEX. CONST. art. IX, § 12.

²²⁶ TEX. REV. CIV. STAT. ANN. art. 4494r-3 (1966) passed in 1969 authorizes the "pledge of all or any part of the revenues of the county to be derived from the operation of its hospital or hospitals" and permits a mortgage on the hospital properties. By the reference to the provisions of the County Hospital Authorities Act (art. 4494r-3), provision is made for the issuance of the bonds without an election if no petition is timely presented requesting a referendum. Bonds issued by the county under art. 4494r-3 are to be distinguished from bonds issued by a county hospital authority under art. 4494r (a device to divest the county of the obligation of supervision of hospital fiscal affairs) or from bonds issued by a hospital district established under TEX. CONST. art. IX, §§ 4-9, 11.

²²⁷ TEX. REV. CIV. STAT. ANN. art. 2351g-2 (1971) was passed in 1969, it being anticipated that a county would obtain revenues from leases or agreements, etc., for the use of the facilities.

²²⁸ *Id.* art. 6795c (1960).

²²⁹ *Id.* art. 2372s (1971).

²³⁰ *Id.* art. 46d-11 (1969).

²³¹ *Id.* art. 46d-8.

navigation facilities. This limitation on the use of revenues and specific taxing authority combine to reduce the drain upon the revenues of the airport, so they would be available for the payment of debt service requirements, even though the revenue bonds would not be payable from the 5-cent tax.²³² From a practical standpoint, most airport revenue bonds in Texas are issued by cities, and the statutes have been devised to make as much revenue available as possible since these bonds are not as readily acceptable as others in the financial markets.

Although counties have recently been given the power to issue revenue bonds for hospital purposes, it is not an entirely new concept.²³³ It may become a popular procedure for the financing of county hospital improvements since all of the revenues from the operation of the hospital may be pledged to the payment of bonds as a first charge, with the expense of operating and maintaining the hospital a second charge against the revenues. Tax money would be available, if required, for the payment of the maintenance and operating expense. In most situations far more money would be pledged to the payment of the bonds under this statute than the county would have the authority to pledge if the bonds were to be payable from taxation. Normally, this factor would reduce the interest rate on revenue bonds, but its effect on the investor remains to be seen. There is a measure of reluctance to invest in revenue bonds where maintenance and operating expenses are not predictable, even where bond payments have a superior claim on the revenues.

E. Time Warrants

1. *As an Obligation.* A time warrant is a debt of the issuer, since it is an obligation not intended to be paid out of current funds in the year incurred.²³⁴ A time warrant is issued to obtain property or labor on credit²³⁵ and is delivered to the contractor, not sold for cash.²³⁶

It is now well settled that where a county has the authority to do a certain thing, or is required to do or perform the act, it has the implied authority to issue warrants to accomplish the objective.²³⁷ With respect to general-law

²³² *Id.* art. 46d-9 requires revenue bonds to state on their face that principal and interest is payable solely from the revenues.

²³³ A city or cities may create a hospital authority under the Hospital Authority Act (*id.* art. 4437e (1966)), while a county or counties may do so under the County Hospital Authorities Act (art. 4494r). The agency so created has been treated by the Attorney General as a political subdivision of the state with power to issue revenue bonds, but without the power of taxation. The first mentioned law was adopted in 1957; the other in 1963.

²³⁴ *Lasater v. Lopez*, 110 Tex. 179, 217 S.W. 373 (1919); *McNeill v. City of Waco*, 89 Tex. 83, 33 S.W. 322 (1895); *Lewis v. Nacogdoches County*, 461 S.W.2d 514 (Tex. Civ. App.—Tyler 1970); *Adams v. McGill*, 146 S.W.2d 332 (Tex. Civ. App.—El Paso 1940), *error ref.*; *Bridgers v. City of Lampasas*, 249 S.W. 1083 (Tex. Civ. App.—Austin 1923), *error ref.*

²³⁵ *Lewis v. Nacogdoches County*, 461 S.W.2d 514 (Tex. Civ. App.—Tyler 1970); *Bridgers v. City of Lampasas*, 249 S.W. 1083 (Tex. Civ. App.—Austin 1923), *error ref.*

²³⁶ *Lewis v. Nacogdoches County*, 461 S.W.2d 514 (Tex. Civ. App.—Tyler 1970); *Cantu v. Rodriguez*, 376 S.W.2d 70 (Tex. Civ. App.—San Antonio 1964), *error ref. n.r.e.*

²³⁷ *Lasater v. Lopez*, 110 Tex. 179, 217 S.W. 373 (1919); *San Patricio County v. McClane*, 58 Tex. 243 (1883); *Grimes County v. Slayton*, 262 S.W. 209 (Tex. Civ. App.—Texarkana 1924), *error ref.*; *Allen v. Abernethy*, 151 S.W. 348 (Tex. Civ. App.—San Antonio 1912); *Cowan v. Dupree*, 139 S.W. 887 (Tex. Civ. App.—Texarkana 1911), *error ref.*; *Stratton v. Kinney County*, 137 S.W. 1170 (Tex. Civ. App.—San Antonio 1911), *error ref.* Express statutory authority is given for limited purposes (appraisal warrants) by TEX. REV. CIV. STAT. ANN. art. 7212 (1960); *Lewis v. Nacogdoches County*, 461 S.W.2d 514 (Tex. Civ. App.—Tyler 1970).

cities, the rule is the same,²³⁸ but as to home-rule cities, the city charter must be consulted.²³⁹

Article 2368a²⁴⁰ is a procedural statute and does not authorize the issuance of time warrants (since that power is implied by the obligation of the issuer to provide the facilities for which the warrants are issued), but it does prescribe the procedure to be followed in the issuance of the time warrants.²⁴¹

Historically, a time warrant has been classed as a nonnegotiable instrument, this being one of the characteristics that distinguishes it from a bond,²⁴² but this ancient rule may now have been changed.

2. *Under the Uniform Commercial Code.* An "organization" is defined to include a "government or governmental subdivision or agency,"²⁴³ and a "person" is defined to include an "organization" in the Business and Commerce Code.²⁴⁴ An "issuer" is defined to include a "person."²⁴⁵ The only question thus remaining is whether a time warrant is a security governed by chapter 8 of the Code—"Investment Securities."

A "security" is defined as an instrument which:

- (A) is issued in bearer or registered form; and
- (B) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and
- (C) is either one of a class or series or by its terms is divisible into a class or series of instruments; and
- (D) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.²⁴⁶

Without question, a time warrant meets the requirements of paragraphs (A), (C), and (D) of the definition. Time warrants were recognized as a method of financing long before cities or counties had the authority to issue bonds, and while not dealt in upon security exchanges, time warrants are dealt in upon the securities market and additionally are classed as a medium for investment.²⁴⁷ Thus, it would seem that when the situation is properly before a court, time warrants should now be classed as negotiable instruments.

²³⁸ *Payne v. First Nat'l Bank*, 291 S.W. 209 (Tex. Comm'n App. 1927), *judgment adopted*; *Bridgers v. City of Lampasas*, 249 S.W. 1083 (Tex. Civ. App.—Austin 1923), *error ref.*; *Graves v. O'Neill & Sons*, 189 S.W. 778 (Tex. Civ. App.—Dallas 1916).

²³⁹ *Foster v. City of Waco*, 113 Tex. 352, 255 S.W. 1104 (1923); *Keel v. Pulte*, 10 S.W.2d 694 (Tex. Comm'n App. 1928), *judgment adopted*; *City of Belton v. Harris Trust & Savings Bank*, 273 S.W. 914 (Tex. Comm'n App. 1925), 283 S.W. 164 (Tex. Comm'n App. 1926), *holding approved*.

²⁴⁰ TEX. REV. CIV. STAT. ANN. art. 2368a (1971).

²⁴¹ *Adams v. McGill*, 146 S.W.2d 332 (Tex. Civ. App.—El Paso 1940), *error ref.*

²⁴² *Lasater v. Lopez*, 110 Tex. 179, 217 S.W. 373 (1919); *Adams v. McGill*, 146 S.W.2d 332 (Tex. Civ. App.—El Paso 1940), *error ref.*

²⁴³ TEX. BUS. & COMM. CODE ANN. § 1.201(28) (1968). It would seem that a city or county would also meet the test of being a "legal entity" so as to be an "organization."

²⁴⁴ *Id.* § 1.201(30).

²⁴⁵ *Id.* § 8.201.

²⁴⁶ *Id.* § 8.102.

²⁴⁷ A time warrant is classed as an obligation of the issuer within the contemplation of INT. REV. CODE of 1954, § 103 (a). Even though the market for warrants is more limited than bonds, there is a ready market for them.

F. *Certificates of Obligation*

1. *Authority for Issuance.* Any city incorporated under (1) the general or special law having the power to levy an ad valorem tax of not less than \$1.50 on each 100-dollar valuation of taxable property therein, or (2) the home-rule amendment, and any county having a population of less than 350,000 according to the preceding federal census may issue certificates of obligation for the purpose of paying any contractual obligation incurred for the construction of any public work or for the purchase of materials, supplies, equipment, machinery, the purchase of land and rights of way for authorized needs and purposes, or for the payment of contractual obligations for professional services.²⁴⁸

2. *Distinguished from Time Warrants.* The Certificate of Obligation Act of 1971²⁴⁹ states that its purpose and intent is to provide an alternative procedure with respect to financing, subject to article 2368a,²⁵⁰ and to provide a new class of securities which may be issued and delivered.²⁵¹ To a large extent, the new law is comparable to article 2368a, but with these major differences:

(a) There is no necessity to publish notice that the governing body of the issuer intends to proceed to authorize the certificates, nor is there the right vested in the resident qualified taxpaying electors to petition for a referendum election.²⁵²

(b) With respect to construction of public works, certificates may be authorized in excess of the original contract obligation (twenty-five per cent in excess) in order to provide for change orders, but the amount of certificates delivered may not exceed that required to discharge the contractual obligation of the issuer.²⁵³

(c) For the purposes specified in section 7 of the Certificate of Obligation Act of 1971, certificates may be sold for cash and the proceeds applied for such authorized purposes.²⁵⁴

²⁴⁸ The Certificate of Obligation Act of 1971, ch. 923, § 2(c), [1971] Tex. Laws 2824 (to be codified as TEX. REV. CIV. STAT. ANN. art. 2368a-1, §§ 1-11), defines "city," while § 2(e) defines "county," and § 2(h) defines "issuer" to include a city or county as therein defined. It should be noted that art. 2368a was also limited in its application to counties having a population in excess of 350,000, while art. 2368f (requiring an election to authorize warrants) applied if the county had a population in excess of 300,000.

²⁴⁹ Ch. 923, § 3, [1971] Tex. Laws 2825.

²⁵⁰ TEX. REV. CIV. STAT. ANN. art. 2368a (1971).

²⁵¹ Ch. 923, §§ 10, 12, [1971] Tex. Laws 2828.

²⁵² *Id.* show that the clear intent of the Act is to be cumulative of other laws and that alternative procedures are provided. Section 9 specifies the manner in which the power conferred is to be exercised. With respect to warrants, art. 2368a, § 3 provides for publication of the notice of intention to issue warrants; *id.* § 4 provides for the right of referendum election.

²⁵³ Ch. 923, § 3(b), [1971] Tex. Laws 2825. It was generally felt that under art. 2368a the warrants authorized should not exceed the contract price as established when bids were received unless the issuer authorized incurrence of claims and accounts to be exchanged for warrants. As a result of dictum in *Cantu v. Rodriguez*, 376 S.W.2d 70 (Tex. Civ. App.—San Antonio 1964), *error ref. n.r.e.*, the authorizing of claims and accounts to be exchanged for warrants was discontinued until the 1967 amendments to § 2 of art. 2368a, when the practice was again instituted with respect to the acquisition of land and right of way. The last sentence of ch. 923, § 4, [1971] Tex. Laws 2825, was intended to expressly authorize what the *Cantu* dictum questioned.

²⁵⁴ It is clear that time warrants may not be sold for cash; they are delivered in satisfaction of the obligation of the issuer. It should be noted that the purposes for which certificates may be sold for cash are those for which no advertisement for bids is required under the Certificate of Obligation Act of 1971 or under art. 2368a. Certificates may also be delivered

(d) There is no justiciable interest conferred upon taxpayers to question the validity of proceedings.²⁵⁵

(e) When certificates are sold for cash, the authorizing proceedings must be submitted to the Attorney General and be approved by him prior to their delivery.²⁵⁶ Certificates approved by the Attorney General are legal and authorized investments for banks and others whose investments are regulated, and are eligible collateral for certain public funds.²⁵⁷

(f) Certificates are expressly made a "security" under the Uniform Commercial Code, and a "debt" under the constitution.²⁵⁸

(g) The giving of notice to bidders is made standard by providing that publication of notice to bidders may be published in a newspaper of general circulation in the city or county which is to receive bids,²⁵⁹ or as provided in the city charter or under article 2368a.

The Certificate of Obligation Act of 1971 was designed to provide greater flexibility in financing by nonvoted tax obligations of the issuer. It should provide greater security for the investor and a more expeditious procedure for an issuer. It should not be viewed as a substitute for voting bonds, for there is a practical limitation upon the amount of nonvoted obligations of a particular issuer that will be readily acceptable in the marketplace as well as the political accountability of the members of a governing body of the issuer.

G. Refunding Bonds

While a city or county may have the requisite authority to issue bonds under constitutional, statutory, or charter provisions, this does not give the authority to change the form of the obligation by the issuance of refunding bonds—express authority to do so being essential.²⁶⁰ Originally refunding bonds were authorized for the purpose of extending maturities of obligations that otherwise might not be paid, but such bonds have become widely used as a device

in payment of the contract obligation. Ch. 923, § 7(8), [1971] Tex. Laws 2826, attempts to clarify the former provisions of art. 2368a by expressly providing that certificates may be issued and sold where current funds or bond funds prove to be inadequate, but *only* where an advertisement for bids had been published. In the light of the broad requirement of § 6 (advertising required where a "contract calling for or requiring the . . . payment or creating or imposing an obligation or liability of any nature upon" an issuer), § 7(9) provides an express exception from the advertising requirements of § 6 with respect to the sale of securities. Charter or other statutory provisions are not affected.

²⁵⁵ TEX. REV. CIV. STAT. ANN. art. 2368a, §§ 2, 9 (1971) confer a justiciable interest where proceedings are taken thereunder. There is no comparable provision in the Certificate of Obligation Act of 1971. Unless a justiciable interest is statutorily conferred, a person must show damage peculiar to himself in order to litigate the validity of proceedings.

²⁵⁶ Ch. 923, § 7, [1971] Tex. Laws 2826. With respect to time warrants, the authorizing proceedings were previously submitted to the Attorney General only if they were refunded into bonds (since only valid obligations may be refunded). This same rule would apply to certificates of obligation not sold for cash. By reason of § 8(ii) certificates may be refunded into bonds.

²⁵⁷ *Id.* § 7.

²⁵⁸ *Id.* § 8.

²⁵⁹ *Id.* § 6(b). Under art. 2368a, § 2, notice to bidders is published only if a newspaper is published within the issuer; otherwise, it is posted (an exception to the mandatory publication requirement of § 2). Charter provisions with respect to advertising for bids are allowed to control over the provisions of art. 2368a by reason of the provisions in the second paragraph of § 2 of art. 2368a. This means that now publication may be by any of three methods; *i.e.*, as provided by charter; if applicable, art. 2368a; or the Certificate of Obligation Act of 1971.

²⁶⁰ San Antonio Union Junior Coll. Dist. v. Daniel, 146 Tex. 241, 206 S.W.2d 995 (1947).

to reduce the interest costs, or to provide for changes in the contract between the holder of revenue bonds and the issuing agency, or for the conversion of a nonnegotiable instrument to one fully negotiable. The latter has been used extensively to provide facilities where there is a lack of statutory authority to issue bonds, but there is authority to provide the facility.²⁶¹ Refunding is now sometimes accomplished for the purpose of making refunding bonds eligible investments for banks and insurance companies where the law under which the bonds were originally issued contained no such provisions.²⁶² Only valid indebtedness may be refunded,²⁶³ and usually no election is required.²⁶⁴ It has been held that refunding does not create new debt.²⁶⁵

With the passage of article 717k-3²⁶⁶ in 1969 there appeared the first general-law authority to issue tax-supported bonds to refund revenue bonds or revenue bonds to refund tax-supported obligations. The statute also contains authority to refund a portion of a series of revenue bonds, a practice that has been looked upon askance in many situations.²⁶⁷ It remains to be seen how and to what extent these new provisions and authority will be utilized. Obviously, many "old concepts" relating to refunding bonds will be revised.

H. Election

1. *Necessity of Having an Election.* In the ordinary financing by a city or county there is no constitutional requirement that bonds be approved at an election before issuance. When a city is operating under article XI, section 4 or 5, it should be noted that the constitution prescribes only a *maximum tax rate*. The same is true with county financing accomplished out of the eighty

²⁶¹ *Lasater v. Lopez*, 110 Tex. 179, 217 S.W. 373 (1919); *Adams v. McGill*, 146 S.W.2d 332 (Tex. Civ. App.—El Paso 1940), *error ref.*

²⁶² See the broad provisions of TEX. REV. CIV. STAT. ANN. art. 717k-3, § 6 (1964).

²⁶³ *City of Laredo v. Looney*, 108 Tex. 119, 185 S.W. 556 (1916); *City of Tyler v. Tyler Bldg. & Loan Ass'n*, 99 Tex. 6, 86 S.W. 750 (1905). In *Tyler* an exception to the general rule was noted. The refunding bonds were submitted to and approved by the Attorney General under a statute which provided that the city's only defense after such approval would be fraud or forgery. The statute was given effect.

²⁶⁴ *Griffith v. Buchanan*, 5 S.W.2d 211 (Tex. Civ. App.—San Antonio 1928); TEX. REV. CIV. STAT. ANN. arts. 717, 797, 2368a (1964). See also art. 717k-3 to the same effect, but where a constitutional provision required an election to create the *indebtedness* (such as TEX. CONST. art. III, § 52, or art. XVI, § 59), this statute provides for the calling of an election to raise the interest rate. Query: If a road bond was voted and issued when the *statute* prescribed the interest rate limitation of 5½% (art. 752i) and the bonds were issued at a lower rate, would an election be required to issue refunding bonds at a rate higher if refunding is to be accomplished under art. 717k-3?

²⁶⁵ *City of Waco v. Mann*, 133 Tex. 163, 127 S.W.2d 879 (1939); *Dallas County v. Lockhart*, 128 Tex. 50, 96 S.W.2d 60 (1936); *American United Life Ins. Co. v. Wood County*, 213 S.W.2d 324 (Tex. Civ. App.—Texarkana 1948), *error ref.*; *Conklin v. El Paso*, 91 Tex. Civ. App. 537, 44 S.W. 879 (1897), *error ref.*, 91 Tex. 537, 44 S.W. 988 (1898).

²⁶⁶ TEX. REV. CIV. STAT. ANN. art. 717k-3 (1964).

²⁶⁷ If only a part of a series of revenue bonds is refunded, the question arises as to whether there is an impairment of the contract obligation with the holder of bonds not so refunded. As to bonds delivered prior to this statute, if the bonds were closed lien, no maturities could be accelerated to the detriment of the holders of bonds not refunded, though interest rates could be reduced. In the situation in which parity bonds could be issued, the objection is met if it is demonstrated that the coverage test for the issuance of additional bonds could still be met under the refunding schedule. Now when bonds are delivered, they are taken with notice of the new statute to the effect that the issuer must demonstrate to the satisfaction of the Attorney General that no impairment of the contractual obligation would occur.

cents allotted to the county under the provisions of article VIII, section 9 of the constitution.

Article 701²⁶⁸ provides that bonds to be issued by cities or counties must be voted, but there is no prohibition in the constitution to prevent the Legislature from empowering the issuance of bonds without a vote of the people when the city or county is proceeding under one of the constitutional provisions mentioned,²⁶⁹ or is issuing bonds payable from the revenues of a self-liquidating project.²⁷⁰ Of course, in those instances where the constitution requires the affirmative vote at an election called for the purpose, then one must be held before the bonds may be issued or the tax levied.²⁷¹

The right to hold an election is not an inherent right, but is dependent upon authority being conferred by law.²⁷² An election is a political proceeding not subject to judicial control, and may not be enjoined by court proceedings²⁷³ even if the result of the election would be a complete nullity.²⁷⁴ When an election is held without authority, the proceedings are a nullity, and the result is nothing more than a straw vote.²⁷⁵

2. Qualification of Voters in a Bond Election.

(a) *Qualified Electors.* Article VI, section 1 of the constitution specifically denies the right of suffrage to some persons.²⁷⁶ The right of the state to restrict the electorate to those twenty-one years of age or more has been upheld insofar as nonfederal elections are concerned, but this has now been changed by amendment to the United States Constitution.²⁷⁷ Article VI, section 2 of the constitution contains the basic requirements for qualification as an elector, *viz.*, (1) the attainment of the age of twenty-one, (2) citizenship of the United States,

²⁶⁸ TEX. REV. CIV. STAT. ANN. art. 701 (1962).

²⁶⁹ *Henderson County v. Allred*, 120 Tex. 483, 40 S.W.2d 17 (1931); *Bell County v. Lightfoot*, 104 Tex. 346, 138 S.W. 381 (1911); *Atkinson v. City of Dallas*, 353 S.W.2d 275 (Tex. Civ. App.—Dallas), *error ref. n.r.e., cert. denied*, 370 U.S. 939 (1962); *Moller v. City of Galveston*, 23 Tex. Civ. App. 693, 57 S.W. 1116 (1900), *error ref.*

²⁷⁰ *Atkinson v. City of Dallas*, 353 S.W.2d 275 (Tex. Civ. App.—Dallas), *error ref. n.r.e., cert. denied*, 370 U.S. 939 (1962); *City of Corpus Christi ex rel. Harris v. Flato*, 83 S.W.2d 433 (Tex. Civ. App.—San Antonio 1935), *error dismissed*; *Womack v. City of West University Place*, 32 S.W.2d 930 (Tex. Civ. App.—Beaumont 1930).

²⁷¹ TEX. CONST. art. III, § 52, art. XVI, § 59 require an election to authorize indebtedness. Article VIII, § 9 authorizes the special road tax of 15 cents to be voted. As mentioned previously, art. VIII, § 1a does not require an election to enable a county to levy the 30-cent flood control and road tax (either purpose or both), but the statute does require an election.

²⁷² *Countz v. Mitchell*, 120 Tex. 324, 38 S.W.2d 770 (1931); *Coffee v. Lieb*, 107 S.W.2d 406 (Tex. Civ. App.—Eastland 1937); *Williams v. Glover*, 259 S.W. 957 (Tex. Civ. App.—Waco 1924); *Trustees of Ind. Dist. v. Elbon*, 223 S.W. 1039 (Tex. Civ. App.—Fort Worth 1920).

²⁷³ *City of Dallas v. Dallas Consol. Elec. St. Ry.*, 105 Tex. 337, 148 S.W. 292 (1912); *Harrison v. Price*, 274 S.W.2d 575 (Tex. Civ. App.—Galveston 1954), *error ref. n.r.e.*; *League v. Brazoria County Road Dist. No. 13*, 187 S.W. 1012 (Tex. Civ. App.—Galveston 1916).

²⁷⁴ *City of Dallas v. Dallas Consol. Elec. St. Ry.*, 105 Tex. 337, 148 S.W. 292 (1912).

²⁷⁵ *Countz v. Mitchell*, 120 Tex. 324, 38 S.W.2d 770 (1931); *Coffee v. Lieb*, 107 S.W.2d 406 (Tex. Civ. App.—Eastland 1937).

²⁷⁶ *I.e.*, persons under 21; idiots and lunatics; paupers supported by the county; all persons convicted of a felony, subject to possible legislative exceptions.

²⁷⁷ *Oregon v. Mitchell*, 400 U.S. 112 (1970); with respect to federal elections, see qualification of electors in TEX. CONST. art. VI, § 2a. U.S. CONST. amend. XXVI, § 1 (effective July 5, 1971, 36 Fed. Reg. 12725 (1971)) reads: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

(3) residence in the state one year and in the county in which he offers to vote for six months,²⁷⁸ and (4) annual voter registration.²⁷⁹ In 1971 a United States district court held article VI, section 2 of the Texas Constitution to be "constitutionally untenable and therefore null, void, and of no effect,"²⁸⁰ but the attack was limited to the annual registration provision of the constitution and the statutes. The court retained jurisdiction and refused to grant an injunction against enforcement of the provisions pending the opportunity for the Legislature to correct the deficiencies.

Most Texas attorneys agree that article VI, section 2 of the constitution prescribes the residence requirements for voters in an election held by a county (twelve months in the state and six months in the county), but there is some difference of opinion on whether article VI, section 3 of the constitution imposes an additional requirement of six months within a city in order to vote in any city election.²⁸¹ The writer is of the opinion that in a city bond

²⁷⁸ The language of the constitution is "and the last six (6) months within *the district* or county in which such person offers to vote." (Emphasis added.) The italicized words have been held to be meaningless. *Duncan v. Willis*, 157 Tex. 316, 302 S.W.2d 627 (1957).

²⁷⁹ Two amendments to TEX. CONST. art. VI were proposed, and both were adopted at the election of November 1966—the Joint Resolution providing that the adoption of one would *not* be construed to nullify the other. H.J. Res. 13, 38, [1965] Tex. Laws 2218, 2224. In *Hill v. Evans*, 414 S.W.2d 684 (Tex. Civ. App.—Austin 1967), *error ref. n.r.e.*, the court refused to enjoin the canvassing of the returns of the election on one proposition (challenged on the question of whether the ballot gave adequate notice of intent and subject matter).

²⁸⁰ *Beare v. Smith*, 321 F. Supp. 1100 (S.D. Tex. 1971). The court said: "This suit attacks the constitutionality of that provision [annual registration] on the basis of the fourteenth and twenty-fourth amendments to the Constitution." *Id.* at 1102. The court held the state had no "compelling state interest" to protect; therefore, the restrictions upon the electorate could not stand (citing *inter alia* *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970)).

²⁸¹ M. WALL, TEXAS MUNICIPAL ELECTION LAW, ADMINISTRATIVE MANUAL FOR MUNICIPAL CLERKS AND SECRETARY 66 (1971) states one view:

Article VI, section 3 of the Constitution and article 5.07 of the Election Code both state that qualified electors of the state with six months' residence in the city 'shall have the right to vote for mayor and all other elective officers' but make no specific mention of the length of city residence required for voting in elections on measures, such as bond elections, annexation elections, charter amendment elections, etc. The contention is sometimes made that a voter need not have lived in the city for six months or for any other specific length of time in order to vote in these elections. Strangely enough, no appellate court has ever ruled on the question directly, but statements in two opinions support the view that six months' residence is required in these elections the same as in elections for naming the city officers. The legal advisory committee for the manual also takes this view.

The opinions to which reference is made are *Kempen v. Bruns*, 195 S.W. 643 (Tex. Civ. App.—San Antonio 1917), and *Wendover v. Tobin*, 261 S.W. 434 (Tex. Civ. App.—San Antonio 1924), *error dismissed*. In *Kempen* the qualifications of persons denied the right to vote were considered in an election contest. The court said: "[I]t does not affirmatively appear that this negro had lived in the town a sufficient time or in the district of the voting place, or that he had paid his poll tax. His rejection cannot be counted as error." 195 S.W. at 645. *Wendover* was also an election contest (prior to the addition of TEX. CONST. art. VI, § 3a) where reference is made to TEX. CONST. art. VI, § 3, and then it is observed: "The only qualification for a qualified voter of the state at an election, such as was held in the city of San Antonio, is that he shall have resided for six months immediately preceding the election in the City and pay taxes in the City, on property therein . . ." 261 S.W. at 438. The court held that the city charter could not and did not attempt to supplement the voter requirements of the Constitution. The advisory committee which the *Manual* indicates has taken this view is an imposing list of municipal authorities, and their view appears to be predicated upon alternative grounds: (1) that the art. VI, § 3 of the constitution *by implication*, was intended to cover all elections held by a city, since qualification for voting in elections for municipal officers is specified, followed by the expression "but in all elections to determine the expenditure of money or assumption of debt . . ." indicating an additional re-

election no particular length of residency within the city is required so long as a person is a resident on the day he offers to vote and meets the other requirements of the constitution. This difference of opinion may be academic in the light of the trend of the decisions on residency requirements.²⁸²

quirement in those types of elections, or (2) that this constitutional provision established 6-month residence requirements for the electorate in elections for municipal officers *and* for the expenditure of money or the assumption of debt, and the later amendment to the constitution (adding § 3a) merely substituted rendition of taxable property as a requirement for voting for the previous requirement of actual payment of the taxes levied (as formerly required by art. VI, § 3) so the person must be a qualified elector, be a resident of the city for 6 months, and have rendered property for taxation in order to participate in the election for which provision is made in § 3a of art. VI. Those who take this view restrict it to elections called by cities. *Duncan v. Willis*, 157 Tex. 316, 302 S.W.2d 627 (1957) (to the effect that the residence requirement for an elector in a bond election is 12 months in the state, 6 months in the county *and* in the subdivision holding the election on the day of the election) is explained as being an interpretation of art. VI, § 2 of the constitution, and, therefore, applicable in all elections held in every political subdivision of the state *except* those held by cities.

²⁸² In *Burg v. Canniffe*, 315 F. Supp. 380 (D. Mass. 1970), *appeal docketed*, 39 U.S.L.W. 3168 (U.S. Oct. 20, 1970) (No. 811) (a new resident of the state was required to have 6 months more residence than others who were qualified to vote); *Kollar v. City of Tucson*, 319 F. Supp. 482 (D. Ariz. 1970), *aff'd mem.*, 91 S. Ct. 1665 (1971) (a non-resident unsuccessfully challenged a city revenue bond election in which he was not allowed to participate; one plaintiff claimed a pecuniary interest as a customer, the other claimed that the city would use bond proceeds to acquire the independent corporation from which he purchased water). In *Hall v. Beals*, 396 U.S. 45 (1969), a 6-month residency requirement was under consideration when the statutory requirement was reduced to 2 months. While the case was held moot, the dissenting judges did not so view it and were critical of *Drueding v. Devlin*, 380 U.S. 125 (1965), which had upheld a one-year residency requirement. A requirement of residency for a period of time so as to impress a local viewpoint is not a sufficient compelling state interest to permit restrictions on electorate in a federal election. *Carrington v. Rash*, 380 U.S. 89 (1965).

Most attorneys who specialize in municipal finance, however, take the view that *Duncan v. Willis*, 157 Tex. 316, 302 S.W.2d 627 (1957) is controlling on residence requirements for city bond elections. This contention is predicated upon the position that the 6-month residence requirement of art. VI, § 3 of the constitution is expressly limited to election of city officials; that there is no implication that art. VI, § 3 was intended to apply to *all* elections, but was expressly restricted to elections for municipal officers; that the last part of art. VI, § 3 and § 3a have been harmonized by *City of Richmond v. Allred*, 123 Tex. 365, 71 S.W.2d 233 (1934), and *Martin v. Richter*, 161 Tex. 323, 342 S.W.2d 1 (1960). In *City of LaGrulla v. Rodriguez*, 415 S.W.2d 701 (Tex. Civ. App.—San Antonio 1967), *error ref. n.r.e.*, it was specifically held that art. VI, § 2 of the constitution governed the electorate in a city dissolution election (rejecting the 6-month residence requirement of art. VI, § 3). *Brown v. City of Galveston*, 97 Tex. 1, 10, 75 S.W. 488, 493 (1903), speaks of art. VI, § 3 in the following language (emphasis added):

The purpose of this Section is to secure to all electors of the state residing in cities and towns the right to vote at all elections for elective officers of such corporation, and to secure to property taxpayers the right to determine questions of the expenditure of money and the assumption of debts, when submitted to a vote . . . Section 3 of Article 6 is self-executing to the extent that, when an election is ordered for *either named purpose* in a town or city, the right to vote in such election is secured by the Constitution, and no implication arises because not necessary to complete the purpose of that section of the Constitution.

Additionally, art. VI, § 3a was adopted to change the rule of *Hillsman v. Faison*, 23 Tex. Civ. App. 398, 57 S.W. 920 (1900), *Winters v. Independent School Dist.*, 208 S.W. 574 (Tex. Civ. App.—Austin 1919), *error dismissed*, and *Barron v. Matthews*, 29 S.W.2d 451 (Tex. Civ. App.—Eastland 1930), and speaks of "qualified electors" in addition to the rendition of property requirement. In *Sweeny Hosp. Dist. v. Carr*, 378 S.W.2d 40, 46 (Tex. 1964), the court said:

Voter qualifications are not found only in Sec. 2, Article 6 as the Attorney General seems to contend; Section 3a lists additional qualifications for bond elections. A 'property taxpaying elector' cannot, therefore, be 'legally qualified' to vote in bond elections unless he meets the general qualification requirements of Sec. 2, Article 6, and also the specific qualification requirements in Sec. 3a, Article 6 that he 'own taxable property' which has been 'duly rendered' for taxation.

(b) *Property Rendered for Taxation.* Article VI, section 3a of the constitution provides:

When an election is held by any county, or any number of counties, or any political sub-division of the State, or any political sub-division of a county, or any defined district now or hereafter to be described and defined within the State and which may or may not include towns, villages or municipal corporations, or any city, town or village, for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt, only qualified electors who own taxable property in the State, county, political subdivision, district, city, town or village where such election is held, and who have duly rendered the same for taxation, shall be qualified to vote and all electors shall vote in the election precinct of their residence.

The Texas courts have spent a great deal of time determining whether article VI, section 3a or article VI, section 2 prescribes the proper electorate in given situations. The rule is easier to state than to apply. The additional requirements of section 3a are not applicable when an election is held to abolish the corporate existence of a city,²⁸³ when the electorate is to determine whether a certain law will apply²⁸⁴ (unless the application of such law automatically authorizes the issuance of bonds and the expenditure of money),²⁸⁵ nor do they apply to a charter amendment that would grant the power to advertise the city or raise the amount of tax which may be levied for municipal purposes,²⁸⁶ nor to an ordinance to establish a minimum wage²⁸⁷ (referendum election)—these being examples of establishing policy that do not directly involve the expenditure of money.

An election to determine whether revenue bonds will be issued determines the expenditure of money; article VI, section 3a has been held to control,²⁸⁸ but the Attorney General of Texas has stated that this is no longer true,²⁸⁹ that such a requirement offends the equal protection of the laws provision of the United States Constitution. Nevertheless, most attorneys who work in the field of municipal finance have not followed the Attorney General's policy statements, but have provided separate voting boxes for resident-qualified, property-taxpaying voters and those who are merely qualified electors. If the traditional electors in bond elections (section 3a qualifications) approve the issuance of bonds and the qualified electors (section 2 qualifications) also approve the bonds, then surely no question could arise over the propriety of authorization.

*Montgomery Independent School District v. Martin*²⁹⁰ is the most recent and

²⁸³ *City of LaGrulla v. Rodriguez*, 415 S.W.2d 701 (Tex. Civ. App.—San Antonio 1967), *error ref. n.r.e.* (stating that more recent decisions had impliedly overruled *Bonham v. Fuchs*, 228 S.W. 1112 (Tex. Civ. App.—Galveston 1921), *error ref.*).

²⁸⁴ *King v. Carlton Ind. School Dist.*, 156 Tex. 365, 295 S.W.2d 408 (1956).

²⁸⁵ See *Martin v. Richter*, 161 Tex. 323, 342 S.W.2d 1 (1960), on urban renewal law.

²⁸⁶ *Moreland v. City of San Antonio*, 116 S.W.2d 823 (Tex. Civ. App.—San Antonio 1938), *error ref.*; *Garitty v. Halbert*, 235 S.W. 231 (Tex. Civ. App.—Dallas 1921), *error dismissed*.

²⁸⁷ *Taxpayers' Ass'n v. City of Houston*, 129 Tex. 627, 105 S.W.2d 655 (1937).

²⁸⁸ *City of Richmond v. Allred*, 123 Tex. 365, 71 S.W.2d 233 (1934) (holding that the proper electorate was the taxpaying electors provided in § 3a of art. VI of the constitution since an expenditure of money was being approved).

²⁸⁹ Policy letters of July 10, 1969, Dec. 19, 1969, and July 10, 1970, based upon *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

²⁹⁰ 464 S.W.2d 638 (Tex. 1971).

vital case involving the application of this constitutional provision. Two separate elections were held to determine whether school bonds would be issued. In one election the traditional voters in bond elections (those specified by article VI, section 3a of the constitution) were permitted to vote, and in that election the proposition failed. In the other election, all qualified voters were permitted to vote (those qualified under article VI, section 2 of the constitution) and the election carried. The Attorney General refused to approve the bonds, and a writ of mandamus was denied. The court considered the various federal court decisions of recent origin²⁹¹ that had struck down state statutes or constitutional provisions as being "unconstitutionally selective in authorizing voting rights" and held that the Texas constitutional provision did not contravene the equal protection clause of the United States Constitution. Texas thereby joins the highest courts of some of its sister states,²⁹² but assigns cogent reasons for the belief the Texas situation does not resemble those in which the federal courts have stricken down the state guidelines for electors. Texas does not restrict the electorate to those who own real property, or seek to weight the vote of property taxpayers by the value of their property (the value of the property is immaterial). Ownership of any personal or real property is sufficient so long as it is placed on the tax rolls by the taxpayer or the assessor; the voter will not be parsed out of his constitutional right by the failure to comply with statutory requirements of timely rendition.²⁹³ With respect to the compelling state interest, the court stated:

In our opinion, the requirement that the voter in a general obligation bond election must get his property on the rolls is in the interest of sound government and affords equal treatment of all citizens. One who is willing to vote for and impose a tax on the property of another should be willing to assume his distributive share of the burden. This is the manner in which the Texas Constitution, as approved by the entire citizenry of the state, provides inducement for those who wish to participate in the decision making process in a

²⁹¹ *Stewart v. Parish School Bd.*, 310 F. Supp. 1172 (E.D. La.), *aff'd mem.*, 400 U.S. 884 (1970); *City of Phoenix v. Kolodziejewski*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969).

²⁹² See *Hebert v. Police Jury*, 258 La. 41, 245 So. 2d 349 (1971), to the effect that a local rural road bond election was improperly held since all qualified electors had been permitted to vote (apparently by reason of the decision in *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969)) rather than the restricted electorate specified in the state constitution. The court held that there was an overriding state interest to protect: that landowners in a rural area are primarily interested and primarily affected by "local roads" affording them access to their land. See also *Muench v. Paine*, 93 Idaho 473, 463 P.2d 939 (1969) (where bonds are payable only from property taxes, such class of voters have greater interest). In *Bogert v. Kinzer*, 93 Idaho 515, 465 P.2d 639 (1970), the same court admitted the decision in the *Muench* case had destroyed the marketability of bonds of Idaho municipalities. In *Settle v. City of Muskogee*, 462 P.2d 642 (Okla. 1969) it was held that "qualified property taxpaying voters" was a legitimate classification to support a compelling state interest, and that taxpayers are the persons having the most interest, so the classification was considered reasonable. *Contra*, *Pike v. School Dist.*, 474 P.2d 162 (Colo. 1970); *Board of Educ. v. Maloney*, 82 N.M. 167, 477 P.2d 605 (1970); *Cypert v. Washington County School Dist.*, 24 Utah 2d 419, 473 P.2d 887 (1970).

²⁹³ The adjudicated cases on each of these points are collected in the opinion. Reliance is placed upon the holding of *Markowsky v. Newman*, 134 Tex. 440, 136 S.W.2d 808 (1940), but no mention is made of TEX. ELECTION CODE ANN. arts. 5.03, 5.04 (Supp. 1970) which purport to change the rule of *Markowsky* and *Handy v. Holman*, 281 S.W.2d 536 (Tex. Civ. App.—Galveston 1955).

School District to assume their rightful portion of the burden they help to create.²⁹⁴

It is feared that *Montgomery* does not foreclose further litigation in a different forum.²⁹⁵ Perhaps final settlement of the issue is near.

I. Approval of Bonds by Attorney General

1. *Historical Background.* Financing through the issuance of bonds was one of the vehicles employed by the Republic of Texas to meet its obligations, but there appears to have been no general statute recognizing that political subdivisions of the state would have such power until 1861 when the Legislature validated bonds issued by counties for military purposes.²⁹⁶ In 1866 the first general law authorizing the issuance of bonds by a political subdivision appears to have been passed when county police courts were authorized to issue bonds for courthouses and jails.²⁹⁷ This power was thereafter extended, but each statute relating to counties specified a particular purpose for which bonds could be issued,²⁹⁸ and this pattern is still followed. The first general law authorizing

²⁹⁴ 464 S.W.2d at 641.

²⁹⁵ At the time of the decision in *Kramer and Cipriano*, nine states restricted the electorate, and while *Kramer, Turner, and Phoenix* have each indicated that a state may have an interest to protect, it is clear that any restriction will be closely scrutinized. The payment of any tax as a condition for voting, however small, has been condemned, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), just as ownership of property as a condition for office holding has been held violative of the Constitution. *Turner v. Fouche*, 396 U.S. 346 (1970).

It is interesting to note the court in *Montgomery* places some reliance on the fact the constitution of Texas, which imposes a limitation on the electorate, was adopted by the qualified voters. If a right is protected by the United States Constitution, may these rights be infringed upon merely because the majority is willing so to do? At least in apportionment cases this has already been answered in the negative. *Lucas v. Colorado Gen. Ass'y*, 377 U.S. 713 (1964).

On at least two occasions, financing of Texas municipalities has been thrown into utter chaos by court decisions. Following *Parks v. West*, 102 Tex. 11, 111 S.W. 726 (1908), an amendment to the Texas Constitution was required, and following *Browning v. Hooper*, 269 U.S. 396 (1926), a special session of the legislature was necessary to validate road districts and their bonds. It is hoped that the continuing confusion on voter qualifications will be soon clarified since the repetition of previous experiences could only damage the credit of the state and its municipalities.

²⁹⁶ 1 H. GAMMEL, LAWS OF TEXAS 1092 (1836) [hereinafter cited as GAMMEL] appears to be the first statute adopted by the Republic, authorizing the issuance of bonds up to \$5,000,000. Bonds were authorized to be issued for general governmental purposes (see also acts in 1838, 1 GAMMEL 1484 (1838), and 1840, 2 GAMMEL 230 (1840)), and for the payment of members of Congress, 2 GAMMEL 571 (1841). Texian Loan Bonds were authorized in 1861, ch. 51, § 1, [1861] Tex. Laws, 5 GAMMEL 375 (1898), and only recently was litigation as to these bonds terminated. *Buford v. State*, 322 S.W.2d 366 (Tex. Civ. App.—Austin), *error ref. n.r.e., cert. denied*, 361 U.S. 837 (1959). That case turned on the effect of TEX. REV. CIV. STAT. ANN. art. 842g (1964) (as both a grant and limitation upon the right to sue the state), but otherwise would have involved interesting questions of whether bond proceeds were expended for defense of the frontier from Indian raids or for insurrection purposes, and, therefore, was barred by act of Congress when Texas "re-joined" the Union. As to counties, see ch. 8, § 1, [1861] Tex. Laws, 5 GAMMEL 450 (1898).

²⁹⁷ Ch. 67, § 1, [1866] Tex. Laws, 5 GAMMEL 984 (1898).

²⁹⁸ In 1871 counties were given the authority to issue bonds in aid of railroad construction and improvements (ch. 37, § 1, [1871] Tex. Laws, 6 GAMMEL 931 (1898)), the power to construct bridges across county lines (ch. 53, § 1, [1871] Tex. Laws, 7 GAMMEL 44 (1898)); for refunding purposes, see ch. 46, § 1, [1879] Tex. Laws, 8 GAMMEL 1343 (1898); ch. 51, § 1, [1881] Tex. Laws, 9 GAMMEL 143 (1898); and ch. 97, § 1, [1887] Tex. Laws, 9 GAMMEL 875 (1898); bridges within the county (ch. 18, § 1, [1884] Tex. Laws, 9 GAMMEL 561 (1898); ch. 141, § 1, [1887] Tex. Laws, 9 GAMMEL 933 (1898); ch. 84, § 1, [1893] Tex. Laws, 10 GAMMEL 542 (1898)); courthouse and jail (ch. 9, § 1, [1881] Tex. Laws, 9 GAMMEL 97 (1898); ch. 17, § 1, [1884] Tex. Laws, 9 GAMMEL

the issuance of bonds by cities was adopted in 1871.²⁹⁹

In 1893 Governor James Hogg called upon the Legislature to restrict the power of cities and counties to issue bonds. He stated that bond debt for the construction of county courthouses amounted to \$30 per voter in the more populated counties and as high as \$220 per voter in the more sparsely populated areas, and to this amount would be added the debt incurred by counties for the construction of jails, roads, and bridges, etc. In cities the debt ranged between \$50 and \$300 per voter. Denouncing the spirit of extravagance, the Governor asked the Legislature to repeal the law of 1889 that allowed the funding of floating indebtedness into bonds, and called for the passage of a law to require the Attorney General of Texas to approve all bonds sought to be issued by cities, towns, and counties before they could be delivered. Governor Hogg's principal attack seems to have been upon the extravagant spending and the placing of burdens on future generations.³⁰⁰

The Gossett Bill was introduced at the request of the Governor in 1893 and received mixed reaction from the press, being denounced as a "mongrel platform" to either protect the investor or to protect the citizen against himself, and that property owners who voted for bonds were being treated as in "such a condition of mental imbecility as to require a committee or the Attorney General to take charge of their affairs."³⁰¹ Others maintained that the law would be protection against the "boomers" and "New York money sharks," with additional protection offered against the "schemers and indifferent people" and "irresponsible swearers" who had plunged cities into debt and humiliation.³⁰²

While the language of the proponents and opponents may have been picturesque, the reported cases indicate the problem was quite real. In *Millsaps v. City of Terrell*³⁰³ a portion of a series of bonds issued by the city was declared invalid since the city was allowed to levy a tax of twenty-five cents on the 100-dollar valuation, but a thirty-cent tax would have been required to pay the debt service requirements. In *Francis v. Howard Co.*³⁰⁴ the validity of the bonds was unsuccessfully attacked on the grounds that the proceeds were improperly used. When city officials represented that the proceedings relating to the authorization of bonds had been adopted by the council (though they had not been), the bonds were declared void even though the city received the money from the bonds.³⁰⁵ Failure to have the seal impressed on bonds was the basis of an unsuccessful attack upon the validity of bonds more than twenty years after issuance.³⁰⁶ When the person who was mayor at the time of the authorization of the bonds ceased to be the mayor by the time of their de-

560 (1898); ch. 59, § 1, [1885] Tex. Laws, 9 GAMMEL 676 (1898); ch. 84, § 1, [1893] Tex. Laws, 10 GAMMEL 542 (1898)).

²⁹⁹ Ch. 37, § 1, [1871] Tex. Laws, 6 GAMMEL 931 (1898)—aid in railroad construction and improvement.

³⁰⁰ HOUSE JOURNAL 17-18 (1893).

³⁰¹ Editorial, *Austin Daily Statesman*, Mar. 13, 1893, at 2, col. 1.

³⁰² *Terrell Times Star*, Jan. 6, 1893, at 2, col. 2; *id.*, Mar. 24, 1893, at 4, cols. 2, 3.

³⁰³ 60 F. 193 (5th Cir. 1894).

³⁰⁴ 50 F. 44 (W.D. Tex. 1892), *aff'd*, 54 F. 487 (5th Cir. 1893).

³⁰⁵ *Peck v. City of Hempstead*, 27 Tex. Civ. App. 80, 65 S.W. 653 (1901), *error ref.*

³⁰⁶ *Thornburgh v. City of Tyler*, 16 Tex. Civ. App. 439, 43 S.W. 1054 (1897), *error ref.*

livery (although he signed them), the bonds were invalid.³⁰⁷ A mistake in the numbering of bonds, however, did not make them invalid.³⁰⁸ These cases illustrate the general attitude of gamesmanship that prevailed, but each attempt to repudiate payment of bonds damaged the credit of political subdivisions in Texas, for the purchase of bonds might also be the purchase of a lawsuit to enforce their payment.

The Gossett Bill was passed to require the Attorney General to examine the legality of all city and county bond issues and certify their validity before they could be delivered.³⁰⁹ The Comptroller of Public Accounts was also required to register the bonds. The Supreme Court of Texas refused to mandamus the Attorney General to approve bonds sought to be issued by a school district (there being no duty then imposed upon the Attorney General to examine the proceedings) and at the next session of the Legislature, the Attorney General was given the duty to examine the validity of the proceedings relating to the authorization of independent school district bonds.³¹⁰ The rationale of that decision was responsible for the adoption of article 709a³¹¹ in 1953 which provides bonds sought to be issued by home-rule cities on behalf of improvement districts *may* be submitted to the Attorney General and by him approved or disapproved.

2. *Duty of Attorney General—Effect of His Approval of Bonds.* The fear that the Attorney General would interfere in the financial affairs of local government (expressed at the time of consideration of the Gossett Bill) has proved unwarranted. Perhaps some of the difficulties anticipated by opponents of the Gossett Bill have been avoided by the court decisions that have considered the duties and functions of the Attorney General. In *City of Galveston v. Mann* the court stated:

The evident purpose of Article 4398, R.C.S., 1925, and other relevant statutes which impose the duty upon the Attorney General to pass upon the validity of bonds proposed to be issued by any municipality or political subdivision of this State, is not only to protect the particular locality and its inhabitants against the imposition of unauthorized or illegal obligations, but also to give assurance to the State Board of Education and other intending purchasers of such bonds that if and when such bonds are so purchased, the purchaser will acquire an indefeasible title thereto. The duty thus imposed upon the Attorney General is important and is in no sense perfunctory³¹²

An issuer of bonds is estopped to deny the accuracy of its certifications to the Attorney General, and the Attorney General and the purchaser have the right

³⁰⁷ *Coler v. City of Cleburne*, 131 U.S. 162 (1889). A procedure for adoption of signatures is now provided by statute and most feel that under principles of law now prevailing, one may adopt the signature of another as his own. TEX. REV. CIV. STAT. ANN. art. 716 (1964).

³⁰⁸ *Presidio County v. Noel-Young Bond & Stock Co.*, 212 U.S. 58 (1909). See particularly the criticism of the Texas Supreme Court's view on estoppel by recitals in the bonds in the connected case of *Ball v. Presidio County*, 27 S.W. 702 (Tex. Civ. App.—Austin 1894), *rev'd*, 88 Tex. 60, 29 S.W. 1042 (1895).

³⁰⁹ Ch. 64, § 1, [1893] Tex. Laws, 10 GAMMEL 514 (1898).

³¹⁰ *Brownson v. Smith*, 93 Tex. 614, 57 S.W. 570 (1900); ch. 42, § 1, [1901] Tex. Laws, 11 GAMMEL 66 (1898), as a general law was made applicable to all independent school districts theretofore created by special act.

³¹¹ TEX. REV. CIV. STAT. ANN. art. 709a (1964).

³¹² 135 Tex. 319, 332, 143 S.W.2d 1028, 1035 (1940).

to rely upon certificates executed by officials of the issuer.³¹³ A mandamus will not issue against the Attorney General to require him to approve bonds when the issuance of the bonds would cause the issuer to exceed its debt limit,³¹⁴ but, by the same token, the Attorney General must take into consideration all sources of revenue of the issuer in determining its ability to pay obligations.³¹⁵

Should it be felt the refusal of the Attorney General to approve bonds sought to be issued is not justified by law, a mandamus action may be brought in the supreme court as an original proceeding. Of course, the normal procedures in mandamus actions apply—the refusal of the Attorney General must be based upon a question of law so that the “misinterpretation” when corrected leaves only the ministerial duty to perform.³¹⁶ No fact questions may be presented,³¹⁷ the duty to perform must be ministerial,³¹⁸ and there must be no adequate remedy at law.³¹⁹

When the Attorney General has the duty to approve bonds, the validity of a bond issue may not be brought into question prior to the submission of the proceedings to the Attorney General for such approval, the suit being premature.³²⁰ Neither can an action be brought on the basis that the obligations sought to be issued are void or voidable. If they are in fact void, there can be no injury; if voidable, it is assumed the Attorney General will perform his duty

³¹³ *City of Tyler v. Tyler Bldg. & Loan Ass'n*, 99 Tex. 6, 86 S.W. 750 (1905); *City of Belton v. Harris Trust & Sav.*, 273 S.W. 914 (Tex. Civ. App.—Austin 1925), *aff'd*, 283 S.W. 164 (Tex. Comm'n App. 1926), *judgment adopted*.

³¹⁴ *City of Athens v. Moody*, 115 Tex. 247, 280 S.W. 514 (1926).

³¹⁵ *City of Houston v. McCraw*, 131 Tex. 127, 113 S.W.2d 1215 (1938); *City of Laredo v. Frishmuth*, 196 S.W. 190 (Tex. Civ. App.—San Antonio 1917), *error dismissed* (rents, fines, forfeitures, and sale of land in addition to ad valorem tax levies). *See also* notes 87-105 *supra*, and accompanying text.

³¹⁶ Where an action (in district court) was filed to restrain the issuance of bonds, and another action was sought to be filed (in the supreme court) to require the Attorney General to approve the bonds, the supreme court (without written opinion) denied the motion for leave to file the mandamus action. *Webb County v. Shepperd*, Civil No. A-5324 (Tex., June 22, 1955). In *Trinity River Auth. v. Carr*, 386 S.W.2d 790 (Tex. 1965), the court was impliedly critical of the Attorney General for not raising the same question as to jurisdiction of the supreme court to hear a mandamus action. If the validity of the bonds is under attack in a court action, it would seem no mandamus action would lie (another court having jurisdiction). *Denison v. Sheppard*, 122 Tex. 445, 60 S.W.2d 1031 (1933); *Buven v. Robison*, 117 Tex. 541, 8 S.W.2d 664 (1928); *Matthaei v. Clark*, 110 Tex. 114, 216 S.W. 856 (1919); *State ex rel. Johnson v. Morris*, 86 Tex. 226, 24 S.W. 393 (1893). But repetitive law suits, raising essentially the same points, for the primary purpose of delaying improvements or the issuance of bonds have been recognized as an increasing problem by the Municipal Law Section of the American Bar Association. 6 MUNICIPAL LAW SERVICE LETTER, No. 6, at 4-6 (1956). The validation provisions of article 717m provide a measure of relief, shifting the burden of proof to the issuer. The writ of prohibition may be useful under some circumstances. *Nacogdoches County v. Marshall*, 469 S.W.2d 633 (Tex. Civ. App.—Tyler 1971).

³¹⁷ *City of McAllen v. Daniel*, 147 Tex. 62, 211 S.W.2d 944 (1948); *City of Galveston v. Mann*, 135 Tex. 319, 143 S.W.2d 1028 (1940); *Holcomb v. Robinson*, 118 Tex. 395, 15 S.W.2d 1027 (1929); *Wooten v. Rogan*, 96 Tex. 434, 73 S.W. 799 (1903); *Teat v. McGaughey*, 85 Tex. 478, 22 S.W. 302 (1893).

³¹⁸ *Common School Dist. No. 16 v. Keeling*, 113 Tex. 523, 261 S.W. 364 (1924); *Arberry v. Beavers*, 6 Tex. 457, 463 (1851) (the exercise of discretion may be compelled, but not controlled). *See also* *Commissioner of General Land Office v. Smith*, 5 Tex. 471, 479 (1849).

³¹⁹ *Buven v. Robison*, 117 Tex. 541, 8 S.W.2d 664 (1928); *International Water Co. v. City of El Paso*, 51 Tex. Civ. App. 321, 112 S.W. 816 (1908), *error ref.*

³²⁰ *Miller v. Snelson*, 126 S.W.2d 504 (Tex. Civ. App.—El Paso), *aff'd*, 133 Tex. 364, 129 S.W.2d 288 (1939); *Davis v. City of San Antonio*, 135 S.W.2d 306 (Tex. Civ. App.—San Antonio 1939), *error ref.*; *Johnson v. Town of Refugio*, 56 S.W.2d 674 (Tex. Civ. App.—San Antonio 1932).

and refuse to approve the bonds.³²¹ There is always the question of whether the plaintiff has the requisite justiciable interest to institute the action.³²²

With respect to bonds issued by cities and counties, it is well to examine the provisions of the basic statutes wherein the Attorney General has a duty to examine the bonds and authorizing proceedings, and the effect of his approval. Article 4398 provides:

He shall carefully examine all county and municipal bonds sent to him as provided by Article 709, in connection with the facts and the Constitution and laws on the subject of the execution of such bonds, and if, as the result of such examination, he shall find that such bonds were issued in conformity with the Constitution and laws, and that they are valid and binding obligations upon the county, city, or town, by which they are executed, he shall so officially certify.³²³

Illustrative of the general laws³²⁴ that require or permit bonds of cities or counties to be submitted to the Attorney General for approval are:

Statute

Application

Article 709 (mandatory)—tax obligations of county, city, or town

Article 709a (permissive)—improvement district bonds of home-rule city

Article 752i (mandatory)—road bonds issued by county under article III, section 52 of constitution (reference statute)

Articles 1111a, 1111b (mandatory)—city utility system revenue bonds for improvements and extensions as additional bonds or refunding (reference statute)

Article 1114 (permissive)—revenue bonds for utility system purpose

Article 717k-3 (mandatory)—refunding bonds—(cumulative law)

Article 715³²⁵ provides that when bonds have been approved by the Attorney General and registered by the Comptroller of Public Accounts the bonds shall be "prima facie valid and binding obligations"—the opinion of the Attorney General being made "evidence of" the validity of the bond. The statute then continues: "The only defense which can be offered against the validity of such bonds shall be forgery or fraud. This Article shall not be construed to give validity to any such bonds as may be issued in excess of the

³²¹ In addition to the cases in the preceding note, see *Killam v. Webb County*, 270 S.W.2d 628 (Tex. Civ. App.—San Antonio 1954), *error ref. n.r.e.*; *Texsan Service Co. v. City of Nixon*, 158 S.W.2d 88 (Tex. Civ. App.—San Antonio 1941), *error ref.*; *Womack v. City of West University Place*, 32 S.W.2d 930 (Tex. Civ. App.—Beaumont 1930); *Smith v. Reaves*, 208 S.W. 545 (Tex. Civ. App.—Texarkana 1919).

³²² *Polly v. Hopkins*, 74 Tex. 145, 11 S.W. 1084 (1889) (the taxpayer is not the guardian of the good name of a city or county, nor is it his obligation to determine what is or is not needed, or whether a contract is advantageous or improvident); see the cases collected in *Powell v. City of Baird*, 132 S.W.2d 464 (Tex. Civ. App.—Eastland 1939).

³²³ TEX. REV. CIV. STAT. ANN. art. 4398 (1966).

³²⁴ Each time it is legislatively determined that specific authority should be given for the authorization of bonds for a particular purpose, new provisions are added governing the approval of bonds by the Attorney General. There is little uniformity. As an example, the statutes in chapter 5 of title 22: Reference is made to arts. 709-715 by six statutes (arts. 802a, 802b-1, 802b-2, 802b-5, 802c, 802d). While in two others, provision is made for approval of the bonds, and they are then "valid and binding obligations" (arts. 802b-4, 802h).

³²⁵ TEX. REV. CIV. STAT. ANN. art. 715 (1964).

limit fixed by the Constitution, or contrary to its provisions."³²⁶ Suit can be brought to declare bonds invalid only upon the grounds specified,³²⁷ and the holders of the bonds are necessary parties.³²⁸ Bonds may not be collaterally attacked,³²⁹ nor may payment of bonds be avoided on the grounds that the bond proceeds were never received³³⁰ or that they were illegally expended.³³¹

V. CONCLUSION

Even though the financing of cities, towns, and counties has been plagued with antiquated constitutional provisions, it is felt that those limitations were salutary at the time of their adoption. Perhaps the greatest deterrent to orderly financing is the present constitutional limitation upon the rate of taxation, yet this problem can be solved with the politically unpopular procedure of a studied and careful revaluation of property. Rather than such an approach, additional political subdivisions are created to overlap existing units of government and assign them a measure of responsibility. Fragmentation of governmental responsibility—the present trend—is as dangerous as centralization or maintenance of the status quo.

The field of municipal finance has not been static, but has moved with dispatch to meet the needs of the community insofar as permitted by legislative enactment. It does seem the time is approaching when: (1) Counties should be given broader powers of financing akin to that given cities, *i.e.*, the power to issue bonds for county permanent improvements; (2) more precision with respect to the powers of home-rule cities would be helpful; and (3) problems relating to qualifications of voters and questions of "delegation" of taxing power to political subdivisions of the state will be more adequately answered. It is presently fashionable to suggest that a "Code" be prepared, but most legislation in this field is adopted to meet a changed condition or to change a rule

³²⁶ *Id.*

³²⁷ *City of Tyler v. Tyler Bldg. & Loan Ass'n*, 99 Tex. 6, 86 S.W. 750 (1905); *Simpson v. Nacogdoches*, 152 S.W. 858 (Tex. Civ. App.—Galveston 1912), *error dismissed*.

³²⁸ *Lowe v. City of Del Rio*, 132 Tex. 111, 122 S.W.2d 191 (1938); *Barrington v. Cokinos*, 339 S.W.2d 330 (Tex. Civ. App.—Beaumont 1959).

³²⁹ *Yoakum County Water Control & Improvement Dist. No. 2 v. First State Bank*, 449 S.W.2d 775 (Tex. 1969). While this case concerns bonds issued by a water control and improvement district (rather than a city or county), it is one that is most significant. The Attorney General had approved the issuance of bonds on behalf of the water district, and the bonds had been delivered to a purchaser several years before the action was instituted. According to the majority opinion, the proceedings approved by the Attorney General were regular on their face, and the bonds could not then be challenged—there having been a previous failure to question the proceedings in an election contest or utilize other remedies that were available. The court held the attack on the bonds to be collateral when only a direct attack was permitted after the bonds were approved by the Attorney General. The dissenting opinion pointed out testimony to the effect that no election to authorize the issuance of bonds had ever been held as required by art. XVI, § 59 of the constitution, taking the position that no election had authorized the issuance of the bonds and that, therefore, they were void.

In *Dallas Joint Stock Land Bank v. Ellis County Levee Improvement Dist. No. 3*, 55 S.W.2d 227 (Tex. Civ. App.—El Paso 1932), it was contended that the tax levied to pay bonds was confiscatory and in violation of the strictures of due process (valuations decreased after the issuance of bonds), but it was held that the Attorney General would not have approved the bonds if the constitutional limit on indebtedness had been exceeded (citing *Munson v. Looney*, 107 Tex. 263, 172 S.W. 1102 (1915)).

³³⁰ *Road Dist. No. 4 v. Home Bank & Trust Co.*, 5 F.2d 625 (5th Cir. 1925).

³³¹ *Francis v. Howard Co.*, 50 F. 44 (W.D. Tex. 1892), *aff'd*, 54 F. 487 (5th Cir. 1893).

established by a court or Attorney General's opinion; accordingly, codification is not now suggested. The repeal of statutes that are now meaningless, unconstitutional as local and special laws, or are obsolete, although a sizeable undertaking, would be of great benefit.