Conflict of Decisions Between State and Federal Courts in Kentucky, and the Remedy

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CONFLICT OF DECISIONS BETWEEN STATE AND FEDERAL COURTS IN KENTUCKY, AND THE REMEDY.*

In discussing this subject I think it is well to have clearly in mind the well-established rule followed by the Federal Courts in administering the law of the respective States where no Federal question is involved.

Section 721 of the Revised Statutes of the United States (Section 725, Title 28, U. S. C.) provides as follows:

"The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

In construing this statute the Supreme Court of the United States has given it a literal and narrow meaning. The phrase "the laws of the several States," as used in the section referred to, generally speaking, has been interpreted to mean the statute law and the constitutional provisions of the several States, as distinguished from the decisions of the courts of last resort of the States on questions of common law, including in that term general commercial law. On these questions, with the exceptions here to be noted, the Supreme Court has declined to be controlled by the decisions of the courts of last resort of the respective States. The only exceptions are that where the matter involved is of purely local concern—and no satisfactory rule has ever been promulgated by which it may be determined what are matters of purely local concern—or where a settled line of State decisions has served to establish a rule of property, the Federal Courts will follow the settled decisions of the courts of last resort of the respective States. With these exceptions, the

* Address of Judge Chas. I. Dawson, delivered before the State Bar Association at Somerset, Kentucky, April 9, 1931.
Supreme Court has, through a long line of decisions, held that on matters not controlled by State statutes or Constitution, even where no Federal question is involved, the Federal Courts will determine for themselves, independent of State decisions, questions of general commercial law and common law.

Therefore, while the Federal Courts have always acknowledged the propriety of giving respectful consideration to the decisions of the highest court of the State on these questions, the rule announced has inevitably resulted in a constant and unseemly clash between the decisions of the State Courts and the Federal Courts on questions which so universally affect the business relations of men as to bring this conflict to the attention of all intelligent laymen. They have seen the State Courts deciding questions affecting the everyday relations between men one way, and the Federal Courts deciding exactly the same questions in a radically different way. They are not concerned with the reasons for this conflict. They only know it exists, and they can not understand, if the law is the perfection of human reason and if the courts are instrumentalities of administering justice, why it should exist. They can not understand why the law should be one thing in a State Court and something else in the Federal Court. In this day and time, when it is the fashion to belittle the law and its administration in the courts of justice, it should be a matter of vital concern to the members of the profession that the conflict to which I have referred exists, and it should be their task, as far as they can, to lessen the number of these conflicts. Inasmuch as the common law of a State is just what it is declared to be by the court of last resort of that State, and inasmuch as the highest court of a State undoubtedly has the right to conclusively establish for the people of that State the principles of general commercial law, within constitutional limitations, and inasmuch as I have always understood that where no Federal question is involved it is the function of a Federal Court sitting in a State merely to declare the law of that State, I have never been able to satisfy myself of the soundness of the reasoning upon which the Federal Courts base their asserted right to disregard the State decisions in these matters.

In a dissenting opinion in a case which recently went up from the Western District of Kentucky,¹ and which will later be

adverted to, my thought on the unsoundness of this rule is expressed by the Great Dissenter, Mr. Justice Holmes, in language so forceful that I think its repetition here is not out of place. He said:

"The often repeated proposition of this and the lower Courts is that the parties are entitled to an independent judgment on matters of general law. By that phrase is meant matters that are not governed by any law of the United States or by any statute of the State—matters that in States other than Louisiana are governed in most respects by what is called the common law. It is through this phrase that what I think the fallacy comes in. 

Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Court of Appeals, from the State Courts, from England and the Colonies of England indiscriminately, and criticise them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any court concerned. If there were such a transcendent body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. It may be adopted by statute in place of another system previously in force. * * * But a general adoption of it does not prevent the State Courts from refusing to follow the English decisions upon a matter where the local conditions are different. * * * It may be changed by statute, * * *, as is done every day. It may be departed from deliberately by judicial decisions, as with regard to water rights, in States where the common law generally prevails. Louisiana is a living proof that it need not be adopted at all. (I do not know whether under the prevailing doctrine we should regard ourselves as authorities upon the general law of Louisiana superior to those trained in the system.) Whether and how far and in what sense a rule shall be adopted whether called common law or Kentucky law is for the State alone to decide.

If within the limits of the Constitution a State should declare one of the disputed rules of general law by statute there would be no doubt of the duty of all Courts to bow, whatever their private opinions might be. * * * I see no reason why it should have less effect when it speaks by its other voice. * * * If a State constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain. But when the constitution of a State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words, so far as it is not interfered with by the superior power of the United States. The Supreme Court of a State does something more than make a scientific inquiry into a fact outside of and independent of it. It says, with an authority that no one denies, except when a citizen of another State
is able to invoke an exceptional jurisdiction, that thus the law is and shall be. Whether it be said to make or to declare the law, it deals with the law of the State with equal authority however its function may be described."

That case was not the first one in which Mr. Justice Holmes expressed his disapproval of the prevailing rule, but, despite his repeated dissent, which, in the case referred to, was concurred in by two of his associates, the rule has been so firmly established and so often reaffirmed by the Supreme Court that it can not be reasonably anticipated that it will ever be changed. Therefore, a modification of this rule is not a means which we may look forward to as an aid to the elimination of the conflicts under consideration.

It does not necessarily follow, however, that the situation is entirely beyond control. The most glaring instances of conflict are in that field of human relations subject to the police power of the State, or the power of the State to declare its public policy in relation thereto, and when I have pointed out some of the most glaring conflicts in this field, I think the method of bringing the State and Federal Courts into harmony on these matters will be readily apparent.

Probably the conflict between the rule in the Federal Court and the one prevailing in the State Court which most readily comes to the mind of the general practitioner has to do with the common law doctrine of fellow servant. The doctrine that the master is not responsible for injuries sustained by one of his employees through the negligence of another of his employees, of course, finds its origin in the common law and grew out of a state of society when industrial relations were much simpler than they are under modern conditions. The Kentucky Court of Appeals at an early date refused, and wisely refused, to apply this doctrine in all of its original harshness, but adopted in its stead a modification of that doctrine, which came to be known as the "association theory." Under this rule an employee is not denied a recovery against his master for the negligence of a fellow servant, unless such fellow servant is so nearly associated with the injured person as that he has an opportunity to observe the manner in which his fellow servant does his work and to protect himself against his negligence. This departure of the Court of Appeals of Kentucky from the common law as it originally stood is a striking example of the contention of Mr. Justice
Holmes that the highest court of a State may, for the people of that State, declare what the common law of that State is.

Notwithstanding this settled application of the fellow servant doctrine in Kentucky, the Federal Courts, under the rule that they will determine for themselves what the common law of the State is, and bound, as they are, by the opinions of the Supreme Court of the United States as to the proper application of the fellow-servant doctrine, have consistently refused to apply the State rule on that subject. To those of you who are familiar with the State rule, the conflict is readily apparent when we learn that the Federal Courts hold that a railroad engineer and a section hand; an engineer on one train and the conductor on another train on the same road; a brakeman on a regular train and the conductor on a wild train; a brakeman working on a switch in the railroad yard and the engineer of another train; the fireman on a train and a bridge crew working on a bridge; a foreman in charge of a mine crew and a member of the crew;—are at common law fellow servants, for whose negligence the master is not responsible. As the result of this wide difference in the application of the fellow servant doctrine, it is but natural that every master sued in a State Court by an employee for personal injuries resulting from the negligence of another employee seeks to remove the action to the Federal Court, if, perchance, any ground of Federal jurisdiction can be found; and to avoid such removal it has grown to be the common practice for the plaintiff to join a resident defendant, however unstable his claim of liability against the resident defendant may be.

Our Workmen’s Compensation Law, the Federal Employers’ Liability Act, and similar legislation have greatly reduced the number of cases in which this particular question is of importance; but it is still important enough for the lawyers of the State to be interested in bringing about uniformity of decision on it. The rule, as announced by the Kentucky Court of Appeals, has been the rule for many years. Legislatures have come and gone, presumably with knowledge of the rule as laid down by the Court of Appeals of Kentucky, and it is fair to assume that that rule has the sanction of the legislative department. The matter is one clearly within legislative control. The Supreme Court itself has declared that the States of the Nation have the right, by legislative enactment, to declare the extent to which the
master may be made to respond for injuries to a servant in his employ resulting from the negligence of another servant, and that when such statutory rule has been enacted the Federal Courts must respect it. So all that is necessary to wipe out this unfair and unseemly conflict on this important question is for the Legislature to give statutory sanction to the rule laid down by the Court of Appeals of Kentucky, or to such modification of that rule as in its judgment may seem wise.

Another important conflict is on the right of a railroad company in this State to grant to one person or corporation the exclusive right to solicit taxicab and transfer business on its depot grounds. The Federal rule was first laid down in the case of Donovan v. Pennsylvania Co. In that case the court held that while a common carrier could not use its property in such a way as to discriminate between members of the public in the performance of its duties as a common carrier, yet, subject to that exception, it held its property as did any other private individual, and without violating public policy could grant to a cabman or transfer company the exclusive right to solicit business in its depot and on its depot grounds. That doctrine has been recently reaffirmed in the case of Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab Co., supra, in which case Mr. Justice Holmes wrote the dissent heretofore quoted from. That case originated in the District Court for the Western District of Kentucky. It fell to my lot to try it in the lower court, and while the reasoning in the case of Donovan v. Pennsylvania Company did not appear to me altogether satisfactory, I, of course, felt constrained to, and did follow it. In that case the court found that the matter was controlled by neither constitutional nor statutory provision in Kentucky, and, being a matter of general law, the Federal Court was not bound by the State rule laid down by the Court of Appeals in the case of McConnell v. Pedigo; Palmer Transfer Co. v. Anderson; and recognized in Commonwealth v. Louisville Transfer Co., that such a contract is void as against public policy and as tending to create a monopoly. There is no necessity for the conflict on this important question to continue longer.

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2199 U. S. 279 (1905).
Note 1.
92 Ky. 465.
131 Ky. 217.
181 Ky. 305.
It is quite apparent that it is idle to hope that the Federal Courts will adopt the State Court rule, or that the State Courts will adopt the Federal Court rule; but the clear import of the *Black & White Taxicab Company* case is that the control of the matter is one within the competency of the Legislature, and if we had a statute regulating the subject the Federal Courts would respect it. Indeed, it would seem not at all open to question that the matter is one which may be regulated by the General Assembly. It is universally recognized that the business of a common carrier is one so affected with a public interest as to bring it within the regulatory power of the legislative department. Furthermore, under the law of Kentucky, only a corporation may acquire or hold land in Kentucky for railroad purposes, and a foreign corporation so acquiring real estate in Kentucky must necessarily hold it and use it subject, within constitutional limits, to the restrictions imposed by the legislative department, and of course the General Assembly may prescribe the conditions under which a railroad corporation organized under the laws of the State of Kentucky may hold its real estate. So the way is clear, by legislative enactment, to bring about uniformity of decision on this question. If the Legislature is of opinion that the Federal rule is the proper one, it should be carried into statutory enactment; if the State rule is deemed to be the better one, it should be sanctioned by statute. Such a statute would be binding upon both the State and Federal Courts, and if, perchance, there should arise, as is sometimes the case, a disagreement between the Federal Courts and the State Courts as to the construction of the statute, its construction by the Court of Appeals of Kentucky, when made, would be conclusive upon the Federal Courts.

In recent years the attention of lawyers, particularly those who specialize in insurance law, has been sharply called to the conflict between the rule in the Federal Court and that obtaining in the State Court respecting the right to contract for a shorter period of limitation than that fixed by the general limitation statutes of the State. Inasmuch as the law of contracts is one which is applied innumerable times every day, it is highly important that there should be uniformity of decision on this question. The Federal rule is well established that, in the absence of a State statute to the contrary, the parties have a perfect right to contract for a shorter period of limitation than
that fixed by the general limitation statutes. This question was
squarely presented and fully reasoned out in the case of Riddles-
barger v. Hartford Insurance Co., and it has been the settled
Federal rule ever since. The Federal rule is sustained by the
overwhelming weight of authority in this country, and in Ken-
tucky when the question first arose our Court of Appeals
adopted the same rule. In the case of Owen v. Howard Insur-
ance Co., decided in 1888, the court accepted without question
the soundness of the Federal rule, although the validity of the
limitation provision in the contract seems not to have been
brought into question. The subject was again adverted to in
1890 by the court in the case of Mutual Security Co. v. Turner,
and the court in that case makes the express declaration that
such contracts are valid. In the case of Lee v. Union Central
Life Insurance Co., decided in 1900, the validity of such pro-
visions was directly in issue, and the court decided in favor of
their validity, citing in support thereof the Riddlesbarger case
from the Supreme Court. In 1904, however, in the case of
Union Central Life Insurance Co. v. Spinks, the question again
arose, and the court, after reviewing the authorities, overruled
its former decisions on the subject, departed from the majority
rule, and took its position on the side of the minority, holding
that such contracts are void and against the public policy of
the State, as expressed in the general limitation statutes. It
seems to me that our court, in taking this position, not only
went against the overwhelming weight of authority on the sub-
ject, but against sound reason as well. I submit that no good
reason can be given why, as respects their property rights, when
parties are dealing at arm's length, they may not contract for a
shorter period of limitation than that fixed in the general limita-
tion statutes. It is now settled law that as to their property
rights citizens may waive, not only statutory but constitutional
provisions, designed for their protection, and courts are con-
stantly extending the doctrine in its application to statutes and
constitutional provisions, designed to secure the rights of citizens
in criminal proceedings as well. Any one at all familiar with

1 7 Wall. 386.
2 87 Ky. 571.
3 89 Ky. 665.
5 119 Ky. 261.
the insurance business can appreciate the vital importance to
the insurer of the prompt presentment and liquidation of claims
on insurance policies. The facts as to a claim can best be ascertainment when the matter is fresh in the minds of the witnesses.
Long delay necessarily subjects the insurer to the very great
danger of false and fraudulent claims. Moreover, under the
laws of all the States, including Kentucky, certain reserves must
be set up and maintained by insurance companies during the
continuance of potential liability on their contracts, and this
fact makes it a matter of vital concern to insurance companies
that their liability shall be determined, with reasonable prompt
ness. What is true of insurance contracts is true, probably in a
lesser degree, of other contracts, where their maturity fixes a
money liability on one of the parties. In view of these facts, I
am unable to understand why parties may not contract that
there shall be no liability unless the claim is asserted within such
a reasonable time as the parties may fix. Personally, I have
hoped that the Court of Appeals might be induced to recede
from its position on this question and bring its decisions in line
with the great weight of authority, but if it does not do so, I
should like for the Legislature to pass a law, either fixing the
limitation for suits on insurance contracts and other claims of
like character at one or two years, or specifically providing that
the parties to any contract may stipulate as to limitation within
such reasonable limits as the Legislature may fix. I presume no
one will question the power of the General Assembly to do this.
Indeed, the suggestion is specifically made in the Spinks case.
If, however, the Legislature can not be induced to do this, cer
tainly, in the interest of uniformity of decision on such an
important question, it should force the Federal Courts into line
with the State rule, by enacting a law prohibiting parties from
contracting for a shorter period of limitation than that fixed in
the general limitation statutes of the State.

While on the subject of insurance contracts, it might be
well to call attention to another conflict between the State
Courts and the Federal Courts in interpreting their provisions.
A great many fire insurance contracts have written into them
what is known as the "Iron Safe Clause," the provisions of
which are no doubt familiar to all of you. The State Court,
beginning with the case of Phoenix Insurance Co. v. Angel,\textsuperscript{12} and continuing up to the recent case of Springfield Fire & Marine Insurance Co. v. Shapoff,\textsuperscript{13} has consistently held such provisions void and unenforceable, on the ground that they are without consideration and against public policy. It seems to me it must be admitted that the reasoning of the Court of Appeals in this matter is not at all satisfactory, but it is the rule nevertheless. The Federal Courts, on the other hand, have consistently held that such a provision in a policy of fire insurance is perfectly valid, and that if the contract provides that a violation of this provision shall avoid liability, it will be enforced unless there has been a reasonably substantial compliance therewith. The courts of the two jurisdictions have had ample opportunity to harmonize their conflict on this question, and it would seem too much to hope that they will do so at this late day. Insurance, however, is a matter of such general interest that it is now well recognized that contracts in relation thereto are subject to reasonable regulation by the law-making department of the government, and the Legislature should be urged to end the conflict on this question by legislation adopting either the Federal rule or the State rule.

In the past there has also been a wide divergence between the State Court and the Federal Courts on the proper construction of the Proof of Loss clause in insurance policies, but the courts of the two jurisdictions in this State within the past few years have made such strides toward bringing themselves into agreement on this proposition that I think it may be safely said that there is now no substantial difference between them on the effect to be given this clause.

All lawyers, of course, are naturally interested in the question of attorney fees, and it would certainly seem that there should be no conflict between the State and Federal Courts on the right of the parties to contract that the obligor shall pay an attorney’s fee, in event litigation is necessary to enforce his obligation; yet such conflict does exist. The Court of Appeals of Kentucky has consistently held that it will not enforce a provision in a note binding the maker thereof to pay a stipulated attorney’s fee, in event the payee is compelled to sue on the

\textsuperscript{12} 18 Ky. Law Rep. 1034.
\textsuperscript{13} 179 Ky. 804.
CONFlict of Decisions

instrument. We have no statute on the subject, yet our Court of Appeals holds that such a provision in the note will not be enforced, even though the provision is valid under the laws of the State where the note is made or where it is to be paid. The reasons assigned are that it is in the nature of a penalty, tends to oppress the debtor, and encourages litigation, and is therefore against the public policy of this State and will not be enforced. If the holder, however, is a non-resident and the amount exceeds three thousand dollars, he can go into the Federal Court in Kentucky and enforce the provision as written. Personally, I have no doubt whatever about the soundness of the Federal rule, but the question of which rule is or is not sound is not nearly so important as that there shall not be one rule on this question for the man who must sue in the State Court and a different rule for the one who is fortunate enough to be able to get his cause into the Federal Court. The reasons assigned by our Court of Appeals for holding such provisions void are certainly sufficient to justify legislative regulation of the subject.

The last conflict, or, more accurately speaking, potential conflict, to which I shall refer is one of such vital importance to all of us, not as lawyers but as taxpayers, and to all the people of the State, as in my judgment to call for legislative action promptly upon the convening of the 1932 General Assembly. I refer to the conflict between the two jurisdictions growing out of the county and city debt limitation provisions of our State Constitution. Nothing could be more positive and direct than Section 157 of our Constitution, which prohibits taxing districts of this State from becoming indebted in any manner, for any purpose, in any one year, in an amount exceeding the income and revenues provided for such year, without first submitting the matter to a vote of the people; and Section 158, which fixes the total debt limit which such taxing units are prohibited from exceeding in any event, except in cases of emergency involving public health or safety. Section 157 specifically provides that any indebtedness contracted in violation of its provisions shall not be enforceable by the person with whom made, and that the taxing unit shall never assume the same. It would seem that no stronger prohibition could be written into the fundamental law, yet the Supreme Court, in a long
line of decisions construing similar constitutional provisions, has laid down the rule that where the Constitution limits the indebtedness of a taxing unit, but neither the Constitution nor a statute provides a method for determining the facts as to whether the proposed indebtedness is within the limitation fixed and for making such finding of fact a public record, then a recitation in the note or bond evidencing the indebtedness, to the effect that the constitutional limitation has not been exceeded, when signed by those having the authority to issue such evidence of indebtedness if within the constitutional limitation, is binding upon the taxing unit, and such unit is estopped to plead as a matter of fact that the indebtedness does exceed the constitutional limit. To those of you who are interested, a fairly complete review of the Supreme Court cases may be found in the case of Gunnison County Commissioners v. Rollins.14

Neither the Constitution nor the Statutes of Kentucky provide any method for officially determining the facts as to whether or not a proposed indebtedness will exceed the constitutional limitation and for making that finding of fact a matter of public record. Therefore, the Fiscal Court of a county, under the Federal rule, may borrow money far in excess of the limitation fixed by Section 157 of the Constitution and give the note of the county, signed by the County Judge, as evidence thereof, and if that note, over the signature of the County Judge, contains a recitation that the indebtedness does not exceed the limitation contained in Section 157, such a recitation is binding upon the county, provided the owner is an innocent holder. This rule is a standing invitation for reckless officials to violate the Constitution. The rule has been invoked recently in Kentucky in two cases in the Federal Court, one in the Western District of Kentucky and one in the Eastern District. The case in the Eastern District involved the right of Mercer County to plead the provisions of Section 157 of the Constitution against a $50,000 note executed by the Fiscal Court, which contained a recitation that it did not exceed the constitutional limitation, and the case in the Western District involved the right of Henderson County to make such a defense to a series of notes executed by the Fiscal Court of that county. In my consideration of the Henderson County case, while I found that the Court

14 173 U. S. 255.
of Appeals of Kentucky had repeatedly held that Section 157 of the Constitution means exactly what it says, and that any person advancing credit to the county does so at his peril as to whether or not the transaction exceeds the constitutional limitation, yet, I found no case deciding what effect should be given to recitations of the character referred to. Therefore, with the greatest reluctance I felt compelled to follow the rule laid down by the Supreme Court. Judge Cochran followed the same rule in the Mercer County case and both of these cases were appealed to the Circuit Court of Appeals and there affirmed. The decision of the Sixth Circuit Court of Appeals in each of these cases will be found reported under the captions of Mercer County v. Eyer,\textsuperscript{15} and State Bank of New York v. Henderson County\textsuperscript{16} respectively. In the Henderson County case the Supreme Court denied certiorari. I do not think application was made for certiorari in the Mercer County case.

Personally, I do not think the Federal rule is right. In effect, it permits a group of county or city officials, whose freedom of action it was the intention of the Constitution to curb, tc violate the constitutional provision with impunity by reciting a falsehood in the note or other paper evidencing the illegal indebtedness which they create. It serves to make a statement of a careless or unfaithful officer superior to a plain constitutional provision. As declared by Mr. Justice Miller in a militant dissenting opinion in Humboldt Township v. Long:\textsuperscript{17}

"The simplicity of the device by which this doctrine is upheld as to municipal bonds is worthy the admiration of all who wish to profit by the fraud of municipal officers."

While the conflict at present may be said to be potential, I have no doubt whatever, should the question be there presented, our Court of Appeals would reach a conclusion contrary to the Federal rule. If such a construction is placed upon the constitutional sections referred to by the Court of Appeals, probably the Federal Courts thereafter would be bound by it; but in my judgment the Legislature should not await action by the Court of Appeals. It should act at the first opportunity. It might be argued that inasmuch as the Supreme Court holds that such recitations are valid in spite of constitutional debt limitations,

\textsuperscript{15} 1 Fed. (2d) 609.
\textsuperscript{16} 35 Fed. (2d) 859.
\textsuperscript{17} 92 U. S. 642.
any attempt to regulate the matter by statute would be futile. I have no doubt of the power of the Legislature to nullify the effect of the Federal rule in the future. I think it perfectly competent for the General Assembly to provide that all persons who buy obligations issued by a taxing unit of this State do so at their own peril, as to whether or not constitutional limitations have been exceeded, recitations therein to the contrary notwithstanding, unless the constitutionality of the obligations has been sustained by the Court of Appeals prior to their sale to the public. Indeed, Mr. Justice Harlan, in the case of Gunnison County Commissioners v. Rollins,18 heretofore referred to, expressly held that the Legislature could control the matter. He used this language:

"It is insisted with much earnestness that the principles we have announced render it impossible for a State by a constitutional provision to guard against excessive municipal indebtedness. By no means. If a state constitution, in fixing a limit for indebtedness of that character, should prescribe a definite rule or test for determining whether that limit has already been exceeded or is being exceeded by any particular issue of bonds, all who purchase such bonds would do so subject to that rule or test, whatever might be the hardship in the case of those who purchased them in the open market in good faith. Indeed, it is entirely competent for a State to provide by statute that all obligations in whatever form executed by a municipality existing under its laws, shall be subject to any defense that would be allowed in cases of non-negotiable instruments. But for reasons that every one understands no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

I see no occasion to feel any concern over the suggestion made by Mr. Justice Harlan that a statute which subjected municipal obligations to the plea that they exceeded the constitutional limit, recitations to the contrary notwithstanding, would make it impossible for municipalities to obtain credit. We all know that when a county or a city desires to sell notes or bonds, it is the common practice, before they are offered to the public, to bring a suit to test their validity both under the statute and under the Constitution. If we had a statute providing that only in event of such a test could a municipality be deprived of the defense that the indebtedness exceeds constitutional limitations, the flagrant violation of Section 157 of the Constitution which is now being indulged in by some of the counties of the State under the protection of the Federal rule would be speedily

18 Supra, note 14.
ended, and the salability of the obligations would in no wise be lessened.

Possibly other conflicts exist which it might be desirable to eliminate, and which could be presented in the future by the method here suggested, but this paper is already too long for me to further trespass upon your time and patience.

If what I have said should result in so sharply challenging the attention of the Bar of the State as to set in motion some plan to correct the deplorable situation I have discussed in this paper, I shall feel amply repaid for the labor involved in its preparation.

CHARLES I. DAWSON.