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him to take charge of his son's earnings, as well as handle his own money. He was overbearing, tyranical and miserly.

It seems to us, however, that the character of the father and husband has but little to do with the issue in this case.

Here was a father with two sons, and possessed of an estate of $100,000, having already given one of his sons $20,000, that proposes to give and does give to the other son as much by investing the same amount in land for him. Is this unreasonable and a fraud on the marital rights of the wife? Reverse the picture of their married life and make all sunshine and happiness in their country home, and see the father give to the son this money, retaining in his possession a large landed estate without encumbrance, worth at least $80,000, with stock on his place sufficient to make the farm profitable, or, if not, with money ample to purchase it, and would it be said that this was an unreasonable allowance or gift and in fraud of the rights of the appellee?

We have no evidence of any wrongful purpose on the part of the husband in giving to the son except such as may be implied from his intense hatred of his wife, and this will not authorize the chancellor to take from his son what was a reasonable, just and proper gift. The consideration of love and affection upholds the transaction, and, while the legal duty of the father to provide for the son may not exist, the gift was in discharge of a natural and parental obligation that no chancellor would disturb. If his father held the writing of the appellee to reconvey this property, there might and would be something in appellant's claim, but here the deeds are absolute and constitute a reasonable settlement. The wife is left with over 300 acres of land, allotted to her as dower, and one-third of the personalty, although it has originated from rents, her third being $5,000 or $6,000, and while she may have the right to preserve the property of the husband to indemnify her for a life of bondage, oppression and cruelty that she submitted to for years, a court of equity will not sever the ties that bound the father and son in adjudging that he had no right to make such gifts, by reason of the misery and ruin he brought to the domestic circle.

In the case of Radfield v. Radfield, 78 Ill., 16, relied on by counsel, the husband retained the right to control the property, and could rescind the will at his pleasure; the title, in fact, was in him. Not so here. While the father collected the rents, the title was absolute in his son, and if the deeds had passed the title to a remainder interest, the father holding for life, they could have been upheld.

In Mannikee's Adm'x v. Beard, 8 Ky. Law Rep., 736, the husband gave to his children the whole of his estate, including money, choses in action, etc., and it was held to be a fraud on the wife.

In this case an ample estate is left the wife, and the gift to the son must be sustained.

Judgment affirmed.

BEARD, &c. v. CITY OF HOPKINSVILLE, &c.

(Filed January 23, 1894.)

1. Section 158 of the Constitution, limiting the amount of indebtedness municipal corporations are authorized or permitted to incur, became operative immediately upon the adoption of the Constitution, and before the cities were actually classified by an act of the legislature.

After the adoption of the Constitution, and before it was by act of the legislature assigned to cities of the fourth class, the city of Hopkinsville,

which had more than 3,000 and less than 8,000 inhabitants, could not increase its indebtedness beyond 5 per centum of the value of the taxable property therein.

2. Same—A contract by the city to pay annually for a number of years a certain sum for water works, where the aggregate sum to be so paid exceeds the maximum sum for which the city is authorized by section 158 of the Constitution to "incur indebtedness," is unconstitutional and void, although the certain sum that becomes due each year can be paid by the city by a tax levy not exceeding 75 cents on the $100, which tax rate the city is authorized to impose.

J. I. Landes, Petree & Downer, C. H. Bush, Joe McCarroll, E. P. Campbell and J. T. Hanbery for appellants.

Wood & Bell and James Breathitt for appellees.

Appeal from Christan Circuit Court.

Opinion of the court by Judge Hazelrigg.

On June 13, 1892, the appellee, through its board of councilmen, entered into a contract with its co-appellee, John P. Martin, by the terms of which the latter agreed to construct and maintain in and near the city a system of waterworks and sewerage, and also an electric light plant.

For the use of seventy hydrants for five years and of thirty-five arc lights for the same period, the city agreed to pay Martin as rents the sum of $5,500 per year. At the expiration of the five years the contract for water rental was to continue fifteen years longer at $4,500 per year, the city having an option to renew the contract for lights at $1,000 per annum.

The city contained a population of more than 3,000 and less than 8,000, and, therefore, would be a city of the fourth class whenever the assignment and classification should be made of the cities and towns of the State as required by the Constitution. This assignment or classification had not been made at the date of the contract or institution of this action.

The indebtedness of the city was something like $125,000, due mainly in five-thirty bonds to the Ohio Valley Railway Company. The value of the taxable property for 1891 was $1,546,380. It is shown that with a tax rate of 75 cents on the $100, together with the usual collections from other fixed sources, the city could pay its annual current expenses of all kinds and also the additional water and light rental proposed in the contract and still have an annual surplus of several thousand dollars.

Immediately after this contract was made the appellants, who are citizens and taxpayers of the city, instituted this action to have the contract declared void, contending that the city of Hopkinsville, or its board of councilmen, had no constitutional power to make the contract, because it bound the city to pay an indebtedness shown to be in excess of the limitations imposed on the city and its authorities by the Constitution. There were other contentions which are not necessary to notice.

The chancellor determined all the points made against the plaintiffs below, uphed the contract and dismissed the petition. This appeal involves the correctness of that judgment.

The constitutional provision supposed to affect the question involved is as follows:

Section 158. The respective cities, towns, counties, taxing districts and municipalities shall not be authorized or permitted to

incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding the following named maximum percentages on the value of the taxable property therein, to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness, viz, * * cities and towns of the fourth class, 5 per centum, * * * provided any city, town, etc., may contract an indebtedness in excess of such limitations when the same has been authorized under laws in force prior to the adoption of this Constitution, or when necessary for the completion of and payment for a public improvement undertaken and not completed and paid for at the time of the adoption of this Constitution. * * *

"Section 166. All acts of incorporation of cities and towns heretofore granted, and all amendments thereto except as provided in section 167, shall continue in force under this Constitution, and all city and police courts established in any city or town shall remain, with their present powers and jurisdictions, until such time as the general assembly shall provide, by general laws, for the government of towns and cities and the officers and courts thereof, but not longer than four years from and after the first day of January, 1891, within which time the General Assembly shall provide, by general laws, for the government of towns and cities and the officers and courts thereof as provided in this Constitution."

By their contention the appellants mean that the indebtedness of the city at the time of the contract was in excess of 5 per centum on its taxable property, which is the limit prescribed by the 158th section of the Constitution for cities of the fourth class, and Hopkinsville is alleged to be a city of the fourth class by reason of its population being 3,000 or more, and less than 8,000. In order to apply the limit of 5 per centum, counsel for the appellants plead as a fact that the population of the city was such as required its assignment and classification among cities of the fourth class. It is not contended, as we understand the argument, that the actual assignment—the new form of classification—directed by the Constitution to be made by the general assembly, can be made by the courts, but that it was the evident intention of the framers of the Constitution to have the wholesome limitations provided for in the section to apply instantly upon its adoption; that the assignment or classification was a mere form and its delay should not entitle the cities desiring to do so to overreach the plain provisions of the Constitution and deliberately incur an unauthorized indebtedness. Notwithstanding the fact that some difficulty may seemingly arise in ascertaining what maximum percentage on the value of the taxable property in a given city is to be applied in determining what limitation on its indebtedness shall control in the absence of the classification, yet we are constrained to the conclusion that not to apply the section as one affecting and controlling the cities of the Commonwealth, immediately upon the adoption of the Constitution, would be in clear defiance of the determined will of the body framing the instrument.

No one idea stands out more clearly than that barriers should be erected against the creation of municipal indebtedness. In times of popular excitement the internal improvement craze had wellnigh wrecked many of the most flourishing counties and towns of the hitherto staid and conservative Commonwealth. To seek excuses for withholding the application of these conservative restraints thus wisely devised by this body of enlightened men, and delay the beneficient results intended, merely because a formal assignment of a given city had not been made to its appropriate class, would be giving prominence to the shadow and

losing sight of the substance. Moreover, it will be observed that the percentages are not fixed wholly with reference to the classes to which the cities may belong, but the per centum fixed for some of the cities is made to depend on their population, and recourse must, therefore, be had in such case to the ordinary methods of proof to ascertain the percentum applicable.

In discussing a similar question it was said, in Law v. The People, 87 Ill.,385, "it has been repeatedly held, and is regarded as settled doctrine, that all negative or prohibitive clauses of this character found in a constitution execute themselves as legislative provisions in the same or other language, prohibiting the incurring of such indebtedness, could be no more binding or forcible than the Constitution itself."

In the case of Holtzhauer v. City of Newport, 15 Ky. Law Rep., 188, it was contended that because the indebtedness of the city at the time of the adoption of the present Constitution, and at the time the contracts in question were entered into, was in excess of 10 per centum on the valuation of her taxable property during that time; therefore, the prohibitory provisions of section 158 were applicable, and we said of this contention: "It may be admitted that, to the extent that this section provides for a state of case in existence at the time of the adoption of the Constitution, it is applicable to all towns and cities resting under the conditions named. But in express terms the limitation of 10 per centum may be exceeded when the porposed indebtedness 'has been authorized under laws in force prior to the adoption of this Constitution.'"

This section was, therefore, treated as in full force upon the adoption of the Constitution, and as applicable to the cities and towns resting under the conditions named. The contract for the increased indebtedness of the city (Newport) was upheld upon the ground that it was contracted "under laws in force prior to the adoption of the Constitution," those laws being in the form of amendments to the charter of the city, approved in 1890, authorizing the issual of bonds for specific purposes, to be paid by taxes levied within certain specified tax districts, created by the acts in question. These amendments to the organic law of the city were held to be continued in force in express terms under the provisions of section 166 of the Constitution.

Construing the section (158) as operative immediately upon the adoption of the Constitution, the question is, does the contract under consideration "authorize an indebtedness" on the part of the city of Hopkinsville "to an amount, including existing indebtedness, in the aggregate exceeding" 5 per centum on the taxable property of the city? The question is wholly new to the law of our State, but the Constitutions of a number of the other States contain provisions similar to the one under consideration, and the answers given by the various courts to the question indicated are by no means harmonious. It is to be remembered that the annual rentals are to be met out of the annual revenues without any increase of the tax rate of 75 cents on the $100 of taxable property, and that, as the contractor, Martin, furnishes the water and light and thus earns the money, he is paid therefor. The appellees, therefore, contend that the liability is thus extinguished as soon as it comes into existence. They contend that "when liabilities are created and appropriations are made which are within the limits of the revenue accruing to meet them, they are not debts within the meaning of the prohibition of the Constitution." The cases relied on by them sustain their contention that revenues may be disposed of in advance of

their receipt, hypothecated, as it were, as if already in the treasury, and when such an appropriation will meet and discharge the obligation, which is but a contingent one, no indebtedness is created in the meaning of the Constitution. We suppose, however, that if the words used in the Constitution are to be given their usual and commonly accepted meaning by the contract in question, the city does "incur an indebtedness" in the sense these terms are used in the Constitution, and that this indebtedness is in excess of the limitation imposed is apparent.

Turning to some of the decisions in States with Constitutional provisions similar to ours, we find the Illinois Supreme Court, in City of Springfield v. Edwards, 84 Ill., 626, thus discussing the question: "It is provided by section 12, article 9, of the present Constitution, that 'no county, city, township, school district or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggreagte exceeding 5 per centum on the value of the taxable property therein, to be ascertained by the last assessment,' etc. * * * The prohibition is against becoming indebtedness—that is, voluntarily incurring a legal liability to pay in any manner or for any purpose when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise and there is no reason to believe the convention did not intend what the words convey. A debt payable in the future is obviously no less a debt than if payable presently, and a debt payable upon a contingency as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and, therefore, within the prohibition. If a contract or undertaking contemplates in any contingency a liability to pay when the contingency occurs, the liability is absolute—the debt exists—and it differs from a present unqualified promise to pay only in the manner by which the indebtedness was incurred; and since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else."

In Culberston v. City of Fulton, &c., 127 Ill., 30, in discussing a contract for constructing a system of waterworks, to be paid for in the future, the court said: "By entering into the contract of August 15, 1887, the city 'became indebted.' The obligation entered into by the terms of the contract constituted such an indebtedness as is contemplated by the language of the Constitution. It can not be said that the indebtedness did not come into being until the work was completed and accepted by the city. The city bound itself to pay for the work when it should be completed, and could be compelled to do so if the work should be done according to contract;" and the case of the City of Springfield v. Edwards, supra, is referred to and approved. To the same effect are the cases in the same suit of Law v. People, 87 Ill., 385; Prince v. City of Quincy, 105, Ill., 138.

In the case of Sackett v. City of New Albany, 88 Ind., 473, it was held that where the Constitution forbids a municipal corporation ever to become indebted beyond a certain amount, that sum may not be exceeded even for necessary expenses.

The contract was for the erection of fire alarm strikers and signal boxes, at the price of $3,325, when the limit imposed by the Constitution had already been exceeded. The language of the Constitution was similar to ours, and the court, by Chief Justice Niblack, after reviewing the decisions of the courts of Illinois and Iowa, said: "By 'indebtedness,' in this connection,

we mean an agreement of some kind by the city to pay money when no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement. It was obviously the intention of the legislature in submitting, and of the people in adopting, the thirteenth article of the Constitution, to arbitrarily restrict the power of municipal corporations to contract debts to a limited per centum of the taxable property, and to require, when that limit of indebtedness has been reached, that such corporation shall be prepared to pay whatever of value they may obtain without the incurrence of any further indebtedness for any purpose whatever."

That there are cases in all these States upholding contracts similar to the one now under consideration, must be admitted, and that the two classes of cases are not easily, if at all, reconcilable is evident.

We have adopted the view in accord with the spirit of our Constitution, as we understand it, and as we think also in accord with better reason. Any other doctrine opens the door to all the mischiefs intended to be inhibited by the Constitution.

A fair illustration of the doctrine contended for by the appellees is given in the case of Dively v. City of Cedar Falls, 28 Iowa, 232, relied on by them, where it is held that "if A should undertake to build a courthouse within three years, doing so much and to be paid accordingly each year, the obligation of the contract would arise when executed, but the indebtedness under the Constitution (if there were none other) would be measured by that to be paid each year."

It seems to us that such a construction of the Constitution would render the limitations in question wholly nugatory.

It is needless to notice any other of the alleged reasons urged against upholding the contract, as the views here announced are fatal to its validity.

The judgment is reversed, with instructions to proceed according to the principles announced in this opinion.

SLONE v. GRIDER, &c.

(Filed February 6, 1894—Not to be reported.)

1. Devise—Joint tenants—Partition—A father devised three tracts of land jointly to his children, C. and M. C. mortgaged a tract containing 125 acres as "being fully described in the will of" his father. The mortgage was foreclosed, and the land purchased at the judicial sale by appellee. Subsequently C. acquired by devise from M. 50 acres, which he sold to appellant. In this action by appellee against appellant to recover eight or ten acres embraced by the conveyance of C. to appellant. Held—Since there was never a partition between C. and M., the parties to this suit, who claim under them, have no right of action, the one against the other, to recover any specific part of the land before such partition or division by order of court.

2. A verbal partition between the two joint owners of the land did not pass title from the one to the other because it was within the statute of frauds.

J. E. Hays for appellant.

N. H. W. Aaron and J. B. Stone for appellees.

Appeal from Russell Circuit Court.

Opinion of the court by Judge Lewis.