

Michigan Law Review

Volume 56 | Issue 6

1958

Municipal Corporations - Financial Powers - Power to Expend Public Funds in Aid of Industry

Paul K. Gaston
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Public Law and Legal Theory Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Paul K. Gaston, *Municipal Corporations - Financial Powers - Power to Expend Public Funds in Aid of Industry*, 56 MICH. L. REV. 1029 (1958).

Available at: <https://repository.law.umich.edu/mlr/vol56/iss6/15>

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

MUNICIPAL CORPORATIONS—FINANCIAL POWERS—POWER TO EXPEND PUBLIC FUNDS IN AID OF INDUSTRY—Taxpayers and voters of Frostburg, Maryland, sought to restrain the holding of an election under enabling legislation to obtain authority both to issue municipal bonds and to devote the proceeds to acquiring a site and contributing to the cost of construction of a building for sale to a private manufacturing company. The chancellor issued an injunction against the holding of such election on the ground that the enabling act, in authorizing the use of public funds for private purposes, was unconstitutional. On appeal, *held*, reversed. The location of new industry in furnishing employment and increasing the financial well-

being of the community serves a "public purpose." *City of Frostburg v. Jenkins*, (Md. 1957) 136 A. (2d) 852.

As a general rule, public funds of municipalities cannot properly be devoted to private use. Taxation for such purposes is equally invalid. Since the power to issue bonds, other than revenue bonds, implies the power to satisfy those obligations through taxation, the "public purpose" doctrine places a limitation on the purposes for which bonds may be issued.¹ As originally laid down, this doctrine rested on neither state nor federal constitutional grounds;² but it is now recognized to be embodied in many state constitutions as well as the due process clause of the Fourteenth Amendment.³ Difficulty arises from the fact that the decisions are not uniform in their concepts of "public purpose." The doctrine, as applied to the case of municipal aid to private industry, has been characterized by a gradually expanding definition of public purpose. Originally, public aid to private industry was limited to railroad corporations.⁴ However, early recognition by the Supreme Court that concepts of "public purpose" may be expanded in light of changing economic conditions⁵ set the stage for a far broader application of the doctrine.⁶ In 1938, Mississippi legislation authorizing municipal aid to private manufacturing companies was upheld on the ground that it was pursuant to a plan to balance agriculture with industry which was a public purpose.⁷ Although many cases continue to question the constitutionality of municipal aid to private corporations,⁸

¹ 15 McQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §39.19 (1949).

² *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 147 (1853). See also *Loan Assn. v. Topeka*, 20 Wall. (87 U.S.) 655 (1874).

³ *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896); *Jones v. Portland*, 245 U.S. 217 (1917). See 47 YALE L. J. 1412 (1938); McAllister, "Public Purpose in Taxation," 18 CALIF. L. REV. 137, 241 (1930).

⁴ *Lowell v. Boston*, 111 Mass. 454 at 461 (1873), where the court stated: "The incidental advantage to the public, or to the state, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary." See HILLHOUSE, MUNICIPAL BONDS 143-199 (1936) and note following *Zigler v. Menges*, 121 Ind. 99, 22 N.E. 782, in 16 Am. St. Rep. 365 (1889), for examples of public and private purposes; 14 A.L.R. 1151 (1921).

⁵ *Jones v. Portland*, note 3 *supra* (holding that the use of public funds to maintain a public yard for the sale of wood and coal was for a public purpose).

⁶ *Finan v. Cumberland*, 154 Md. 563 at 565, 141 A. 269 (1928), where the court stated: "What is a public purpose for which public funds may be expended is not a matter of exact definition; it is almost entirely a matter of general acceptance." *Jacksonville v. Oldham*, 112 Fla. 502, 150 S. 619 (1933). See 5 MICH. L. REV. 1383 (1952); *Fernandina v. State*, 143 Fla. 802, 197 S. 454 (1940) (holding that securing employment for 1000 people is a public purpose).

⁷ It was emphasized that unemployment was high, the enabling act provided it was for a public purpose, and the city was to have a measure of control over the corporations. *Albritton v. Winona*, 181 Miss. 75, 178 S. 799, app. dismissed 303 U.S. 627 (1938). See 112 A.L.R. 571 (1938); 12 TULANE L. REV. 645 (1938).

⁸ *Nash v. Town of Tarboro*, 227 N.C. 283, 42 S.E. (2d) 209 (1947); *Azbill v. Lexington Mfg. Co.*, 188 Tenn. 477, 221 S.W. (2d) 522 (1949).

since 1938 broader application of the "public purpose" doctrine has been justified on the basis of legislative determination⁹ or judicial judgment¹⁰ that economic conditions necessitate such aid. In addition, the courts have indicated greater willingness to uphold such aid when the funds used by the city in aid of a private company are received from a bond issue not supported by the general credit of the city.¹¹ The decision in the principal case seemingly gives a more liberal construction to the "public purpose" doctrine than any prior case. The court neither requires a legislative determination that the enabling act was for a public purpose nor discusses any peculiar economic conditions making such aid necessary. In addition, the bonds to be issued are payable out of the general credit of the city. As historically applied, the "public purpose" doctrine has been all but done away with by the Maryland court. But it is today self-evident that industry, in furnishing employment, promotes the growth and increases the financial well-being of a community. It does not seem unreasonable that the Maryland court should take judicial notice of these facts, and declare municipal aid to a private corporation, for the purpose of securing new industry, a "public purpose." In reaching its decision, the Maryland court construed the state constitutional provision¹² prohibiting the use of state credit in aid of an individual, association, or corporation to be inapplicable to cases where the *court* finds such credit is extended for a public purpose.¹³ Constitutional restrictions such as the Maryland provision¹⁴ were enacted to put an end to the use of public credit in aid of private enterprise.¹⁵ Some courts have avoided the impact of the constitutional limitations by holding that such provisions restrict only the states and have no effect on municipi-

⁹ *Faulconer v. Danville*, 313 Ky. 468 at 472, 232 S.W. (2d) 80 (1950), where the court stated: "The legislative determination of what is a public purpose will not be interfered with by the courts unless the judicial mind conceives it to be without reasonable relation to the public interest or welfare and to be without the scope of legitimate government." *Miller v. Police Jury of Wash. Parish*, 226 La. 8, 74 S. (2d) 394 (1954).

¹⁰ *Dyche v. London*, (Ky. 1956) 288 S.W. (2d) 648 at 650, where the court stated that the validity of giving aid to private industry "depends entirely upon the existence of underlying economic conditions which render the project essentially one of a 'public' nature. We think the city must establish with clear and convincing proof that such conditions exist."

¹¹ The most typical situation is where the bond issue is payable solely from the rent of a city purchased building; *Faulconer v. Danville*, note 9 *supra*; *Holly v. Elizabethton*, 193 Tenn. 46, 241 S.W. (2d) 1001 (1951). But see *State v. North Miami*, (Fla. 1952) 59 S. (2d) 779; *State ex rel. Beck v. York*, 164 Neb. 223, 82 N.W. (2d) 269 (1957).

¹² MD. CONST., art 3, §34.

¹³ It is significant that the city adduced no evidence on this point. Compare note 10 *supra*.

¹⁴ See GRAY, LIMITATIONS OF THE TAXING POWER 140-157 (1906).

¹⁵ State and municipal governments had been making such reckless expenditures in aid of private railroad corporations that heavy burdens of debt and taxation had resulted to the people. See HILLHOUSE, MUNICIPAL BONDS 143-199 (1936); *Johns Hopkins University v. Williams*, 199 Md. 382, 86 A. (2d) 892 (1951).

palities.¹⁶ Others have preferred to reason that, since the revenue from municipal bonds loaned in aid of private interests is not the lending of credit, the constitutional restrictions should not apply.¹⁷ Most courts have refused to accept either of these theories, however, but recent cases have shown a tendency to bypass the constitutional restrictions where there is a clear showing by the municipality of a primary public purpose to be served,¹⁸ where the private enterprise to be aided directly serves the public,¹⁹ or where the general credit of the city is not liable for repayment of the money given or loaned.²⁰ In not requiring direct proof of a primary public purpose to be served, the principal case has apparently gone one step farther in defeating the operation of the constitutional provision.

Paul K. Gaston

¹⁶ The court in the principal case indicated that they preferred this view but placed the decision on other grounds. *Pattison v. Board of Supervisors of Yuba County*, 13 Cal. 175 (1859); *contra*, *State ex rel. Beck v. York*, note 11 *supra*.

¹⁷ *Grout v. Kendall*, 195 Iowa 467, 192 N.W. 529 (1923); *contra*, *Jarrolt v. Moberly*, 103 U.S. 580 (1881); *William Deering & Co. v. Peterson*, 75 Minn. 118, 77 N.W. 568 (1898).

¹⁸ *Dyche v. London*, note 10 *supra* (holding that relief to private manufacturing companies to relieve serious unemployment is not a violation of the constitutional restrictions).

¹⁹ *Johns Hopkins University v. Williams*, note 15 *supra* (upholding municipal aid to a private educational institution); *Pipes v. Hilderbrand*, 110 Cal. App. (2d) 645, 243 P. (2d) 123 (1952) (upholding municipal aid to a privately owned air terminal).

²⁰ *Newberry v. Andalusia*, 257 Ala. 49, 57 S. (2d) 629 (1952); *Village of Deming v. Hosdreg Co.*, 62 N.M. 18, 303 P. (2d) 920 (1956); *contra*, *State v. North Miami*, note 11 *supra*; *State ex rel. Beck v. York*, note 11 *supra*.