where the assembly prerogative is itself the most important liberty being protected, the principal case presents as clear-cut an illustration of it standing alone as can be found; but even here it is barely possible that the conversation of the group was a large consideration in the judicial disposition of the case. The *Hague* and *DeJonge* decisions, though ostensibly based solely on the protection of assembly, both involved freedom of speech in quite the same degree. Thus, the greater the importance of the presence of speech or press elements, the greater probably will be the influence imputed to assembly.

Historical analysis of the assembly right shows that the Articles of Confederation contained no provision whatsoever for the exercise of this privilege, while heated debate accompanied its inclusion in the present Constitution.[19] A conflict exists among the authoritative writers as to whether or not this was a right in itself in the English common law.[20] A seeming qualification on the scope of the assembly guaranty, though little has been made of it, is found in both state and national constitutions. "The right of the people peaceably to assemble, and to petition the government for a redress of grievances" is the wording of the final clause in Amendment I of the Federal Constitution, while the Ohio Constitution, by Article I, Section 3, permits assemblage "to consult for the common good; to instruct their Representatives; and to petition the General Assembly for the redress of grievances." The exercise of the assembly right has never been confined specifically to the ends so expressly provided, yet the latitude given the preceding unqualified rights of free speech and press has never been attained. If this be explainable on the basis that assembly is only a necessary prerequisite to the other liberties, then the present decisions add greatly to the importance which may be expected of the assembly guaranty in the future, but do not accord it an independent status. J.J.F.

Constitutional Law — Recent Interpretation of Ohio's Limitation on Indebtedness

Constitutional and statutory limitations on the creation of indebtedness by state and municipality,[1] although generally reflecting in their origin a sound and commendable fiscal policy, have in recent years given

[19] 1 Annals of Cong. 759.

[20] Jarret and Mund, *The Right of Assembly* (1931) 9 N.Y.U.L.Q. Rev. 1.

[1] 6 McQuillin, The Law of Municipal Corporations (2d) ed. 1937) sec. 2364. "There are . . . constitutional . . . statutory . . . and . . . charter provisions. (Some provisions forbid) indebtedness in excess of a certain per cent of the value or assessed value of the taxable property in the municipal area, and (others limit) indebtedness in any one year to the income and revenue provided for such year, and (others contain) both the first and second provisions."

rise to numerous perplexing problems in the financing of the ever-expanding activities of modern government.[2] Under American constitutional theory a limitation such as that imposed upon Ohio municipalities by force of legislative act[3] can be modified through ordinary legislative channels; but far greater obstacles face those who would adjust to the seeming needs of the present-day mandatory restrictions imbedded in a state's fundamental document. Such constitutional debt limitations were the product of nineeenth century American growing pains which perhaps reached their greatest intensity around the midpoint of that 100-year span. Typical, seemingly, was the situation in Ohio, where 1850 found the state already heavily burdened with debt and its tax monies too often going for questionable expenditures at the hands of public officers of limited knowledge and experience.

At Ohio's Constitutional Convention of 1851, these conditions were colorfully portrayed by Henry H. Gregg, delegate from Columbiana County: "The citizens of that part of the state in which I reside are particularly tenacious upon the subject of public debt and taxation. They have been taxed, and re-taxed and over-taxed, year after year, for the benefits of other parts of the State and have never received anything in return. And sir, we ask now, that debt-contracting, loan-laws, and money-squandering may forever be put an end to—that the whole system may be dug up by the roots and no single sprout ever be permitted to ever be hung up around the necks of the people of this state again. Leave no sprout to germinate into 'plunder laws' and taxation—secure the public treasury against all such drains, burdens, wastes, and plundering systems, so that one can at least rest secure in the future, and as if there was a 'good time coming' when our taxes would be lessened, and we finally be relieved of the intolerable debt and taxation which now hangs upon us."[4]

With such sentiments evidently shared by the delegates generally, the Convention came to agreement upon a two-way plan to steer Ohio clear of further experiences with the rocky reefs of unsound fiscal policy. To curtail expenditures of tax monies, and thus indirectly to limit the rising tide of taxation, there were written into Ohio's new Constitution Article XII, Sec. 6, and Article VIII, Secs. 4 and 6, all of which operated to cut off erstwhile state and local spending in aid of internal improvements. But unlike many state constitutions adopted at this time in American political development, the Ohio document of 1851 carried no tax rate limitation; municipal taxing power was made subject to legisla-

[2] See Legis. (1933) 18 Iowa L. Rev. 169.
[3] OHIO G.C. Sec. 2293-14.
[4] 1 Ohio Convention Debates (1851) 469. See also the discussion *id*, at 477.

tive control by Article XIII, Sec. 6, while the state itself was left free. Not until 1929 did Ohio incorporate into her organic act, as a part of Article XII, Sec. 2, a millage limitation applicable alike to the state and its political subdivisions. The Convention's second angle of attack was directed specifically toward the debt "evil." Anticipating more recent proponents of the pay-as-you-go theory, the delegates sought to eliminate any possibility of imposition of unjust tax burdens by one generation upon those to come. The result was Article VIII, Sec. 1 and 3, limiting to $750,000 the aggregate amount of state indebtedness ordinarily possible,[5] although by Article XIII, Sec. 6, determination of the debt limits for municipalities was, as above observed, left to statute.

Constitutional provisions of the general Ohio pattern seemed, at the time of their adoption in the nineteenth century, to constitute a satisfactory solution to a serious situation. But within a comparatively short period the rapid development of the states and the changing conception of the place of government of American society had produced signs of strain between what had been deemed desirable and what increasingly appeared to be necessary. Extended reference to the enlarged activities of state and local governments would be superfluous here; it suffices to touch upon their entrance into social and economic regulation upon the increased cost of manifold forms of institutional service demanded of them, upon their entrance into such fields as utility operation earlier regarded as the province of private enterprise. Those in control of government became ever more acutely aware of the grip of a dilemma from which some form of escape became imperative. With tax rate limitations this lay largely in the restricted application of such limitations, which have always been framed as restrictions solely on ad valorem taxation of property. Resort could be had, consequently, to newer forms of taxation that were free of a specific maximum, although judicial doctrine has found in due process or other concepts vaguer limitations on them. But with debt limitations, any escape short of constitutional amendment was not so readily apparent; solutions here have called for a reappraisal of the purpose and intent which lay behind such provi-

[5] Article VIII, Sec. 1, Ohio Constitution: The state may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the general assembly, or at different periods of time, shall never exceed seven hundred and fifty thousand dollars; and the money, arising from the creation of such debts shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever.

Article VIII, Sec. 2: In addition to the above limited power, the state may contract debts to repel invasion, suppress insurrection, defend the state in war, or to redeem the present outstanding indebtedness of the state . . .

Article VIII, Sec. 3: Except the debts above specified in sections one and two of this article, no debt whatever shall hereafter be created by or on behalf of the state.

sions as Ohio's Article VIII, Secs. 1 and 3. By far the most general escape which has resulted from this reappraisal is to be found in the doctrine that bond issuances to finance self-liquidating projects, the cost to be paid from pledged receipts, do not constitute a violation of the constitutional debt maxima.[6]

These general escape devices have made their appearance in Ohio. Because the tax rate limitation in Ohio was a late comer, methods of restricting its effectiveness as a damper on increasing taxation had long preceded it.[7] Save for the income tax, and even the use of it was incorporated into the proposed Bigelow Amendment of last fall, Ohio has resorted to all the other major forms of enforced contribution to the mounting cost of government, the limitations on which, where existent at all, leave greater leeway than do the provisions of the present Article XII, Sec. 2.[8] And the state has resorted with success to the pledge of receipts plan in the financing of projects of a clearly self-liquidating character.[9] The controlling decision on this latter point is that of *Kasch* v. *Miller*,[10] in which the court sustained a statutory scheme for flood prevention because the money borrowed for construction was to be repaid through the sale or lease of the impounded waters or the power thereby generated. Very recently the Supreme Court of Ohio, in *State Bridge Commission of Ohio* v. *Griffith*,[11] reapproved the *Kasch* decision and sustained the issuance of refunding bonds by the Commission, because there was no obligation on the part of the state to pay these bonds except from bridge revenues. The court's reasoning in the *Kasch* case is revealed in the following passage from the opinion: "An inspection of the act, however, discloses that under no circumstances, and under no possi-

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[6] Fox v. Bicknell, 193 Ind. 537, 141 N.E. 222 (1923); State *ex rel.* Hawkins v. State Examiners, 97 Montana 441, 35 P (2d) 116 (1934); McClain v. Regents of University, 124 Ore. 629, 265 Pac. 412 (1928); Morgan v. Portage, 174 Wis. 588, 184 N.E. 376 (1921); 96 A.L.R. 1385, 72 A.L.R. 687. Another escape device, bottomed on a similar rationale, is the special assessment. For cases on this see: Quill v. Indianapolis, 124 Indiana 292, 23 N.E. 788 (1890); Waller v. Pritchard, 201 Iowa 364, 202 N.W. 770 (1926); State v. Curtis, 319 Mo. 316, 4 S.W. (2d) 467 (1928); Charlotte v. American Trust Co., 159 N.C. 388, 74 S.E. 1054 (1912); 33 A.L.R. 1415.

[7] Indeed the history of the adoption of this form of limitation in 1929 indicates that the provision was designed not to check all taxation as was the case earlier when ad valorem exactions on property were the dominant form of state and local taxation, but to shift the ever increasing burden from property to other tax subjects.

[8] To illustrate, privilege taxation in Ohio, whether by state or city, is subject to the judicially found limitation that the tax cannot exceed the value of the privilege made the subject of the exaction. Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N.E. 564 (1902); Saviers v. Smith, 101 Ohio St. 132, 128 N.E. 269 (1920); Calerdin v. Freiberg, 129 Ohio St. 453, 195 N.E. 854 (1935). But past litigation appears to indicate that this restriction is quite fluid.

[9] Compare the provision of the present Article XVIII, Sec. 12, specifically authorizing municipalities to employ the pledge-of-receipts plan in the financing of public utilities even though the municipality's statutory debt limit has been reached.

[10] 104 Ohio St. 281, 135 N.E. 813 (1922).

[11] 136 Ohio St. 334, 25 N.E. (2d) 847, 16 Ohio Op. 467 (1940).

bility can the state be made to answer for any of the obligations created by the act, by reason of the construction of such improvement. . . . The debt created under the act is not a state debt; the bonds authorized thereunder entail no obligaion upon the state, which it is required legally or morally to assume; the mortgage attached to no state property owned by or purchased with revenues of the state. . . . This act provides that the superintendent of public works shall be the supervising officer under whom the improvements are made. . . . The legislature no doubt considers it to be a wise public policy to place the supervision of the construction of the improvement under control of the state, and that the payments therefore should be disbursed by its own officers."[12]

To follow the court on this proposition requires a parting with not only the current dictionary view[13] of the meaning of debt but good Ohio precedent as well. For in the early case of *State* v. *Medbery*[14] the Ohio court, in condemning as beyond the debt limit a contractual arrangement for canal repair that called for a total state expenditure of $1,375,000, held that "the moment these contracts were executed, they created a present obligation on the part of the state to pay money at a future period."[15] It is judicial legerdemain to declare that, under the facts of the *Kasch* situation, there has been no creation of a state debt. But the two cases can be brought into harmony by considering the source of repayment in each in relation to the situation prompting adoption of the debt maxima of Article VIII. In the early case, the debt was to be repaid out of tax revenues; in the latter, from disposition of water and power for a price. In public finance theory, these two sources of governmental monies are carefully distinguished;[16] it is just as clear that in adopting Article VIII, Secs. 1 and 3, the delegates to the Ohio Constitutional Convention of 1851 were thinking of obligations that must be met through general taxation. Measured by historical purpose as well as by weight of precedent, the *Kasch* court arrived at the proper result, but the basis upon which it predicated this result was tenuous.

Although the *Kasch* exception for self-liquidating projects has been successfully relied upon to make possible state activity in significant areas,[17] there has remained the socially important problem of financing

[12] Kasch v. Miller, *supra*, note 10, at 287-288, 135 N.E. at 814-815.

[13] "A sum of money due by certain and express agreement." Bouvier's Law Dictionary (3d rev. ed. 1914).

[14] 7 Ohio St. 522 (1857).

[15] *Id.* at 536.

[16] SELIGMAN, ESSAYS ON TAXATION (10th ed. 1928) 400.

[17] On the strength of the *Kasch* decision the Attorney General ruled in 1933 that the State of Ohio was in a position constitutionally to take advantage of a forest conservation program sponsored by the federal government, the state to repay the latter from proceeds realized from this work. See (1933) Op. Att'y. Gen. Ohio No. 800.

The recent construction of university dormitories at Ohio State University and elsethe construction, extension and improvement of institutions devoted to the care and treatment of maladjusted groups. Insanity has been on the increase in recent years; care of the epileptic and the feeble-minded for various reasons requires extended facilities. Yet existing institutions are considerably overcrowded and unable to meet the demands of the newer cases. Some of these are housed in private hospitals; the remainder go and come at will, mingling with the normal citizenry, although in desperate need of treatment and confinement.[18] The necessity for some solution cannot be gainsaid, nor can the impossibility of appropriating from the general budget the sums needed for the immediate realization of these types of improvements.

Faced with this seeming impasse, the state's legislators pondered the possibility of applying to these pressing areas of need the theory of the *Kasch* debt limitation escape. With respect to institutions for the feeble-minded, epileptic and tubercular, the analogy seemed to fit perfectly, for by statute the State of Ohio places the cost of care primarily upon family and/or friends and secondarily upon the counties from which these patients come.[19] In the case of the insane, the primary incidence of the cost is the same, but it is the state itself which is secondarily responsible.[20] This possibility of state liability, to be met presumably from tax revenues, except for funds derived from sale of institutional products, becomes primary in the case of those committed for criminal acts; there is no "pay-patients" law for criminals.

With this set-up, the Legislature enacted in 1938, with amendments the year following, the Public Institutional Building Authority Act.[21] The purpose of the act was declared to be "the construction, equipment

where in Ohio, the bonds to be paid off from student charges, is predicated on the *Kasch* doctrine. See OHIO G. C. Sec. 7923-1, as amended by 118 v. S. 39 (1939). Compare Baker v. Carter, 165 Okla. 116, 25 P. (2d) 747) (1933); Fanning v. Univ. of Minnesota, 183 Minn. 222 (1931).

In February of this year the Ohio Supreme Court sustained Ohio legislation authorizing the State Bridge Commission to acquire and operate toll bridges, the cost of acquisition and improvement to be met by revenue bonds. State *ex rel.* State Bridge Comm. v. Griffith, 136 Ohio St. 334, 25 N.E. (2d) 847, 16 Ohio Op. 467 (1940), cited note 11, *supra.*

[18] From an interview at the offices of the Public Institutional Building Authority. The plight of the State is revealed in the emergency clause of the Act which created the Authority. It is declared by OHIO G.C. 2332-11 (3): "This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety. The reason therefor lies in facts which two-thirds of all the members elected to each branch of the general assembly have considered, found and determined and which are as follows: the facilities of many of the benevolent institutions of the state have become so inadequate as seriously affect the ability of the state to care for the inmates of such institutions requiring immediate efforts to remedy the situation, therefore this act shall go into immediate effect."

[19] See OHIO G.C. Sec. 1815-1 to 1815-14, inclusive.

[20] See OHIO G.C. Secs. 1890-46. 1815.

[21] Ohio Laws, 117 v. 886, as amended in 118 v. S. B. 313 (1939).

and improvement of buildings for the use of benevolent, penal and reformatory state institutions."[22] All lands employed were to be state property, the Authority to secure in them a possessory estate for twenty-five years.[23] Construction cost was to be met through bond issues up to $10,000,000 which, while made in the name of the State of Ohio, would be obligations solely of the Authority.[24] Servicing of these bonds was to be effected by the payment to the Authority of specified rentals for the use of the facilities thus afforded particular state departments; these rentals, in turn, were to come from any available departmental income. Sections 2332-4 and 2332-6 carried general provisions to this effect, while Section 2332-3a provided specially for agreements of such tenor to be undertaken between the Department of Public Welfare and the Authority looking to the betterment of hospital facilities for the care of patients and inmates under the department's control.[25] Elaborate provisions were included covering the issuance and nature of the bonds,[26] and the rights and remedies of the bondholders.[27] For the protection of the latter, the act authorized appointment of a trustee on application of holders of twenty-five per centum in principal amount of outstanding bonds; the trustee was empowered to bring all necessary actions required by the creditors' interests, and was declared entitled as of right to the appointment of a receiver who might take over and operate the defaulting properties of the Authority.

Initial efforts under the Institutional Building Authority Act were directed to a $7,500,000 construction program looking to the enlargement and improvement of ten existing state hospitals and institutional buildings devoted to the care of the feeble-minded. All appropriate action was taken by the Authority up to the point of attestation of the bonds by the Secretary of State. To test the constitutional theory underlying the act, this official refused to attest the bonds. The Authority then brought in the Ohio Supreme Court an original action in mandamus. Judge Day dissenting, the state's high court found Sections 2332-3a, 2332-4, and 2332-5 of the act "unconstitutional and void in so far as they authorize the transfer of income producing property of the state to the Authority, the rentals from which are to service the bonds

[22] OHIO G.C. Sec. 2332-2.
[23] OHIO G.C. Sec. 2332-5.
[24] OHIO G.C. Sec. 2332-4.
[25] The language of G.C. § 2332-3a is as follows: "... During the term of any such agreement or agreements for such use occupancy and maintenance the department of public welfare is hereby authorized and required to fix the amount or amounts to be charged for the support of patients and inmates of the hospitals under control of said department of public welfare so as to be sufficient in the aggregate to provide available agreements. . . ."
[26] OHIO G.C. Sec. 2332-7.
[27] OHIO G.C. Sec. 2332-8.

issued by the Authority."[28] The importance of this decision on the meaning and scope of Article VIII, Sec. 1, merits close analysis of the reasoning upon which it is based.

The doctrine of *Kasch* v. *Miller* the court reaffirmed; the difficulty in the present case, declared the majority, lay in the fact that receipts from hospital operation were not unequivocally made the sole source of payment. This was clear both from the agreement between the Authority and bondholders and from that between the Authority and the Department of Public Welfare. It had been made an absolute condition of the latter contract that the Department would pay as rental the fixed sum of $421,500 per year. Such a provision does differ from that employed in the financing of municipal utility plants, where there is a pledge only of operating revenue after deduction of all operating expenses, an amount that fluctuates in accordance with prevailing economic conditions.[29] While this possibility of state financial involvement may well have been sufficient to justify the court in throwing the burden upon the draftsmen of the basic agreement between Department and Authority, there appears to have been slight probability that the state could be compromised. For under the Ohio "pay-patients" law, amounts paid by families and friends in 1938 totaled $35,000 in the case of the feeble-minded, $26,000 for epileptics, and $521,000 in the case of the insane. County payments for support of the first two groups aggregated $578,000.[30] Sources other than the State of Ohio thus amply guaranteed payment of the $421,500 rental charge fixed in the agreement.

The court, however, saw still another possibility by which the state might become involved. Because the private and county payments go direct to the state treasury and are then appropriated out to the Welfare Department, there is present the chance of legislative diversion of these monies. Segregation occurs only with respect to monies in the hands of the Authority.[31] In the *Kasch* situation, on the other hand, the revenues derived from the sale or lease of water and power reached the state treasurer, not as part of the general funds subject to appropriation but as a special deposit known as the water conservation fund. Although a majority of the courts adhere to this distinction, declaring that only where a fund is segregated is an obligation payable therefrom not within

[28] State *ex rel.* Public Institutional Building Authority v. Griffith, 135 Ohio St. 604, 623, 22 N.E. (2d) 200, 208, 14 Ohio Op. 533, 541 (1939).

[29] Alabama State Bridge Corp. v. Smith, 217 Ala. 311, 116 So. 695 (1928), held: "They (referring to the bridge corporation created by the legislature) only pledged the surplus of several funds without any guaranty that there should be such surplus."

[30] Figures secured from the office of counsel for the Institutional Building Authority.

[31] OHIO G.C. Sec. 2332-9.

the debt limitation maxima,[32] actual differences in administration consist solely in the maintenance in the one situation of separate entries. A more fundamental distinction does, however, exist between the utility situation and that before the court in the *Griffith* litigation. With the former, government has truly entered the market place; the arrangements it makes are purely contractual, the exaction paid for the services it renders is technically a price. Care of the mentally sick and incompetent is conducted on another plane; government there is something more than a trade, and payment is a matter of compulsion. In this broader sense there is a degree of state involvement in the *Griffith* fact-pattern not present in that of *Kasch* v. *Miller*, a greater immediacy transcending differences between general and segregated funds.

A judgment intuitive of similar tenor seemingly carried the day with respect to the eventuality of default. The statutory scheme challenged in *Kasch* v. *Miller* gave to bondholders the right of foreclosure and to the purchaser at foreclosure the entire interests of the state for twenty-five years. Yet the court found nothing in that to view with alarm. Quite different was the court's reaction to analogous provisions in the Building Authority Act designed to afford adequate protection to bondholders. "Clearly such receiver would have the same right and powers as receivers generally have and are given by the court as to custody of property for the benefit of creditors in cases of insolvency. Undoubtedly, such receiver, representing the creditor bondholders, would be authorized to operate the property independently and exclusively, and would not be obliged to deal with the defaulting Welfare Department for the use of the same. In ordinary course, unless the state in some way came to the rescue to redeem its property, the receiver could bring about a sale of the remainder of the leasehold estate of the Authority in these properties, to liquidate the bonds."[33] It is one thing to permit operation of utility or analogous enterprises in the interests of frustrated creditors; it is quite another to contemplate private management of a considerable portion of the state's hospitalization activities for the avowed purpose of bondholder rather than patient welfare. If the decision in the *Griffith* case flows from a judicial reaction to such a distinction, then the court's present temperament will require, if the *Kasch* escape is to be workable in the remaining areas of need, a diminution in bondholder protection that might well make the obligations unmarketable.

[32] Joliet v. Alexander , 194 Ill. 457, 62 N.E. 861, 100 A.L.R. 900 (1902). In State College Development Ass'n. v. Nisser, 66 .D. 287, 281 N.W. 907 (1938), it was said: "If the political subdivision is obligated directly or indirectly to feed the special fund from general or other revenues in addition to those arising solely from the specific improvement, then a debt is created."

[33] *Supra*, note 28, at 622-623, 22 N.E. (2d) at 208.

It is possible, however, that the *Griffith* hostility toward the bondholder protective provisions was in final result predicated upon the union of new and existing structures in the plan before the court. The actual decision in the case would seem to bear this out; Section 2332-8 was not declared invalid, and subsections 3a, 4, and 5 were stricken down only to the extent they authorized "the transfer of income-producing property of the state to the Authority, the rentals from which are to service the bonds issued by the Authority."[34] Such an interpretation bottoms the Authority's contentions in the current litigation between it and Neffner, now before the Supreme Court on demurrer.[35] The plan at issue in this latest effort to relieve the undeniable needs of the state, calls for a $4,500,000 bond issue for the erection of an entirely new and separate institution for the feeble-minded. Thus should default occur, all that could be lost would be the equity in the property resulting from payments made before default. Although this loss might be quite large, the courts take no account of such a factor; physical severance prevents the forfeiture of a structure erected with tax revenues.

Physical severance is also counted upon in the *Neffner* case to overcome another major basis of judicial criticism of the *Griffith* set-up. "By the great weight of authority," declared the majority in the *Griffith* decision, "bonds issued by a state or municipality, with the proceeds of which some addition is to be constructed or added to public property, which bonds by agreement are to be liquidated solely and exclusively from the revenues of the entire property, old as well as new, constitute a debt or an indebtedness of the state or municipality as the case may be."[36] The authorities cited for this proposition go upon the theory that the pledging of revenues derived from already existing properties, by diverting such monies from their regular channel of general appropriation, indirectly increases the burden of the beleaguered taxpayer, who must then make up the difference.[37] Physical severance alone will not correct for this; to meet this objection it would seem essential that there be fiscal severance as well. For only by the construction of separate buildings and the pledging of the income from these new facilities could the threat to the taxpayer be completely eliminated under this theory.[38]

[34] See note 28, *supra*.

[35] State *ex rel.* Public Institutional Building Authority v. Neffner. Hearing on demurrer was held May 7, but no decision had been rendered at the date of this issue.

[36] *Supra*, note 28, at 616, 22 N.E. (2d) at 205-206.

[37] Schnell v. Rock Island, 232 Ill. 89, 83 N.E. 462, 14 L.R.A. (N. S.) 874 (1907); Fjeldsted v. Ogden City, 83 Utah 278, 28 P. (2d) 144 (1933).

[38] Physical severance could be dispensed with if appeal were had to cost accounting techniques by which an apportionment could be made between the revenue capacity of the old and the new. A few courts have approved this. See Legis. (1933) 18 IOWA L. REV. 269, 277, n. 42.

Not only does this theory of union of properties force complete severance as the price of satisfying Article VIII, Sec. 1 *qua* debt limitation; by preventing the diversion of funds derived from existing functions it makes of that constitutional provision a sort of indirect tax rate limitation. This may possibly explain Judge Day's dissent from all of the *Griffith* decision save its reaffirmation of *Kasch* v. *Miller*. For in *State ex rel. Portsmouth* v. *Kountz*, [39] he had declared that "In the absence of a specific tax limitation, a constitutional provision limiting the power to create debts does not operate as a limitation on the taxing power of a municipality. However, constitutional provision imposing a tax limit, by implication, does impose a debt limit, on the theory that the greater includes the lesser, that the power to spend is circumscribed by the power to collect."[40] Such a view as to the nature of debt maxima would seem to stand the historical test of the intent of those who framed Ohio's fundamental law in 1851. Those delegates diagnosed the fiscal ills that were before them as essentially twofold; and there is little basis for believing that they conjoined the two for purposes of treatment save in the recognition of the fact to which Judge Day refers, that a tax limit indirectly operates to deter borrowing.[41]

Despite this background, the *Griffith* court found Ohio to be in accord with the weighty authority from outside because of the court's disposition of a "similar situation in the case of *Village of Brewster* v. *Hill*. . . ."[42] Passed over was a court of appeals decision in *Pathé* v. *Donaldson*,[43] where the financing of a light plant extension from earnings of the whole enterprise was assumed to be consistent with Article XVIII, Sec. 12 of the Ohio Constitution. That provision, as before noted,[44] specifically approves for municipal utility financing the *Kasch* escape from general debt maxima. *Brewster* v. *Hill*,[45] on the other hand, involved the interpretation of Article VIII, Sec. 6, the lending of credit prohibition adopted in 1851 as part of the policy of restricting the amount of governmental spending.[46] Even in its own sphere, the *Brewster* case has been criticized in the pages of this *Journal* for its puzzling theory that a municipal corporation, in purchasing a plant extension out of total earnings, somehow becomes the creditor-lender in the transaction rather than the debtor.[47] But strange as this may be, the

[39] 129 Ohio St. 272, 194 N.E. 869, 2 Ohio Op. 161, 97 A.L.R. 1099 (1935).
[40] Id. at 276-277, 194 N.E. at 871-872.
[41] See Note (1903) 16 HARV. L. REV. 442.
[42] *Supra*, note 28, at 617, 22 N.E. (2d) at 260.
[43] 29 Ohio App. 171, 163 N.E. 204, 6 Ohio L. Abs. 562 (1928).
[44] See note 9, *supra*.
[45] 128 Ohio St. 343, 190 N.E. 766 (1934).
[46] See discussion at p. 298, *supra*.
[47] Note (1935) 1 O.S.L.J. 55.

court puts all sleight-of-hand performers to shame in deducing in the *Griffith* case that "By the same token, when it loaned its financial credit, it made itself indebted to the seller."[48] The public is not allowed to learn the magic by which a municipality purchasing on time payments is first transformed into a creditor only to then be reclassed a debtor. Yet on the strength of this deduction, the court concluded "that if the bonds in this case are issued as contemplated, the state not only lends its credit by the contribution of its property *in esse* but becomes indirectly indebted on account of these bonds."[49] Here would seem to lie the weakest link in the chain of reasoning by which Ohio's high court invalidated the first effort made under the Building Authority Act. But that court's opinion and decision in the *Griffith* litigation gives evidence that on this very matter will come the greatest judicial resistance to further efforts to find a solution through the general technique contemplated in that legislation. J.M.H.

CORPORATIONS

CORPORATIONS — SALES OF ASSETS — PRESUMPTION OF FAIR VALUE FAVORING DEMANDS OF DISSENTERS

The early American corporation was a small enterprise with a simple financial structure and few stockholders, most of whom were actively engaged in the management of the business. In most jurisdictions, a majority of the stockholders of a solvent corporation were denied the power to transfer all of its property,[1] effect a consolidation or merger,[2] or bring about fundamental changes in the financial structure,[3] as against the dissent of a single stockholder.

These common law rules were inadequate to meet the changing needs of the modern corporate system. It became apparent that majority shareholders were too greatly restricted if sweeping changes in corporate structure were to be carried out with efficiency and dispatch; greater

[48] *Supra,* note 28, at 617, 22 N.E. (2d) at 206.

[49] *Ibid.*

[1] Butler v. New Keystone Copper Co., 10 Del. Ch. 371 (1915); Abbott v. American Hard Rubber Co., 33 Barb. Ch. 578 (N.Y. 1861); Kean v. Johnson, 9 N.J. Eq. 401 (1853), (often cited as a leading case denying to the majority the right to sell. The decision was perhaps influenced by the fact that the corporation involved was a railroad, and a quasi-public corporation); 3 COOK, CORPORATIONS (8th ed. 1923) sec. 670; 13 FLETCHER, CYC. CORP. (PERM. ED.) sec. 5797. *Contra:* Treadwell v. Salisbury Mfg. Co., 73 Mass. 393, 66 Am. Dec. 490 (1856); see Warren, *Transfers of Corporate Undertakings* (1917) 30 HARV. L. REV. 335..

[2] Garrett v. Reid-Cashion Land & Cattle Co., 34 Ariz. 245, 270 Pac. 1044, rehearing denied, 34 Ariz. 482, 272 Pac. 918 (1928); Colgate v. U. S. Leather Co., 75 N.J. Eq. 229, 72 Atl. 126, 19 Ann. Cases 1262 (1909).

[3] Kent v. The Quicksilver Mining Co., 78 N.Y. 159 (1879).