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THE BORROWING POWER UNDER THE “CASUAL DEFICIT” PROVISO OF THE INDIANA CONSTITUTION

FRANK G. BATES*

The general economic situation of the present day has brought current problems of state finance into high relief. The question has been discussed whether, should circumstances make such action desirable, temporary relief for an unbalanced budget might be secured, within the limitations imposed by the Constitution, by recourse to a state loan. This question gives renewed interest to certain episodes in the financial history of the state, and to the decision in the case of Hovey v. Foster handed down at the November, 1888, term of the Supreme Court of Indiana.

The adoption of the Constitution of 1851 found the state of Indiana heavily in debt,—a legacy from the era of “internal improvements.” The debt consisted, for the most part, of bonds issued for an elaborate system of public works, chief among which was the construction of the Wabash and Erie Canal. The bonds, authorized in 1835,1 were sold from time to time until 1839, when the market failed. The interest was met until 1841, when it fell in arrears.2

By an act of 1846, reenacted in 1847 in more ample and effective form,3 an adjustment was made with the bondholders. Some $15,000,000 of the securities had been issued, of which

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1 Acts, 1835, c. 2, p. 6.
3 Acts 1847, c. 1, p. 3.
more than $11,000,000 were outstanding at the date of settlement. Under the settlement made by the act of 1847 the canal, its lands and appurtenances were turned over to a board of Canal Commissioners and the outstanding bonds were called in by the state. For one-half of the face value of these bonds plus accumulated interest, canal stock was to be issued. This "canal stock" was ultimately to be redeemed from the property and earnings of the canal but the state absolved itself from all responsibility for these securities. For the remaining half of the old bonds there was to be issued "state stock," in reality state bonds, in two series:—"five percent stock" for one-half of the total amount of bonds surrendered, and "two and one-half percent stock" for the accrued and accruing interest thereon.

At the date of the taking effect of the Constitution in 1851, there was outstanding a state debt of $8,047,765. The annual interest burden was at that time $198,301.

It was with the presence of this debt to keep the unhappy experiences of the Internal Improvement era fresh in their minds that the framers of the Constitution inserted in that document the proviso that no law should be passed authorizing a debt to be contracted for the state save for three purposes:—"To meet casual deficits in the revenue; to pay interest on the state debt; to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for the public defense." The makers of the Constitution contemplated, of course, the carrying out of the settlement of 1847 with the bondholders, and the arrangement then made was in no way disturbed by the new Constitution.

The General Assembly of 1857, due to a deadlock between the two Houses which were of opposite political faiths, failed to make either a tax levy for general purposes or to pass a general


5 The debt as it then stood was made up as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Stock, (five per cent and two and one-half per cent)</td>
<td>$6,637,720</td>
</tr>
<tr>
<td>Old Internal Improvement Bonds</td>
<td>1,300,000</td>
</tr>
<tr>
<td>Treasury Notes, not bearing interest</td>
<td>110,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$8,047,765</strong></td>
</tr>
</tbody>
</table>

(Aud. Rept., 1851; Doc. Journ. 1851, pp. 71-81.)

6 Constitution, Art. X, Sec. 5.
appropriation act. This produced a situation which involved the application of two of the provisos of the Constitution; viz., "to meet casual deficits in the revenue," and "to pay the interest on the state debt."

Under the system then in effect appropriations were made by the previous General Assembly for the period ending March 30, 1857. Since the Treasurer of State refused, in the absence of an appropriation, to honor warrants in favor of the benevolent institutions, the immediate effect was to close the Institute for the Blind, the Institution for the Deaf and Dumb and the Hospital for the Insane, and to send their inmates back to their friends or to the counties. Upon the advice and with the moral support of the other officers of state the Treasurer later reconsidered his refusal and consented to honor warrants. Thereupon the institutions affected reopened their doors September 16, 1857.

It had been customary, ever since 1853, when the "state stock" issued under the acts of 1846 and 1847 began to bear interest, for the Treasurer without any legislative appropriation, to forward semi-annually to the agent of the State in New York a sum sufficient to meet the interest payment on the stock. When the day approached for the payment of the interest due July 1, 1857, the officers of state negotiated a loan for that purpose amounting to $165,000. This they did under the clause permitting borrowing to meet interest on the public debt, supplemented by a section of the statutes which authorized such action by the Governor, Auditor and Treasurer.

The reasons advanced by the officers of state as governing in their decision to borrow to meet the interest payments rather than to use funds in the treasury are stated in the report of the Ways and Means Committee. They say:—"The officers, thinking the money in the treasury might be needed to meet the current expenses of the state, and having no authority, except for the purpose of paying interest on the state debt, deemed it prudent to borrow sufficient money to pay the interest and keep

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8 Ibid.
the money then in the treasury for the payment of current expenses.”

This transaction is of interest since it indicates that it was not then believed that the shortage of funds for current purposes could be replenished by recourse to the “casual deficit” clause of the Constitution. This position is supported by a later decision that the constitutional clause authorizing the creation of debt to pay interest was merely permissive and required, before administrative officers could act, the supplement of a legislative appropriation.

The General Assembly found it necessary, when they assembled in 1859, to take extraordinary measures to meet the unusual financial situation. State stock had been redeemed since 1847 to the amount of approximately $392,000, and was now held in the treasury. To meet the interest payments due July 1 of that year the stock thus held was to be sold to the Commissioners of the Sinking Fund and the proceeds used to meet the interest payment. The remainder of the proceeds were made available, “whenever by reason of a deficiency in the Treasury of State, such money may be needed for the payment of the current expenses of the State.” The same act then proceeded to authorize the Governor, Auditor and Treasurer to procure a loan of not to exceed $50,000—“should the sum hereinbefore provided be insufficient to meet the current expenses of the state for the years 1859 and 1860.”

The Commissioners of the Sinking Fund declined to take the stock on the ground that the act was void for want of a title. So the officers sold the stock to outside parties. No record of this sale appears in the records nor is there other evidence forthcoming that the transaction actually took place, but if consummated it constituted the first instance of the creation of a debt to meet a casual deficit.

Again, in 1860, funds being lacking for the payment of current general appropriations, the officers of state, presumably acting under the last-quoted section of the discredited act of 1859, proposed to borrow “from twenty-five to thirty-five thou-

11 Ristine, Auditor v. State of Indiana, ex rel. The Board, 20 Ind. 328; State, ex rel. The Board v. Ristine, Auditor, 20 Ind. 345 (1863).
sand dollars" from the Commissioners of the Sinking Fund. In declining to make the loan the commissioners said:—"It might or might not be true that the state officers would have a right to borrow money for the purpose indicated in their application."

Two years later, in 1863, the legislature met under the influence of the intense emotions engendered by the war as well as by state politics, with the governor as the storm center of the disturbance. After making the regular tax levy the General Assembly adjourned without passing the biennial appropriation act.

As a result of the criticisms of the Treasurer’s action in 1857 and 1858 in paying out money in the absence of specific appropriation, such action had been specifically prohibited in the “Act to Provide a Treasury System” passed in 1859, supplemented by an act of 1861.

Now, acting in strict accordance with these acts, the Auditor and Treasurer declined, in the absence of an appropriation, to release from the treasury funds to supply the current needs of the benevolent and penal institutions. To prevent a recurrence of the closing of the institutions the Governor borrowed upon his personal responsibility funds from the treasurers of some sixteen counties, from one of the railroad companies in the state and from certain private citizens. These, with certain public moneys at his command, served to meet the emergency and the institutions were kept open. The General Assembly in 1865 appropriated $135,000 to repay the loans so made. This episode resulted in no borrowing under the casual deficit provision but it disclosed the straits in which the state’s services were placed from the failure of the legislature to make the regular appropriations.

In 1873 the General Assembly faced financial problems of some difficulty. The Governor, in his regular message estimated that the total amount available from all sources for state purposes in 1873 would but slightly exceed $950,000, while expenditures for ordinary purposes would probably amount

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17 Acts, 1865, c. 49, p. 118.
to some $885,000, leaving a balance of less than $70,000. The "ordinary purposes" for which expenditures were made included interest payments on the public debt, "foreign" and "domestic," amounting, in 1872, to $231,880.96.

Moreover, extraordinary demands were pressing on the treasury. There had been enacted, in 1872, an act for the immediate redemption of the old Internal Improvement Bonds as yet unsurrendered under the act of 1847. Also, the Women's Prison was in an unfinished condition and some of the benevolent institutions were demanding enlargement.

The situation was intensely aggravated by the fact that the General Assembly had cut the state levy for general purposes, which had stood in 1869 and for the years immediately preceding at fifteen cents, to five cents for 1871 and 1872. The effect was to reduce the total annual revenue for state purposes derived from taxation from $1,307,961.93 in 1871 to $495,487.63 in 1872, and to $438,181.14 in 1873.

To add to the confusion, the same legislature had adjourned without passing the biennial appropriation act. Fortunately there had been enacted in 1869 a law whereby, whenever the General Assembly should fail to make appropriation for the support of the state's benevolent institutions, the officers of

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18 House Journal, 1873, p. 18.
19 The state debt at the beginning of the year 1873 was made up as follows:

Foreign—

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Stock, interest stopped 1870</td>
<td>$37,890.12</td>
</tr>
<tr>
<td>War Loan Bonds</td>
<td>139,000.00</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$176,890.12</strong></td>
</tr>
</tbody>
</table>

To these should be added:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal Improvement Bonds with accumulated interest</td>
<td></td>
</tr>
<tr>
<td>estimated at perhaps</td>
<td>$500,000.00</td>
</tr>
</tbody>
</table>

Domestic—

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>School Fund Bonds</td>
<td>$3,729,016.15</td>
</tr>
</tbody>
</table>

The School Fund Bonds represented funds borrowed from the Common School Fund by the State from time to time for many years. These loans had, in 1867, been consolidated into four non-negotiable bonds of the State bearing interest at six per cent. (Acts, 1867, c. 11, p. 28.) (Abstract, Aud. Rept. 1872, Acts, 1873, p. 270.)

21 Acts, 1871, c. 4, p. 5.
state were authorized to direct the Auditor to draw warrants in their behalf for necessary expenses. Consequently the closing of the institutions as had happened in 1857 would be avoided.22

To meet the situation for succeeding years the tax levy was raised again to fifteen cents.23 Meantime, to meet more immediate needs, the Governor, Auditor and Treasurer were, "for the purpose of carrying on the government, if it shall become necessary to meet the appropriations for the present fiscal year," to make temporary loans "to be repaid out of the funds appropriated at the present session of this General Assembly for the purposes aforesaid, when they shall be paid into the treasury."24 Under this act there was borrowed during the year 1873 the sum of $910,000, evidenced by five certificates of indebtedness.25

These loans were negotiated, clearly, under the "casual deficit" clause of the constitution. The policy of failing to balance the budget and of meeting the current deficit by temporary loans here entered upon was persisted in for a score of years, and it was not until the year 1915 that the state was free from the debt thus accumulated. Although by the language of the act care seems to have been taken to adhere to the letter of the "casual deficit" limitation of the constitution, and to give to the certificates of indebtedness the form of anticipation loans, still, the dates of maturity fixed coupled with a failure to make provision through additional taxes to meet these maturities, scarcely indicate an expectation of immediate redemption.

On the date of maturity of the first of these certificates provision was made for refunding this and also the remaining certificates as they should become due.26 The same care as to language and the same implied doubt as to the ultimate date of extinguishment reappear in this act. Moreover, it is signifi-

23 Acts, 1873, c. 94, p. 208.
24 Acts, 1873, c. 68, p. 177.
25 The five certificates were as follows:

<table>
<thead>
<tr>
<th>Month</th>
<th>Amount</th>
<th>Rate</th>
<th>Due Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mar. 12, 1873</td>
<td>$200,000 at 8%</td>
<td></td>
<td>Mar. 12, 1875</td>
</tr>
<tr>
<td>Apr. 15, 1873</td>
<td>100,000 at 7%</td>
<td></td>
<td>Apr. 15, 1876</td>
</tr>
<tr>
<td>July 11, 1873</td>
<td>300,000 at 7%</td>
<td></td>
<td>Apr. 15, 1876</td>
</tr>
<tr>
<td>July 30, 1873</td>
<td>110,000 at 7%</td>
<td></td>
<td>Apr. 15, 1876</td>
</tr>
<tr>
<td>Dec. 1, 1873</td>
<td>200,000 at 8%</td>
<td></td>
<td>Dec. 1, 1876</td>
</tr>
</tbody>
</table>

Aud. Rept. 1873, p. 13, Repts. Officers of State, 1873;
cant that on the day following the passage of the refunding act the levy from which funds for such redemption must come, was reduced from fifteen to thirteen cents. The maturity of the refunded bonds was fixed at three years.\textsuperscript{27}

Although the act of 1875 appears to have contemplated but one refunding, yet the first of the loans refunded under it was again refunded in 1878 for a like term, and without any further legislative authority. The legality of this proceeding seems to have been questioned for, in 1879, when the remaining $710,000 was about to mature, an act was passed specifically authorizing a further refunding. Under this act, although the new loan was denominated a "temporary" one, one is reminded by its use of the word that "temporary" is but a relative term. The new bonds, drawing interest at five percent, were to be callable after five years and to mature in ten years. As if to forestall a recurrence of the unauthorized refunding of 1878, the act specifically forbade any further borrowing on the credit of the state.\textsuperscript{28}

An increase in the number of persons demanding institutional care at the hands of the state, supported by the growing social consciousness of the community had led, within a decade, to the appropriation of almost a million dollars for capital expenditures at the state benevolent and correctional institutions. These appropriations, together with an unwillingness to meet them by increased taxes, were, for the most part, responsible for "temporary" loans amounting by 1883 to $925,000.\textsuperscript{29} During 1883 and 1884 further extraordinary expenditures totaled not less than $722,000.\textsuperscript{30} In each biennium beginning in 1879 there had been made advances from the General Fund to supplement the New State House Fund raised by a special levy, amounting by 1885 to something over a half-million dollars.\textsuperscript{31}

In full view of this situation the General Assembly of 1885 failed to increase the general levy or to lay a sinking fund tax, but authorized further loans. Three measures taken by this legislature deserve notice here.

First, the advances hitherto made to the New State House Fund were consolidated into what was denominated the "Regis-

\textsuperscript{27} Acts, Spec. Sess. 1875, c. 33, p. 80.
\textsuperscript{28} Acts, Spec. Sess. 1879, c. 97, p. 200.
\textsuperscript{29} Aud. Rept. 1882, p. 79. Repts. Officers of State, 1882.
\textsuperscript{30} Aud. Rept., 1884, p. 60. Repts. Officers of State, 1884.
tered New State House Bonds, Temporary Loan,” an issue of $500,000 at three and one-half percent callable in 1890 and maturing in 1895.\textsuperscript{32}

Second, to meet the current needs of the treasury, a new loan of $600,000 was authorized, called “Registered Bonds, Temporary Loan,” drawing interest at three and one-half percent, callable in 1890 and maturing in 1895, and designed to meet current expenses and capital outlays.\textsuperscript{33}

Third, the same act authorized the Governor, Auditor and Treasurer, whenever a lower rate of interest could be secured, to refund the outstanding temporary indebtedness of the state by the issue of bonds callable after five years and maturing in ten years.\textsuperscript{34} Accordingly $585,000 of the accumulated debt which had been refunded in 1879 at five percent and callable after April 1, 1884, was refunded at the same rate of interest as was to be borne by the new loan.\textsuperscript{35}

Thus, at the close of 1885, the total outstanding “temporary” debt stood at $1,685,000. That those responsible for the prevailing financial policy of the State were not unmindful of the constitutional restraints upon the creation of debt is evidenced by the care taken to designate each of these loans, for however long a term, as “temporary” loans.

When the General Assembly convened again, in 1887, the financial situation was not improved and the conduct of that body made matters even worse. They were reminded that the net disbursements from the General Fund, in 1885, exceeded receipts, exclusive of loans, by $658,836.51, and in 1886 by a sum nearly as great. They were told, moreover, that the state was paying an annual interest charge of $234,286.99 on the school fund bonds.\textsuperscript{36}

The Governor’s recommendations and his reasons in support of them are interesting. Pointing the path of least resistance and ignoring completely possible constitutional restraints, he said:

“It will be apparent to you that the State cannot engage in the construction of expensive and elaborate improvements without increasing the

\textsuperscript{32} Acts, Spec. 1885, c. 18, p. 110.
\textsuperscript{33} Acts, 1885, c. 15, p. 24.
\textsuperscript{34} Ibid.
\textsuperscript{35} Aud. Dept. 1885, p. 64, Repts., Officers of State, 1885. The whole of the borrowing and refunding transactions of 1885 are recounted in: Governor’s Message, Jan. 7, 1887. Sen. Journ. 1887, p. 35.
\textsuperscript{36} Governor’s Message, Jan. 7, 1887, Sen. Journ. 1887, p. 38.
tax levy for state purposes, or borrowing in the necessary moneys, to meet the additional cost of such improvements. Considering the excellent credit of the State I have no hesitation in recommending the borrowing of the necessary funds in the preference to increasing the rate of taxation. The rate of interest which the State would be required to pay would not exceed one-half of the rate which individual taxpayers of the State would be compelled to pay, and a sinking fund to pay the bonds as rapidly as the State would have the right to redeem them would finally liquidate the State’s indebtedness.\(^{37}\)

The recommendations of the Governor opposing the raising of the tax rate fell upon acquiescent ears in the legislature but not so the proposal to establish a sinking fund to liquidate the debt. The General Assembly not only did not provide additional revenue either from additional taxes or from loans, but finally adjourned without making general appropriations for the years 1887 and 1888.

Faced once more by what had become a familiar situation in the state, an opinion of the Attorney General suggested a way out. He found embodied in various statutes continuing authority whereby the expenses of the benevolent and correctional institutions, the salaries of most state officers and employees, and a substantial proportion of the office expenses could be met without further legislative action.\(^{38}\) To meet the interest on the debt, foreign and domestic, which now amounted to some $330,000 annually, recourse was had to borrowing under the act of 1852.\(^{39}\) Under this authority the proper officials made, in 1887, a loan of $340,000, and in 1888 another of like amount.\(^{40}\) These loans, known as “Registered Bonds, Temporary Interest Loan,” were callable April 1, 1889, and matured five years from date. Thus the state was plunged one step deeper into the financial morass, for it was now borrowing money to pay interest on money borrowed to meet, in part at least, current expenses. The credit of the state was, however, still such that the loans could be floated at three percent. The date of call and the early maturity fixed for the bonds lead to the conclusion that this was actually looked upon as an extraordinary transaction which would be provided for by the next General Assembly.

\(^{40}\) Aud. Rept. 1887, p. 50. Repts., Officers of State, 1887; Aud. Rept., 1888, p. 22; Repts., Officers of State, 1888.
The repeated failure to balance the budget and the consequent loans must, from the nature of things, ultimately produce a reaction in public opinion. This reaction came in 1889. The retiring Governor, at the opening of the legislative session in that year spoke plainly of the financial situation. He recalled the fact that within a few years past the state had made capital outlays, in addition to the proceeds of the special State House levy, amounting to a sum in excess of $2,275,000. After pointing out that the "foreign" debt was now $2,381,825.12, while the "domestic" debt was $3,904,783.22, and that the annual interest on the first was now $79,375 and on the second, $258,486.99, the Governor therefore made two recommendations:

First. He recommended that a sinking fund levy be made to extinguish the state debt.

Second. That the $3,904,783.22 of the domestic debt represented by the bonds held by the Common School Fund and drawing interest at six percent, be paid, and the fund distributed to the counties to be loaned to citizens at the same rate. To procure the wherewithal to make the payment, he would negotiate a foreign loan which might be secured at three percent. Thus the school fund would receive the same return and the state save upwards of $117,000 annually in interest.41

The recommendation concerning a sinking fund was again ignored, but the usual officers were authorized to negotiate a loan to carry out the conversion of the School Fund loan as suggested by the Governor.42 The securities thus issued, amounting to $3,905,000 and bearing three percent interest, became known as the "Refunding School Fund" loan.

After the interest on the public debt, now amounting to $370,000 annually, was provided for by a loan of that amount under the act of 1852, there still remained a considerable current and accumulated deficit which must be met by still other loans. To meet this demand the officers of state were empowered to make two more "temporary" loans of $700,000 each, callable in 1894 and maturing in 1899.43

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(The loans thus made, together with the interest bonds and the Refunding School Bonds, brought the issues of the year up to $5,675,000, of which $1,750,000 was the result of the policy of failing to balance the budget in order to keep the tax rate down. Were all the loans just author-
The preliminary steps taken by the financial officers of the state to negotiate the first of the loans authorized in 1889 to meet the "temporary deficit" in the treasury brought to a climax the rising tide of dissatisfaction with the financial policy so long pursued.

Anticipating that the validity of the proposed bond issue would be called in question, the Governor sought and secured from the Attorney General an opinion as to the constitutionality of Chapter 216 of the Acts of 1889. That officer in an extended opinion sustained the constitutionality of the act.44

He held that the power to meet deficits carries with it the competence to decide when a deficit exists; that the question of what remedy to apply when such deficit does exist is a political question and hence beyond question by the court. Further, applying the tests of precedent and usage to determine the meaning of the constitutional inhibition, he proceeds to show that on two occasions before45 similar loans had been made. Furthermore, Governor Hendricks, a member of the Constitutional Convention of 1850, had acted without protest in carrying out the loan act of 1873. Further, the financial departments of the state under successive heads had acted consistently in accord with the practice, and the citizens had by their failure to object acquiesced in the assumption on which the statute now in question was passed. Hence on grounds of precedent and usage it seemed too late to question the validity of the proceeding. By an appeal to the proceedings of the constitutional convention he concluded that it was not a narrow limitation on the power of the legislature to meet the financial exigencies attendant upon the performance of its ordinary functions by the state government which was sought by the framers, but rather a safeguard against extraordinary indebtedness for internal improvements.

Upon the eve of the negotiation of the loan, a citizen, one Foster, sought to enjoin the officers from proceeding further in the procuring of it.

The relator alleged that the debt about to be contracted was not intended to meet any of the contingencies provided for in

ized carried into effect the total foreign debt would go to $8,056,615.12. The domestic debt would, however, have been reduced to $484,000. (Aud. Rept. 1889, p. 46, Repts., Officers of State, 1889.)

44 Opinions of the Attorney General, 1889-90, p. 15, Repts., Officers of State, 1890, Pt. I.
BORROWING POWER

the constitution, viz.: "to meet casual deficits in the revenue; to pay interest on the state debt; to repel invasion, suppress insurrection, or, if hostilities threatened, provide for public defense." Therefore the act of the General Assembly was unconstitutional and void. In the circuit court the contention was sustained and the act declared invalid. Appeal took the case to the Supreme Court of Indiana. Here for the first time the court was called upon to interpret the section of the constitution here in question.

It appeared from the answer of the respondent officers that the Auditor had reported to the General Assembly that the probable income for the year at existing rates of taxation would be insufficient to meet outstanding obligations and the appropriations required to meet the current and necessary expenses of the state government, and to complete the expansions and improvements at various state institutions then under contract and in course of construction, hence there would be a resulting deficit of perhaps $1,650,000.

It appeared further that the Governor, in response to a request of the House of Representatives, had presented information to indicate that if tax levies were to remain constant there would be created in the next two years a deficit of not less than $2,200,000. It was shown that it was upon the statements thus furnished by the Auditor and the Governor that the loan had been authorized.

The court interpreting the meaning of the section of the Constitution in question said:

"On the one hand, the evils of an enormous public debt, the legacy of the system of public improvements in which the State had theretofore embarked, were fresh in the minds of the people when the present Constitution was adopted. This was the mischief that was not to be repeated. On the other hand, it was foreseen that without gathering from the pockets of the people, and carrying a large surplus in the treasury of the State, no human provision could prevent occasional deficits in the revenues. The tax levy could not possibly be adjusted to the necessary expenses of carrying on the State government, and of providing and maintaining the public buildings and institutions of the State, and for such other appropriations as are clearly within legislative discretion, without an occasional surplus or deficit."47

46 Hovey v. Foster, (1889) 118 Ind. 502.
47 Hovey v. Foster, (1889) 118 Ind. 502, 506.
Proceeding to consider what constitutes a "deficit" and what deficits may properly be classed as "casual" the court continued:

"In order to justify the exercise of legislative discretion in the enactment of a law such as the one in question, there must have been a deficit in the revenues required to meet the ordinary appropriations made for the purpose of carrying on the government, and of providing for the general welfare of the State and its institutions. The deficit must have been design- edly brought about by making extraordinary appropriations for purposes other than those above named, with a view to evade the constitutional inhibition, and to authorize the contracting of a debt on behalf of the State in disregard of its terms. It must have resulted from those casual or occa- sional discrepancies between the revenues received and the amounts re- quired to provide for the general welfare, and carry on the State govern- ment in the ordinary way, which could not be foreseen and provided for without the accumulation of an unnecessary surplus in the treasury." 48

The court then goes on to say, supported by cited authority, that the determination of when the contingency mentioned in the constitution shall have arisen is a matter to be determined in the first instance by the legislature. While this determination of the legislature is not final, it carries a presumption in its favor until it is demonstrated that there was intention to evade the Constitution; or that as a matter of fact there was not good reason to suppose that the specified contingencies had arisen.

Citing precedent the court proceeds:

"Courts are supposed to take cognizance of the current public history of affairs, and to construe enactments of the General Assembly in the light of concurrent history. If, under pretense that an invasion was threatened, or that an insurrection was imminent, the Legislature should authorize a loan when it was known to every intelligent person that the assumption was a mere pretense, courts would not hesitate to declare the act void. So, if it were known that the Legislature had authorized the use of State funds in the construction of a railroad, canal, or other public work or institution, not within the ordinary and legitimate needs of the State, and that a loan was about to be authorized to meet appropriations made to defray the expense of such a work, under the guise of meeting a deficit to carry on the government of the State, it would be the duty of the courts, when called upon, to take cognizance of the facts, and arrest what they would judicially know to be a mere pretext to evade the Constitution." 49

The court denied such knowledge in this instance but did take judicial cognizance of the fact that the state had been engaged in the construction of public buildings and institutions, that a

48 Ibid. 506.
49 Ibid. 509.
soldiers' and sailors' monument was in process of erection, and that "unusual and unforeseen expenditures" had been required. Hence they were bound to presume that after due deliberation the legislature had ascertained:

"That in order to meet necessary appropriations, which it was their duty to make in order to cover past deficiencies and carry on the State government until the meeting of the next Legislature, a casual deficit would result in the revenues, such as authorized the contracting of a debt on behalf of the State."\(^{50}\)

Taking notice of the fact that the sessions of the General Assembly were biennial and that appropriations must be made to cover the intervening two years, the court held that it was "not necessary that an actual deficit should have existed in the revenues at the time the act was passed."

"A casual deficit, such as may authorize the contracting of a debt on behalf of the State, may be one that is anticipated and provided for, if it is foreseen that it must necessarily occur before other provisions for replenishing the public funds can be made available."\(^{51}\)

Contracts had been entered into which could not be violated or repudiated with credit to the state and it is a legitimate duty of the officers of the state to save the public credit. Therefore the decision of the lower court was reversed and the statute was sustained as constitutional.

This opinion viewed after the lapse of time presents an interesting example of what sometimes appears to take place in cases of constitutional law. The court seems to take cognizance of an overwhelming public demand or a clear public need which can best be served by sustaining the legislative act in question. It first decides the case in favor of the validity of the act, actually upon grounds of statesmanship and broad public policy, and then proceeds to rationalize its decision by building up, sometimes with some violence to logic and the plain meaning of words, an opinion upon which to rest its decision. In most cases where this course seems to be resorted to it is the inevitable result of the burden placed upon our courts of adapting a rigid written constitution to the expanding and changing needs of a dynamic society.

\(^{50}\) Ibid. 510.

\(^{51}\) Ibid. 510.
In this case, however, it is not clear that the court was placed
in exactly this position of necessity. Even if it be conceded
that the deficit existed and that it was "casual," it was, the court
truly says:

"A matter within legislative discretion what provisions should be made,
whether by increasing the levy or by contracting a debt, in order to pro-
vide for the deficit which was inevitable."\textsuperscript{52}

The legislature had before it two possible courses of action.
If one of these could be followed only by giving to a section of
the constitution an interpretation which appeared to many to
be strained and of dubious validity, was it not its duty to turn
to the alternative course of action?

Was the fact that the people, while demanding public improve-
ment, had persistently refused to tax themselves to pay for the
same, a sufficient justification for the General Assembly to re-
fuse to take the plain and constitutional road of an additional
levy, and to resort to a course of action which, to save the credit
of the State, placed upon the court the burden of such a con-
struction of the fundamental law?

The court emphasizes the "enormous public debt, the legacy
of the system of public improvements," a "mischief which was
not to be repeated," which was fresh in the minds of the people
at the time the constitutional limitation was set up. It con-
trasts the existing contingency with what would have been the
case if the legislature had been about to indulge again in "the
use of state funds in the construction of a railroad, canal, or
other public work or institution, not within the ordinary and
legitimate needs of the state." It would be interesting to learn
the criterion by which the court decided what needs were "ordi-
nary and legitimate." It is interesting to speculate what would
have been the decision and the grounds thereof, if the interpreta-
tion of this clause of the Constitution had been deferred until
the second quarter of the twentieth century, and the question
had then arisen over a "temporary deficit" incurred as a result
of highway construction. Would the construction of highways
now be held to be an "ordinary and legitimate need," even if at
that earlier day railroads and canals were not?

The net result of the decision seems to be that the constitu-
tional limitation is deprived of its force except as to subjects

\textsuperscript{52} \textit{Ibid.} 511.
beyond the "ordinary appropriations made for the purpose of carrying on the government, and for providing for the general welfare of the state and its institutions." The decision as to what is included in "ordinary" appropriations, and what is for the general welfare, appears to depend in such cases upon the preconceived notions held by the court or upon the political exigencies of the moment,—grounds as far removed from reason as are those conclusions which, when reached by others, the courts are sometimes prone to brand as "mere caprice or whim."

The immediate effect, then, of the decision in *Hovey v. Foster* was to sustain the action of the legislature in authorizing the issue of the bonds in question and the bonds were thereupon issued. The further result, however, of the episode was the dawn of a new day in the state's financial policy. Pressure exerted by the wiser men in the public service, by the public and by the press, forced a reluctant General Assembly to action. The first tangible evidence of the change was the Tax Act of 1891, which was designed to place the revenue system of the state on a new and higher level of efficiency, under the supervision of a State Board of Tax Commissioners.55

It was, however, impossible to execute a *volte face* immediately since the new legislation could not bear fruit at once. Meantime, the Act of 1852 was once more invoked to procure $300,000 to apply on the interest about to fall due.54 Further, the Governor, Auditor and Treasurer were authorized to make a loan of as much as $700,000 "for the purpose of carrying on the state government." Further evidence of a change of financial policy is seen in the fact that of the $700,000 authorized to be borrowed it was found possible to restrict the actual loan to $300,000, and that the bonds thus issued were made to mature in five instead of ten years.55

To provide for the carrying of the existing debt until it could be liquidated two steps were taken: First. The authority to refund loans whenever advantageous already conferred on the Governor, Auditor and Treasurer in 1885, was again conferred on the same officers. Second. General power was further conferred on them, whenever any portion of the debt should mature, to refund the same by the issue of ten-year bonds which were

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54 Aud. Rept. 1891, p. 41, Repts., Officers of State, 1891.
55 Aud. Rept. 1892, p. 56, Repts., Officers of State, 1892.
to be callable after five years, to bear interest at not more than three and one-half percent.\textsuperscript{56}

Through transactions carried on under this act the debt rose to its high-water mark of $8,346,617.12. In 1893 a sinking fund tax was levied and from that date a policy of debt-extinguishment went steadily forward.\textsuperscript{57} In the year 1902 when in a single year $1,317,000 was paid, the Auditor of State expressed the hope that the whole of the foreign debt might be extinguished in four years.\textsuperscript{58} This hope proved too sanguine, and this goal was not actually achieved until April 1, 1915, when the last $130,000 of these bonds was redeemed at their maturity.\textsuperscript{59} Then, for the first time since 1873, a period of forty-two years, the State of Indiana was without a debt contracted under the "casual deficit" proviso of the Constitution, and sustained by the decision of the Supreme Court in the case of \textit{Hovey v. Foster}.\textsuperscript{59}

\textsuperscript{56} Acts, 1891, c. 99, p. 199.
\textsuperscript{57} Acts, 1893, c. 97, p. 182.
\textsuperscript{58} Aud. Rept. 1902, p. 14, Repts., Officers of State, 1902, Pt. II.
\textsuperscript{59} Aud. Dept., 1915, pp. 10, 29.