No. 6564

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LUMBERMENS TRUST COMPANY,
a Corporation,
*Appellant,*

*vs.*

THE TOWN OF RYEGATE, MONTANA,
a Municipal Corporation,
*Appellee.*

## Brief for Appellant

*Upon Appeal from the United States District Court for the District of Montana.*


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## Brief for Appellant

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### GENERAL STATEMENT

This is an appeal involving old principles of common honesty. Principles which have been clothed by Dean Ames of the Harvard Law School with the forcefully descriptive words of "unjust enrichment". A municipality has, uses, and receives the income from, and a large portion of its inhabitants has and uses a complete water-system all in accord with the express wish of its electors, but the bonds given in payment thereof it refuses to collect or repay.

In 1919 the Town of Ryegate, Montana, County Seat of the newly created County of Golden Valley, undertook to secure the construction and installation of certain public improvements. Among others it sought to secure a sewerage system and a supply of water, including distributing pipes and hydrants. The case at

bar particularly involves the happenings relating to the water supply and distribution system and the means provided and attempted looking to the payment of the attendant indebtedness.

There are under the laws of Montana two methods under which such public improvements may be constructed and indebtedness created with respect to payment for the same in the future. One method is the incurring of general indebtedness on the part of the town itself. In this connection and at this time it is enough to note that the people of Montana in the adoption of their constitution in 1889, imposed a restriction upon municipal indebtedness whereby a town was not allowed to become indebted in any manner or for any purpose in an amount, including existing indebtedness, exceeding three percentum of the taxable value of the property within said town, with a proviso as to sewerage and water system, that upon favorable vote of the affected taxpayers such limitation might be exceeded. This constitutional restriction was directed to the legislative assembly, and the legislative assembly acting thereunder empowered towns, with respect to the construction, control and acquisition of water supply, to indebt themselves in excess of the 3% limit, particularly requiring an election to determine whether or not any bond shall be issued and requiring the proposition to be submitted to a vote of the affected taxpayers.

A second method for the securing of public improvements is provided by laws permitting the creation of Special Improvement Districts with respect to which a legislative code was in effect at the time in question. Under this method the indebtedness incurred was paya-

ble by means of assessments against the real estate benefited and within the improvement district and provision for the issuance of bonds spread over a period of time. Proceedings touching the issuance of such special improvement district bonds are inaugurated by a resolution of intention to create the district, which resolution shall, among other matters, state the general character of the improvement contemplated and an approximate estimate of its cost; a hearing of protests, and due notice thereof through publication and mail; and a resolution creating said district after the determination at the hearing of the protests.

The Town of Ryegate undertook to arrange for the funding of the indebtedness to be incurred through the construction of its contemplated water system and distributing plant by using both methods, and accordingly it held an election, the result of which was a favorable vote authorizing the exceeding of the 3% limit of indebtedness imposed by law and the constitution; and further authorizing the issuance of $15,000 par value general bonds of the Town of Ryegate for the purpose of acquiring a water supply and system for the town. This method provided funds to the extent of $15,000 to be applied, under the specifications which were later adopted, to the payment of the reservoir, pump house, pumping plant, and such of the main water line as it would cover. This sum, however, would not pay for the installation of a distribution system sufficient to supply the town or its inhabitants with water, and the town council thereupon proceeded by the second method to create a special improvement district to supplement the water supply and system just referred to.

Accordingly in December of 1919 the council passed a resolution of intention to create Special Improvement District No. 4, and stated the character of the improvement to be "the construction of pipes, hydrants and hose connections for irrigating appliances and fire protection, all of which improvements are to be made in accordance with plans and specifications to be prepared", etc. The resolution stated the approximate estimate of costs and expense of constructing improvements to be $28,350. The resolution made further and regular provision for notice of hearing; declared the boundaries, and numerous other matters not pertinent to this suit. Thereafter publication was duly made of the notice for the hearing of protests. Protests were received and a hearing afforded, and on being found insufficient the same were overruled and a resolution creating said district was duly passed whereby the town council became vested with jurisdiction to order the improvement contemplated. Notice for the submission of bids was thereafter published, which resulted in the award of the contract to Security Bridge Company on April 26, 1920. The contract was made on a unit basis, that is, at stipulated prices per cubic yard as to excavation, etc., and per linear foot as to pipes, a unit price as to each hydrant complete, together with certain prices for pump-house, pump-house machinery, etc. The contract covered the installation of the entire water system and distributing plant, and the specifications providing for payment stipulated that the $15,000 available under the general bonds should be applied as hereinbefore mentioned in connection with the reservoir, pump-house, etc., and the balance was to be paid by the acceptance of bonds of Special

Improvement District No. 4 at par by the contractor, and upon approved payments of the engineer with usual provisions for withholding percentages pending final approval and acceptance, and particularly provided that expense such as should be incurred for legal purposes, printing, engineering, etc., should be paid by the contractor refunding without discount to the town the full amount, with respect to which the contractor would be paid in the bonds of the Special Improvement District.

Following the award of this contract on April 26, 1920, the contractor executed the contract, qualified by furnishing the necessary sureties, and undertook the construction of the work.

The Security Bridge Company was not able to carry on the work of construction without converting the special improvement bonds into cash, and it therefore arranged the sale of these bonds to Lumbermens Trust Company, plaintiff herein, and the Trust Company from time to time accepted delivery of the bonds as sent to it, remitting therefor in money 85% of the par value. These moneys provided the means of payment by the contractor for the material and labor required in the construction of the work.

The bonds so issued were in the statutory form suggested by the Montana laws, which bonds stated the obligation to pay as authorized by Resolution No. 14 (resolution creating Special Improvement District No. 4) as:

> "for the construction of the improvements and the work performed as authorized by said resolution to be done in said district, * * * in payment of the contract in accordance therewith."

The bond further declared itself to be

> "payable from the collection of a special tax and assessment, which is a lien against the real estate within said improvement district",

and it further recited that

> "all things required to be done precedent to the issuance of the bond had been properly done, happened and been performed in the manner prescribed by the laws of the state of Montana."

The coupons covering the agreement to pay interest on the bonds in question were so arranged that the first coupon became due and payable on January 1, 1922. In August, 1921, the Town Council of Ryegate proceeded to the matter of a levy and assessment against the property within the district for the purpose of meeting the obligation first maturing on the bonds in question, and this was accomplished by resolutions duly adopted in the month of September, 1921, whereby certain levies and assessments were made payable on or before November 30, 1921.

On January 1, 1922, the coupons referred to were paid and a few weeks thereafter suit was brought in the District Court of the State of Montana for Golden Valley County at the instance of Mike Belecz and others, who complained of the assessment levied against their properties within the district and charged that such assessments and levies were illegal. This suit went on to issue and subsequently came on for trial, which resulted in a decree signed July 8, 1924, by the terms of which taxes and assessments levied and assessed upon the property within Special Improvement District No. 4

were decreed to be null and void, and an injunction issued against the Town of Ryegate and the County Treasurer of Golden Valley County, restraining them from attempting to collect the same or to issue tax deeds against the same, and particularly described certain parcels of real estate, with respect to which the assessments were declared to be null and void. This suit was not representative by which plaintiffs attempted to appear for other taxpayers or persons similarly situated. Nor were all the persons and property in the district involved. No payments of interest or principal have been made since the payment of the coupons due January 1, 1922.

The case at bar was instituted, the same being filed in December, 1926, to impose liability against the Town of Ryegate on account of the failure of collections and payments of funds designed to pay interest and principal accruing and due upon the bonds issued by the town as bonds of Special Improvement District No. 4, the money required for the construction and installation of said improvements having been furnished by the plaintiff, who is the owner and holder of all of the bonds in question, and the town itself having accepted and received as for its own the water plant and its distributing system, and continued to use the same for municipal and public purposes under elaborate ordinances providing rates, rules, supervisors, etc. Answer was made to the complaint, which will be discussed later on, which included four separate and affirmative answers. Plaintiff's reply brought the allegations of these answers to issue, and thereafter the parties entered into a Stipulation in writing as to the trial and the facts. Under this

Stipulation the parties expressly waived in writing a trial by jury and further stipulated that the admissions of the pleadings and the agreed facts should exclusively stand as the evidence to be offered as to the issues covered by such admissions and agreed facts, and that testimony might be taken only as to matters not so covered. The cause was brought on for trial before the court in December, 1929, and on May 14, 1931, the court filed its written opinion as and for its findings of fact and conclusions of law herein, and thereafter and on the 16th day of May, decree was entered dismissing the suit and taxing costs against the plaintiff. To sustain the record, if the same should be viewed with uncertainty as to the nature of the case, whether an action at law or a suit in equity, the court further ordered on July 7, 1931, that the written decision filed in the cause should stand as the Findings of Fact and Conclusions of Law under Equity Rule 70½. Thereafter an appeal was brought to this court upon the record made and the bill of exceptions below, wherein is found the following

## ASSIGNMENT OF ERRORS

(found at pages 255 and 256 of printed Transcript on Appeal)

I

The Court erred in ordering this action dismissed and in entering a decree in favor of defendant and against the plaintiff and for the dismissal of said cause in its entirety.

II

The Court erred in making any findings whatsoever relative to whether or not there was notice given to

property owners within the district of the letting of the contract for the construction of the improvement in the Town of Ryegate, which is the subject of this action.

III

The Court erred in making any finding relative to the estimated cost of the improvement in the Town of Ryegate.

IV

The Court erred in making any finding as to whether or not protests were filed after the contract was let for the installation of the improvement in the Town of Ryegate, which is the subject of this action.

V

The Court erred in limiting its findings to a question of the improvements and the improvement district and in finding that the improvements were within an improvement district and for the use and benefit of the improvement district's inhabitants alone.

VI

The Court erred in not finding that the water system was for the use and benefit of the municipality and the Town of Ryegate and for certain portions of the inhabitants thereof and for the purposes set forth in the resolutions creating the improvement district in question.

VII

The Court erred in finding that the defendant, Town of Ryegate, did not, and has not become indebted to the plaintiff, on account of moneys advanced by it and had and received by the Town of Ryegate, the benefits of which the defendant, Town of Ryegate, is now using and enjoying.

VIII

The Court erred in holding that the indebtedness sought to be imposed upon the defendant, Town of Ryegate, is unconstitutional and in violation of any provision of the Constitution of the State of Montana, including Section 6 of Article XIII of said Constitution.

## THE PLEADINGS

(pp. 2-51 of Printed Transcript)

Under stipulation (t) of the Stipulation as to Trial and Facts (p. 60 Tr.) it was agreed

> "Upon the trial of this cause, both plaintiff and defendant may offer evidence by depositions or otherwise upon all issues raised by the pleadings herein not covered by or included in this agreed statement of facts, and the cause may be submitted to the court upon the admissions in the pleadings, this statement of facts and the evidence introduced upon the trial of the cause, but no evidence shall be introduced by either party to this action upon any disputed question of fact which is covered by the foregoing statement of facts."

This provision makes it important that we have a clear understanding of what the admissions in the pleadings are. In studying these pleadings *(reference of page numbers is to the Printed Transcript)* we find the following:

I

The Complaint (p. 2) alleges the identity and status of the parties to the case in Paragraphs I and II, which allegations are admitted by the Answer (p. 19) in Paragraph I.

## II

The Complaint in Paragraphs III, IV and V (pp. 2-3) alleges the passage by the Town council of Resolution No. 10, being the resolution of intention to create Special Improvement District No. 4, on or about December 30, 1919; publication of the required notice January 1, 1920; and passage on or about February 11, 1920, of Resolution No. 14, creating Special Improvement District No. 4. The Answer in Paragraphs II, III and IV (p. 19) admits these facts with slight qualifications not important, showing a slight correction in the boundaries of District No. 4 as shown by Exhibit "A", made a part of Paragraph III of the Complaint by reference. The Answer denies that these boundaries are coextensive with the boundaries of the town itself, and by affirmative allegation states the purpose of Resolution No. 10 was the "construction of pipes, hydrants, and hose connections for irrigating appliances and fire protection as expressed" in the resolution. This affirmative allegation is admitted by plaintiff in its Reply in Paragraph I (p. 48).

## III

The Complaint in Paragraph VI (p. 3) alleges the true object and purpose of the proceedings to be the establishment and installation of a complete water system for the town and its inhabitants. The Answer in Paragraph V (p. 20) denies the purpose as alleged and affirmatively states that at about the same time the town sold general bonds, aggregating $15,000 par value,

to pay part of the cost of the water system for the town. The Reply in Paragraph I (p. 48) admits the truth of this further allegation.

IV

The Complaint alleges in Paragraph VII (p. 4) that Security Bridge Company was the successful bidder and was awarded the contract for the construction of the improvements contemplated. The Answer in Paragraph VI (p. 20) admits the bridge company was the successful bidder and admits that a written contract was entered into with the bridge company "for the construction of said water works system *and the improvements for which said special improvement district was created*".

V

The Complaint at Paragraph VIII (p. 4) alleges in effect that it was intended that the town should issue negotiable evidence of the debt in the form of special improvement bonds to pay for the construction, and that after due and legal proceedings an issue, aggregating $45,602.42, was accomplished; and refers to Exhibit "B" as a copy of one of such issue of bonds. The Answer in Paragraph VII (p. 21) denies that such bonds were negotiable; admits $45,602.42 par value in bonds was delivered to the Bridge Company in payment of its contract and that Exhibit "B" is a correct copy of such a bond. It alleges further the intention of the town and the Bridge Company was that the proceeds of the general bonds of $15,000 would be used for the construction of a waterworks system, and the balance of the sys-

tem and improvements to be constructed in District No. 4, was to be paid by the Special District bonds at par; and further alleges that these bonds were delivered by the town to the contractor, Security Bridge Company, and were accepted in full settlement and payment of the balance due under its contract with the Town of Ryegate, after allowing credit for the proceeds of the sale of the general bonds of the town. The Reply, Paragraph III (p. 48) denies these allegations of the Answer.

## VI

The Complaint in Paragraph IX (p. 5) alleges that the town requested and importuned the Bridge Company to take bonds in lieu of cash prior to making its contract, to which the Bridge Company acceded, and that bonds were duly signed, sealed and delivered from time to time as the work progressed and was finished. The Answer in Paragraph VIII (p. 22) denies such request or importunity; admits that the bonds were issued from time to time, and alleges that the Bridge Company solicited and was anxious to do the work and accept bonds as a portion of its pay; it further alleges that the bonds so delivered were accepted as payment of amounts due on the contract and as actual payments of the estimates made. It further alleges that the Bridge Company and the Town Council knew that the bonds of the Special District could not be sold at a discount of not more than 10%. The Reply in Paragraph II (p. 48) admits that the Bridge Company solicited the work and agreed to take the proceeds of the general bonds, and

the proceeds or the bonds of the Special District as evidence of the obligation to pay; but the other allegations are denied in Paragraph III (p. 48).

## VII

The Complaint in Paragraph X (p. 5) alleges that the Bridge Company had no means of handling bonds in lieu of cash and was obliged to find a market for the same, and that the town had knowledge of this condition and circumstance from the beginning. The Answer in Paragraph IX (p. 23) denies knowledge or information sufficient to form a belief as to these matters.

## VIII

The Complaint alleges in Paragraph XI (p. 6) that, with the knowledge of the town, the Bridge Company negotiated a sale of the bonds to plaintiff, Lumbermens Trust Company, who became the purchaser and succeeded thereby to all rights of the Bridge Company growing out of its construction, etc. The Answer in Paragraph X (p. 23) denies knowledge of plaintiff's rights in the premises until long after the completion of the contract, and denies that plaintiff succeeded to any rights of the Bridge Company.

## IX

The Complaint alleges in Paragraph XII (p. 6) that under its contract with the Bridge Company, plaintiff accepted the bonds from time to time and furnished all the money required to build the water plant; that plaintiff is the owner and holder of all the bonds without

notice of imperfection and for value according to the terms of the bonds, deliveries having begun on July 28, 1920, and concluded November 24, 1920, under the schedule of deliveries set forth. The Answer admits in Paragraph XI (p. 24) that bonds were so issued and delivered on the approximate dates and in the amounts stated; denies sufficient knowledge or information to form a belief as to purchase of the same or furnishing of money, or as to the ownership of the bonds or for value, and denies that plaintiff took the same without notice of imperfection.

## X

The Complaint alleges in Paragraph XIII (p. 7) that the water system was constructed, received and accepted and used by the town continuously since its completion and acceptance, and the town has received the income therefrom, the same having been built wholly from moneys of the plaintiff had and received and used by the defendant town for such purpose. The Answer admits in Paragraph XII (p. 24) that

> *"said waterworks system, and the improvements provided for and specified in the resolution of intention, and the resolutions creating said special improvement district number four, as hereinbefore alleged, was constructed, received and accepted, and is now, and at all times since its acceptance has been, used by the defendant and some of the inhabitants thereof;"*

but denies (p. 25) that the improvements were built or constructed from moneys had or received from plaintiff, in whole or in part; denies the use of any money had or received from plaintiff for the construction of the system, or the improvements contemplated in or pro-

vided for by the creation of the district, and denies that defendant ever had, received or used any money from plaintiff evidenced by the bonds aforesaid.

## XI

The Complaint alleges in Paragraph XIV (p. 8) that interest was paid by defendant on the bonds as the same matured January 1, 1922, and thereafter it refused, and continues to refuse, to pay any interest thereon *or on account thereof,* and has totally and wholly failed to pay and has declared its intention of never paying the principal sum due or any part thereof, and has repudiated the debt and any obligation to pay the same, and that there is now due the total sum of $45,602.42, with interest from January 1, 1922; and that defendant continues to refuse to pay the claim and has repudiated the debt and obligation, notwithstanding repeated demands made for payment thereof. The Answer denies that defendant ever paid any interest upon the bonds; it denies that the bonds are a debt of the defendant, or that there is any obligation on defendant's part to pay the same, or any part, and denies that anything is due or owing from defendant to plaintiff, or any interest whatever. It admits that defendant refuses to pay any part of the claim, denies that it ever repudiated the debt, and denies that the bonds are a debt of defendant. It admits further that the defendant has not paid any part of the interest or the principal, and does not intend ever to pay the same, or any part thereof. It alleges that the interest on January 1, 1922, was paid out of assessments levied upon property included in the Special Improvement District No. 4, and not otherwise; and by

way of explanation denies that defendant has ever refused to pay any interest on the district bonds, for the reason that defendant is not liable thereon and has never been requested to pay the same. The Reply Par. III (p. 48) denies all these affirmative allegations.

## XII

The Complaint alleges in Paragraph XV (p. 3) the diverse citizenship of the parties and the jurisdictional amount involved. This is admitted by the Answer in Paragraph XIV (p. 26).

## XIII

Further matters in the Answer are to be noticed as follows:

Paragraph XV (p. 26) is an additional denial of "negotiability" of the bonds; and in Paragraph XVI (p. 26) the Answer alleges that on February 17, 1920, Resolution No. 14, creating Special Improvement District No. 4, was passed and refers to a copy thereof, marked Exhibit "A", which is annexed; and by Paragraph XVII (p. 26) the Answer alleges that on June 9, 1920, the Town Council passed Ordinance No. 28, providing a method and manner of assessment and paying the cost of improvements, a copy of the ordinance being annexed and marked Exhibit "B"; and further by Paragraph XVIII (pp. 26-27) the Answer alleges that the Town Council passed and adopted Ordinance No. 29, authorizing the execution, issuance and delivery of the bonds in question, a copy of such ordinance being annexed to the Answer as Exhibit "C". These allega-

tions of Paragraphs XVI, XVII and XVIII and Exhibits are admitted by the Reply in Paragraph I (p. 48).

## XIV

The Answer in Paragraph XIX (p. 27) alleges that under these resolutions and ordinances the bonds in question were payable only out of assessments to be levied on the real property in Special Improvement District No. 4, and not otherwise; that they are not general obligations of the town, nor an indebtedness of the town, nor payable out of the general funds of the town. These allegations appear to be denied under the provisions of Paragraph III of the Reply (p. 48).

## XV

The defendant pleaded a "first affirmative defense" (p. 27), the purport of which is, that the Town of Ryegate on April 26, 1920, had an assessed value of all property within the town of $577,005.00, and that its then outstanding and unpaid indebtedness was $15,584.87, with no money in the general fund out of which special improvement district bonds could be paid, nor were the same payable from current revenues. Further schedules of indebtedness and money in the general fund is set forth as of the date of delivery of each of the parcels of bonds delivered during the construction work in question, and at its termination, purporting to show that at all these times the town was generally indebted in excess of 3% of the tax valuation of the property within the town, and that, therefore, the constitutional limitation of indebtedness would prevent the obligation of

the special improvement district bonds from being imposed upon the town itself. These allegations appear to be denied in Paragraphs I and II (p. 49), being the Reply to the separate and affirmative defenses.

## XVI

For a "second affirmative defense" (p. 29) defendant alleges, on information and belief, that plaintiff purchased the bonds at 80% of the par value thereof. This allegation is denied by the Reply in Paragraph II (p. 49).

## XVII

For a "third separate defense" (p. 29) defendant alleges in Paragraph I, that the Town Council, in deciding to create Special Improvement District No. 4, employed special counsel, of especial skill and experience in municipal bonds, to prepare the necessary resolutions and ordinances, and supervise all the proceedings, for the sole purpose of having the same done strictly in accordance with the Montana laws, so that the bond issues should be legal and valid, and that everything advised by said special counsel to be necessary to make and do was made and done to make the bond issue legal and valid. This allegation is denied for want of knowledge or information sufficient to form a belief in Paragraph III (p. 49) of the Reply.

Defendant further alleges in Paragraph II, (p. 30) that Security Bridge Company did not rely upon the proceedings had under the advice and direction of the special counsel employed by the town, but had all the proceedings passed upon by their own counsel, who are of more

than ordinary skill and experience in bond issues, and matters relating thereto under the Montana laws, and that in purchasing the general bonds of the town, and in agreeing to accept the special improvement district bonds in payment of its work, Security Bridge Company relied entirely on the advice of its own counsel, and accepted the improvement district bonds knowing that the Town of Ryegate was not liable for the payment of any part of the bonds, principal or interest, and accepted the same knowing that it must rely entirely upon the payment of assessments on the real property within the district. These allegations are denied by the Reply in Paragraphs IV and V (p. 49), except that it is admitted Security Bridge Company had its own counsel investigate the legality of the bond issues referred to.

In Paragraph III, (p. 31) defendant alleges, on information and belief, that when plaintiff, Lumbermens Trust Company, purchased the bonds from Security Bridge Company it purchased the same knowing that the town was not liable for the payment of either principal or interest, and did so without relying on any statement of any officer of the Town of Ryegate, but relied solely on the advice of its counsel, who were skilled in such matters, and purchased the bonds on the advice of its counsel that the proceedings had were legal and the bonds were valid obligations of the district. These allegations are denied by Paragraph VI of the Reply (p. 49).

## XVIII

For a "fourth affirmative defense" (p. 31) defendant alleges in Paragraph I that the town made an attempt

to levy assessments upon the property in Special Improvement District No. 4 in the year 1921, which assessment was made payable on or before November 30, 1921. This is admitted by the Reply in Paragraph VII (p. 49).

In Paragraph II, (p. 31) defendant alleges that in January, 1922, Mike Belecz, a property owner, together with a number of other property owners within the district, began suits in the District Court of the State of Montana for the County of Golden Valley, against the Town of Ryegate and the County Treasurer of Golden Valley County, for the purpose of enjoining and restraining the Town of Ryegate and the County Treasurer from the collection of any assessments levied, or attempted to be levied, upon property in the Improvement District No. 4, on account of the payment of any part of the principal or interest on any of the bonds in question, and alleged in their complaint that the description as to the character of the work set forth in the Resolutions of Intention and of Creation of said district was defective, in that the character of the work described was "the construction of pipes, hydrants, and hose connections for irrigating appliances and fire protection", which was not definite information to the property owners as to the specific character, extent or nature of the contemplated improvements, and did not include the payment of the cost of installation of any general waterworks system. They further complained that at the time the Resolution of Intention was passed there was not on file or available plans and specifications for examination by the lot owners; further that the whole

cost of the improvements made under the resolutions in said special improvement district exceeded the sum of $1.50 per lineal foot plus the cost of pipe as prescribed by law; and further that no notice of any kind was given of the letting of the contract for construction of the improvements; and that when the same was let the price under the contract amounted to a sum exceeding $52,000, while the estimated cost was stated at $28,350, and that the total cost when actually constructed exceeded $57,000; and further that the contract price and the actual cost of making the improvements were wholly out of proportion to the value of the improvements to the property; and that when the contract was let it was impossible to sell bonds in the improvement district at par; that no purchaser could be found; which facts were known to the mayor and town council, and that the contractor took the bonds in payment of the contract price, and in so doing allowed for a discount on the bonds, which was added to its bid for the work, thereby increasing the cost of the work over what it would have been had the bonds sold at par; all of which was done with the knowledge of the mayor and the town council; and further, that in the suits referred to judgments and decrees were entered holding the assessments to be null and void, and enjoining the Town of Ryegate and the County Treasurer from collecting, or attempting to collect, any assessments. Under Paragraph VII of the Reply (pp. 49-50) it is admitted that in the month of January, 1922, Mike Belecz and other property owners began various suits for the purpose of enjoining and restraining the Town of Ryegate and the County Treas-

urer from collecting any assessments to be levied upon property in District No. 4 for the payment of principal and interest of the special improvement district bonds. It denies knowledge or information sufficient to form a belief as to the contents of the complaints, and admits that judgments and decrees were made and entered, but denies knowledge or information sufficient to form a belief as to the extent and character of the judgments and decrees, excepting that they have prevented the collection of principal and interest on the bonds in question.

At Paragraph 3 (p. 34) defendant alleges that plaintiff herein, Lumbermens Trust Company, was advised of the commencement of these suits and employed special counsel to assist counsel for the town in defending the suits; that no appeals have been taken from the judgments and decrees, which have long since become final judgments and decrees as to the legality of the bond issue. These further allegations are denied by Paragraph VIII of the Reply (p. 50), and all other allegations not specifically touched upon in the affirmative matters are denied by Paragraph IX of the Reply (p. 50).

Since the Stipulation as to Trial and Facts referred to is especially important under the Montana practice as well as the federal practice in cases tried to the court without a jury, wherein an agreed statement of facts is in effect considered as findings of fact for the purpose of review on appeal, we believe this brief should contain the

## STIPULATED FACTS

(found at pp. 52-61, Transcript on Appeal)

It is agreed.

a. That the allegations of Paragraphs I, II, IV, and XV of the complaint are true. (p. 52).

b. In 1919 the Town of Ryegate, the county seat of Golden Valley County, was desirous of installing a water system, but because of the small assessed value of all property within its corporate limits it could not legally and constitutionally issue sufficient general bonds to cover the entire cost of such installation. It did issue general bonds of the Town of Ryegate in the sum of $15,000.00 and on December 30th, 1919, passed a resolution of intention to create and establish improvement district known as Special Improvement District No. 4, and Exhibit "A" attached to the complaint herein, is, except as to an immaterial matter, a true and correct copy of the resolution so passed and said district was created for the purpose of raising additional funds over and above the $15,000.00 general bonds necessary to pay for said water system and improvements specified in such resolution. (pp. 52-53).

c. On Feb. 17th, 1920, said town passed and the Mayor thereof approved Resolution No. 14, a true copy of which is attached to the answer herein, marked Exhibit "A" thereto. (p. 53).

d. The map initialed and marked Exhibit 1 filed with this agreed statement correctly portrays the boundaries of the town and its additions, the boundaries of said improvement district and location of water mains and streets or city hydrants of said water system. The unplatted area shown within the boundaries of the town and its additions on said map is liable for the payment of all taxes levied for town purposes, the same as though it were platted; said map also portrays the location of certain public buildings in said town. The only buildings belonging to the Town of Ryegate as a municipal corporation are the pumping station of said water system and a small frame building used to store fire equipment, said building and equipment having a value not to exceed $1,000.00. (p. 53).

e. The true object and purposes of the passage and approval of said resolution and the issuance of said general and special improvement district bonds was the establishment and installation in and for the Town of Ryegate, and for a portion of its inhabitants of a complete waterworks and a complete waterworks system consisting of reservoir, pumping plant, mains, and all other connections and appliances necessary to have a complete system for the supplying of water for municipal purposes to said town, and water to a portion of the inhabitants thereof and for the purpose set out in said resolutions. (p. 53-54).

f. That when the said town of Ryegate called for bids for the construction of said waterworks system and the improvements specified in said resolutions, the Security Bridge Company was the successful bidder therefor and a written contract was thereupon entered into between said town and said Security Bridge Company for the construction of said waterworks system and the improvements specified in said resolution, a true and correct copy of which contract is hereto annexed and marked Exhibit 2. (p. 54).

g. For the purpose of paying for said waterworks system and the improvements specified in said resolution, said town issued its general bonds in the sum of fifteen thousand dollars and bonds of said Special Improvement District No. 4 in the sum of forty-five thousand six hundred two dollars and forty-two cents; that Exhibit "B" attached to the complaint herein is a true and correct copy of one of said special improvement district bonds which, save and except as to amounts and dates of maturity, is a true and correct copy of all of said bonds. (p. 54).

h. On April 14, 1920, W. P. Roscoe, as an officer of the Security Bridge Company, purchased said general bonds of said town at par and accrued interest and said Security Bridge Company agreed to accept and did accept said general bonds and said special improvement district bonds in the sum of forty-five thousand six hundred two dollars and forty-two cents in payment of the costs of installation of said waterworks system and the

improvements specified in said resolution and that said improvement district bonds were issued and delivered to said Security Bridge Company, or upon its order, from time to time as the work progressed and upon the estimates of the engineer of said town as said work was completed and accepted. (pp. 54-55).

i. That said Security Bridge Company was a construction corporation without funds for investment purposes and it was necessary for said company to at once arrange for the sale of said bonds in order to obtain the money necessary to purchase supplies and materials and to pay the labor necessary for the construction of said waterworks and the improvements specified in said resolution. (p. 55).

j. The Security Bridge Company sold said general and improvement district bonds to plaintiff herein at 85% of the par value thereof, the plaintiff paying said Security Bridge Company the sum of thirty-eight thousand seven hundred sixty-two dollars and six cents for said improvement district bonds. (p. 55).

k. That while said contract disclosed that said bonds were taken at par as the consideration in the construction contract, they were in accordance with a prior agreement between plaintiff and the Security Bridge Company sold by the Security Bridge Company to the plaintiff herein at a price of 85% of the par value thereof. (p. 55).

l. From time to time, after said improvement district bonds were issued for completed and accepted work, plaintiff purchased and accepted said bonds at 85% of their par value with accrued interest from said Security Bridge Company and did thus by the purchase of said district and said general bonds furnish to Security Bridge Company all the money used by it to build and complete said waterworks system and the improvements specified in said resolutions, that plaintiff became the purchases of said bonds for value before maturity and is now the owner and holder thereof and that said general and improvement district bonds were issued and delivered by said town to said Security Bridge Company, or delivered to the plaintiff, at the request of said Security

Bridge Company, upon the dates, of the number and in the amounts set out in paragraph twelve of the complaint herein. (p. 56).

m. Said water system and improvements specified in said resolution were so constructed and accepted and the said town has been and yet is receiving the income from said system and improvements, and said town and such of the inhabitants thereof as live within the limits of said district now have and are using said water system and improvements. (p. 56).

In further amplification of this paragraph "m" the facts are that there are:

(1) Thirty business houses within said improvement district and none without. (p. 56).

(2) Public buildings consisting of public school, courthouse, four churches, postoffice in one of said business houses, Milwaukee Railway Station, school gymnasium and a shack used as fire hall, all within said special improvement district, there being no similar buildings in said town outside of said improvement district. (pp. 56-57).

(3) Sixty-one residences within said improvement district. (p. 57).

(4) Thirteen residences, two warehouses, a small substation of the Montana Power Company outside of the limits of said improvement district but within the fire protection of said water system by reason of the fire apparatus owned by said town but used for fire protection only as to such residences and structures. (p. 57).

(5) There are twenty-two residences and two county warehouses in the Town of Ryegate situated outside of the limits of said special improvement district which cannot use said water system and improvements or equipment for fire protection, or for any other purposes as the same was installed. (p. 57).

(6) Said town has operated said water system and said improvements since their installation and has received therefrom total gross income as follows, each year of its operation thereof:

| | |
|---|---|
| 1921 | $ 211.33 |
| 1922 | 978.53 |
| 1923 | 721.16 |
| 1924 | 980.95 |
| 1925 | 811.70 |
| 1926 | 1092.68 |
| 1927 | 749.18 |

Total gross receipts $5,545.53. (p. 57).

(7) The charges against said water department, water system and improvements during the same years are as follows:

| | |
|---|---|
| Cash paid on warrants issued with interest thereon | $5,539.28 |
| Warrants outstanding | 1,504.03 |

The interest accruing on said general bond issue of $15,000.00 is paid out of a levy of 7½ mills each year upon all of the property within the Town of Ryegate and its additions, which levy has not been quite sufficient to pay such accruing interest. None of such general bonds have been paid. (p. 58).

The interest which matured on said improvement district bonds up to January 1, 1922, was paid by the Town of Ryegate out of assessments levied upon the lots in said district in accordance with said resolutions, but no part of said interest was paid out of any general or special fund of said town. Six per cent is a reasonable rate of interest in the State of Montana. (p. 58).

n. On October 16, 1920, the town clerk of the Town of Ryegate at the request of Security Bridge Company forwarded bonds numbered fifty-four to seventy-eight inclusive for five hundred dollars each a total par value of twelve thousand five hundred dollars of said Special Improvement District No. 4 to plaintiff and on November 26, 1920, at the request of Security Bridge Company said town clerk forwarded to plaintiff bonds of said Special Improvement District No. 4, numbered from seventy-nine to ninety-one inclusive of the par value of six thousand six hundred two dollars and

forty-two cents and that plaintiff remitted to Security Bridge Company 85% of the par value of said bonds with accrued interest. (pp. 58-59).

o. All of the allegations of Subdivision II of defendant's answer, being defendant's first affirmative defense, are admitted to be true excepting the clause "nor were the same payable out of the current revenues of said town of Ryegate" and excepting the clause "that said bonds were never payable out of the current revenues of said town," and excepting all of that portion of said Subdivision II which reads as follows: "and that if the said bonds of special improvement district number 4 of the Town of Ryegate, amounting to the sum of $45,602.42 were held to be general obligations of the town of Ryegate the same and each of said bonds would be and are unconstitutional, invalid and void for that the amount of said bonds and each of them, added to the then general indebtedness of said town would be and are greatly in excess of the constitutional and statutory limit of indebtedness which said town might then or may now incur." None of the exceptions above noted are admitted. (p. 59).

p. All of the allegations of Paragraph one of Subdivision IV of defendant's answer being defendant's third separate defense are admitted. (p. 59).

q. All of the allegations of Paragraph 2 of said Subdivision IV are admitted except the following allegations "and that in purchasing the general bonds of the Town of Ryegate, as herein alleged, and in agreeing to accept such special improvement district bonds at par value in payment of work under its said contract with the Town of Ryegate, said Security Bridge Company relied wholly upon the advice of its counsel." (pp.59-60).

r. It is further admitted that plaintiff purchased said special improvement district bonds from Security Bridge Company with the knowledge that they were special improvement district bonds and with full knowledge of the laws of Montana governing the issuance of such bonds, the powers of the defendant with reference thereto and the methods provided and authorized for the payment thereof. (p. 60).

s. It is admitted that in the month of January, 1922, Mike Belecz and other property owners began various suits (see refernce thereto in Subdivision V of defendant's answer), and that made a part of this statement of agreed to facts by being attached hereto, marked Exhibits 3, 4, 5 and 6 are, except for formal parts, true copies of the complaint, answer, reply and decree respectively in said suit.

That similar suits were filed by a number of other persons similarly entitled to sue with similar pleading and decree. That this plaintiff had its own counsel associated in the defense and trial of those actions. That no appeal was ever taken from said judgment and decrees. (p. 60).

t. In none of the minutes of the town council of the Town of Ryegate does the name of plaintiff, as purchaser of said general bonds of the Town of Ryegate or of said special improvement district bonds appear. Neither does plaintiff's name appear in any of said minutes, records or files in any connection whatever, except in copies of letters of the town clerk remitting some of said bonds to plaintiff at the request of Security Bridge Company, as hereinbefore set forth. (pp. 60-61).

Upon the trial of this cause, both plaintiff and defendant may offer evidence by depositions or otherwise upon all issues raised by the pleadings herein not covered by or included in this agreed statement of facts, and the cause may be submitted to the court upon the admissions in the pleadings, this statement of facts and the evidence introduced upon the trial of the cause, but no evidence shall be introduced by either party to this action upon any disputed question of fact which is covered by the foregoing statement of facts. (p. 61).

Signed by the respective counsel and filed. (p. 61).

This Stipulation of Agreed Facts refers to

**EXHIBIT NO. 1**

**Blue-Printed Map of Ryegate**

This Exhibit is a blue-printed map of the Town of Ryegate and adjacent territory, intended to show the

boundaries of the Town of Ryegate, the boundaries of Special Improvement District No. 4 therein, the location of the reservoir, the pumping plant and the connecting mains, distributing pipes and hydrants. This Exhibit in reduced size has been made into a cut, which is hereunto appended.

The Agreed Facts refer also to

**EXHIBIT NO. 2**

(Printed Transcript, pp. 61-67.)

**Construction Contract**

(Important provisions only are set up.)

* * * TOWN OF RYEGATE, MONTANA, of the first part, and THE SECURITY BRIDGE COMPANY, a corporation of Billings, Montana, of the second part. (p. 61).

* * * party of the second part has agreed * * * to furnish * * * all the necessary material and labor, * * * and to excavate for and build * * * before the first day of October, A. D. 1920, the water mains, pumping plant, and reservoir indicated on the plans now on file in the office of the Town Clerk, and the connections and appurtenances of every kind complete * * * in the manner * * * specified, * * * the Engineer shall * * * inspect * * * the materials to be furnished and the work * * * to see that the same conform to plans and specifications. (pp. 61-62).

* * * The first part * * * to pay * * * the following prices as full compensation for furnishing all materials, labor, tools and equipment used in building and constructing and completing said water system * * * and full compensation for all loss or damage arising out of the nature of the work, etc. * * * according to plans and specifications and the requirements of the engineer * * * to-wit: (p. 64).

For all material, tools and labor and in every way completing the proposed water system in the Town of Ryegate, Montana, according to plans and specifications * * *, and any special instructions that may be given from time to time * * *. (p. 64).

(Here follows a list of unit prices given both in words and figures, and describing each size or kind of pipe, hydrant, excavation, backfill reservoir, pump house, motors, cess pools, electrical equipment, etc.) (pp. 65-66).

* * * that the *payments* by the party of the first part *shall be as provided for in the specifications.* (p. 67).

(Signatures follow).

The Specifications as introduced at the trial supplemented the foregoing contract and the portion dealing with *"payments"* will be found (pp. 212-213) in the following language:

## PAYMENTS

The contractor will receive monthly partial payments of the amount of ninety per cent of an estimate of the work done or the material furnished during the preceding month made by the engineer in charge on the 1st day of each month. Said estimate to be less the amount of any deduction which may be made in accordance with these specifications. The remaining ten per cent shall be paid upon final completion and acceptance of the work by the engineer and members of the Town Council. Final payment shall be made within ten days of date of final acceptance of the work. The Town now has available from the proceeds of general obligation bonds, $15,000.00 in cash to apply on the construction of the sewer system and $15,000.00 in cash to apply on the construction of the water system. After deducting the preliminary expenses this money will be paid to the contractor in cash for the construction of the reservoir, pump house, pumping plant, the sewage disposal plant, and such of the main water line and the main sewer line as it

will cover. The balance of the water system is to be paid in Special Improvement District bonds drawn against Special Improvement District No. 4 in the Town of Ryegate, Montana, and the balance of the cost of the Sewer System will be paid for in Special Improvement District Bonds drawn against Special Improvement District No. 3, in the Town of Ryegate, Montana. These bonds will be accepted by the contractor in full payment for such work at their par value.

The contractor will from time to time have included in his estimate, the cost of such incidental expenses, as printing, engineering, legal expenses, etc., for which he will be issued Special Improvement District bonds against Special Improvement Districts Nos. 3 and 4, and the amount of such incidental expenses as shown by the estimate shall be immediately refunded in their full amounts without discount to the Town or such other persons as estimates may have been issued for.

The litigation brought in the state court in behalf of Mike Belecz and others in January, 1922, referred to in the Agreed Facts as Exhibits Nos. 3, 4, 5 and 6, are respectively the Complaint, Answer, Reply and the Court's Findings and Decree (pp. 68-92).

These have been edited for the present purpose by the elimination of unimportant provisions intended to show the issues made in that suit. The Complaint, Answer and Reply will be considered together, being

**EXHIBITS NOS. 3, 4, 5.**

(Printed Transcript, pp. 68-83.)

The Complaint alleged in Paragraphs 1, 2, 3 and 4, the identity of the parties, and alleges the plaintiffs to be the owners of the various tracts of land set forth as

belonging to them and embraced within the description of District No. 4. In Paragraphs 5, 6 and 7 it is alleged that the resolution of intention, publication of notice and resolution creating District No. 4 were accomplished. All of these allegations (pp. 69-70) are admitted by the Answer (p. 81).

Paragraph 8 of the Complaint alleges the object and purpose of the proceedings as the establishment and installation of a complete water works and complete water works system, consisting of reservoir, pumping plant, mains and other connections and appliances necessary for a complete system furnishing water to the inhabitants of the town, and that a contract was made for the construction of such system, which was constructed and installed (p. 71). These allegations are denied by the Answer (p. 81).

The ninth paragraph of the Complaint alleged that for the purpose of paying for the improvements a resolution known as Ordinance No. 28 was passed, providing method and manner of assessment and payment on an area basis, and further provided for the issuance of bonds of District No. 4 to be retired out of the fund derived from assessments when paid, and that Ordinance No. 29 was passed authorizing the issuance of bonds and detail connected therewith (p. 71). These allegations are admitted by the Answer (p. 81).

The Complaint in Paragraph 10 alleges levy and assessment adopted by the town council imposed against the real property in District No. 4, including plaintiff's properties, to defray the cost of improvements, reciting

the total cost as $45,602.42, and further alleges on information and belief that notice of resolution levying the assessment was not published as required by law, and further alleged the detailed descriptions of the properties owned by the plaintiffs (pp. 72-75). The Answer admits these allegations, except for the denial of allegations referring to lack of publication of the notice of resolution levying assessment (p. 81).

The Complaint in Paragraph 12 alleged the description in resolution of intention to be insufficient to give definite information to plaintiffs of the specific character, extent or nature of the improvement; that the description used was "construction of pipes, hydrants and hose connections for irrigating appliances and fire protection"; that this description did not include water works or a general water works system or system of mains or reservoir or pumping plant which was contemplated, and was thereafter constructed; that the improvements described were entirely different and much less extensive than the improvements actually made; that the description recited that the improvements would be made in accordance with plans and specifications to be prepared, which were not then prepared and were not available for examination by plaintiffs. That the notice published and the resolution creating the district were equally defective in failing to describe the character of the improvement; that the town council did not acquire jurisdiction to create the improvement district or proceed with the installation of mains; that all proceedings were therefore void (pp. 76-77). These allegation are denied by the Answer (p. 81).

The Complaint in Paragraph 12 alleges cost in excess of the limit prescribed by law, i. e. $1.50 per lineal foot plus the cost of the pipe laid (p. 77). The Answer denies this (p. 81).

The Complaint in Paragraph 13 alleges no notice of any kind given of the letting of the contract; that when the contract was let the price amounted to $52,829.35; estimated cost was $28,350.00; total actual cost was $57,619.22; that contract price and actual cost are wholly out of proportion to the value of the improvements (p. 77). The Answer denies these allegations (p. 81).

The Complaint in Paragraph 14 (p. 77) alleges on information and belief that at the time contract was entered into it was impossible to sell the bonds at par; the contractor took the bonds in payment of its contract price and extras, and allowed a considerable discount because of the market condition; that the cost of the work was greatly increased thereby; that all of these matters were well known to the mayor and town council. The Answer (p. 81) denies these allegations.

The Complaint in Paragraph 15 (p. 78) alleges protests were made by the owners of a majority in area of the lots and parcels of land within District No. 4, and alleges the withdrawal of protest by the railway company by the payment of $2500.00 furnished by certain parties who were interested in having the improvements made, including the contractor who secured the contract. The Answer (p. 81) denies these allegations.

The Complaint in Paragraph 16 alleges illegality of the levies and assessments on account of the matters re-

ferred to (p. 79), which are denied by the Answer (p. 81).

The Complaint in Paragraph 17 (p. 79) alleges that one-tenth of the taxes and assessments levied were payable on or before November 30, 1920; became delinquent December 1, 1921, with penalties thereafter; that defendants threatened to sell the property on account of such delinquencies, thereby causing irreparable damage, injury, etc. The Answer (pp. 81-82) admits the allegations of Paragraph 17, excepting a denial as to plaintiffs' remedies or wrongs or damage or injury which will be occasioned by the enforcement of the levies and assessments.

The Complaint prayed a decree adjudging the taxes and assessments null and void (p. 80), and prayed an injunction against defendants from selling any of the property on account of the taxes and assessments for the year 1921; and further prayed injunction from selling any portion of the lands for any year thereafter, and restraining the issuance of tax deeds if sales were accomplished, and restraining defendants from in any manner attempting to collect any portion of the taxes and assessments.

The defendants filed a special defense (pp. 82-83) which alleged actual publication of the resolution of intention. This is admitted in the Reply (p. 83).

Defendants further alleged (p. 82) that plaintiffs did not within sixty days from the date of awarding the contract file written notice specifying in what respect the acts were irregular, erroneous or invalid, or in what manner their property would be damaged by the mak-

ing of said improvements, and did not in writing make any objections to any act or proceeding with relation to the making of said improvements, and alleged that thereby plaintiffs have waived all objections which they now urge.

The Reply (p. 83) admits these further allegations, except that they deny the waiver of any objections to the irregular, erroneous and invalid acts complained of herein.

## EXHIBIT NO. 6

(Printed Transcript, pp. 84-92.)

covers the State Court's findings, etc., as follows:

## DECREE, ETC.

(p. 84)

This cause came on for trial February 6, 1923 * * * court * * * without a jury * * *. D. Augustus Jones, Esq., and Johnston, Coleman & Johnston appeared as attorneys for plaintiffs, and Stuart McHaffie, Esq., and Nichols and Wilson appeared as attorneys for the defendants. Evidence was introduced on behalf of both plaintiffs and defendants and the cause was thereupon submitted to the Court.

Thereafter * * * June 27, 1924, * * * filed * * * Findings of Fact and Conclusions of Law * * * as follows: * * *

## FINDINGS OF FACT

(p. 84)

(1) That the defendant Town * * * a Municipal corporation, * * * the defendant W. O. Wood * * * treasurer of said Golden Valley County, * * *

(2) The plaintiffs * * * the owners of * * * property * * * described in complaint * * * within the limits of Special Improvement District No. 4 * * * (p. 84-85).

(3) * * * on the 30th day of December, 1919, * * * town * * * duly passed resolution of intention number 10, for the creation of special improvement district No. 4 * * * notice * * * was duly published * * * thereafter * * * resolution number 14, creating * * * was duly passed * * * (p. 85).

(4) * * * the character of the improvement as set out * * * was "the construction of pipes, hydrants, and hose connections for irrigating appliances and fire protection." * * * the * * * improvement * * * actually installed * * * was a complete water works and water system * * * reservoirs, pumping plant, mains and fire hydrants * * * for the furnishing of water to the inhabitants of said town. * * * installed * * * by Security Bridge Company * * * under one contract, * * * upon bid * * *. * * * the notice * * * and the plans * * * and contract * * * all refer to * * * a complete water system consisting of the elements above described. (pp. 85-86).

(5) * * * after the contract * * * let, the Town * * * provided * * * mode of assessment * * * of * * * each parcel of land * * *. * * * the assessment * * * was for * * * $45,602.42 * * * bonds * * * were * * * accepted and * * * issued * * * in payment * * *. (p. 86).

(6) * * * the plans * * * delivered to * * * Clerk ten days or two weeks before April 13 * * * not presented to the Town Council * * * until April 13 * * * one day before bids * * * received * * *. (pp. 86-87).

(7) * * * pipe used * * * cost * * * $17,726.47. (p. 87).

(8) * * * contractor * * * took into consideration * * * the bonds * * * discount * * * and bid * * * upon that basis * * * (p. 87).

(9) * * * no notice of any kind * * * of the letting of the contract. (p. 87).

(10) * * * the cost * * * which the Town Council * * * attempted to assess against the property * * * was the sum of $45,602.40 * * * estimated cost * * * was $28,-350.00. (p. 87).

(12) * * * plaintiffs (8 named) * * * within sixty days * * * filed written protests. (p. 88).

(13) * * * improvement * * * was a different improvement * * * in that the improvement actually installed was an entire and complete water system, whereas * * * resolution * * * was the construction of pipes, hydrants, and hose connections * * *. (p. 88).

(14) * * * within the time * * * written protests * * * filed by * * * majority in area * * * the Chicago, Milwaukee & St. Paul Railway Company, the owner of a large amount of land * * * prior to the hearing upon said protests interested citizens * * * raised a fund of $2500.00 and paid the same to the Chicago, Milwaukee & St. Paul Railway Company * * * the said * * * Railway Company withdrew its protest * * * so doing an insufficient number of protests were left on file to defeat the creation of said district. (pp. 88-89).

From the foregoing Findings of Fact the Court made

## CONCLUSIONS OF LAW

(p. 89)

1. * * * Town Council * * * never * * * acquired jurisdiction to create * * * district for the installation of a water system or of an improvement of the kind actually installed, * * * installation * * * without authority * * * all of the proceedings with reference thereto * * * null and void.

2. * * * cost of * * * system as installed was in excess of the cost allowed by law * * * and the assessment * * * for that reason illegal. (p. 89).

3. * * * Town Council * * * knew * * * contract price was increased * * * that the bonds issued * * * would have to be disposed of at less than par * * * knew * * * bid would have been * * * lower * * * and contract price lower if the bonds could have been sold at par, * * * for this reason * * * proceedings * * * in letting said contract were null and void. (pp. 89-90).

4. Plaintiffs * * * entitled to an injunction restraining the defendants * * * from in any way * * * attempt-

ing to collect * * * assessments against the property of any of said plaintiffs situate in * * * District No. 4 * * *. (p. 90).

5. Let Decree be drawn in accordance * * *. (p. 90).

## DECREE

(p. 90)

That all taxes and assessments levied and assessed upon property * * * to pay for special improvements * * * under resolution of intention No. 10 * * * and * * * resolution No. 14 * * * which are the subject of this action, are null and void; that the defendants are * * * enjoined and restrained from selling any of the property of plaintiffs herein, described in the complaint * * * account of the nonpayment of any of said * * * assessments imposed because of the creation of said district and the construction of improvements therein; * * * and * * * enjoined and restrained from issuing any tax deed to the purchaser of any of said lots or property * * *.

That the said defendants * * * are * * * enjoined and restrained from * * * attempting to collect * * * assessments; that the lots and properties referred to herein, the taxes and assessments against which * * * are hereby declared to be null and void * * * are particularly described as follows: (Detailed description by lot and block number, etc.) (pp. 90-91-92).

Dated July 8, 1924.
Filed July 16, 1928.

## TESTIMONY

(Printed Transcript, pp. 151-251.)

At the trial of this cause, in addition to the pleadings, agreed statement of facts and exhibits appended thereto, some testimony was offered intended to cover the facts which were not made the subject either of admission or agreement.

We find the testimony of *John N. Neale* (beginning p. 157). This witness was a bond buyer of the plaintiff in the years 1919 and 1920. His testimony discloses that he visited the town of Ryegate, interviewed various members of the council, discussed the prospective improvements and made his recommendations; all this in the year of 1919. He testifies affirmatively that he discussed his identity and his principal with these parties. The testimony shows (p. 163) that he had no information as to any opposition by the property holders in the district and explains (p. 164) that he would have made no recommendation to purchase any bonds had he known or heard of any protests or opposition, that being a condition which he always looked out for and which his company would always avoid if present. This is reiterated (p. 165). His testimony further discussed the necessity of Security Bridge Company finding a market for the bonds (p. 166) and discloses that such necessity was discussed and knowledge of the condition imparted to the officers of the Town of Ryegate. This testimony was offered to show knowledge on the part of the Town of plaintiff's position in the matter, and a lack of notice on the part of plaintiff of any opposition or basis of imperfection in the bonds, as well as disclosing knowledge imparted to the town of the necessity of the contractors finding an outlet for the sale of the bonds.

The testimony of *W. P. Briggs* (p. 170) discloses that a statement relating to Local Improvement Bonds, marked Plaintiff's Exhibit No. 1 (p. 171) was forwarded to the plaintiff, signed by the town clerk and

with the seal of the town attached, dated August 12, 1920. This statement discloses a negative answer to the question propounded as to whether any litigation was pending or threatened affecting the issue (p. 173). The witness' testimony further discloses that on May 29, 1920, the Town of Ryegate drew a sight draft on plaintiff for the balance of the proceeds of $15,000 general bond issue (p. 175); and further shows (pp. 176-177) that no knowledge of threatened litigation, protests or anything of that character was brought to the plaintiff until the earlier part of the year 1922, when suit was begun in the state courts. The testimony of this witness was offered to show good faith and lack of notice of any imperfection on the part of plaintiff, and also as bearing upon the knowledge of the Town that plaintiff, Lumbermens Trust Company, had undertaken to purchase these securities, as well as the general bonds, as early as the month of May, 1920.

The testimony of *W. P. Roscoe* (beginning p. 178) was received, which showed him to be officer of Security Bridge Company; shows that the witness made several trips to the Town of Ryegate, talked to the various councilmen and the mayor; definitely shows that he discussed with these officials the necessity of the contractor selling the bonds; that the witness directed the Town and its clerk to mail the first issue of general bonds, with draft attached, to plaintiff (p. 180), and further discloses that witness secured a copy of legal opinion from the Town referring to the general bond issue, and advised the city that it was to be forwarded to Lumbermens Trust Company, as well as the tran-

script of the special district proceedings and the opinion and transcript were made Plaintiff's Exhibits "A" and "B" attached to the deposition, which were received in evidence. The witness further testified that certificates were made up as to the allowance of estimates on the work in connection with the bonds issued from time to time (pp. 182-183), and that he advised the council and the town officers that these certificates were for the Lumbermens Trust Company. The witness further testified as to the installation of the system. That it would serve a population three times the then population of Ryegate. "The system was installed in such a way that extensions could be made to it that it would serve the entire community of Ryegate within the corporate limits" (pp. 183-184). This witness' testimony was intended to show (1) knowledge on the part of the town of the necessity of selling the bonds by the contractors; (2) that Lumbermens Trust Company was known by the town to be the buyer of the bonds early in the transaction and that various exhibits indicated recognition of this on the part of the town and its officers; (3) and further disclose facts with respect to the installation of the water system that the water system was for the entire city, irrespective of the limitation of the improvement district, was what was contemplated and installed; (4) and that the plant installed could serve a growing community without additional expense to the plant itself (the ordinances provide for the cost of extensions).

Ordinance No. 33 (p. 186), showing that the town had provided regulations for the use of the water and

charges and tariffs relating thereto, was introduced; Ordinance No. 34 (p. 201), showing the creation of the office of City Water Commission and its duties. These ordinances were important in showing not only the intent and extent of the use of the water system and the acceptance of it by the city, but also in showing that it was an entire project for the benefit of the town and the whole of its population.

On the part of the defendant, testimony of *Henry Thien* (p. 206) is that of a witness who was a member of the council in 1919, and whose term of office expired in May, 1920. His testimony, in rebutting that of Mr. Neale and Mr. Roscoe, is almost entirely negative. In large part the witness does not recall the conversations, although he admits that Mr. Roscoe referred to Portland in introducing Mr. Neale (p. 204). The witness stated that the opposition to the improvement developed when the estimate of probable cost was obtained (p. 205). The witness states that he knew nothing of Lumbermens Trust Company until after the suit started by Mike Belecz in 1922 (p. 206). Cross-examination of this witness (pp. 207-209) disclosed that prices were high in the year 1920; that the opposition was entirely one as to matter of costs; that there were two factions in the town. In offering his testimony certain exhibits relating to specifications, notice to contractors, proposals in connection with the bid, etc., were offered and received, the purport of which was to explain in greater detail some of the matters adverted to in the Agreed Facts. This is particularly true as to the specifications relating to "Payments" (p. 212), but the offer to

prove "Estimates" by the witness was unsuccessful, though it may not be of material importance (p. 210). The "Payment" provisions and the Proposal indicate that the water system and the sewer system were combined in one set of specifications.

Defendant further offered (p. 218), and there was received, Minutes of council meetings, which have some bearing by way of explanation, and particularly the Minutes of the meeting held February 11, 1920, and the adjourned meeting February 17, 1920, at which time protests were filed and disposed of at the last named date in connection with the proceedings to create Special Improvement District No. 4, including a schedule of protestants who were represented by counsel at said meeting. The Minutes of the meeting of February 17, 1920, are shown in detail (pp. 228-229), at which time the protests were found insufficient under the law.

The deposition of *G. H. Corrington,* former councilman, is found at pages 229-230. This testimony is negative as to knowing anything about Lumbermens Trust Company. The witness states that he did not recall meeting Mr. Roscoe and did not recall meeting Mr. Neale, and stated that he did not request Lumbermens Trust Company to buy any of the bonds.

Further testimony of *Henry Thien* (p. 231) developed that that witness did not request Lumbermens Trust Company to buy any of the bonds.

The testimony of *C. H. Parizek,* former councilman (p. 231), is wholly negative. He does not recall conversation with Mr. Roscoe during the time he was an alderman; he did not recollect meeting Mr. Neale; did

not recollect anyone talking about Lumbermens Trust Company; did not recall Mr. Roscoe appearing before the council; did not recall having heard Lumbermens Trust Company might buy the special bonds; did not recall legal opinion with reference to the legality of the general bonds.

Testimony of *W. H. Northey* (pp. 234-235). This witness was mayor of the town from May, 1920, to May, 1922. He admitted knowing Mr. Roscoe but was not acquainted with Mr. Neale. His testimony is replete with "I don't recall," "I don't know anything about it," "I don't remember." He recognized his own signature and stated that the first time he knew Lumbermens Trust Company had the bonds, was when he was served with summons in the case at bar. His testimony is entirely negative except as to two or three unimportant details.

Testimony of *B. Mellen* (pp. 235-240). This witness was a member of the Town Council beginning in May, 1920. He admits knowing Mr. Roscoe by sight; declared he did not know Mr. Neale. The greater part of his testimony is negative. He asserted that he knew nothing of Lumbermens Trust Company until after the suit started in 1922; declared he had never seen the legal opinion furnished by the town as to the validity of the general bonds; did not recall Mr. Roscoe having appeared before the council; never knew that certified copies of the minutes approving estimates were made out; never heard of them until the time of taking his testimony. The witness (p. 238) was unwilling to say whether he was present at the meeting unless the

minutes should so state. Confronted with the records, the witness admitted (pp. 238-239) that he voted in favor of the allowance of the estimates.

The defendant put in portions of the Minutes of meetings (pp. 240-247). These showed the detail of the estimates made, and progress of the work, the earliest date being July 28, 1920, and thereafter August 11, 1920, August 25, 1920, September 8, 1920, October 13, 1920, and the final estimate of November 24, 1920. Detail of the work done and payments made, etc., set forth in these statements, made part of the Minutes. These are corroborative of many of the matters agreed upon in the Agreed Facts.

Further testimony of *Henry Thien* (p. 248) disclosed that the witness did not know and was never informed who was going to buy the bonds, but on cross-examination (p. 249) he admitted that he presumed they had some outlet, for otherwise they would not take them.

Testimony of *Parker W. Hastings* (p. 249) was taken in rebuttal in behalf of plaintiff. It appears that he was one of the officers of Security Bridge Company, and that he, as such officer, requested the town or its officers to forward the certificates issued during progress to the Lumbermens Trust Company, these being the same certificates marked Plaintiff's Exhibit "C" introduced by Mr. Roscoe.

The foregoing synopsis hastily sketches the testimony offered and it appears to us that the only important matters which were not settled by the Agreed Facts or the admission of the pleadings are as follows:

1—Notice of any defects, threatened litigation, protests, etc., given to plaintiff. It was admitted that plaintiff was a purchaser before maturity and for value, and the matter of notice of imperfection was left open. The uncontradicted testimony of the witnesses Neale and Briggs shows conclusively that plaintiff had no actual notice of any imperfections.

2—The matter of knowledge on the part of the Town of Lumbermens Trust Company having agreed to purchase these bonds. This testimony is conflicting, the trial court made no finding upon it. On the one side there is definite positive testimony on the part of the witnesses Neale, Roscoe and Hastings, to the effect that the town and its officers were notified at various times and in various ways, and that information was forwarded by the town to the plaintiff, as disclosed by the testimony of Mr. Briggs. On the part of the town we have the halting, negative testimony of the various councilmen, who recall nothing specific, and who do not remember detailed facts. It is important to notice that this line of testimony is guarded, none of these witnesses being willing positively to testify that these things did not occur, and each relies on the time-worn crutches of "do not recall" and "do not remember."

The other issues which may not have been agreed upon are unimportant, since they are either matters of legal conclusion, such as the "negotiability" of the bonds, with respect to which plaintiff will now state that the special improvement bonds are not "negotiable" in the sense that such term is used, under the Negotiable In-

struments Law as an obligation which is payable by its terms at some specific date, whereas special improvement bonds by their terms are payable only from special funds to be derived from properties which may or may not be a time certain. In the other sense of assignability by delivery, etc., the bonds are "negotiable" in a practical sense. They may more properly be called for legal purposes "assignable choses in action" which have the characteristics of negotiability. They carry with them, however, a greater degree of commercial transferability than is accorded to a mere contract which is assignable, and the cases disclose that the law will protect a holder of a special improvement bond who has purchased the same for value and before maturity and without notice of imperfection, in much the same degree as would be the case were the instrument legally negotiable in the sense of commercial law. It should be noted that the ordinances of the Town of Ryegate, in connection with the issuance of these bonds, refer to them as "negotiable coupon bonds," and there is an argument to be made as to whether or not the town may, having so ordained, be heard thereafter to deny their negotiability.

## SCOPE OF REVIEW

Where an action is tried to a federal court, trial before a jury having been waived as provided by the statutes, and an agreed statement of facts submitted to the court as the foundation of the action and as evidence in support thereof, the scope of review in the Circuit Court of Appeals becomes immediately of interest.

**Points and Authorities**

An agreed statement of facts is on appeal the equivalent of a jury's special verdict, and the legal conclusions properly to be deduced therefrom are thereby brought before the court for review on appeal.

*Mutual Insurance Co. v. Tweed,* 7 Wall. 44.
*Supervisors v. Kennicott,* 103 U. S. 554; 26 L. Ed. 486.
*Lehnen v. Dickson,* 148 U. S. 71, 73; 37 L. Ed. 389.
*Anderson v. Messinger,* 146 Fed. 929.
*Northern Pacific Ry. v. Van Dusen,* 34 Fed. (2d) 786.
*Kansas City Life v. Shirk,* 50 Fed. (2d) 1046.

The reception of other matter in evidence, which does not disturb the ultimate or material facts, does not change the rule above stated.

*Anderson v. Messinger,* 146 Fed. 929.

Where the court has filed an opinion which is treated as its findings of fact, or where parties by stipulations have agreed that such opinion shall be considered as the findings of fact, the court on appeal will give effect to such findings as such for the purposes of review.

*Mutual Insurance Co. v. Tweed,* 7 Wall. 44.
*Lehnen v. Dickson,* 148 U. S. 71; 37 L. Ed. 373.

On a case submitted to the court without a jury under an agreed statement of facts the *form* of the action is not open to objection.

*Willard v. Wood,* 135 U. S. 309, 314; 34 L. Ed. 210.

The same practice obtains in the State of Montana.

*U. S. Bank v. Great Western Sugar Co.,* 60 Mont. 342; 199 Pac. 245.

**Argument**

In the case at bar a Stipulation of Facts was entered into in addition to the pleadings, under the terms of which the admissions of the pleadings and the agreed statement of facts should stand exclusively as to issues, with respect to which no dispute is made in the pleadings. A very little additional evidence was taken, none of which tended to disturb the ultimate facts as agreed upon. In making its decision the trial court filed an opinion by way of Decision (p. 94) which, as shown by the bill of exceptions, was entered as the Findings and Conclusions of the court (p. 252). In preparing the transcript as shown by the printed record (p. 252) the clerk was requested to insert a copy of these findings, but the same was apparently overlooked and the direction to the clerk printed in its stead. The same condition developed as to the decree or judgment (p. 252). To correct this oversight the parties, by a Further Stipulation filed in this court, have agreed that the Decision shown (beginning p. 94) constituted the Findings and Conclusions which were to have been entered by the clerk at page 252, and that the Decree shown (p. 112) was the judgment intended to be inserted by the clerk at page 252. It will be observed that the court allowed an exception to the plaintiff, with respect to these findings (p. 252). In this state of the record it is clear that the court has made reviewable findings in the case at bar to

which exceptions have been allowed, and thereby the correctness of the findings upon the exceptions is before the court on review. There are no authorities to the contrary. Had the court's findings been general only, under the authorities listed above it is clear that the application of the law to the Agreed Facts and the pleadings would also have been properly before the court for review.

The latest case discussing this matter to be found by counsel is *Kansas City Life v. Shirk,* 50 Fed (2d) 1046, wherein Judge Pollock has marshaled the cases, discussing the underlying principles with a collection of authorities, which amply demonstrate the law with respect to review in the circuit court of appeals. In this very recent decision, Judge Pollock declined to review a general finding made in the lower court, pointing out that important additional testimony and evidence had been received, and no exceptions taken respecting such thereby presenting a condition which the court was not permitted to review. In the case at bar, however, the trial court has, by making its decision a special finding as explained by the Further Stipulation and by allowing exceptions thereto, supplied precisely for the benefit of the record on review, the very matters which were lacking in Judge Pollock's case.

In Judge Pray's decision in the case at bar the court has stated the position of defendant as follows (p. 96):

> " 'The general question presented by this action is whether or not a city or town in Montana is liable upon any theory for the debt represented or evidenced by the bonds of a special improvement district which

by their terms are made payable from a special fund derived from special assessments upon and against the property embraced within that district.' If this question should receive an affirmative answer, then the further question arises whether the Town of Ryegate can be held liable in this instance in view of Section 6 of Article 13 of the Constitution of Montana."

We are willing to accept the proposition as so stated and will undertake to show the liability of the Town of Ryegate thereunder.

To make sure that the questions might be fully reviewed in the event that this case should be considered as a suit in equity rather than an action at law, the trial court on July 7, 1931, entered an order amending its decision, to the effect that the decision theretofore filed (p. 94) should stand as findings of fact and conclusions of law as required under the new Equity Rule 70½. This will be found at page 254.

The action of the trial court in so doing is supported by the following cases:

*Briggs v. United States,* 45 Fed. (2d) 479.
*Lewys v. O'Neill,* 49 Fed. (2d) 603.

Both of these cases were suits in equity; the first in the Circuit Court of Appeals and the other in the District Court. The same practice has been followed in admiralty.

*The El Sol,* 45 Fed. (2d) 852, 857.

The case at bar was instituted on the law side and the answers of defendant raise a number of defenses some of which have equitable significance. Being submitted to

the court without a jury and on an agreed statement of facts, not only is the *form of action* not deemed important as held by the United States Supreme Court in *Willard v. Wood, supra,* but, since the change in federal practice effected by Sections 274-a and 274-b of the Judicial Code (U. S. C. A., Sections 397-398), it makes little difference for the purpose of review upon which side the case was begun with respect to the review granted on appeal.

Where the facts are agreed upon and the cause tried to the court, the question as to whether the matter be determined at law or in equity is waived and failure to transfer the same to the equity side of the court will be regarded as harmless, since the judge would determine the matter anyway.

*American Trust Co. v. Butler,* 47 Fed. (2d) 482.

Where plaintiff has begun at law and defendant has interposed a legal answer, the plaintiff may still have the benefit of equity on a *replication* to the answer.

*Plews v. Burrage,* 274 Fed. 881.
*Union Pacific Ry. v. Syas,* 246 Fed. 561.

Even where the case has been tried as an action at law when it should have been equitable, it will be determined on the equity side.

*Gunther v. Home Insurance Co.,* 286 Fed. 396.

A party is not estopped from demanding his right to an equitable hearing because he has started at law.

*Clarksburg Trust Co. v. Commercial Ins. Co.,* 40 Fed. (2d) 626.
*United States v. Amalgamated Sugar Co.,* 48 Fed. (2d) 156.

A case need not be transferred to the equity side in order to determine whether the equitable defenses are good.

*Arkansas Coal Co. v. Stokes,* 277 Fed. 625.

The Circuit Court of Appeals may on its own motion transfer a cause from the law to the equity side or vice versa under the act (28 U. S. C. A., Sec. 391) authorizing the court to give judgment "after an examination of the entire record before the court, without regard to technical error, defects, or exceptions which do not affect the substantial rights of the parties."

*Clarksburg Trust Co. v. Commercial Ins. Co.,* 40 Fed. (2d) 626, 634,

wherein Judge Parker, after stating the rule above set forth, said that the court

> "will not hesitate to exercise the power when otherwise a failure of justice may result. Courts exist to do justice; and it would be a reproach * * * to deny relief * * * merely because his counsel came in * * * by the wrong door of the court."

The statute is to be liberally construed, its intent being to make the change from law to equity or vice versa with the least change of form possible.

*Liberty Oil Co. v. Condon Bank,* 260 U. S. 235; 43 Sup. Ct. 118.
*Plews v. Burrage,* 274 Fed. 881.
*Southern Ry. v. Greenwood,* 40 Fed. 679.

Under the foregoing authorities and the condition of the record the review in the case at bar extends to the entire record and this Court may administer equitable relief if the facts shown by the record shall so require in order to do substantial justice.

A fine discussion and review of these very principles by the Montana Supreme Court on a rehearing application is found in

*U. S. Natl. Bank v. Great Western Sugar Co.*, 60 Mont. 351; 199 Pac. 345.

## PRELIMINARY

In considering this case we believe the broad underlying facts clearly show the plan of improvement adopted by the town to be the installation of a water plant and distributing system for the town, under which the proceeds of general bonds of the par value of $15,000, duly issued pursuant to an election held under the applicable laws, should be used in paying for the work and material involved in the construction of the reservoir, pump house and pumping plant, while the distributing system emanating therefrom would be paid either by the bonds or the proceeds of the bonds of the Special Improvement District No. 4 which was created. This is clear under the provisions of the contract as shown by the "payment" provision of the specifications made a part thereof by reference (p. 212). Pursuant to this plan general bonds were authorized under appropriate proceedings which described the purpose of the $15,000 issue as "procuring a water supply and constructing a

water system for said town." (See reference to Ordinance No. 25 at p. 218). It was not unreasonable or unnatural that, with this description of the improvements to be paid for by the proceeds of the general bonds, the town council in its resolutions and proceedings relating to the Special Improvement District No. 4, should use the descriptive language referring to the improvements *therein* to be constructed as "pipes, hydrants, hose connections for irrigating purposes and fire protection." This language is identical to that found in Section 5226, Montana Revised Codes 1921. Combining the description used in connection with the proceedings touching the general bonds with the description of the improvements to be constructed in District No. 4, we have in practical language a fair description of the entire water plant and distributing system which the town sought to acquire and have constructed. Common sense suggests that "pipes, hydrants, hose connections for irrigating purposes and fire protection" is the equivalent of any common description given such water pipes and fire hydrants as were in fact installed in District No. 4. The Agreed Facts includes Exhibit No. 1, which is a map of the Town of Ryegate and of District No. 4. It shows the location of the improvements as installed, from which it will be observed that *within* District No. 4 there was constructed and installed *pipes and hydrants only,* and whether or not the water-mains, (being pipes of various diameters, 4″, 6″ or 8″) should, under the common meaning of the English language, be designated other than as "pipes", is, we assert, nothing more than the merest quibble and entitled to no substantial

consideration. *These mains are pipes in fact,* and generally recognized as such by the parties hereto (see Minutes of the Council relating to Estimates, pp. 240-247) wherein the only descriptions of the water-mains are shown to be either "pipe" or "cast-iron pipe."

If the foregoing be kept clearly in mind the principal objection raised in this controversy vanishes. No other contention can be deemed jurisdictional.

Further underlying facts constantly to be kept in mind are that, under the plan adopted, the Town of Ryegate actually secured and is using for municipal purposes a water-plant and distributing system planned to extend and reach its corporate limits, and that as to the latter, except for the payment of one interest coupon January 1, 1922, *nothing has been paid either on interest or principal,* although the town accepted and received the distributing plant, and *has continuously used* the same *and appropriated for its own the revenues* derived therefrom *for a period of ten years!* Under such circumstances every intendment of law must be presumed to be in favor of the obligation unless an insuperable legal obstacle shall prevent. The language of the United States Supreme Court is pertinent. It said: "Common honesty demands that a debt thus incurred should be paid." *Douglas County Commissioners v. Bowles,* 94 U. S. 104, 110.

Referring to the foregoing expression, the same tribunal afterwards remarked: "This sentiment has lost no force by the lapse of time." *Tulare Irrigation District v. Shepard,* 185 U. S. 1, 8.

## PLAINTIFF'S POSITION HEREIN IS EQUIVALENT TO THAT OF A BONA FIDE HOLDER

### Points and Authorities

I

The holder of bonds admittedly genuine is presumed to be a *bona fide* holder within the meaning of the Negotiable Instruments Law.

*Board of Education v. James,* 49 Fed. (2d) 91.
*Caldwell v. Guardian Trust, etc., Co.,* 26 Fed. (2d) 218, 224, 227.
*Presidio County v. Noel-Young Bond Co.,* 212 U. S. 58, 70; 29 Sup. Ct. 237.

II

The fact that a holder had actual knowledge of the proceedings taken and had prepared the instruments himself does not affect his position as *bona fides* where he has paid value.

*Eyer v. Mercer County,* 292 Fed. 292.
Affirmed 1 Fed. (2d) 609.

The rule is not changed because the interest rate was illegal, nor because a discount of the face value had been made in the negotiation, even where the holder prepared the instruments himself.

*Eyer v. Mercer County,* 292 Fed. 292.

III

The fact that the bonds were purchased by the holder at less than par does not deprive him of the rights of a *bona fide* holder.

*State v. West Duluth,* 75 Minn. 456; 78 N. W. 115.
*Eyer v. Mercer County,* 292 Fed. 292.
*Cuddy v. Sturdevant,* 111 Wash. 304; 190 Pac. 909.

IV

The holder of a special improvement bond, which is recognized as not being a "negotiable instrument" within the meaning of the Negotiable Instruments law, has the same rights in this respect as the holder of a fully negotiable instrument.

*Cuddy v. Sturdevant,* 111 Wash. 304; 190 Pac. 909.
*Troy Bank v. Russell County,* 291 Fed. 185, 191.
*Flagg v. School District,* 4 N. D. 30, 51; 58 N. W. 499, 507.

V

A *bona fide* holder is not charged with duty of investigating the character of improvements actually made.

*Northwestern Bank v. Centreville,* 143 Fed. 81.

Reference to a resolution in the bond does not require purchaser to determine its legality.

*Fairfield v. School District,* 116 Fed. 838.

VI.

The transferee of special improvement warrants is not subject to any defense offered against the contractor. It is subject only to defenses existing at the time of issuance. The town must protect such warrants.

*Dakota Trust Co. v. Hankinson,* 53 N. D. 356; 205 N. W. 990.
*Long Beach District v. Lutge,* 129 Cal. 409; 62 Pac. 36.

**Argument**

We have earlier in this brief discussed the testimony touching the matter of actual notice of any defect in the bonds of Special Improvement District No. 4. Under the Agreed Facts it is stipulated that plaintiff was the owner and holder of all of these bonds; that plaintiff purchased the same for value and before maturity. The question of notice was left open. The testimony of the witnesses *Neale* and *Briggs* referred to at pages 42-43 of this brief, clearly shows that no actual notice of defect in the bonds was brought to the plaintiff prior to the bringing of the *Belecz* suit. No evidence to the contrary was offered or received.

As to constructive notice and whether the law imputes constructive notice to the holder of special improvement bonds as distinguished from direct obligations which are fully negotiable, the cases referred to in *Points* and *Authorities* are controlling. A full discussion of this matter will be found in *Cuddy v. Sturdevant, supra,* which case is closely in point, since the defects complained of are substantially identical with defects contended for in the *Belecz* suit. The case of *Troy Bank v. Russell County, supra,* has a fair discussion of the same matter when dealing with a certificate of indebtedness, which was held to be not negotiable in the legal sense.

The legal presumption of bona fides stated in the authorities clearly supports plaintiff's position, there being no opposing testimony.

## EFFECT OF BELECZ DECREE AS RES JUDICATA

Defendant has pleaded suits begun by Mike Belecz and other plaintiffs in the state court, alleging various grounds of attack against the validity of the assessments and the improvements constructed in Special District No. 4. It is stated that these suits came to judgment and decree, that they were not appealed from and are therefore final, and that in the defense of such suits counsel employed by plaintiff, Lumbermens Trust Company, assisted counsel for the Town of Ryegate.

### Points and Authorities

I

The defense of *res judicata* is effective against parties and privies to the proceeding adjudicated, and as to such it extends to the issues made and which might properly have been adjudicated, whether actually determined or not, but which were open to adjudication in the particular case.

15 *Ruling Case Law,* p. 483.

One who participates in litigation by paying a portion of the expense, who assists in the trial, who files briefs, who employs or pays counsel, but is not a *party* to the proceeding, and does not have the right to control the case and to direct its disposition, and to appeal from a

decree therein, *is not bound* by that judgment if the same facts and issues are controverted in a later contest.

*Mankato v. Barber Asphalt Co.,* 142 Fed. 329.
*Stryker v. Goodnow,* 123 U. S. 527, 540; 31 L. Ed. 194.
*Litchfield v. Goodnow,* 123 U. S. 549; 31 L. Ed. 199.
*Bigelow v. Old Dominion Min. Co.,* 255 U. S. 111; 56 L. Ed. 1009; 32 Sup. Ct. 641.
*U. S. v. California Bridge & C. Co.,* 245 U. S. 337; 62 L. Ed. 333; 38 Sup. Ct. 91.
*Cramer v. Singer Mfg. Co.,* 93 Fed. 636 (9th C. C. A.)
*Northern Bank v. Stone,* 88 Fed. 413.
*General Electric Co. v. Morgan-Gardner Co.,* 168 Fed. 52.
*M'Ilhenny v. Gaidry,* 253 Fed. 613.
*Stromberg v. Zenith Carburetor Co.,* 220 Fed. 154, 156.

## II

It is recognized that while the "adjudication" can run only to the parties properly before the court, yet the doctrine of "estoppel" is sometimes urged against those who assist in its participation, but as to such the federal rule is that the party is not estopped unless he had the *right to defend,* the *right to control* the proceeding, and the *right to appeal.*

*Robbins v. Chicago,* 4 Wall. 657, 672; 18 L. Ed. 427.
*Railroad v. Bank,* 102 U. S. 14, 21; 26 L. Ed. 61.
*Green v. Bogue,* 158 U. S. 985; 39 L. Ed. 1061.
*White v. Croker,* 13 Fed. (2d) 321.
*Fahey Tobacco Co. v. Senior,* 247 Fed. 809, 817.
*I. T. S. Rubber Co. v. Essex Rubber Co.,* 270 Fed. 594, 608; 257 U. S. 664.

## III

The subject matter in the earlier litigation must be identical to operate as an estoppel, where one is not a party before the court in such case.

*U. S. v. California Bridge Co.*, 245 U. S. 337.
*Road District No. 7 v. Guardian Sav. & Tr. Co.*, 8 Fed. (2d) 932.

### Argument

In the case at bar and under the Agreed Facts, paragraph "s" (p. 60), it is stipulated as follows:

> "That this plaintiff had its own counsel associated in the defense and trial of those actions. That no appeal was taken from said judgment and decrees."

The Agreed Facts had further stipulated, paragraph "t" (p. 61):

> "no evidence shall be introduced by either party to this action upon any disputed question of fact which is covered by the foregoing statement of facts."

This stipulation with respect to the association of counsel controls the record in the case under the last stipulation quoted. This clears the record under the denial made by the reply, paragraph VIII (p. 50), of the allegation in defendant's answer (p. 34):

> "That plaintiff herein was advised of the commencement of each and all of said suits, and employed special counsel to assist counsel for the Town of Ryegate in defending said suits; that no appeal was taken from any of said judgments or decrees;"

The foregoing is the entire record touching this matter. It goes no further than to agree that plaintiff employed counsel who assisted in the defense.

In the federal courts it is well settled that such participation in a trial does not bind the party who employed the assisting counsel. A case most directly in point is *Mankato v. Barber Asphalt Co.,* 142 Fed. 329, where the contractor employed its own counsel to assist the city and paid the fees of special counsel selected by the city in the defense of property owners suits brought against the city to declare the proceedings invalid with respect to street paving in the nature of a special improvement.

The question respecting employment of counsel has arisen in a number of patent suits. In *Stromberg v. Zenith Carburetor Co.,* 220 Fed. 154, 156, it appeared that in the former suit the manufacturer, who was not named a party to the suit, paid the expenses of the defense, employed counsel who took charge of the cost in the trial, and who took an appeal in the name of the defendant, but upon the appeal pending the defendant discharged this attorney and went no further, substituting counsel of its own, who dismissed the appeal and consented to a decree and waiver of the right to appeal. It was held that this participation and conduct of the case did not estop the manufacturer from setting up his position in a later case.

In the 9th Circuit Court of Appeals it was held, *Cramer v. Singer Mfg. Co.,* 93 Fed. 636, opinion by Judge Gilbert, that judgment in a former case, which made a manufacturer a party by name, but who was not served, yet who assisted in the defense, paid the costs, expenses and counsel fees, did not estop the manufacturer from bringing in its own behalf a subsequent suit.

The Circuit Court of Appeals for the 7th Circuit, in *General Electric Co. v. Morgan-Gardner Co.,* 168 Fed. 52, held that a manufacturer who paid the attorney who defended the patent infringement suit for a customer, and who paid part or all of the costs incurred, did not thereby become concluded by the decree in the absence of a showing that the attorney had exclusive control and direction of the case.

In *I. T. S. Rubber Co. v. Essex Rubber Co.,* 270 Fed. 594, 608, the District Court for Massachusetts held that a party who participated in an earlier case involving patent infringement, who advised defendants therein to allow decrees to go by default, and who paid the damage decreed thereunder, was not estopped by that judgment from trying out the merits of the infringement in a subsequent controversy.

An earlier case is that of *Northern Bank v. Stone,* 88 Fed. 413, decided by Judges Harlan, Taft and Lurton, which held that where the attorney general of the state participated in a suit brought by a Bank against a county, involving the validity of taxes under a state statute resulting in a decree, a subsequent suit involving the right of other counties and municipalities to collect the tax did not bind the state from further participation.

In a trade mark case of *M'Ilhenny v. Gaidry,* 253 Fed. 613, 617, it was held that a person named as a defendant in an earlier case, but who was not served, but who employed counsel, who prepared the answer which was filed by attorney for codefendant who was served, was not held bound by the decree entered.

A further trade mark case is that of *Fahey Tobacco Co. v. Senior,* 247 Fed. 809, 817, where it was held that contribution to defending counsel in a former case which was settled by stipulation, did not bind the contractor in a later case directly brought against him.

The filing of a brief in support of a party's position in a prior case does not estop the party furnishing the brief from defense in a later suit, *Stryker v. Goodnow,* 123 U. S. 527, 540.

The owner of lands described in the bill, but not named as a party to the suit, is not estopped because she paid part of the defense expense required in resisting the proceeding, *Litchfield v. Goodnow,* 123 U. S. 549.

One who contributes to the cost of the defense, but has not the right to control the same, is not bound by a judgment therein in a later suit, involving the same issue, *Walz v. Agricultural Ins. Co.,* 282 Fed. 646.

One who participates in a defense but who is not a party must participate openly and avowedly, and control the proceedings in order to be estopped by the judgment, *White v. Croker,* 13 Fed. (2d) 321.

The famous case of *Bigelow v. Old Dominion Min. Co.,* 225 U. S. 111, is to the same effect. In that case two joint tortfeasors were implicated in a fraud against their corporation. One was sued in the Federal Court for the Southern District of New York and the other not made a party because not resident within the district. The nonresident assisted in the defense of his joint tortfeasor in the federal court, although not nominally a party, and contributed to the expense and defense of the matter, which went in favor of the defend-

ant. Subsequently the nonresident was sued in the State Court of Massachusetts, where he resided. That court held participation in the federal case did not operate as an estoppel against the corporation bringing the action, and the Federal Supreme Court sustained that position.

The cases go even further in that the subject matter must be *precisely identical* even where the participation is complete. See *U. S. v. California Bridge & C. Co.,* 245 U. S. 337. The former case involved the site of a shipyard in San Francisco Bay, in connection with which the party had fully participated. This was held not to be an estoppel in connection with a later case, which involved an alternative site.

Generally the federal law is clear that to bind a party who is not nominally a party or privy, it must appear that the party sought to be estopped had a *direct interest* in the subject matter which was *precisely determined,* the *right to defend,* the *right to control* the proceedings and the *right to appeal. Road District No. 7 v. Guaranty Sav. & Trust,* 8 Fed. (2d) 932; *Robbins v. Chicago,* 4 Wall. 657, 672; *Railroad Co. v. Bank,* 102 U. S. 14, 21; *Green v. Bogue,* 158 U. S. 985.

In the Ryegate case the record shows only assistance given to the counsel of the town; it does not show what participation, if any, plaintiff's counsel gave to the defense of the property owners suit; it does not show that the assistant counsel controlled the proceedings; it does not show that assistant counsel or plaintiff in this cause had any right to control the proceedings, much less to appeal therefrom; it merely shows that appeal

was not taken. There is nothing in this record to show that participation by counsel was openly and avowedly in behalf of plaintiff; on the contrary the findings in the state court show the following (p. 84):

> "This cause came on for trial February 6, 1923, before the Court, sitting without a jury, * * * D. Augustus Jones, Esq., and Johnston, Coleman & Johnston appeared as attorneys for plaintiffs, and Stuart McHaffie, Esq., and Nichols and Wilson appeared as attorneys for the *defendants.*"

This narration does not disclose that anyone appeared for Lumbermens Trust Company, and there is no open and avowed appearance for them whatsoever. It is clear that the record compels the state case to stand as no estoppel insofar as Lumbermens Trust Company is concerned, by reason of participation in the defense of the state cases.

Furthermore the issues made in the state cases are quite different from those set up in the case at bar. A cursory reading of the complaint in the state court and comparison with the complaint in the case at bar will show various positions which are not common to the two causes. The validity of the *bonds* is not drawn in question in the *Belecz* case. The relief prayed for in the *Belecz* suit looked only to the cancellation of assessments levied at the time the suit was brought. These levies may have been bad in part and have justified a decree, which under no circumstances would determine the validity of the bonds themselves or the position of plaintiff herein as a holder of the same, having purchased them before maturity and for value. Applying the doc-

trine of the United States Supreme Court the precise questions were not involved in both cases in addition to the other matters referred to, and we can confidently say that the state adjudication has no bearing as such or as an estoppel against plaintiff herein.

This precise question was determined by J. Sanborn in

*Road District No. 7 v. Guardian Savings Etc. Co.,* 8 Fed. (2d) 932 (C. C. A. 8th).

This renowned jurist declares (p. 935) as follows:

"Other arguments of the assailants of this decree are that the United States District Court was without jurisdiction to render it: (a) Because the suit of the Weona Land Company and others against the district and its officers, in which that (state) court in July, 1922, adjudged the assessment of benefits void and enjoined defendants therein from collecting the taxes based thereon, was commenced before this suit was brought, and the state court thereby 'first acquired jurisdiction of the same matter involved in this suit, and both this suit and said suit in equity, Weona Land Company v. Road Improvement District No. 7 of Poinsett County, Arkansas, involve the very matters in controversy in this case,' and, the suit in the state court having been first brought, the court below had no jurisdiction of this case under Kline v. Burke Construction Co., 26 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077. But the facts on which this position is based never existed, and do not now exist, and it is consequently untenable. The state court never first, or at any time, acquired jurisdiction of the 'same matter involved in this suit,' nor were 'the very matters in controversy' in this case involved in that suit. The matters in controversy in that suit were the claims and rights of the district and its offi-

cers to enforce the assessment they had made and the taxes they had levied on the property in the district against the owners of that property. The matters in controversy in this suit are the claims and rights of the purchasers for value before maturity, without notice of any defects or defenses thereto, of the negotiable mortgage bonds of the district, certified to have been lawfully made and secured on the property therein, * * *"

We have developed the argument under this head with some consideration, because it appears to have been assumed by Judge Pray in deciding this cause in the trial court, that an adjudication had been made which bound the parties with respect to the legality of the bonds. Judge Pray himself makes no specific finding on this with respect to which an assignment of error could have been predicated, but the language of his decision (p. 94) indicates such assumption on his part. The cases cited and the doctrine developed therein clearly show that such assumption would be unfounded in federal law if present in the mind of the court.

## RULE OF STARE DECISIS INAPPLICABLE TO CASE AT BAR

The judgment of the state court, while in no sense res judicata and not a basis of estoppel, is still open to discussion as a decision under the rule of *stare decisis*. This involves the jurisdiction of the federal court in cases of diverse citizenship and brings up the question as to the independent determination of the issues by the federal courts, notwithstanding contrary decisions in state courts.

## Points and Authorities

### I

It is well settled that the federal courts have a concurrent but wholly independent jurisdiction in matters of general law, particularly as the same refers to contracts and as relating to decisions of the state courts in dealing therewith, and where the construction of state statutes or city ordinances has not been settled in the highest court of the state prior to the fixing of the federal litigants' rights complained of, the federal courts are free, and it is their duty independently, to interpret the state statutes as its own judgment shall determine, irrespective of the state decisions made prior to the federal decision but subsequent to the date of such vesting.

*Mankato v. Barber Asphalt Co.,* 142 Fed. 329.
*Tulare Irrigation Dist. v. Shepard,* 185 U. S. 1, 10.
*Concordia Ins. Co. v. School District,* 282 U. S. 438.
*Travelers' Ins. Co. v. Thorne,* 180 Fed. 82.
*Odegard v. General Casualty Co.,* 44 Fed. (2d) 31, 37.

### II

Under Section 5237, Revised Code Montana 1921, any property owner or person having an interest in land liable to assessment, who claims any previous act or proceeding to be irregular, defective, erroneous or faulty, may file within sixty days from the date of the contract's award, a written notice specifying in detail the matter complained of, and failure so to object within the time shall constitute a waiver by such property owner,

provided only that notice of the passage of the resolution of intention has been actually published and the notice of improvements posted as provided. Prior to the proceedings involved in this case the Supreme Court of Montana had held that a property owner could not bring a suit attacking the legality of districts, their creation, contracts, etc., where he had not filed his claim within sixty days.

*Harvey v. Townsend,* 57 Mont. 407; 188 Pac. 897.

## III

Recent cases sustaining the right of the federal court to make its independent judgment from that of the state courts, whether of general law or statutory law declaratory of the common law or statutes, which have been construed by the state court after the contract or right had originated, are as follows:

*Fetzer v. Johnson,* 15 Fed. (2d) 145 (6th C. C. A.)
*Community Bldg. v. Maryland Casualty Co.,* 8 Fed. (2d) 678, 680 (9th C. C. A.)
*Jackson v. Harris,* 43 Fed. (2d) 513, 517 (10th C. C. A.)
*Denver v. Denver Tramway Corp.,* 23 Fed. (2d) 287, 302 (8th C. C. A.)
*Northwestern Bank v. Centreville,* 143 Fed. 81.

## IV

Where the federal courts judgment conflicts with that of the state court dealing with the same subject matter, the federal court has power by appropriate orders to enjoin or to command state officers to perform

the necessary acts to give support to the federal judgment, notwithstanding contrary decrees of the state court.

*Fetzer v. Johnson,* 15 Fed. (2d) 145.

V

Generally a federal court will interfere by enjoining parties from claiming rights under a state judgment or decree where the result would be unconscionable or support a fraud, notwithstanding that the state court has otherwise determined the issues.

*Wells Fargo & Co. v. Taylor,* 254 U. S. 175; 41 Sup. Ct. 93, 96.
*Simon v. Southern Ry.,* 236 U. S. 115; 35 Sup. Ct. 255.
*Public Service Co. v. Corboy,* 250 U. S. 153; 39 Sup. Ct. 440.

**Argument**

The proposition of independent federal determination with respect to general law is so well known as to require no extended argument. The cases are so numerous in pronouncing the doctrine with respect to the independent right of the federal court to determine state statutes, where the same have not been settled by the state courts prior to the vesting of the federal litigants rights, that it is only necessary to call attention to the leading case of *Burgess v. Seligman,* 107 U. S. 20, and following the same through the cases, we find scores of cases following that doctrine in the subsequent determinations of the federal courts.

The case which most nearly approaches the facts in the case at bar is that of *Mankato v. Barber Asphalt Co.*, 142 Fed. 329. In that case it appears that the contract had been awarded to Barber Asphalt Company, but that shortly before the award a taxpayer's suit had been begun against the city but not against Barber Asphalt Company, who was not yet the contractor, asking an injunction against any improvement which should impose pecuniary liability upon the city. The contract was thereafter awarded, which avowedly imposed no such liability upon the city. Shortly thereafter the complaint was amended by the taxpayer asserting this contract to be invalid. This case went on for trial and was tried while the work was under construction. It resulted in an adjudicataion of invalidity. This was appealed to the Minnesota Supreme Court and affirmed. Meanwhile the work was completed. The contractor was not brought into the case as a party but employed counsel to assist, and paid the fees of special counsel who represented the city. During the pendency of the work, but after the award of the contract, a property owner brought a second suit with similar allegations against the contractor, asking relief based upon invalidity of the contract. This cause was not immediately tried but was determined subsequent to the first case, and resulted in a similar judgment of invalidity. On appeal to the Supreme Court of Minnesota it also was affirmed. Before the affirmation of the second case on appeal, but subsequent to the affirmation of the first case, Barber Asphalt Company brought its action against the City of Mankato for having negligently failed to do its duty

in making the necessary levies and assessments designed to provide funds for the payment of the construction work. This necessarily required that the contract should be held valid. In a well reasoned opinion Judge Adams holds the state decisions to be ineffective; that the federal court is not bound to follow the same and in its best judgment cannot follow their reasoning. The case is a stronger case by far than the position of the Town of Ryegate in the case at bar, since the Mankato case developed the facts showing a suit brought to determine the validity long before the work was completed, and the first suit was actually filed prior to the award of contract, though it did not involve, and necessarily could not involve, the validity of the contract itself, which was supplied by supplemental complaint later. The court clearly holds that the contractor's rights were vested when the contract was awarded, and that as such the federal court's duty was to protect those rights, particularly in cases of diverse citizenship, with respect to which the federal courts must protect the nonresident citizen.

*Burgess v. Seligman,* 107 U. S. 20, is one where the Supreme Court of the United States, dealing with the identical contract, that of subscription to railroad stock, and the statute of Missouri dealing therewith, refused to follow the Supreme Court of Missouri, which decided the identical contract and subscription prior to the decision in the Federal Supreme Court. The litigant's rights were vested when the contract was entered into and a subsequent decision of the state court was ineffective to change that right.

Let us now consider the facts applicable to the case at bar. The Town of Ryegate entered into a contract April 26, 1920. The rights of Security Bridge Company as contractor were vested and settled as of that date. Any decision by any Montana court thereafter which determined any matter of municipal law which had not been definitely settled prior to April 26, 1920, has no binding effect upon the federal courts, who will exercise their independent jurisdiction to determine the same, notwithstanding any later decisions of the Montana Supreme Court or any Montana trial court.

The first block of bonds which were issued and delivered by the Town of Ryegate for Special Improvement District No. 4 was made, under the stipulated facts, on July 28, 1920. As heretofore discussed in another matter, it appears that on June 9, 1920, the town council of Ryegate passed its Ordinance No. 29, whereby it ordained that a continuing annual tax should be levied to provide for the payment of principal and interest on the bonds which were to be issued. The same ordinance ordained further that all moneys collected on account of said assessments should be deposited by the town treasurer in a special fund, and should not be paid out for any other purpose than the payment of principal and interest on these bonds.

The bond itself, which is shown in the record (p. 43) is in the statutory form, and states that the Treasurer of the Town of Ryegate will pay to the bearer the sum of $500.00

> "* * * for the construction of the improvements and the work performed as authorized by said Res-

olution to be done in said District, and all laws, resolutions and ordinances relating thereto, in payment of the contract in accordance therewith."

It further recited (p. 44):

"This bond is payable from the collection of a special tax or assessment, which is a lien against the real estate within said improvement district."

It further certified:

"That all things required to be done precedent to the issuance of this bond have been properly done, happened and been performed in the manner prescribed by the laws of the State of Montana * * *."

It must be clear that Ordinance No. 29 having been enacted before the issuance of the bond, is one of the ordinances referred to in the bond itself as above quoted. The rights of the plaintiff herein date from the purchase of the bonds themselves, the first purchase being as of July 28, 1920. Everything done by the Town of Ryegate prior to July 28, 1920, and for the protection or support of these bonds, is available to the plaintiff as a purchaser thereof.

It is of extreme importance to note at this time that the contract was awarded to Security Bridge Company on April 26, 1920. The first bonds were delivered thereafter, and on July 28, 1920, the intervening time aggregates ninety-three days, the statute, Section 5237, requires that notices in the nature of protest as to any irregularity, etc., must be filed within sixty days from the date of the contract's award. If, in fact, any such protests were made, they must have been made prior to

July 28, 1920, and were known to have been made by the town when it issued and delivered the first block of bonds mentioned. The bond speaks as of the date of its delivery, and the bond certifies and recites that all things precedent and necessary have been done, and declares that the bond is a lien on the real estate within the district. In the nature of things the plaintiff could not know what protests, if any, were filed after the award of the contract, and is not obliged to know, nor to keep on hand an inspector of the mail coming to the Town of Ryegate, or any other file or record, in order to determine what protests, if any, should be filed. That information was the private information, practically speaking, of the town. The Montana Supreme Court had held a few years prior thereto in *Harvey v. Townsend,* 57 Mont. 407; 188 Pac. 897, that a party who had filed no such protest was barred from attacking the legality of the districts, their creation, contract of improvement, etc., where the sixty day period had elapsed. Plaintiff had a right to rely on that decision.

It is true that about one year after the installation of the improvements in the Town of Ryegate the Supreme Court of Montana expressed an opinion in the case of *Evans v. Helena,* 60 Montana, 577; 199 Pac. 445, construing the statutes relating to the nature of improvements and the sale of bonds at less than par. That case, however, was one brought by a diligent property owner at the inception of the proceedings and before the work had been done on the bonds issued. We shall refer with more detail to this position later on. There is no doubt that this decision was the inspiration for the

*Belecz* case in the state court, but for the present we content ourselves with saying that this case subsequently adjudicated must not be considered as having any bearing whatever on the rights of the bridge company or of the plaintiff growing out of the issues involved in the case at bar.

We have found, and there has been cited by defendant to the trial court, no case of the Supreme Court of Montana which settled the law as to the issues in this case prior to April 26, 1920, or for that matter at a later date where the exact issues of this case are properly considered. Under the federal rule above stated it is unnecessary that we determine whether this cause shall be determined as a matter of general law applicable to contracts, or whether it involves statutory construction of Montana's laws. Viewed in either direction the issues are open to the federal court for an independent determination, and of course the decision in the trial court sitting in Golden Valley County has no bearing whatever as an adjudication insofar as settling the law of the state is concerned, whether it be appealed from or not.

The law in the national courts was settled in *Burgess v. Seligman,* supra, and the expressions of Justice Bradley in that case have not been improved upon, but have been followed with fidelity in the intervening years. We quote as follows:

> "But the appellant's counsel, with much confidence, press upon our attention the decisions of the Supreme Court of Missouri on the questions involved in this case, and on the very transactions which we are con-

sidering. That court, since the determination of this case by the Circuit Court, has given judgment in two cases adversely to the judgment in this, and to the views above expressed. The first case was that of *Griswold v. Seligman,* decided in November, 1880; the other, that of *Fisher v. Seligman,* decided in February, 1882, in which the former case was substantially followed and confirmed. The case of *Griswold v. Seligman* seems to have very fully and carefully considered. We have read the opinion of the court and the dissenting opinion of one of the judges with much attention, but we are unable to come to the conclusion reached by the majority.

We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as

they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail.

(The court here cited more than fifty prior decisions in the Federal Supreme Court.)

In the present case, as already observed, when the transactions in question took place, and when the decision of the Circuit Court was rendered, not only

was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the Circuit Court was called upon, and which we are now called upon, to consider. It can hardly be contended that the Federal court was to wait for the States courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the Circuit Court should be reversed merely because the State court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view, we should gladly do so; but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion. *Pease v. Peck,* 18 How. 595, and *Morgan v. Curtenius,* 20 id. 1, in which the opinions of the court were delivered by Mr. Justice Grier, are precisely in point."

The independent right of the federal judiciary to determine the underlying issues is so clearly demonstrated in the line of authority hereinbefore cited (which is only a small fraction of the many federal cases in accord therewith) that it makes pertinent the suggestion that in the trial court Judge Pray has labored under the assumption, in part at least, that the issues made in the state court were determinative of the law in the trial of the case at bar. It is difficult to put one's finger on the specific assumption in the trial court's decision, but we feel that the underlying thought of the court has been based upon the state court decision, since there is nothing whatever in the record made in the case at bar touching alleged want of notice to property owners after letting the contract; filing of protests against the contract within sixty days thereafter, together with other specific matters adverted to by the trial court,

save and except as the same will be found related in the findings made in the Belecz case in the state court. As the cases demonstrate, federal courts are not bound in any degree as to the application of the law if such were the determination of the state court and the statute relating to sixty days, since no decision of the Supreme Court of Montana had settled that law in favor of the contention declared by the court in the *Belecz* case, and in fact the decision of *Harvey v. Townsend,* supra, prior to the time of entering into the Ryegate construction contract on April 26, 1920, was precisely the opposite.

The Supreme Court has recently covered the subject and clearly shown the distinctions between state decisions reversing earlier decisions as applied by the Federal Courts in their own independent jurisdiction where State statutes are involved and the effect of the State decisions as a basis for Federal review either as ex post facto, impairment of the obligations of contracts, or due process of law, in *Tidal Oil v. Flanagan,* 263 U. S. 444, 451; 44 Sup. Ct. 197, 198, which opinion, as stated by Taft, C. J., was intended to clear up the apparent confusion in the decisions theretofore.

We come now to discuss a first and preliminary view as to the liability of the Town of Ryegate as determined from the pleadings and the Agreed Facts.

**UNDER THE ADMISSIONS OF THE PLEADING AND THE UNANSWERED ALLEGATIONS AS SUPPORTED BY THE AGREED FACTS, DEFENDANT IS LIABLE TO THE PLAINTIFF IN SOME AMOUNT FOR MONEYS WHICH DEFENDANT HAS COLLECTED AND HAS NOT PAID TO THE PLAINTIFF AS THE HOLDER OF ALL THE BONDS, AND HAS NOT ACCOUNTED THEREFOR IN WHOLE OR IN PART.**

**Points and Authorities**

I

Under the Montana system of jurisprudence municipalities are granted their powers by the legislative assembly through general laws.

*Constitution of Montana,* Art. III, Sec. 1; Art. IV, Sec. 1; Art. V, Secs. 1, 26.
*McClintock v. Great Falls,* 53 Mont. 221; 163 Pac. 99.

II

The legislative assembly has empowered towns to create special improvement districts for water supply and distribution; to levy taxes and assessments, issue bonds, etc., in payment therefor, etc.

*Revised Code Montana 1921,* Sec. 5039 (subd. 80), Secs. 5225-5255.

III

Where a town has duly passed a resolution of intention, published due notice for hearing of protests at a time and place where the same have been heard, and has passed a resolution creating special improvement district after finding the protests to be insufficient, it thereupon has acquired jurisdiction to order the proposed improvements.

*Revised Code Montana 1921,* Secs. 5227, 5229, 5230.
*Power v. Helena,* 43 Mont. 336; 116 Pac. 415.
*Shapard v. Missoula,* 49 Mont. 269; 141 Pac. 544.
*Johnston v. Hardin,* 55 Mont. 574; 179 Pac. 824.
*Billings Association v. Yellowstone County,* 70 Mont. 401; 225 Pac. 996.

IV

It is the statutory duty of the town council to correct defective improvement proceedings, provide a method of assessment to defray the costs of improvements, make levies and assessments, modify and correct assessments if proper objections are made and sustained, make the necessary relevies, certify the same to the county treasurer, whose duty it is to collect the same, etc.

*Revised Code Montana 1921, Secs.* 5237, 5238, 5240, 5241, 5243, 5251, 5252.
*Revised Code Montana 1921,* Secs. 5214, 5215, 5216.

V

The law presumes that public officers have duly and regularly performed their official duties in the absence of a contrary showing.

*Revised Code Montana 1921,* Sec. 10606 (subd. 15).
*State v. Mills,* 81 Mont. 86; 261 Pac. 885,

where allocation of tax funds by the county commissioners was presumed to have been regular.

*Lumber Co. v. School District No. 56,* 84 Mont. 461; 277 Pac. 9,

where proceedings relating to the purchase of lumber for a school house was presumed to be regular.

*Buckhouse v. School District No. 28,* 85 Mont. 141; 277 Pac. 961,

which presumed the regularity of notices, polling places and establishment of precinct boundaries relating to a school election.

*Swords v. Simineo,* 68 Mont. 164; 216 Pac. 806,

which presumed the regularity of all proceedings of county commissioners in creating a special improvement district.

*Warner v. New Orleans,* 87 Fed. 826,

where equity's maxim that considers that as done which ought to be done is applied to a city involved in collection of assessments to pay improvement warrants, and the city held as if collections had been made.

See also:

*Jersey v. Peacock,* 70 Mont. 46; 223 Pac. 903.
*State v. District Court,* 72 Mont. 213; 232 Pac. 201.
*Hyde v. Mineral County,* 73 Mont. 363; 236 Pac. 248.

This presumption under Sec. 10606, Revised Code 1921, is in and of itself satisfactory evidence and the

burden of proof is on the party who contends to the contrary.

*Lumber Co. v. School District No. 56, (supra.)*
*State v. District Court, (supra.)*
*Swords v. Simineo, (supra.)*

## VI

An answer or a plea must be responsive to the complaint or declaration, and to the whole thereof.

*21 Ruling Case Law 532.*
*Johnston v. Florida East Coast Ry.,* 66 Fla. 415; 63 So. 713.
*Truitt v. Caldwell,* 3 Minn. 364; 74 Am. Dec. 764.
*Byers v. Fowler,* 12 Ark. 218; 54 Am. Dec. 271, 287.
*United States v. Girault,* 11 How. 22.

### Argument

We wish to point out the complete insufficiency of defendant's defense made by its Answer and the Agreed Facts. This first discussion is based upon the proposition that the Town of Ryegate under the most favorable theory advanced by it is necessarily liable to the plaintiff in some amount.

We have analyzed the Pleadings and the Agreed Facts heretofore. We wish now briefly to comment upon these admissions and agreed facts as made.

The plaintiff has alleged a *prima facie* case of liability; it has alleged the identity of the parties, federal jurisdiction, the creation of Special Improvement District No. 4, the award of contract for the construction thereunder, plan for the issuance of bonds in payment of the special district's share of the improvements, the

completion of the work and the issuance of the bonds by the Town of Ryegate for that purpose, the situation by which plaintiff became the purchaser of the bonds, thereby furnishing money for the improvements, and that plaintiff at the time of bringing this action was the holder and owner of all of the bonds; that the town had accepted the work as performed by the contractor and continued to use the same; that the interest coupon of January 1, 1922, had been paid; that nothing further had been paid and that defendant refused to pay further sums in any amount and declared its intention of never paying the same, or any part thereof, or on account thereof.

The defendant by its answers has admitted all of these important matters with qualifications not important to this discussion. The only important feature in its answers by way of denial touched the matter of plaintiff being the owner and holder of all of the bonds, and this is admitted in the Agreed Facts. The differences as to object and purpose of the improvements as stated, details in the pleading which are verbally distinguished, are not important at this time.

Defendant, however, has appended to its answers as Exhibits "A", "B" and "C" certain ordinances of the town, including that of the resolution of intention No. 10. The only importance attaching to this matter in this discussion is the description of the improvements which were proposed to be constructed, that is, "pipes, hydrants, and hose connections for irrigating appliances and fire protection." There is no dispute as to this, and for the record in this case (p. 56) there is no dispute

that *those improvements were actually "constructed and accepted"*, because the Answer, paragraph 6 (p. 20) specially admits the contract was entered into

> "for the construction of a waterworks system, *and the improvements for which said special improvement district number four was created,"*

The answer further specially alleges, paragraph 12 (p. 24):

> "that said waterworks system, *and the improvement provided for and specified in the resolution of intention* * * * was constructed, received and accepted,"

The Answer also set up as its Exhibit "C" Ordinance No. 29, which, Section 7 (p. 46), ordained that

> *"a continuing direct annual tax in the form of a special assessment be, and the same is hereby levied upon all the taxable real estate within the boundaries of said Special Improvement District No. 4 * * * in an amount sufficient to pay the interest on said bonds as the same becomes due and to discharge the principal of said bonds at the maturity thereof."*

And further, Section 8 (p. 46):

> *"That all money derived and received from the collection of said special assessment shall be deposited by the Town Treasurer to the credit of Special Improvement District No. 4 of said Town of Ryegate, and the same shall be paid out by the Town Treasurer for no purpose other than in payment of the principal and interest of said bonds."*

Defendant set up further affirmative Answers, the first of these purports to plead the unconstitutionality of the debt of the special improvement district if it

should be imposed upon the town generally. That is not important for the purpose of this discussion.

The second defense declares that plaintiff paid 80% of the par value of the bonds in purchasing the same. This is equally unimportant at this time.

The third defense is to the effect that plaintiff employed skilled counsel to prepare the proceedings; that the contractor submitted the matters involved in the proceedings to its own counsel and relied thereon, and that plaintiff did the same. This Answer is unimportant for the present purpose.

The fourth separate Answer alleges that, pursuant to its ordinances, the town attempted to make assessments and levies in 1921 and against the real property in District No. 4, which assessments were due on or before November 30, 1921. That in January, 1922, Mike Belecz and others brought a suit in the state court, setting up various grounds of attack against these assessments, which resulted in decrees annulling the same. This matter is set forth more particularly in Agreed Facts, to which is appended the complaint, answer, reply and the court's findings and decree in the state court. This defense is apparently offered by defendant in the case at bar as an excuse for not making the regular payments as originally contemplated, and it is with respect to this defense that we now urge the insufficiency of these answers as a defense in full to plaintiff's complaint in the case at bar. It affirmatively appears without question that the *Belecz* suit in the state court applied *only to the real property specifically described in the complaint and in the court's decree.* The suit was not

brought in a representative capacity. The proceedings in the state court do not disclose the issuance of any restraining order in the nature of a preliminary injunction, and no reason whatever is advanced as to why taxes and assessments might not have been collected on all other properties not involved in the litigation, notwithstanding said suit. The Answer makes no effort to plead a full defense in behalf of the town with respect to collections which should have been made under the provisions of Ordinance No. 29, which defendant has pleaded in its own behalf.

The Answers do not undertake to show to the court what sums were collected prior to the institution of the *Belecz* suit. It appears that some funds were collected, because the interest coupon was paid. The defendant has rendered no account in its pleadings and none are disclosed by the Agreed Facts or other matters pertaining to this record.

We now wish particularly to notice the position of defendant: It has conceded the legality of the district and the plan of payment, and has expressly stated that the work specified in the resolutions of intention and of creation were the improvements contracted for and constructed by and accepted from Security Bridge Company. Whatever may be the issues as to the character of improvements contended for by property owners in the suits in the state court, *defendant in the case at bar has admitted that the improvements described in the resolutions were actually contracted for, constructed, accepted and received as the identical improvements resolved upon at the initiation of the proceedings* relating to Spe-

cial Improvement District No. 4. *That is the record in this case.* To explain its position in the matter in the case at bar the Town of Ryegate has set up as exhibits to its Answer resolutions and ordinances designated Exhibits "A", "B" and "C". Of particular importance is Exhibit "C" in Ordinance No. 20, passed June 9, 1920, which provided for the *continuing annual tax* by way of assessments and the *creation of a special fund for the deposit of all the moneys collected.* This last provision is a clear declaration of trust for the sole benefit of the special improvement bonds and their holders. The defendant has thereby placed itself in the position of being an agent or a trustee and not an obligor. Necessarily this invokes the principles of equity. The declaration of trust itself, shown in Exhibit "C", definitely prescribed the duty of the town treasurer to pay out moneys from this fund only and solely in payment of principal and interest on these bonds. An action for money had and received to recover money from an agent or trustee is fundamental, provided that the amount of such money is known. In the case at bar defendant has evaded the issue as to what funds it has on hand. It has shown a performance of its obligations under its own theory, to the extent of having paid only one interest coupon, and by way of excuse has stated that certain suits in the state court resulted in decrees annulling the assessments made against the properties described. Unless this excuse is sufficient in itself to be a *complete* defense to any *further funds* which the Town of Ryegate has collected, it is manifestly insufficient, and having failed to render an accounting to the court or to plead

that no funds were on hand to apply to the payment of the principal or interest, or on account thereof, defendant has necessarily by such Answer opened up such issues as can be determined only by a court in equity, which can properly command the trustee to render an *accounting,* and in aid thereof grant relief by way of *discovery,* together with any other or further proceedings which may be required to make the same effective. This Answer definitely throws the cause on the equity side of the court.

There are a number of things in the Agreed Facts of no importance in this important discussion. It is important, however, to note paragraph "e" (p. 53). This states the true object and purpose of the resolutions creating Special District No. 4 and the issuance of the special bonds, to include a supply of water for municipal purpose to the town, and water to a portion of the inhabitants *"and for the purpose set out in said resolutions";* and by paragraph "f" (p. 54) that the contract entered into between the town and the bridge company was

> "for the construction of said waterworks system *and the improvements specified in said resolutions,"*

and further, paragraph "g" (p. 54), that the town issued its bonds generally in the sum of $15,000, and the bonds of Special District No. 4 in the sum of $45,602.42,

> "for the purpose of paying for said waterworks system *and the improvements specified in said resolution,"*

and further, paragraph "h" (p. 54), Security Bridge Company purchased the general bonds of the town at

par plus accrued interested, and accepted said general bonds and the special improvement district bonds in the sum of $45,602.42

> "in payment of the costs of installation of said waterworks system *and the improvements specified in said resolution.*"

It is agreed that the Bridge Company had no funds of its own for investment purposes and it was necessary to arrange the sale of these bonds, which it sold to plaintiff at 85% of par value, and that plaintiff paid for the special bonds $38,762.06 (paragraphs "i" and "j", p. 55).

Of especial interest is paragraph "l" (p. 56), which agrees that plaintiff purchased these bonds and furnished all the money used by it to build and complete the

> "waterworks system *and the improvement specified in said resolutions*";

and further, that plaintiff purchased the bonds for value before maturity and is the owner and holder thereof, and that these bonds were delivered either by the town to the bridge company, or to the plaintitff, in the amounts and upon the dates in the schedules set forth in the complaint, the first delivery being July 28, 1928. The agreed statement, paragraph "m" (p. 56), stipulates that "said water system and *improvements specified in said resolution* were so constructed and accepted", and the town has received the income from such improvements and now has and continues to have and use the same.

The Agreed Facts further refers to the suit brought in the state court, and Exhibits 3, 4, 5 and 6 appended

refer to the Complaint, Answer, Reply and Findings and Decree made in such case. It is agreed that similar suits by a number of persons resulted in similar pleadings and decrees; it is agreed that plaintiff has counsel associated in the defense of these actions; it is agreed that no appeal was taken from the judgments and decrees.

This brings us to an inspection of the proceedings in the *Belecz* case in the state court. For present purpose the only matter of particular interest is that the complaint *involves the property specifically described* therein (paragraph 10, pp. 72-75). The demand made by plaintiffs in the *Belecz* case is that the taxes and assessments be decreed null and void and an injunction from *selling the property aforesaid* on account thereof; that in case any property should be sold the injunction should extend to restraining the issuance of a tax deed. It appears that the cause was tried February 6, 1923 (p. 84). In the conclusions of law entered (p. 90) we find that the court declared plaintiffs as entitled to an injunction against defendants collecting any portion of the assessment against the *"property of any of the plaintiffs situate in District No. 4."* This was dated June 27, 1924. The decree which followed adjudged that the taxes and assessments levied and assessed upon property situate in District No. 4, to pay for special improvements therein under resolutions which are the subject of the action, are null and void;

> "that the defendants are, and each of them is hereby enjoined and restrained from *selling any of the property of plaintiffs herein, described in the complaint*

*herein,* * * * and * * * enjoined and restrained from issuing any tax deed to the purchaser of any of *said lots or property, or any part thereof.*"

The decree further declares:

"That the *lots and property referred to herein,* the taxes and assessments against which, on account of the creation of said district and construction of improvements therein, are hereby declared to be null and void and the collection of which is hereby restrained, *are particularly described as follows,* to-wit:

(A detailed description by lot and block number follows).

This decree was dated July 8, 1924, and appears to have been filed July 16, 1928.

The scope of the suit in the state court and of the conclusions and decree therein, clearly and emphatically show that it was *limited to the precise property* therein specifically described and passed upon. The decree was not signed until July 8, 1924, and could not be effective prior to that date. The complaint does not ask for a restraining order or temporary injunction, nor does the record show that any such restraint was imposed upon the town. The pertinent question which must be answered, and with respect to which this record is silent, is this: What moneys were collected prior to the decree in the state court? A further question is: What collection has been made of assessments against properties other than the plaintiffs, who brought suits in the state court? What excuse has defendant offered for not having fulfilled its statutory duty? The defendant has

pleaded itself as an agent or supervisor of the special improvement district, and by virtue of its own ordinances it shows itself to be a *trustee for the benefit of the holders of the special improvement district bonds.* Irrespective of the Montana statutes, which are noted under *Points and Authorities,* the duties of the town under its own Ordinance No. 29, which requires a continuing annual tax, and which requires the deposit of all funds collected to be placed in the special fund for the benefit of these bonds, are sufficient to impose liability against the Town of Ryegate and require not only an accounting and remittance of the funds on hand and collected by it, but a detailed and further showing to explain why taxes and assessments have not been collected each year from and after the passage of Ordinance No. 29.

We do not wish the court to believe the criticism made in this respect is merely captious, theoretical or inconsequential. The fundamental law underlying the pleading of answers require that a full answer, responsive to all of the issues, must be made, in order to constitute a defense. While the pleadings are not in the precise form which would be most agreeable for the determination of such matters, because of the submission of the case on the Agreed Facts, it is nevertheless clear that, putting together the pleadings and the Agreed Facts, we find that defendant has not responded fully or satisfactorily to its legal obligations as disclosed by the complaint, nor has defendant satisfactorily explained the position in which it has placed itself by its own Answer and the pleading of its own ordinances.

The law presumes that a public servant has performed his official duty. Aside from whatever may be said of the position of the Town of Ryegate as an agent of the special improvement district, or as a trustee in connection with the collection of the funds involved, the Town of Ryegate and its officers are nevertheless public servants, and under *Points and Authorities* we have pointed out the Montana statute and numerous cases determined in Montana, which accord with a great multitude of cases from other jurisdictions, holding that a public official must be presumed to have done his duty regularly and completely in the absence of a contrary showing, and that such statutory presumption in itself constitutes satisfactory evidence; some of the cases say that it is conclusive in the absence of contradictory testimony. We must, therefore, conclude as a matter of law, under the presumptions required by the Montana statute, that the town council of Ryegate has performed its duty in the intervening period, and has made the necessary levies upon the properties which were not subject to the restraining order, and further that the county treasurer of Golden Valley County, under the statutes of Montana, has collected the assessments regularly and has settled with the town council as required by the Montana statutes; and, it being the duty of the town treasurer of Ryegate, under Ordinance No. 29, to deposit these funds in a special fund for the benefit of these special bonds, the court must assume funds to be on hand in a substantial amount.

The defense, so far as pleaded does not extend further than the properties of Mike Belecz and others, with

respect to which a computation can readily be made of the assessments in 1921, which aggregate $11,485.00 under the schedule set forth (pp. 73-75); the total assessment aggregates $45,602.42. The record discloses, therefore, that approximately one-fourth of the property subject to the assessment was involved in the litigation in the state court. If it be true that other property owners succeeded in the securing of similar decrees, the *record does not disclose* their names nor the amounts of the assessment. Manifestly this information is available to and known by the Town of Ryegate, and if it has failed to plead the same, either in detail or generally, the fault must rest upon the town. If we were to assume, which the record will not permit, that all of the property within the Town of Ryegate had become the subject of a decree annulling the taxes and assessments, then it was the duty of the defendant in the case at bar to have pleaded the fact, to have exhibited the decrees and judgment rolls to the trial judge as a complete defense for failure to collect moneys, if it has so failed; or as a defense to the requirement that it shall pay the principal and interest on the bonds.

There is nothing suggested in the record of this case in the nature of a restraint upon the Town of Ryegate from paying the moneys which it has on hand unto the holders of the bonds. There is nothing in this record to indicate how much moneys were on hand after the payment of the interest coupon January 1, 1922. Two and one-half years elapsed after the payment of that coupon before the decree was signed in the state court in the *Belecz* case. There is nothing in the record to

justify the assumption that the town did not, during that period of two and one-half years, during which it was under no restraint by preliminary injunction or restraining order, collect assessments regularly on properties within the district, and especially is this true as to the three-fourths of the property not involved in the litigation.

In connection with the foregoing it must also be borne in mind that under Section 5232, Revised Code of Montana 1921, the creation of Special Improvement District No. 4 could not be prevented unless protested by more than 50% of the affected area. The various resolutions and minutes disclosed that the protests were insufficient and it is stipulated in the Agreed Facts that the creation was regularly accomplished. In this condition of the record the court must presume that at least 50% of the affected property owners did not protest, and, since the property owners who have not protested have no right to seek invalidation of assessments the presumption is that at least 50% of the property remained subject to the continuing assessments which it was the duty of the city to levy and collect.

That a court of equity will hold a town for collections of assessments which ought to have been made is taught by *Warner v. New Orleans,* 87 Fed. 826.

We do not wish to be understood as pressing a matter which might be cured merely by amendment and further showing. We do not hesitate to say emphatically, and charge the defendant with the fact, that it has collected assessments, which moneys have not been

accounted for to the bondholders, and which it now has in its possession, or has appropriated for purposes other than that prescribed in Ordinance No. 29, passed June 9, 1920. We challenge defendant to make its showing to the contrary. We do not know what amounts have been so collected as to dollars and cents, but we do not believe, nor will the court believe, that the Town of Ryegate collected on account of assessments precisely in dollars and cents the exact amount to the penny sufficient to pay the interest coupon of January 1, 1922, and no more. We charge here and now that the Town of Ryegate has collected substantial sums which it has failed to pay or to tender as for interest or on account thereof. A court of equity should countenance no such condition. The case must be reversed and remanded to clean up the condition of this trust fund, which defendant itself has shown to have been created and which it has failed to explain as to payment and liquidation.

The first *Assignment of Error* will be found at page 255 of the Transcript on Appeal in the following language:

> "The Court erred in ordering this action dismissed and in entering a decree in favor of defendant and against the plaintiff and for the dismissal of said cause in its entirety."

The preceding argument fully meets the position taken in assigning this error and discloses the assignment to be well founded.

## THE TOWN OF RYEGATE IS LIABLE GENERALLY TO THE BONDHOLDERS, IT HAVING FAILED TO PERFORM ITS DUTIES, STATUTORY OR OTHERWISE, BUT NECESSARY TO MAKE THE SPECIAL IMPROVEMENT BONDS A VALID LIEN.

### Points and Authorities

I.

Under the Montana laws the Town of Ryegate clearly had the power in 1919-1920 to create special improvement districts, levy taxes and assessments providing for payment of bonds, etc., sufficient to make the bonds a valid lien on the benefited property.

*Revised Code Montana 1921,* Sec. 5039 (subd. 80), Secs. 5225-5255.

II.

A town may be liable either ex delicto or ex contractu (there being an implied contract legally to perform its duties) where a town has failed to make valid provisions for the collection of improvement assessments which were not in original contemplation to have been paid by the town itself.

*Dillon, Municipal Corporation (5th Ed.),* Sec. 827, pp. 1250-1252.
*Fort Dodge Co. v. Fort Dodge,* 115 Iowa 568; 89 N. W. 7.
*Denny v. Spokane,* 79 Fed. 719; 25 C. C. A. 164. (9th C. C. A.)
*Mankato v. Barber Asphalt Co.,* 142 Fed. 329.
*Bates County v. Wills,* 239 Fed. 785, 789. (8th C. C. A.)

*Barber Asphalt v. Denver,* 72 Fed. 336, 339. (8th C. C. A.)
*Barber Asphalt v. Harrisburg,* 64 Fed. 283. (3rd C. C. A.) Certiorari denied, 163 U. S. 671.
*Oklahoma City v. Orthwein,* 258 Fed. 190. (8th C. C. A.)
*District of Columbia v. Lyon,* 161 U. S. 200; 40 L. Ed. 670.
*Dale v. Scranton,* 231 Pa. 604, 80 Atl. 1110.
*Nolan v. Reading,* 235 Pa. 367, 84 Atl. 390.
*Freese v. Pierre,* 37 S. Dak. 433, 158 N. W. 1013.
*Pine Tree Co. v. Fargo,* 12 N. Dak. 360, 96 N. W. 357.
*Rogers v. Omaha,* 82 Neb. 118, 117 N. W. 119.
*Terrell v. Paducah,* 122 Ky. 331, 92 S. W. 310.

## III.

A prima facie case is made upon a showing of:

1—Authorization of contract by appropriate ordinances, etc.;

2—Performance of the contract;

3—Acceptance by the town;

4—Issuance of warrants or bonds; and

5—Unreasonable delay in providing funds for means of payment.

This is true whether ex delicto or ex contractu.

*Dillon, Municipal Corporations (5th Ed), Sec.* 827, pp. 1251-1252.
*Commercial Bank v. Portland,* 24 Ore. 188; 33 Pac. 532.
*Jones v. Portland,* 35 Ore. 512; 58 Pac. 657.
*Reilly v. Albany,* 112 N. Y. 30; 19 N. E. 508

## IV.

Failure of the town to enact ordinances adapted to the purpose of providing funds for the payment of

special improvements from the benefited property imposes liability upon the town itself.

*Mankato v. Barber Asphalt Co.,* 142 Fed. 329.
*Barber Asphalt Co. v. Denver,* 72 Fed. 336, 339.

The fact that the state courts have held the contract to be invalid does not disturb this doctrine.

*Mankato v. Barber Asphalt Co.,* 142 Fed. 329.

V.

Because the ordinances enacted are held by the state courts to be unconstitutional, and by reason of the lapse of time the town has lost the right to reassess the benefited property, the rule is not changed imposing general liability upon the town itself for this neglect.

*Denny v. Spokane,* 79 Fed. 719.
*Catlettsburg v. Citizens Bank,* 234 Ky. 120; 27 S. W. (2d) 662.

And this is true where the law upon which the assessments are based is held to be unconstitutional by the highest courts of the state.

*Barber Asphalt Co. v. Harrisburg,* 64 Fed. 283.
*Gable v. Altoona,* 200 Pa. St. 15; 49 Atl. 367.

VI

Generally where special assessments are held to be invalid and illegal the town itself will be held liable, since its duty is to make valid assessments.

*Fort Dodge Light Co. v. Fort Dodge,* 115 Ia 568; 89 N. W. 7.
*Oklahoma City v. Orthwein,* 258 Fed. 100.
*Addyston Pipe Co. v. Corry,* 197 Pa. St. 41; 46 Atl. 1035.

## VII.

Where assessments have been levied but are in amounts insufficient to meet the funded obligation, the municipality is itself liable where it has failed to make reassessments.

*Bates County v. Wills,* 239 Fed. 785, 789.
*Hauge v. Des Moines,* 207 Ia. 1207; 224 N. W. 520.

It is the duty of the municipality and its implied obligation to provide the necessary agency to raise the money from the benefited properties to meet the costs of special improvements.

*Catlettsburg v. Citizens Bank,* 234 Ky. 120; 27 S. W. (2d) 662.
*Dale v. Scranton,* 231 Pa. 604; 80 Atl. 1110.

## VIII.

Because the amount for which a municipality may be liable for failure to do its duty in providing valid assessments and necessary machinery for the payment of special improvement obligations shall exceed the amount of indebtedness permitted the municipality under constitutional limitations or restrictions were it a general obligation of the municipality, the town is not freed from liability on that account. The constitutional restriction of indebtedness refers only to "voluntary" indebtedness.

*Fort Dodge Light Co. v. Fort Dodge,* 115 Ia. 568; 89 N. W. 7.

Montana's Constitution, Article XIII, Section 6, is identical to the Iowa Constitution in its restriction save only as to the percentum. The same is true of the Constitution of Illinois. When Illinois revised its Constitution it took its restriction on municipal debt from Iowa.

Article XI, Section 3 of the Iowa Constitution, therefore, is the parent of the language found in Montana's Constitution, Article XIII, Section 6. Early Iowa cases prior to 1889, the year of the adoption of Montana's Constitution, had determined the meaning of this language as referring only to "voluntary" indebtedness. This was decided June 6, 1886, in the case of

*Thomas v. Burlington,* 69 Ia. 140; 28 N. W. 480,

and such municipal obligations had been determined as not being a "debt" within the meaning of the Constitution in the earlier decisions of

*Battle v. Des Moines,* 38 Ia. 414.
*Rice v. Des Moines,* 40 Ia. 638.

The settled meaning of the Iowa Constitution must be considered as having been adopted by the State of Montana when this language was brought into the Montana Constitution in 1889 under familiar rules of construction.

The imposition of liability for failure to perform a duty is to be considered either as a tort or as the violation of an implied contract to perform a legal duty which has a similar basis. Either will support an action for money had and received under the authorities cited, *supra.*

The State of Illinois has held a tort liability not to create an "indebtedness" within the meaning of its constitution.

*Bloomington v. Perdue,* 99 Ill. 329.
*Chicago v. Norton Co.,* 196 Ill. 580.
*Chicago v. Sexton,* 115 Ill. 230.
*Com'rs v. Jackson,* 165 Ill. 17.

Montana has held refunding bonds not to constitute "indebtedness" within the meaning of the constitution, although the amount thereof was in excess of the constitutional limit showing a disposition to broaden the meaning of the constitutional provision so as not to include an old and therefore an involuntary obligation within its prohibition.

*Palmer v. Helena,* 19 Mont. 61, 65; 47 Pac. 209.
*Parker v. Butte,* 58 Mont. 539; 92 Pac. 748.

And Montana's Supreme Court has this summer decided that, notwithstanding the constitutional limit, a municipality may be held for liability in refunding an indebtedness which was itself created without the necessary vote on the question of exceeding the constitutional limit of indebtedness, this being on the principle of estoppel.

*Edmunds v. Glasgow,* 300 Pac. 203.

## IX.

Generally, constitutional provisions similar to that of Montana, though differing slightly in terminology, are so construed as to permit the imposition of an involuntary liability upon a municipality.

*Addyston Pipe Co. v. Corry,* 197 Pa. St. 41; 46 Atl. 1035.
*Gable v. Altoona,* 200 Pa. St. 15; 49 Atl. 367.
*Baker v. Seattle,* 2 Wash. 576, 582; 27 Pac. 462.
*Winston v. Spokane,* 12 Wash. 524, 527; 41 Pac. 888.

The same construction has been given to charter provisions which in themselves limit the indebtedness of the particular town in states where the system of jurisprudence developed involves special charters and charter powers.

*Dillon, Municipal Corporations* (5th Ed.), 373.
*Denny v. Spokane,* 79 Fed. 719.
*Little v. Portland,* 26 Ore. 235; 37 Pac. 911.
*McEwan v. Spokane,* 16 Wash. 212, 215; 47 Pac. 433.

The same rule is applied where the limitation is found by legislative enactment of general law rather than a constitutional provision or a charter requirement.

*Mankato v. Barber Asphalt Co.,* 142 Fed. 329.

## X.

Generally, the test of such indebtedness is made on the question of whether or not the indebtedness is "voluntarily" incurred.

*Fort Dodge Light Co. v. Fort Dodge,* 115 Ia. 568; 89 N. W. 7.
*McCraken v. San Francisco,* 16 Cal. 691.
*Grant County v. Lake County,* 17 Ore. 453.
*Potter v. Douglas County,* 87 Mo. 239.
*Barnard v. Douglas County,* 37 Fed. 563.
*Chicago v. Manhattan Cement Co.,* 178 Ill. 372; 53 N. E. 68.

## ARGUMENT

The liability of the Town of Ryegate in connection with the creation of Special Improvement District No. 4 and the indebtedness incurred in the construction of the improvements therein has a definite aspect when viewed with respect to the duty of the town under its powers legally to create valid liens and assessments for the security of the bonds issued, and this is wholly irrespective of any thought or theory of original or general liability assumed for the payment of these bonds by the town itself. We do not wish to spend a great deal of time on the underlying theory of this liability. Briefly, however, the liability is based upon the following line of reasoning. Under the Montana laws the Town of Ryegate had been granted power by the legislative assembly to create special improvement districts. An entire chapter of the Montana Code deals with procedure the same being Chapter 56, including Sections 5225-5227 inclusive, Revised Codes of Montana, 1921. The record in this case is clear by the admissions of the pleadings and the stipulations of the Agreed Facts, with respect to which there can be no dispute, that the Town of Ryegate regularly and legally created District No. 4 for the purpose of "constructing pipes, hydrants, and hose connections for irrigating appliances and fire protection." The legislative assembly by these acts had given the Town of Ryegate adequate legislative power to contract for the construction of these improvements upon the creation of the district, and the creation of the district must be assumed under the record. The Town of Ryegate, therefore, had the power to enter

into a contract in ordering proposed improvements under the specific language of Section 5230. It entered into such a contract under an award made April 26, 1920. The contract is shown in the printed transcript (p. 61). All of the statutes and the laws, whether expressed by the statutes or the ordinances of the town relating thereto, must be considered as a part of the obligations of the respective parties to this contract, so that the obligation of the town to make the *assessments,* levies, *reassessments if necessary,* and all other details required to make the bonds valid liens on the real estate within the district, must be considered as implied obligations on the part of the Town of Ryegate in its contract with Security Bridge Company. So far as the construction of the statutes is concerned and insofar as the same have been settled by the Supreme Court of Montana prior to April 26, 1920, such construction must be considered as entering into the contract in question. When Security Bridge Company therefore was awarded its contract and it qualified thereunder by posting the necessary bond, etc., its rights were fixed as of that date, and these rights included the obligations of the Town of Ryegate to do whatsoever was necessary or needful in setting up adequate machinery for the purpose of levying assessments and collecting therefrom the necessary funds designed to meet the payment of the bonds which the contract provided should be issued in payment of the work. This is truly a part of the contract of the Town of Ryegate and it is not in its inception a contract by the town to undertake the payment either as principal or as a guarantor of any of the

moneys due on account of the improvements in the special district as represented and evidenced by the bonds in question. It may not properly be called a contingent liability in the usual sense of commercial law. There was nevertheless an obligation on the part of the town to perform its duties, statutory and otherwise, whether expressly recited in the contract or in any way, to make effective the matters above adverted to, and failing to perform its contract in that respect, or if we prefer so to term it, its failure to perform its duties to the contractor as imposed by statute, ordinance or general law, makes no difference; its liability is imposed when it failed to do the needful things, and it is no excuse if the town made a mistake, either through its counsel in preparing the necessary proceedings with respect to this machinery, or whether the town wilfully refused to make assessments at all, or whether in obedience to the mandate of some court having apparent jurisdiction it declined to make further assessments, for in law the city is not relieved from responsibility by reason of the fact that these assessments may have proved to have been illegal, provided always at its inception of activities in that respect the town had legisislative power to do the thing correctly. Many of the cases in support of this doctrine have been based upon a theory of ex delicto growing out of the wrong done in failure to perform a duty owing to the contractor on the part of the municipality, but it is equally true that this may be viewed as the violation of an implied obligation of the contract itself. The law presumes that the parties to a contract shall obey the law just as effectively as

if it were definitely expressed in writing within the body of the contract itself, and further, when the damage which has resulted grows out of the expenditure of moneys for the benefit of the town, then the implied contract takes on the aspect of an action as for money had and received, or for material and labor furnished and received, with respect to which the town has not performed its consideration, to-wit: the setting up of valid machinery for the imposition and collection of the assessments, and therefore the measure of damage is that of the money had and received by it, or the reasonable value of material and labor furnished and received. The cases are so very numerous that we can only touch on a few of the most illustrative decisions. At this point let us refer to

> *Dillon, Municipal Corporations* (5th Ed.), Sec. 827, p. 1250.

> "*Liability of City if Contract Price is payable from Assessment.*—When the charter or statute authorizing the improvement, or an express stipulation in the contract, provides that the contractor shall be remunerated from the proceeds of an assessment on the property benefited and shall look only to the assessment as the source for payment, or when the city charter provides no other means to pay the contractor than the proceeds of the assessment as it is collected, there is no liability on the city to the contractor other than to make and collect the assessment and pay it over, unless the city fails in some duty it owes to the contractor connected with the levy and collection of the assessment. Upon the receipt of the assessment the city becomes liable to the contractor as for money received to his use. But *where the contract price is payable from assessments,* the courts, *having regard to the duty of the municipality to cause the assess-*

*ment to be made* and collected *in a proper manner and without unreasonable delay* after the work is done, have laid down the principle that *the municipality is answerable in damages* to the contractor for a breach of its duty in this respect, and in many cases have held that the failure of the municipality to discharge its duty by making the necessary assessment, or by its unreasonable delay in collecting and paying over the money, *constitutes a breach of the contract or a liability ex delicto,* giving to the contractor a *right to recover his compensation or damages* against the municipality *generally.*"

The case at bar meets all the conditions suggested by the renowned editor of this magnificent work. We wish, however, to refer to a few of the leading cases in this respect.

*Mankato v. Barber Asphalt Co.,* 142 Fed. 329.

Once more we refer to this leading case which has so recently had the approval of the Federal Supreme Court (276 U. S. 536). This case is so closely in point as to all of the controlling facts with the case at bar that we must be pardoned if this decision is urged with apparent persistence. The facts in this case developed that a paving contract had been entered into and shortly thereafter and before the work was started, legal proceedings had been brought to attack the validity of the contract itself in the state courts, which litigation was successful in holding the contract invalid, the work, however, continued and was completed. The state decision was affirmed in the Minnesota Supreme Court. That litigation had been brought against the City of Mankato itself, but a second suit begun about the same

time, shortly *after the contract was entered into,* had made the contractor a party defendant. The second case similarly held the contract to be invalid. An action brought by the contractor against the City of Mankato for having failed to provide the necessary assessments and make appropriate levies for the collection from the benefited property within the district which had been improved, was brought in the federal court notwithstanding the state decisions, and the federal court sustained in its independent judgment the validity of that contract notwithstanding the state's decisions to the contrary, and based liability upon *failure of the city to have done its duty,* and the state decisions supporting the city's position in the federal litigation were of no avail.

In *Denny v. Spokane,* 79 Fed. 719, assessments for street grading had been made by the city payable exclusively from the benefited properties. Litigation, however, determined that the ordinances with respect to these assessments were invalid and void for unconstitutionality. The litigation had been carried through the various Washington courts and when finally determined the statute of limitations had run against the city's rights to make reassessments which might have been made otherwise. This court found no difficulty in holding the city liable generally, it having failed to make valid assessments notwithstanding its earnest efforts so to do.

In *Barber Asphalt Co. v. Harrisburg,* 64 Fed. 283, special assessments had been levied against adjacent properties with respect to a special improvement which

was exclusively to be paid by the benefited property. The statutes of Pennsylvania which permitted this method of assessments were attacked and were held to be unconstitutional. The city thereupon declined liability on its own account. It could not collect assessments from the benefited property by reason of the Pennsylvania Supreme Court's decision holding the same unconstitutional under the method attempted and the laws applicable thereto. The federal court nevertheless held the City of Harrisburg liable generally notwithstanding, it having failed to make valid assessments, which under the laws it could not do apparently. Yet it undertook so to do and it must pay the consequences. We can think of nothing in the case at bar comparable to this condition. Under the Montana laws the Town of Ryegate had legal facilities for making valid assessments. Whether it did so or not is now unimportant.

In *Gable v. Altoona,* 200 Pa. St. 15, the *Harrisburg* case was followed by the state courts and the town held liable generally, notwithstanding the unconstitutional character of the laws which *ex vi termini,* permitted the assessments which it had attempted to make against the benefited property.

To the same effect see the case of *Addyston Pipe Co. v. Corry,* 197 Pa. St. 41.

The case of *Fort Dodge Light Co. v. Fort Dodge,* 115 Ia. 568; 89 N. W. 7, is one of the leading cases cited throughout the authorities, in which case the city had made illegal assessments against street railway properties as for part of the paving of the town. It was

held that the street railway company was not liable in any degree for this improvement. Certificates in the nature of warrants were held by one of the banks and, on intervention, it was held that these certificates were good against the town generally, although they were intended to be paid only out of the special assessments to the exclusion of the city itself.

In the recent case of *Hauge v. Des Moines,* 224 N. W. 520, the *Fort Dodge* case is reaffirmed. This case involved four different counts dealing with special improvement bonds, with respect to which the city was not primarily or directly liable. Under the second count the City of Des Moines was held liable for having failed to have made a *sufficient levy in amount* to cover the obligation of the bonds, it appearing that certain property holders had brought a suit in the state court and had their assessments reduced. The city had not taken the precaution to make a reassessment to cover this deficit. It was, therefore, liable itself though not so originally intended. Under the third count a sewer bond was involved where the owner of the benefited property had failed to pay his assessments, and there was an apparent failure to collect the tax on the same through the tax sale as contemplated. The failure on the part of the city to have diligently proceeded to the collection of such tax imposed upon the city a liability for failure to do that duty. In these cases the city was liable not on the bond itself but for failure to do the necessary thing to make the bonds valid or collectible, or to proceed effectively to bring about collection of the assessments required to meet the bonds. It is im-

portant to note that this case was approved and cited by the Montana Supreme Court this summer in deciding the case of *Edmunds v. Glasgow,* 300 Pac. 203.

In *Oklahoma City v. Orthwein,* 258 Fed. 190, the case involved arose on account of paving as stated in connection with the fourth count at p. 193. It seems that provision for paying for this special improvement was effected by ordinances requiring the payment exclusively from the abutting property owners along the streets. The question raised was whether or not on a wide street, a street railway line, running through the center, set off in a separate parking strip with curbing, should be held as an abutting property owner, the assessments having been so imposed. Thereafter litigation going through Oklahoma's Supreme Court had determined that the liability of the street railway company depended on whether or not it owned the parking strip in fee or its equivalent. The particular count involved a street where this condition existed, but the street railway company's title as a feeholder had been disputed. A proceeding in the state court had been brought and after some time, following dilatory pleas, a default decree had been entered in favor of the street railway company exonerating it from the assessments. The case brought in the federal courts was to impose upon the city itself liability on this paving contract obligation, the city having failed to make a reassessment against the other properties and it not having undertaken at any step to be liable directly for itself. The Circuit Court of Appeals held that it was no excuse for the city to show that the assessment had

been determined adversely to the city in the state litigation, and therefore the city itself would be held liable, it having failed to do its duty.

There is a long line of Oregon cases which have supported this doctrine, the leading case being that of *Commercial Bank v. Portland*, 24 Ore. 188; 33 Pac. 532. In these cases the improvements were made by way of special assessments and a special provision of the contract provided that the contractor would not compel the city to pay anything on account of the improvement. The city having delayed the completion of litigation brought by the benefited property owners for a period of five years was alone held a sufficient basis for liability against the city, it having failed to do its duty, although the litigation had not yet been determined. This is one of the leading cases cited throughout the nation, coming early in the history of municipal law. The same facts were involved in *Little v. Portland,* 26 Ore. 235; 37 Pac. 911, the latter action being brought ex contractu, while the former was ex delicto, there being no difference in practical effect.

The requisites of a prima facie case are set out by Judge Bean in his opinion in *Jones v. Portland,* 35 Ore. 512; 58 Pac. 657. These have been stated in *Points and Authorities.* The action was ex delicto and the burden of proof was placed on the city to show the contrary. In this case it was shown that the city charter exempted the city from payment. The warrants issued expressly stipulated they would not be payable by the city itself. Nevertheless five years delay in providing the fund necessary to liquidate these warrants was sufficient to im-

pose liability upon the city. These cases have been more recently followed in

*O'Neil v. Portland,* 59 Ore. 84; 113 Pac. 655.
*Dennis v. Willamina,* 80 Ore. 486; 157 Pac. 799.

Leading cases in this matter are those of *Reilly v. Altoona,* 112 N. Y. 30; 19 N. E. 508, and *Bucroft v. Council Bluffs,* 63 Ia. 646.

The State of Washington stands almost alone in opposition to the great weight of authority to be found in the decisions of the various states, and almost all federal decisions. The early Washington cases were in accord with the rule announced. In the case of *German-American Bank v. Spokane,* 17 Wash. 315; 49 Pac. 542, that court reversed its earlier decisions and considered a long line of authority in the major opinion, which was conceived to be in support of its new ruling. In passing it is interesting to note that practically every case considered by the court has been interpreted by the text writers, compilers and other courts commenting thereon as holding the opposite from that as assumed by the Washington Supreme Court. The dissenting opinion of Judge Dunbar states the rule concisely as generally held. A history of the Washington situation may be found in *State v. Hastings,* 120 Wash. 283; 207 Pac. 23, which gives the history of this branch of the law in that state. Our own Circuit Court of Appeals had occasion to discuss the same situation in *Intermela v. Perkins,* 205 Fed. 609. See also the compilation of authority in 44 *Corpus Juris,* 406, showing Washington's singular position.

Judge Pray relied upon the expressions of the Supreme Court of Montana in *Gagnon v. Butte,* 75 Mont. 279; 243 Pac. 1080, which in turn quoted from the *German-American Bank v. Spokane* decision from the Supreme Court of Washington. In so doing we believe Judge Pray erred in applying those expressions as the law applicable to the case at bar. Briefly we shall state the reasons:

1—The *Gagnon* case was decided in 1926, and was the first expression apparently of the Montana Supreme Court on the subject of a municipality's liability for failure to make effective assessments, collections, etc. In that opinion no earlier Montana case is cited or relied on. It was therefore the first expression of that court touching the matter under the authorities heretofore discussed. The law being unsettled April 26, 1920, and at the time when the bonds in question were issued, the federal court is not bound by the *Gagnon* decision.

2—As expressly pointed out in the *Gagnon* opinion, the statutes under discussion in that case were *different* statutes than those in effect in 1920 when the rights herein were vested. The *Gagnon* case dealt with the earlier but *repealed* laws, (quoted *in haec verba* in the opinion) and the court expressly points out the necessity of applying the *former law* (Sec. 3427 Montana Code 1907) wherein the following language was expressed by the statute:

> "Neither the holder nor owner of any bond issue under the authority of this act shall have *any claim therefor against the city* by which the same was issued, except from the special assessments made for the improvements for which the bond is issued."

Under the former laws the form of bond provided stated that payment would be made "out of special improvement district No. .... Fund *and not otherwise* * * *"

These earlier statutes also included a specific provision with respect to the *foreclosure of assessments by the bondholder.* This statute was similar to those of many states whereby special improvement assessments are a type of lien which the bondholders may enforce themselves directly by independent proceedings of their own, in much the same way that foreclosure is made of tax certificates, etc. *This section was also repealed* in 1913, as the court points out. The *Gagnon* case was one where the bondholder might have enforced his rights through such foreclosure proceedings, but he neglected to do so and thereafter the legislature repealed that act and his position then was that of a plaintiff seeking to hold the city for mere failure to make collections, a *liability* which did not exist under the *applicable statutes.* The court holds the earlier laws measured the bondholder's rights and that decision is not authority on the laws in force in 1920.

The laws in effect in 1920 as disclosed by the statutes (Sec. 5225-5255, Revised Codes Montana 1921) have no provision comparable to the sections referred to above. In repealing the former laws the legislative assembly must have had something in mind, and in omitting the more drastic provisions of the statute it must be presumed that a less drastic rule was intended for the future. Words and events must be given their natural meaning, and a repeal and failure to re-enact those pro-

visions of the statutes must be given the effect of broadening the rule as determined in the *Gagnon* case under the *earlier* laws.

However, even in the *Gagnon* case the Montana Supreme Court says:

> "There is no liability in the city to the contractor * * * *unless the city fails in some duty it owes to the contractor connected with the levy and collection of the assessment.*"

This expression is directly in line with the great weight of authority which has been discussed.

3—The *German-American Bank* case itself did not declare a complete bar to relief, but refused relief to the bondholder against the city generally if there existed any method or right by which the bondholder could compel proceedings against the benefited property. Mandamus is the usual rule to enforce levies or collections. Even if this be the law, (and the great weight of authority opposes) it has no application to the facts in the case at bar. The Town of Ryegate was not in default on its bonds in January, 1922. The holders of the bonds could not have brought at that time any proceeding by mandamus or otherwise to compel levies, assessments, or in any fashion interfere with the conduct of the town's business so long as the bonds were not in default. Washington decisions do not deny relief to bondholders under such conditions. *Philadelphia Co. v. New Whatcom,* 19 Wash. 225, 232.

There was no default herein when the complaining property owners brought a suit to enjoin the town and

the county treasurer from the performance of their duties. Defenses were made by the parties defendant. The fact that the state court ruled the proceedings to be invalid does not change the situation now. The case at bar is, as to this matter, precisely that of the *Mankato v. Barber Asphalt Company* case, where the state courts had held the contract invalid, yet the right of the contractor to sue the city for its *failure to enact* necessary ordinances, etc., was sustained in the federal courts.

4—Plaintiff herein has a right to sue in the federal court by reason of its diverse citizenship. This is a constitutional right and is supported by the statutes of the United States and the law of no state has any force whatever, whether by procedural or general laws, in any degree to circumscribe that right. The Congress of the United States has not given jurisdiction to the federal courts to entertain original suits in mandamus under the well known statute. *Shepard v. Tulare Irrig. Dist.*, 94 Fed. 1. Notwithstanding this limitation federal litigants are entitled to the full protection of the courts in their rights. This identical situation came early to the attention of the federal judges and a method was devised in procedure by none other than Judge Dillon himself when he sat as a United States Circuit Judge. See

*Jordan v. Cass County,* 3 Dill 185; Fed. Cas. No. 7517.

*Dillon, Municipal Corporations* (5th Ed.) 1394.

which has been approved by the United States Supreme Court in

*Cass County v. Johnston,* 95 U. S. 360; 24 L. Ed. 416.

*Davenport v. Dodge County,* 105 U. S. 237; 26 L. Ed. 1018.

and has been followed by this Court in

*Mather v. City and County of San Francisco,* 115 Fed. 37.

The pleadings in the case at bar are sufficient to sustain the practice in this latter respect, since it is necessary under the rules dealing with this sort of municipal case to apply first for a judgment against the municipality, which may later be enforced specially by subsequent writs of mandamus or such other writs as may be necessary to make effective the decree or judgment entered in the original suit.

From the foregoing it is, we insist, clear to the point of demonstration that the Town of Ryegate breached a duty which it owed to plaintiff in the matters complained of, and stated in the agreed facts herein. The long line of federal cases solidly support the rule which imposes upon the municipality the obligation to perform its statutory duties and its implied obligations, although dealing with special assessments and properties specially benefited. The length of this brief makes it impossible to set up excerpts from many of the cases which clearly state the rule involved. We will, however, refer to the following expression by Judge Sanborn in *Barber Asphalt Co. v. Denver,* 72 Fed. 336, 338:

> "One who induces a contractor to perform labor or furnish material by the promise that a third person, who, he claims, owes him a debt or duty, shall pay to the contractor the agreed price of the labor and

materials he furnishes, cannot enjoy the fruits of the contract, and leave the contractor remediless, either because his debtor does not pay, or because the debt or duty did not exist. In either event he becomes primarly liable to pay the contract price himself. White v. Snell, 5 Pick. 425; City of Chicago v. People, 56 Ill. 327, 333; Bucroft v. City of Council Bluffs, 63 Iowa 646, 650, 19 N. W. 807; Cronan v. Municipality No. One, 5 La. Ann. 537.

Stripped of its verbiage, this is the first cause of action disclosed in this complaint: The city of Denver agreed with the Barber Asphalt Paving Company that, if the latter would lay this pavement, it should be paid $38,094.05 therefor, in this way: A certain portion of this sum should be paid in cash, obtained or to be obtained from the sale of the bonds of the city of Denver; $4,169.16 of it should be paid by the street-railway companies which had contracted to pave part of this street at the time and in the manner in which the city directed; and the balance should be paid from moneys to be realized from an assessment to be levied upon the property abutting upon the improvement. The plaintiff in error has paved the street, and the city has received all the benefits of a full performance of the contract. The city has discharged the obligation imposed upon it by the contract, with this exception; that it has not caused, or attempted to cause, the street-railway companies to pay the paving company the $4,169.16 which it contracted that they should pay to it; and it refuses to pay this amount itself, or to take any steps to cause the railway companies to pay it. Why is this not a good cause of action? If the city had failed to issue its bonds, or to pay that part of the price of this improvement which it promised to pay from their proceeds, an action could have been immediately maintained to recover it. If it had failed to levy the assessment upon the lots abutting upon the improvement, or if it had been without the power to make that levy, and it had thus failed to cause that part of the price to be paid by the owners of those lots, the

paving company could have recovered it by a direct action against the city. It is not perceived why its liability for that part of the price which it contracted that the railway companies should pay is less direct, primary, or absolute. It is no answer to this proposition to say that, while the city contracted that the railway companies should pay this $4,169.16, it did not, before the contract was let, provide, by ordinance or otherwise, any method by which the railway companies could be compelled to pay it. It is no defense to an action for the breach of a contract that the party in fault did not make adequate provision for its performance. In Bucroft v. City of Council Bluffs, 63 Iowa, 646, 650, 19 N. W. 807—a case in which the city had agreed to pay for certain improvements out of a fund to be raised by the levy of assessments upon abutting property, and in which the property owners refused to pay, and the city was without power to enforce payment—the supreme court of Iowa said:

> 'It may be said that the defendant did not, in terms, agree to pay, but it contracted, and the work was done for a compensation fixed by the city, and to its satisfaction, under an assumed power that the expense could be assessed as a charge on the abutting owner; and, in substance, both parties contemplated that payment should be made in a certain manner, or out of a designated fund. The plaintiff cannot be so paid. The defendant had no claim nor demand against the abutting owner, nor the power to create the fund, and yet it contracted that it had. * * * Now, when it turns out that there was no such fund, and that the power to create it did not exist, it seems to us that the city should not and cannot escape all liability under the contract; and it has been so held.'

In Reilly v. City of Albany, 112 N. Y. 30, 42, 19 N. E. 508, in which the plaintiff's assignor made a contract with the city of Albany to make certain improvements, to be paid for by assessments, and the proceedings leading up to the assessments were de-

clared to be invalid, and the city refused to proceed to make other assessments, when a suit had been brought to recover the contract price of the work directly from the city, the court of appeals said:

> 'When the contractor had performed his work according to his contract, he had no duty remaining to discharge, and then had a right to rely upon the implied obligation of the city to use with due diligence its own agencies in procuring the means to satisfy his claims. It could not have been supposed that he was not only to earn his compensation, but also to set in motion, and keep in operation, the several agencies of the city government, over whom he had no control, to place in the hands of the city the funds necessary to enable it to pay its obligations. That was a power lodged in the hands of the city, and the clear intent of the contract was that it should exercise it diligently for the purpose of raising the funds necessary to pay for the improvement. For an omission to do so it would become liable to pay such damages as the contractor might suffer by reason of its neglect of duty.'

*If a municipal corporation which has the power* to *make a contract* for street improvements contracts for them, and *stipulates in the contract* that the agreed *price* of the improvements *shall be paid* to the contractor *out of funds* realized or *to be realized by assessments upon abutting property, the city is primarily* and absolutely *liable* to pay the contract price itself, *if it has no power to make such assessments, or if the assessments it attempts to make are void.* City of Memphis v. Brown, 20 Wall. 289, 311, 312; Hitchcock v. Galveston, 96 U. S. 341, 350; Barber Asphalt Paving Co. v. City of Harrisburg, 12 C. C. A. 100, 64 Fed. 283; Bucroft v. City of Council Bluffs, 63 Iowa, 646, 650, 19 N. W. 807; Scofield v. City of Council Bluffs, 68 Iowa, 695, 28 N. W. 20; City of Chicago v. People, 56 Ill. 327, 333; Maher v. City of Chicago, 38 Ill. 266, 273; Miller v. City of Milwau-

kee, 14 Wis. 699; Fisher v. City of St. Louis, 44 Mo. 482; Commercial Nat. Bank v. City of Portland, 24 Or. 188, 33 Pac. 532.

If a municipal corporation which has the power to make a contract for street improvements contracts for them, and stipulates in the contract that the agreed price of the improvements shall be paid to the contractor out of funds to be realized by assessments upon abutting property, and the city has power to make the assessments, but fails to do so, or *fails to make valid assessments, and* thereby to *provide the fund* out of which the contractor may receive the price of his labor and materials, *the city is primarily and absolutely liable* to pay the contract price *itself*. Bill v. City of Denver, 29 Fed. 344; Argenti v. City of San Francisco, 16 Cal. 256, 281, 283; Beard v. City of Brooklyn, 31 Barb. 142, 150, 151; Commercial Nat. Bank v. City of Portland, 24 Or. 188, 33 Pac. 532; City of Louisville v. Hyatt, 5 B. Mon. 199, 201; City of Leavenworth v. Mills, 6 Kan. 288, 297; Reilly v. City of Albany, 112 N. Y. 30, 42, 19 N. E. 508; Michel v. Police Jury, 9 La. Ann. 67. In cases of this character the city becomes primarily liable, *even when the contract expressly provides that the contractor shall accept the assessments in payment of the contract price,* and that the city shall not be otherwise liable, whether the assessments are collectible or not. Barber Asphalt Paving Co. v. City of Harrisburg, 12 C. C. A. 100, 64 Fed. 283; City of Chicago v. People, 56 Ill. 327, 334; Commercial Nat. Bank v. City of Portland, 24 Or. 188, 33 Pac. 532. *There is no substantial conflict of authority upon these propositions,* and the principle they establish is decisive of the question under consideration."

The foregoing expression by the great jurist of the Eighth Circuit seems to have settled the law definitely for that circuit, as disclosed by the more recent cases in accord therewith. See

*Mankato v. Barber Asphalt Co.,* 142 Fed. 329.
*Bates County v. Wills,* 239 Fed. 785.
*Oklahoma City v. Orthwein,* 258 Fed. 100.

as illustrating important leading cases subsequently determined in that great court. (All approved by Butler, J., in *Moore v. Nampa,* 276 U. S. 536).

In the 3d Circuit Court of Appeals is *Barber Asphalt Co. v. Harrisburg,* 64 Fed. 283. After reciting the provisions of the contract in some detail, which contract had provisions relating to payment to be made from the benefited property only, and the contractor's agreement to accept the assessments in payment of the amount due under the contract, and the city should not otherwise be liable whether the assessments should be collectible or not, the court said:

"The plaintiff performed its part of the contract, and received on account $13,470.59, paid from assessments, leaving $21,729.92 of the contract price unsatisfied.

At the date of the contract the defendant had authority to pave its streets, and pay for the same from its treasury. It *believed it had authority also* to *assess the cost of such paving on abutting properties,* and transfer the obligations thus created in payment for the work. The *plaintiff had no reason to doubt the correctness of this belief.* The legislature by an act of May 24, 1887, had provided for such assessments. The supreme court of the state, however, after the work had been completed declared the act invalid. Shoemaker v. Harrisburg, 122 Pa. St. 285, 16 Atl. 366; Berghaus v. Harrisburg, 122 Pa. St. 289, 16 Atl. 365; Ayers' Appeal, 122 Pa. St. 266, 16 Atl. 356. The defendant went through the form of making assessments; and the property holders paid $13,470.59, before the invalidity of the statute was dis-

covered. They refused, however, to pay more; and, the defendant denying liability for the balance due under the contract, this suit was commenced to recover it.

On demurrer filed to the plaintiff's statement the circuit court rendered judgment for the defendant; whereupon the plaintiff appealed, and assigned this action of the court as error.

Is the defendant liable? The suit is on the contract, and the liability must be found in it, if at all.

As we have seen the defendant had power to contract for paving its streets, at the cost of its treasury. It did not, however, so contract, in terms. Is it liable to pay from this source in consequence of the terms used and the facts stated? It undertook to pay the price specified by assessments, and the plaintiff agreed to accept these in discharge of its claim, adding that 'the city shall not be otherwise liable whether the assessments be collectible or not.' Omitting the language just quoted there could be no doubt of the defendant's liability. The case would be identical, in all respects, with Hitchcock v. Galveston, 96 U. S. 341. The language quoted does not however, we think, add anything to the force or effect of that which precedes it. It simply expresses what would be implied in its absence. *The agreement to accept the assessments in payment relieved the city from liability to pay otherwise.* By it the *plaintiff assumed the risk of collecting.* If the defendant, in such case, had made and transferred the contemplated assessments, it would have discharged its entire obligation; just as it would in the present case. This, however, it has not done. *Its attempt to do it failed; its acts in this respect were a nullity. It is immaterial that the failure resulted from want of authority*—as it would be if it resulted from any other cause beyond its control. It undertook, unconditionally, to make and transfer assessments, and its failure is a breach of the contract. *To say* its obligation is discharged by a vain attempt to make them; that the *plaintiff is bound to accept useless forms of assessments, is un-*

*reasonable.* The *parties contemplated valid charges* on the property. The term 'assessment' clearly implies this; nothing short of a lawful assessment—one capable of enforcement, satisfied it. It was such assessments the plaintiff agreed to accept, and assumed the risk of collecting. The parties were *mutually mistaken respecting the authority* to pay in the special manner designated; but *this does not relieve the defendant* from its obligation to pay."

And we contrast the language (64 Fed. 285) of this court with that of the Washington court in *German-American Bank v. Spokane,* wherein the Washington court has attempted to show that hardship developed by reason of compelling payment by the town on the one hand, or by loss to the bondholders on the other, should be borne by the bondholders on the theory that the officers of the municipality were in effect agents and be borne by the bondholders, the federal court saying:

"The defendant having failed to make the required assessments is in default upon its contract, and must make reparation by paying the consequent loss. *There is no hardship in it,* and if there was it would afford no justification or excuse for shifting it to the plaintiff. The *defendant has received full value for what he is required to pay;* and if the contract admitted of another construction we would strongly incline to the one adopted, because it is not only consistent with the intention of the parties, but *avoids the great injustice of allowing the defendant to hold and enjoy the plaintiff's property without paying for it.*

There is abundant authority for this construction. Hitchcock v. Galveston, 96 U. S. 341, is in point. The city contracted with Hitchcock to do certain work upon its streets, for which he was to accept its bonds in payment. It had, however, no authority to issue the bonds, and, discovering this while the work

was in progress, stopped it and declined to pay for what was done, on the ground that the contractor had bound himself to depend upon this source of payment alone. The court, deciding that the contract contemplated and required valid bonds, and that the city had failed to furnish such, held the contract broken, and the city liable to pay from its treasury. In principle this case is not distinguishable from the one before us. The court says:

> 'It is enough that the city council had power to enter into the contract for the improvement, that such a contract was made, that the plaintiff has proceeded to furnish materials and do the work, as well as assume liabilities, that the city has received and now enjoys the benefit of what he has done and furnished; that for these things the city promises to pay; and that after having received the benefit of the contract the city has broken its promise. It matters not that the promise was to pay in a manner not authorized by law. If the payment cannot be made in bonds because their issue is ultra vires it would be sanctioning rank injustice to hold that payment need not be made at all.'

*White v. Snell,* 5 Pick. 425; *Hussey v. Sibley,* 66 Me. 192; *Miller v. Milwaukee,* 14 Wis. 705; *Bill v. City of Denver,* 29 Fed. 344—involved the same question, and were similarly decided. In *Chicago v. People,* 56 Ill. 327; *Maher v. Chicago,* 38 Ill. 272; *Louisville v. Hyatt,* 5 B. Mon. 200; *Fisher v. St. Louis,* 44 Mo. 482; and *Scofield v. City of Council Bluffs,* 68 Iowa, 695, 28 N. W. 20—the contractor distinctly agreed to look to assessments alone for payment; and yet the municipalities, having no authority to make them, were held liable to pay otherwise."

**The Constitution, Art. XIII, Sec. 6, Does Not Inhibit Such Liability**

We come now to discuss the second question suggested by Judge Pray as to whether or not the statutory restriction of municipal indebtedness found in the Montana Constitution, Article XIII, Section 6, will permit such a liability to be imposed upon a town when its effect is to increase the town's indebtedness beyond the limitation of three percentum fixed by the constitution, unless there be a taxpayers' vote approving the same.

That portion of the Montana Constitution referred to is to be found in the following language:

> "No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three (3) per centum of the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district shall be void; provided, however, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt.

For the present purpose we assume in our discussion that the approval of the taxpayers is not present, although that issue may be developed hereafter in another

aspect. The Montana Constitution was adopted by its people in October, 1889. The peculiar language opening Article XIII, Section 6, may be found word for word, except as to the percentum, in the Iowa Constitution, which had been adopted by that state many years prior thereto. The Iowa language was adopted when Illinois revised her constitution and the Illinois Constitution is identical to the Montana provisions, with the exception of the percentum. The Illinois Constitution is involved in the case of *Litchfield v. Ballou,* 114 U. S. 190, which Judge Pray relies upon in his decision (p. 111). There can be no doubt that the origin of this peculiar language is the Iowa Constitution. See *Dillon, Municipal Corporations* (5th Ed.), p. 337, also *Prince v. Quincy,* 105 Ill. 215.

Early in the history of Iowa it became necessary to determine whether or not every obligation imposed against a municipality, and which would result in a judgment or other form of indebtedness, constituted an unconstitutional debt within the meaning of the constitution. The early cases are referred to under *Points and Authorities,* and there are numerous cases in addition thereto in support of the same doctrine, from which it appears that such liability as is created by reason of failure to perform a duty, whether it be considered as negligence, the commission of a tort, or any other form of involuntary obligation imposed against a municipality, the constitutional restriction did not apply, and in the very well considered case of *Thomas v. Burlington,* 69 Ia. 140, the Iowa law appears to have been settled in that respect. Similar Illinois cases are cited in *Points*

*and Authorities* which bear out the same construction, and while we have not at hand or have found a Montana decision squarely meeting this contention, in the absence thereof we must assume that the construction of sister states dealing with identical language should be persuasive, and as to the early Iowa cases which antedated the adoption of the Montana Constitution, in the absence of a contrary holding by the Montana Supreme Court, we should find them to be controlling since the well recognized rule of constitutional construction is that when cases are carried into a constitution from that of another state, it is presumed that the construction given that language by the highest court of the former state is adopted with the language itself.

This brings us squarely up to the point of whether or not the imposition of a liability by way of judgment or otherwise against a town, because it has failed to do its duty in the creation of valid assessments, or has failed in some detail with respect to the validity of the bonds issued, or any of the other duties which the statute casts upon the town in connection with special improvements and special improvement districts and their plans and methods of assessments and payment, is to be considered as an unconstitutional indebtedness under the provisions of Article XIII, Section 6. This section is brought directly before the court in the case of *Fort Dodge Light Co. v. Fort Dodge,* 115 Ia. 568; 89 N. W. 7. This is a well reasoned case, in which the court has discussed the matter with great care, and it squarely holds that the Iowa constitutional provision, which is

identical in language to that of Montana, does not prohibit the imposition of such liability as an "indebtedness" under the constitution.

To the same effect is

*Gable v. Altoona,* 200 Pa. St. 15.
*Mankato v. Barber Asphalt Co.,* 142 Fed. 329.
*Addyston Pipe Co. v. Corry,* 197 Pa. St. 41; 46 Atl. 1035.
*Denny v. Spokane,* 79 Fed. 719.

See also approved statement of Judge Dillon in

*Dillon, Municipal Corporations* (5th Ed.) Sec. 198, p. 373.

In the *Mankato* case the validity of the contract itself was challenged and was held invalid in the state courts, as we have stated earlier in this brief. Under the familiar principles of independent federal determination the federal court was not bound by this state decision and undertook on its own account to determine whether or not the contract was invalid, and upon such investigation disagreed with the state supreme court and held the same to be valid, whether as general law or as a construction of the charter of Mankato and the statutes of Minnesota, or a combination of all. In the Pennsylvania cases the laws themselves were held to be unconstitutional in the state courts, so that there could bo no legality of a contract which was based upon such laws insofar as the assessments were concerned. In *Denny v. Spokane,* 79 Fed. 719, and in *Little v. City of Portland,* the city charters themselves express a definite lim-

itation of indebtedness, which amount was exceeded by the imposition of the liability growing out of the failure to set up adequate machinery for the collection of the assessments from the benefited property involved.

We have expressions from the Montana Supreme Court which show that the Montana constitutional provision is not interpreted to prohibit every kind of indebtedness in addition to that coming within the language of the constitution. Thus it has been held in *Parker v. Butte,* 58 Mont. 531; 193 Pac. 748, that in order to be prohibited under the constitutional provision the indebtedness must be an additional debt, and therefore a refunding bond issue, although the constitutional limit is already exceeded, is not prohibited, and the recent case of *Edmunds v. Glasgow,* 300 Pac. 203, holds that an issue of refunding bonds, the original issue of which were probably invalid, having been issued without an approving vote of the taxpayers, as to excess, yet the refunding issue was not prohibited by the constitution, it not being an additional debt, if the former obligation were good, and the former obligation was held to be good only because of recitals which estopped the town from denying validity thereof. We find, therefore, that in Montana additional indebtedness may be created by an estoppel without violating the constitution, which is one form of penalty imposed upon a municipality where it has made statements or recitals to the prejudice of bondholders, which the municipality will not be permitted to deny, though in fact the constitutional prohibition would otherwise invalidate the indebtedness.

The entire discussion under this division of the argument, therefore, results in showing beyond all question that the Town of Ryegate might be held liable for failure to have done its duty in connection with special improvement district and its bonds. It should have been diligent in making its collections, if it has not collected the same, and if the same were not collected because of invalid assessments the fault is that of the town and not of the bondholder; and further there is no bar under the Montana constitution with respect to the imposition of such an obligation or liability upon the town. It is not a voluntarily created debt. See Judge McClain in *Fort Dodge Light Co. v. Fort Dodge,* 115 Iowa 568. There is nothing voluntary about this sort of obligation; certainly the contractor did not voluntarily enter into a transaction expecting the town directly to indebt itself herein, but he did expect the city to make valid assessments, which duty it owed to the contractor. The Town of Ryegate has failed completely to provide adequate machinery in the matter of assessments, levies and collections in connection with the matters involved in the case at bar. The Montana statutes gave it full right to make these levies and assessments; upon protests filed, if any, to determine the same, and to adjust assessments accordingly and make reassessments, all to the end that the lien of the bonds should be made effective and valid. The fact that some case in the state court involving a fraction of the property should have been brought and after several years determined adversely to the validity of the assessments complained of, is no excuse legally or ethically for the Town of

Ryegate to offer in not having pressed the collection of its other assessments, and to have levied reassessments, and even if these assessments were then held bad the town might well be held liable under the doctrine announced in the cases hereinbefore cited.

If the contract which the Town of Ryegate entered into was valid there can be no doubt that all of the other proceedings, no matter how irregular, become unimportant in this case. The right to determine the validity of that contract, however, is before the court now just as it was in the *Mankato* case. The decisions of the state courts have determined nothing in respect thereto.

It must be remembered throughout this entire discussion that at no place and in no degree has an element of fraud been brought into this case. We recognize that many matters may be invalidated where fraud exists.

At this stage of the argument we shall proceed to discuss the underlying validity of the contract involved and the necessity of this court as a federal court making its own determination of all of the issues which were presented. The state of the record being so meager with respect to the proceedings brought in the *Belecz* case, and no evidence having been offered in the case at bar to prove the assertions made by the plaintiffs in the *Belecz* case, this court has too scanty a record to justify findings as made by Judge Horkan in the *Belecz* case.

We will discuss each of the grounds of attack stated in the *Belecz* case and will show them to be wholly insufficient in law and under the facts agreed upon herein to invalidate or nullify any of the proceed-

ings complained of. This discussion involves, as in the *Mankato* case, a redetermination of the issues in the state court, excepting that in the *Mankato* case there was an apparent showing of evidence on the part of the city from which the court might make a fair determination. The case at bar was tried without such a showing and we have only the pleadings and findings in the *Belecz* case to proceed upon.

## PLAINTIFF'S RIGHT TO SUE THE TOWN FOR A JUDGMENT, BASED ON SPECIAL IMPROVEMENT OBLIGATIONS, TO BE SPECIALLY ENFORCED UNDER FEDERAL PRACTICE.

### Points and Authorities

### I

The jurisdiction of the federal courts does not permit an original suit by mandamus. A plaintiff is not thereby denied his rights in the federal courts to secure the same relief. He may sue a town generally and enforce that judgment by subsequent enforcing orders by way of mandamus or otherwise where the obligation is payable exclusively from abutting property owners in special improvement districts.

*Jordan v. Cass County,* 3 Dillon 185; Fed. Cas. No. 7517.

*Cass County v. Johnston,* 95 U. S. 360; 24 L. Ed. 416.

*Davenport v. Dodge County,* 105 U. S. 237; 26 L. Ed. 1018.

*Mather v. San Francisco,* 115 Fed. 37 (9th C. C. A.)

II

A litigant cannot be deprived of his right to sue in the federal court by reason of the law prohibiting mandamus as an original suit.

*Shepard v. Tulare Irrigation Dist.,* 94 Fed. 1.
*Heine v. Commissioners,* 19 Wall. 655.
*Dillon, Municipal Corporations* (5th Ed.) p. 1394.

III

The relief afforded through the federal courts is similarly available in an equity suit without the formality of first obtaining a judgment, provided equity jurisdiction is otherwise established.

*Burlington Bank v. Clinton,* 106 Fed. 269.

IV

Montana's statutes provide a method for reassessment by the town council, which apparently is not limited as to time within which the reassessment may be made.

*Revised Code Montana 1921,* Sec. 5252.

**Argument**

The federal statutes do not permit the bringing of an original suit in mandamus to enforce an assessment as is the usual practice in the various states. This is so well known as to require no citation of authority. In his decision Judge Pray quotes from *Gagnon v. Butte,* which in turn quotes from the Washington case of *German-American Bank v. Spokane,* to the effect that the rights of bondholders are open to enforcement against special improvement properties, and that it is the duty of the

bondholder *under the facts of those cases* to protect and preserve his rights. This rule may be fair enough in the state courts. For the present we need not discuss its soundness, but plaintiff herein is a nonresident of Montana, is a citizen of Oregon, has constitutional rights to sue in the federal courts, of which it cannot be deprived by court rules or state practice. The problem of enforcement has been well settled in the federal courts in similar matters, as shown by the cases cited in *Points* and *Authorities.* The practice which has been followed in this court by Judge Gilbert in *Mather v. San Francisco, supra,* permits a suit against the municipality as the first step, and this may be enforced thereafter by appropriate orders mandatory in character to compel the assessments against the benefited properties. The cases cited fully support the doctrine and by reason of the length of this brief we do not wish to extend the argument. The pleadings in the case at bar and the Agreed Facts, remembering that the *form* of action is not limited, are sufficient to support plaintitff in seeking this relief if it be available. We think it is available because Montana has a law permitting reassessment, which will be found at Section 5252 of the Revised Code of Montana 1921. The language section which is important reads as follows:

> "Whenever, by reason of any alleged non-conformity to any law or ordinance, or by reason of any omission or irregularity, any special tax or assessment is either invalid or its validity is questioned, the council may make all necessary orders and ordinances, and may take all necessary steps to correct the same and to reassess and relevy the same, including the ordering of work, with the same force and effect as if made

at the time provided by law, ordinance, or resolution relating thereto; and may reassess and relevy the same with the same force and effect as an original levy; whenever any apportionment or assessment is made, and any property is assessed too little or too much, the same may be corrected and reassessed for such additional amount as may be proper, or the assessment may be reduced even to the extent of refunding the tax collected. Any special tax upon reassessment or relevy shall, so far as is practicable, be levied and collected as the same would have been if the first levy had been enforced; and any provisions of any law or ordinance specifying a time when, or order in which acts shall be done in a proceeding which may result in a special tax, shall be taken to be subject to the qualifications of this act."

From this statute it seems clear that the town council of Ryegate can be compelled to make the reassessments which the statute contemplates. That being present the relief is available under the decisions, particularly *Mather v. San Francisco.*

## EFFECT OF RECITALS CONTAINED IN SPECIAL IMPROVEMENT BONDS AND THE LIABILITY OF THE TOWN ITSELF THEREUNDER.

### Points and Authorities

### I

A town in Montana has power to create special improvement districts, make assessments levied upon real estate within such districts and to pay all expenses incurred in making the improvements with special improvement warrants or bonds. Such power has been granted *in praesenti.*

*Revised Code of Montana* 1921, Sec. 5039 (80).
*Shapard v. Missoula,* 49 Mont. 269; 141 Pac. 544.

II

Procedural statutes for the creation of special improvement districts has been provided by the Montana legislature and a specific enumeration of the subjects included within the general grant of power (Sec. 5039, subd. 80) to which such procedure applies. These subjects include water-works, water-mains, extensions of water-mains, pipes, hydrants, hose connections for irrigating purposes and appliances for fire protection.

*Revised Code of Montana* 1921, Chap. 56 (Secs. 5225-5255).
*Shapard v. Missoula, supra.*

III

The town council had legislative authority to issue bonds in payment of the expense incurred for the improvements made in District No. 4 and to issue bonds in payment therefor in a form which included recitals to the effect that all things required to be done precedent to issuance had been properly done, happened and performed in the manner prescribed by the Montana laws, and that the assessment from which the bond payments were to be collected was a lien on the real estate within the district.

*Revised Code of Montana* 1921, Sec. 5039 (80).
*Revised Code of Montana* 1921, Sec. 5249.
*Shapard v. Missoula, supra.*

IV

Where the laws are such that there *might under any state of facts* be lawful power to issue bonds by a mu-

nicipality, a recital in the bonds issued that all things required by law to be done and performed precedent to issuance had been done and performed, estops the municipality to deny the truth of such recitals as against *bona fide* holders of the bonds. The purchaser of municipal bonds is required to look no further than that the municipality had the legislative power to issue the bonds if properly exercised.

*2 Dillon, Municipal Corporations* (5th Ed.), Secs. 905, et seq.; pp. 1416, et seq.
*Knox v. Aspinwall,* 62 U. S. (21 How.) 539, 543; 16 L. Ed. 208.
*Grand Chute v. Winegar,* 82 U. S. (15 Wall.) 355; 21 L. Ed. 170.
*Block v. Commissioners,* 99 U. S. 686, 694; 25 L. Ed. 491.
*Chaffee County v. Potter,* 142 U. S. 355, 364; 35 L. Ed. 1040.
*Evansville v. Dennett,* 161 U. S. 434; 40 L. Ed. 760.
*Edmunds v. Glasgow,* 300 Pac. 203.
*Road District No. 7 v. Guardian S. & T. Co.,* 8 Fed. (2d) 932, 935 (8th C. C. A.)
*Henderson v. Sovereign Camp W. O. W.,* 12 Fed. (2d) 883 (6th C. C. A.)
*Road District No. 4 v. Home Bank,* 5 Fed. (2d) 625 (5th C. C. A.)
*Aurora v. Gates,* 208 Fed. 101, 104; L. R. A. 1915-A 910. (Certiorari denied 232 U. S. 722.)

V

That the instrument is "non-negotiable" does not change the rule as to such estoppel.

*Flagg v. School District,* 4 N. Dak. 30; 58 N. W. 499, 506.
*Troy Bank v. Russell County,* 291 Fed. 185, 191.

*Cuddy v. Sturdevant,* 111 Wash. 304; 190 Pac. 909.
*Hauge v. Des Moines,* (2d count) 207 Ia. 1209; 224 N. W. 520.
*First Bank v. Elliott,* (Iowa) 233 N. W. 713.

VI

A municipality is estopped to deny the truth of recitals made by it in a *special improvement bond* as against a bona fide holder thereof.

*Cuddy v. Sturdevant,* 111 Wash. 304; 190 Pac. 909.
*Hauge v. Des Moines,* (2d count) 207 Ia. 1209; 224 N. W. 520.

VII

Where a town has issued special improvement bonds which *ex vi termini* are payable only from a special tax and assessment on the real estate benefited, and the bonds include a recital that all precedent conditions required by law have been regularly kept and peformed, the town is liable to a holder in due course on account of such certificate and recital if the matters recited therein shall be false. The purchaser and holder has a right to rely on such recitals.

*Hauge v. Des Moines,* 207 Ia. 1209; 224 N. W. 520.
*First Bank v. Elliott,* (Iowa) 233 N. W. 712.

VIII

Such a certificate and recital estops the town from denying the validity of the bond certified; and for failure to provide legal assessments against the benefited properties as a basis of payment, the town is itself liable for such breach of duty to the bondholder.

*Hauge v. Des Moines,* (2d count) 207 Ia. 1209; 224 N. W. 520.

**Argument**

Copy of a special improvement bond involved herein is set forth in the record (p. 16). Already in this brief at page 5, we have referred to the recitals declared and made a part of this bond. Reference thereto will show that the bond is declared to be payable from the collection of a special tax and assessment "which is a lien against the real estate within the district." The bond has a general recital

> "that all things required to be done precedent to the issuance of this bond have been properly done, happened and been performed in the manner prescribed by the laws of the State of Montana relating to the issuance thereof."

The bonds were signed by the mayor, attested by the town clerk and sealed with the official seal of the Town of Ryegate.

No question is made as to the identity and authority of the officials which signed and executed the bond. Ordinance No. 29 (p. 40) expressly authorized such execution (p. 45) and the form of the bond including the recital (p. 43). The ordinance was duly passed June 9, 1920. Minutes of the council meetings held July 28, August 11, August 25, September 8, October 13 and November 24 (pp. 240-248) show specific authorization of the issuance of the bonds in stated amounts. The bond discloses on its face no defect or lack of authorization.

The position of plaintiff herein as a bona fide holder has been demonstrated at pages 60-62 of this brief.

Towns in Montana were granted full power to create special improvement districts and to issue bonds in payment of all expenses incurred in making the same under the legislative act now found in Section 5039 (subd. 80) of the Revised Code of 1921. The important language of that act reads as follows:

> "The city or town council *has power:*
>
> To create special improvement districts, designating the same by number; to extend the time for payment of assessments levied upon such districts for the improvements thereon for a period not exceeding twenty years; to make such assessments payable in instalments, and to pay all expense of whatever character incurred in making such improvements with special improvement warrants, which warrants shall bear interest at a rate not to exceed six per centum per annum."

The language of the act is that of a grant *in praesenti* and was so construed June 8, 1914, by the Montana Supreme Court in *Shapard v. Missoula,* 49 Mont. 269; 141 Pac. 544, wherein the court fully discussed and explained the legislation and showed the presence of power granted by that statute.

The court also discussed the effect of the subsequent legislation (Secs. 5225-5255 of present Revised Code, 1921), and held the later act not to have repealed the earlier general grant of power, but supplemented the same with a code of procedure as to creation of districts and specified the applicable subjects for such, *the power to create being present.* The court said (141 Pac. 545):

> "The plaintiffs assail the validity of the proceedings of the mayor and council in many particu-

lars, and counsel on both sides have filed elaborate briefs submitting many questions for decision. * * *, it will be necessary to discuss but two questions:

1. Has the council of a city power to create special improvement districts for the purpose of improving the streets therein and to charge the abutting property by special assessments for the cost of the improvement This query is answered by reference to subdivisions 6 and 80 of section 3259 of the Revised Codes (Sec. 5039, Revised Code 1921) which have been a part of our statute law for many years. The former grants to cities and towns the power 'to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, parks and public grounds, and vacate the same.' The latter authorizes them:

'To *create special improvement districts,* designating the same by number, *to extend the time for payment of assessments levied* upon such districts for the improvements thereon for a period not exceeding three years; *to make such assessments payable in installments* and to *pay all expenses of whatever character incurred* in making such improvements, *with special improvement warrants,* which warrants shall bear interest at a rate not to exceed six per centum per annum.' * * *

It is argued by counsel for plaintiffs that these provisions were by implication repealed by the act of 1913, supra. The purpose of this act was to repeal the several sections of the Code providing the *mode* of creating special improvement districts, which were in many respects inharmonious and incongruous, and to substitute in place of them others free from these defects and providing a simpler and more practicable procedure for improving and beautifying city streets. It is true that section 2 of this act purports to grant power to effect many improvements none of which are specifically mentioned in section 3259, supra, wherein the general legislative powers of cities and towns are enumerated, and that by a general clause in

section 35 it repeals all acts or parts of acts inconsistent with any of its provisions; yet, as *it does not* in any way *limit or circumscribe these general provisions,* it may not be said to be in any sense inconsistent with them, *except* in so far as subdivision 80, supra, has been affected by it and the other legislation referred to *as to the time allowed within which to pay* assessments. On the contrary, *the latter act is* to be construed as *a specific enumeration of the subjects included* within the purview of the general grant *to which the procedure* prescribed by it *applies.* As above stated, *the purpose* of the act *was to prescribe the procedure* by which special improvement districts may be created, *not to grant powers. It cannot be maintained that,* in an attempt to do this, *the Legislature* by implication *took away the power which it was providing the means to enforce."*

Under the *Missoula* case it was held that the jurisdictional requirements for the creation of a special improvement district are:

1—Resolution of intention.

2—Publication of notice.

3—Hearing and determination of protests.

Under the record herein the admissions in the pleadings and the stipulations of the agreed facts obviate any question as to the creation of the district itself. The legality of the creation of District No. 4 is not a question in this case.

The defect asserted in the *Belecz* case as depriving the town council of jurisdiction to create the district, is based on the proposition that the improvements resolved upon in the proceedings touching creation were in fact entirely different from those actually installed. The fallacy of this contention has been argued at pages 93-96 of this brief.

The question of recitals made in the bond is very different. Under the federal decisions cited above, and as recently held by the Montana Supreme Court in the *Glasgow* case, recitals protect a bonda fide holder of bonds which recitals are to the effect that all precedent conditions to their issuance have been legally complied with and performed. The holder need look only to the *legislative power* of the municipality *to issue* such *bonds under some circumstances* and to *determine whether the conditions prccedent have been in fact kept* and performed. It is not necessary to determine the truth or falsity of such fact to sustain the position of a bona fide holder.

In the *Glasgow* case the Montana Supreme Court said (300 Pac. 203, 205):

> " 'Where innocent persons invest money in the bonds of a municipality because of authorized recitals of its officers, the bonds should be sustained unless an insuperable legal obstacle prevents.' 44 C. J. 1248. This rule does not apply, however, where there is a lack of power on the part of the municipality to issue the bonds. 44 C. J. 1248; White v. City of Chatfield, 116 Minn. 371, 133 N. W. 962. But *here the municipality was not lacking in power* to issue the bonds.
>
> (4) The constitutional limit of indebtedness of 3 per cent. may be extended by the legislative assembly. Section 6, art. 13, supra. *This it did by subdivision 64 of section 3259,* supra. * * * In consequence, *the municipality had the power, if properly exercised, to issue the bonds in question* to the extent that it did.
>
> (5) It has been laid down that, if the laws are such as that there might under any state of facts or circumstances be lawful power in a municipality or quasi-municipality to issue its bonds, it may by recitals therein estop itself from denying that those facts or

circumstances existed.' 44 C. J. 1249. And 'the rule that recitals in municipal bonds that the conditions precedent to their issuance have been fulfilled are conclusive in favor of bona fide purchasers, and estop the municipality to deny their truth, applies in full force when the statute requires a petition or the consent of the voters or taxpayers as a condition precedent to the issuance of the bonds.' 44 C. J. 1251; and see note in L. R. A. 1915A, 954, 963, 961, note 142. And recitals in municipal bonds that the constitutional and statutory limit of indebtedness has not been exceeded creates an estoppel as against innocent purchasers, where, as here, there is nothing on the face of the bonds to indicate that the recitals are untrue. Gunnison County v. Rollins, 173 U. S. 255, 19 S. Ct. 390, 43 L. Ed. 689; see, also, note in L. R. A. 1915A, 946; 44 C. J. 1252.

(6) Where, as here, the recital is that everything required by law to be done and performed before executing the bonds had been done and performed, the municipality is estopped to dispute the truth of the recitals as against bona fide holders of the bonds. Waite v. City of Santa Cruz, 184 U. S. 302, 22 S. Ct. 327, 46 L. Ed. 552; L. R. A. 1915A, 936; 19 R. C. L. 1004; and see Stanly County v. Coler & Co., 190 U. S. 437, 23 S. Ct. 811, 47 L. Ed. 1126; Town of Climax v. Burnside, 150 Ga. 556, 104 S. E. 435; Hauge v. City of Des Moines, 207 Iowa, 1209, 224 N. W. 520; Hayden v. Town of Aurora, 57 Colo. 389, 142 P. 183; Henderson County v. Sovereign Camp, W. O. W. (C. C. A.) 12 F. (2d) 883; 2 Dillon on Municipal Corporations (5th Ed.) Secs. 914 et seq.; Simonton on Municipal Bonds, p. 258."

Many cases discuss the contention that power emanates from the observance of the procedure and the faithful performance of precedent conditions. Such is not the federal law. Judge Pray fell into error when he said in his opinion herein (p. 104) discussing asserted lack of power in the Town of Ryegate because of no

election on the question of exceeding the constitutional indebtedness under Section 5039 (64):

> "With no such constitutional inhibition, it was within the general powers of the town to construct a water supply, but in the instant case no such general power existed on the part of the town *until* conferred upon it by the taxpayers of the town. *To begin with, it had no power at all,* and *in order to acquire it, an election must be held to determine whether such power should or should not be granted.*"

The foregoing statement is manifestly erroneous. The holding of the *Missoula* case (discussing subd. 80 of that act) clearly showed that the general *power was granted by the legislature* with respect to *all* of the matters therein enumerated. This included subd. 64 which Judge Pray had under discussion as well as subd. 80 involved in the *Missoula* case itself. In the *Glasgow* case just referred to the Montana Supreme Court has completely settled the matter in its statement that the power was present, although there had been no election on the question of exceeding the constitutional indebtedness limit. The granting words of the act are clear. It states:

> *"The * * * town council has power:"*

This is the language of a present grant of power. Later in this brief we shall discuss its application to subd. 64. For the present we are interested only in subd. 80.

It is equally clear that the town council has authority to make such recitals, which certify of themselves that all precedent conditions have been duly performed. See Section 5249, *Revised Code 1921,* wherein the form of warrant or bond to be issued for special improvements

is set forth and which includes in identical language such recitals. The force of this statute must be such as to empower the town officials to make the recital under the form of bond ordained by the legislature, otherwise the statutory form would mean nothing. Power to sign such a bond of necessity includes the power to determine the truth of the facts recited. Further, the record (p. 40) discloses Ordinance No. 29 to have been regularly passed, which ordinance adopted this statutory form in the identical language used in the bond itself, and this Ordinance No. 29 directed the mayor and town clerk to sign, attest and seal the bonds.

From the foregoing it is clear to the point of demonstration that the *legislative power to issue the bonds* in question was reposed under a present grant in the town council of Ryegate, and that the officials of that town were authorized to execute the bonds declaring the tax and assessment to be a lien on the real estate within the district for the purpose of enforcing collections for the payment of the bonds, as well as the general recital as to the performance of all precedent conditions. The legislative power being present and the authority of the town to issue the bonds bearing such recitals being equally present, under the federal decisions it becomes immaterial in a test between a bona fide holder of those bonds and the town whether in fact these precedent conditions have been kept or performed in any degree.

We refer to a very few of the many federal cases touching upon these matters, and where similar contentions were advanced respecting defects and contending that such defects are, and the performance of them is, a

measure or limitation of the power itself. These cases almost uniformly hold the performance of conditions to be merely procedural and do not affect the jurisdictional power to issue the bonds with their accompanying recitals.

*Henderson County v. Sovereign Camp,* 12 Fed. (2d) 883, presents extremely clear reasoning in holding that failure to attach the seal to coupons and invalidity asserted for failure to receive approval of voters as a required condition precedent to the issuance of the bonds are not open to adjudication in the courts where the bonds themselves bear recitals certifying to full compliance with all precedent conditions in an action brought by a bona fide holder. The Circuit Court of Appeals for the 6th Circuit said (12 Fed. (2d) 884):

> "Admitting that the county court had the right in some circumstances to issue bonds of this kind—though claiming that its powers in that respect were ministerial—it is contended that these bonds are invalid, because the authority to issue them could be brought into existence only with and by the performance of certain statutory conditions that were never fulfilled. On the other hand, the holder of the bonds contends that the grant of power was in the present, with a deferred right to exercise it, depending upon the happening of certain precedent conditions, it being the province of the county court to determine whether those conditions had been fulfilled, and, that court having certified on the face of the bonds to their fulfillment, the county is estopped as against innocent holders to assert the contrary. * * * Bonds of the last-mentioned class, to which it may be conceded these belong, cannot be issued, to be sure, without the approval of the voters. But there is, nevertheless, a grant of power to the county court, in prae-

> senti, the enjoyment or exercise of which is made dependent upon the happening of some precedent condition; there being vested in the court, in our view of the intendment of the act, the power to determine whether those conditions have been performed, and, when performed, a discretion as to what part of the issue will be sold. It is the law that a bona fide purchaser of municipal bonds for a valuable consideration, without actual notice of any defense to them, is not bound to do more than to see that there was legislative authority for their issue, and that the officers who were thereunder authorized to issue them have decided that the precedent conditions upon which the grant was allowed to be exercised have been fulfilled.

The *Glasgow* case cites the foregoing opinion with approval and it may be looked upon as an expression of the law which Montana is willing to follow.

*Aurora v. Gates,* 208 Fed. 101, presents a concise statement of the federal law as to recitals, together with a well selected group of authorities. The defect complained of in that case was a failure to publish the ordinance providing for the issuance of water works bonds as required by the Colorado statutes, it being contended that in the absence of such publication neither the town nor its officers had power to issue the bonds, and therefore not being published the bonds were wholly void. The bonds bore a recital substantially identical to the general recital involved in the Ryegate bonds. The court said (208 Fed. 104):

> "The argument against the estoppel by the recital and certificate from proving that the ordinance was not published is twofold. The first runs in this way: In the absence of an ordinance neither the town nor its officers had any power to issue the bonds or to make the recital and certificate therein. The ordinance

never was published; therefore it never went into effect; and the bonds, the recitals, and certificates were issued without authority and are void. * * * But the validity of this contention is no longer open to debate in the national courts. It ignores the vital distinction between that total want of power which no act or recital of the municipality or quasi municipality may remedy and the total failure to exercise or the inadequate exercise of a lawful authority. *It ignores the essential difference between a total lack of power under the laws under all circumstances and a lack of power which results merely from the absence of the exercise or the inadequate exercise of the power.* The former, it is true, cannot be affected by the estoppel of recitals or certificates, but the latter may be.

A municipality or a quasi municipality may not, by the recitals or certificates in its bonds, estop itself from denying that *it is without power* to issue them *when* the laws are such that *there can be no state of facts or of circumstances under which it would have authority* to emit them. But, *if* the laws are such that *there might under any state of facts* or of circumstances *be lawful power* in the municipality or quasi municipality *to issue its bonds, it may, by recitals* therein, *estop itself from denying* that those facts or circumstances exist and *that it has lawful power to send them forth,* unless the Constitution or act under which the bonds are issued prescribes some public record as the test, and no such test was prescribed in this case, of the existence of some of those facts or circumstances. Chaffee County v. Potter, 142 U. S. 355, 364, 12 Sup. Ct. 216, 35 L. Ed. 1040; City of Evansville v. Dennett, 161 U. S. 434, 441, 443, 446, 16 Sup. Ct. 613, 40 L. Ed. 760; Stanly County v. Coler, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126: Waite v. Santa Cruz, 184 U. S. 302, 320, 22 Sup. Ct. 327, 46 L. Ed. 552; Quinlan v. Green County, 205 U. S. 410, 419, 27 Sup. Ct. 505, 51 L. Ed. 860; Presidio County v. Noel-Young Bond Co., 212 U. S. 58, 65, 67, 69, 70, 29 Sup. Ct. 237, 53 L. Ed. 402; Board of Com'rs v. Sutliff, 97 Fed. 270, 277, 38 C. C.

A. 167, 173; National Life Ins. Co. v. Board of Education, 62 Fed. 778, 789, 792, 10 C.C.A. 637, 648, 651; City of Huron v. Second Ward Savings Bank, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 49 L. R. A. 534; Wesson v. Saline County, 73 Fed. 917, 919, 20 C. C. A. 227; City of South St. Paul v. Lampbrecht Bros. Co., 88 Fed. 449, 453, 31 C. C. A. 585, 589; Board of Com'rs of Haskell County v. National Life Ins. Co., 90 Fed. 228, 231, 32 C. C. A. 591, 594; Hughes County v. Livingston, 104 Fed. 306, 311, 43 C. C. A. 541, 546; Independent School District v. Rew, 111 Fed. 1, 7, 49 C. C. A. 198, 204, 55 L. R. A. 364; Fairfield v. Rural Independent School District, 116 Fed. 838, 840, 841, 54 C. C. A. 342, 344, 345. If the town had published the ordinance under which the bonds were sent forth, it would have had ample authority to issue them, and to make the recital and certificate they contain. There might therefore have been a state of facts under which it would have had authority to issue the bonds and to make the recital and certificate they contain and it was within the power of the town to bring that state of facts into existence. The town, therefore, had the power, by a recital or a certificate in the bonds to the effect that this state of facts existed, to estop itself from denying its existence for the purpose of defeating the bonds and the coupons which innocent purchasers had bought in reliance upon that recital or certificate."

And further at page 108:

"The recitals in municipal bonds by the officers or the representative body invested with power to perform a precedent condition and with authority to determine when that condition has been performed, that all the requirements of law necessary to authorize the issue of the bonds have been complied with, precludes inquiry, as against an innocent purchaser for value, whether or not the precedent condition had been performed before the bonds were issued. Platt v. Hitchcock County, 139 Fed. 929, 933, 71 C. C. A. 649; Clapp v. Otoe County, 45 C. C. A. 579, 587, 104 Fed.

473, 481; City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 49 L. R. A. 534; National Life Ins. Co. v. Board of Education, 62 Fed. 778, 792, 793, 10 C. C. A. 639, 651, 652; School District v. Stone, 106 U. S. 183, 187, 1 Sup. Ct. 84, 27 L. Ed. 90; Town of Coloma v. Eaves, 92 U. S. 484, 23 L. Ed. 579; Commissioners v. Beal, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; City of Cairo v. Zane, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673.

Where, by legislative enactment, authority has been given to the officers of a municipality to issue its bonds on some precedent condition, and where the fact may be gathered from the enactment that those officers were invested with power to decide whether or not that condition had been complied with, their recital in the bonds issued by them that it was fulfilled is duly authorized, and it estops the municipality or quasi municipality from proving its falsity to defeat the bonds in the hands of an innocent purchaser. Quinlan v. Green County, 205 U. S. 410, 419, 27 Sup. Ct. 505, 51 L. Ed. 860; Presidio County v. Noel-Young Bond Co., 212 U. S. 58, 65, 29 Sup. Ct. 237, 53 L. Ed. 402; Stanly County v. Coler, 190 U. S. 437, 451, 23 Sup. Ct. 811, 47 L. Ed. 1126; Tulare Irrigation District v. Shepard, 185 U. S. 1, 23, 22 Sup. Ct. 531, 46 L. Ed. 773. A municipality, a quasi municipality, or a corporation and its officers, who by the apparent legality of their obligations or by recitals of their validity have induced innocent purchasers to invest in them are estopped from denying their legality on the ground that in some of the preliminary proceedings which led to their execution, or in their execution itself, they failed to comply with some law or rule of action relative to the mere time or manner of their procedure, with which they might have lawfully complied, but which they carelessly disregarded. Speer v. Board of Commissioners, 88 Fed. 749, 758, 32 C. C. A. 101, 111; Clapp v. Otoe County, 45 C. C. A. 579, 587, 104 Fed. 473, 481; Union Pacific Ry. Co. v. Chicago, R. I. & P. Ry. Co., 2 C. C. A. 174, 239, 241, 51 Fed. 309, 326, 328; Sioux City

Terminal Railroad & Warehouse Co. v. Trust Co. of North America, 27 C. C. A. 73, 86, 82 Fed. 124, 137; Board of Commissioners v. Sherwood, 11 C. C. A. 507, 510, 64 Fed. 103, 108; City of Huron v. Second Ward Sav. Bank, 30 C. C. A. 38, 86 Fed. 272, 49 L. R. A. 534."

In *Road District No. 4 v. Home Bank,* 5 Fed. (2d) 625, the defects complained of were that the bonds had been sold in violation of the Texas statutes at less than par on an installment plan, for other than cash, and not to the highest bidder. The attorney general's certificate required by law had been obtained, expressing his opinion as to validity. The record of the county commissioners disclosed the illegal sale. The 5th Circuit Court of Appeals held estoppel to prevent the denial of the truth of this certificate, the bonds being held by one who purchased in the open market at 72.

*Road District No. 7 v. Guardian S. & T. Co.,* 8 Fed. (2d) 932, involved the legality of a district's creation itself. After the issuance of the bonds a property owner in the state court attacked the legality of such creation and the state trial court held its creation to be invalid. The trustee of the bond issue thereafter brought its action in the federal court against the district, in which proceeding defenses were offered to the effect that the matter had been already adjudicated in the state court which first obtained jurisdiction of the subject matter; that the creation of the district was invalid for stated reasons; and further, that the improvements were excessive in cost exceeding benefits derived therefrom; that the assessments were unjust and unequally applied, etc. The 8th Circuit Court of Appeals, in its own inde-

pendent determination, held the district to have been validly created, and as to the matters of excessive cost, unjust and unequal assessments, etc., the recitals in the bonds estopped the district altogether from raising any question of such defect, the bonds being held by a holder for value, who purchased the same prior to the decision in the state court, and who had a right to rely upon the certificate and recital. The holder of the bonds was the original purchaser from the district in this case.

*Grand Chute v. Winegar,* 82 U. S. 355, holds the results of a special election held to authorize the bonds in question, and contentions of corrupt extravagance, change in location in the road involved, etc., to be matters respecting which the town was estopped to show, the bonds having been sold prior to the work being done or commenced. A town may not show a lack or failure of the required statutory formalities, or the fraud of its own agents, when the bonds carry a recital stating that they were issued pursuant to the authorizing acts.

*Eyer v. Mercer County,* 292 Fed. 292, was approved by the Montana court in the *Glasgow* case. That case held that the holder of a note who had himself prepared the instrument and the recital to the effect that all precedent conditions respecting the issuance of the note had regularly happened and been performed, and who was the original purchaser thereof, might rely upon that receital; the county was held bound thereby, notwithstanding the asserted illegal rate of interest involved and a discount taken on the note.

It has often been contended that, under the law of negotiable instruments to the effect that a non-nego-

tiable instrument is open to all defenses, failure to comply with precedent conditions may be shown as a defense against an otherwise bona fide holder of such instrument. *Where such instrument bears a recital similar to those already discussed* in dealing with negotiable instruments and under like circumstances, the municipality is estopped to deny the truth of such recitals. Estoppel is not based in any degree on negotiability, it is based on its own doctrine that one who induced another to purchase the same upon recitals, which may in fact be false, may not thereafter be permitted to deny the truth of such recitals. It is the familiar doctrine of estoppel *in pais*. A full discussion will be found in *Flagg v. School District,* 4 N. Dak. 305, 58 N. W. 499, at pages 506, 507. A more recent discussion will be found in *Troy Bank v. Russell County,* 291 Fed. 185, 191.

The same doctrine was upheld in the decision of *Cuddy v. Sturdevant,* 111 Wash. 304; 190 Pac. 909, which involved special improvement bonds issued by the City of Centralia, payable exclusively from properties within a special improvement district. To the same effect is the recent case of *Hauge v. Des Moines,* 207 Ia. 1209; 224 N. W. 520, which is cited with approval by the Montana court this summer in the *Glasgow* case, and may fairly be said to reflect the Montana law.

From the foregoing authorities it is clear that recitals to the effect that all precedent conditions have been regularly kept and performed, estops the municipality from denying the truth of recitals in a contest between the municipality and a bona fide holder of the bonds.

In the nature of things nearly all cases deal with direct general obligations of the municipality and the effect of the estoppel is to impose upon the municipality a judgment in the amount necessary for the payment of the bonds. When dealing with special improvement obligations, however, the same rule of estoppel applies, but its effect is somewhat different in its application.

It presents two aspects: First, the town having made recitals in a special improvement obligation, thereby clothes the bond with *indicia* of regularity. The recital thereby becomes an inducement to buy on the part of a purchaser. If the matters recited are untrue and the conditions precedent have not in fact been regularly performed, a bona fide holder has a right to rely upon the recitals. The municipality by its false recital and certificate wrongs the purchaser. The municipality is not a mere volunteer in the matter but acts in the exercise of statutory obligation and duty. In this aspect it must be that the town, because of its false statement and recital, should respond in damages to the purchaser who relied thereon.

The second aspect is that the town is estopped to deny the truth of the matters recited, which in effect is an estoppel to deny the *validity* of the bonds themselves. If the bonds were valid it was the duty of the municipality to make the necessary assessments and collections for the purpose of paying the same, although at the expense of the benefited property and not directly from the treasury of the municipality. For breach of its duty to make the necessary valid assessments (under the long line of authority discussed herein in another division

of this brief), the town becomes liable because of that breach, whether it be deemed ex contractu or ex delicto, under the doctrine of the *Denver, Mankato* and *Harrisburg* cases.

There is no escape from liability on the part of the Town of Ryegate. It is liable to the plaintiff herein, as the holder of all of the bonds in question, either because of its false certificate and recital, the measure of damages being the amount paid by plaintiff for the bonds plus interest; or for having failed to make valid assessments and set up the necessary effective machinery for the collection of the same.

Cases directly in point are: *Hauge v. Des Moines,* 207 Ia. 1209; 224 N. W. 520, and *First Bank v. Ellott, (Iowa);* 233 N. W. 712. A companion case, *Crewdson v. Elliott,* was similarly decided, 233 N. W. 713. The *Hauge* case was approved by the Montana court in the *Glasgow* decision last July. These cases may fairly be said to represent the Montana law at this time. The reasoning of the *Hauge* case is succinct and unanswerable. It is to this effect: the law contemplates and the parties intend in contracting for public improvements, that the contractor shall be paid. Any other supposition would be monstrous. It is the duty of the municipality to see necessary details and conditions fulfilled to make the assessments valid. This has nothing to do with direct responsibility or obligation to pay. If the municipality generally certifies and recites that all these conditions have been legally performed, etc., when in fact the contrary is true, then the properties benefited are not subject to the lien and are not liable for the payment of the

bonds; and if the municipality were itself not to be held for the recital made there would be no liability against the municipality. The door is wide open for fraudulent recitals. The contractor and bondholders would have no protection, and neither the town nor the benefited property would be obliged to pay. The court points out (and apparently the Montana Supreme Court approves) the obligation should be more pointed in dealing with special improvement bonds than when dealing with the direct obligations of the town itself. The *Hauge* case (referring to the second count involved), 224 N. W. 622, declares:

> "It is further alleged that, because of the appeal taken by certain property owners against assessments made by the city on their property, it was finally adjudged in the district court of Polk county that the assessments against the property of the persons appealing were excessive, and the court reduced them by the amount of $3,878.16, and that, had said assessments not been so reduced, the proceeds of the tax would have produced sufficient revenue to pay bond No. 51, above referred to, when due, together with the interest thereon. Referring now to the bond, it is found to contain the following recital: 'And it is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issuing of this series of bonds have been done, happened and performed in regular and due form as required by law and resolution.' Has this recital in the bond been complied with?
>
> It is evident import of the various statutes governing this matter that the city council shall levy such an amount as is necessary to the payment of the bonds and interest thereon at the time of maturity. This must be so, because *the very purpose of the whole proceedings is that the contractor shall be fully compensated*

*for the work he did,* and, if payment is deferred, he should, of course, have interest thereon, and, even aside from the recital in the bond, we think *there is an implied obligation on the part of the city,* under these statutes, *to levy a sufficient amount to pay not only the bonds themselves but the interest thereon* as it accrues, and, if it fails so to do, it has breached the obligations of its bond, and becomes liable therefor under our prior pronouncements in the following cases: (citing cases).

The city is bound by the recitals in the bond, and, if they be false or fraudulent, the city must be the loser, and not the bondholder. 19 R. C. L. p. 1004 et seq; Harris on Issuing, Transfer, and Collection of Bonds, p. 129, et seq; Simonton on Municipal Bonds, p. 258, et seq.

*This is especially true* in a case like the one at bar, *where the bond is payable out of a certain fund to be raised* by taxation *on the property benefited.* Were it not so, the city could perpetrate fraud on all purchasers of bonds by reciting therein that all of the requirements of the law had been complied with, and thus escape payment of any kind.

We are not now interested in the question of whether or not the issuance of bonds under the improvement statutes creates an indebtedness within the meaning of the constitutional limitation as held in Davis v. City of Des Moines, 71 Iowa, 500, 32 N. W. 470, and many subsequent cases. This *bond created an obligation on* the part of *the city to perform a certain statutory duty, and it certified that it had performed such duty.* If it fell short on its certification, it should respond to the bondholders for such shortage by reason of its misrepresentations in the certificate, and, in view of the fact that the measure of damages, either in a suit on a bond, or an action for a breach of a bond, is the same in both instances whether it be designated as a suit to recover on a bond, or an action in damages for a breach of a bond, the result would be the same, and the discussion resolves into a mere matter of nomenclature."

Let us look to the facts involved in the case at bar. The first bonds of District No. 4 were issued as of July 28, 1920. This was ninety-three days after the award of the contract to Security Bridge Company. Juridiction to order the improvements proposed and contemplated in the creation of District No. 4 became effective with the overruling of the protests as determined by the town council and its passage of the resolution of creation February 17, 1920. As heretofore stated, the creation of the district itself is not open to question. It is conceded by the agreed facts. Whether or not the contract entered into thereafter in fact contemplated the installation of improvements entirely different from those resolved upon, and the further fact as to whether or not the improvements actually installed were entirely different, than those resolved upon in the creation of the district, are not of themselves particularly important under the decisions dealing with estoppel by way of recitals. A reading of the bond itself discloses that it was issued as authorized by Resolution No. 14 February 17, 1920, creating District No. 4, and for the construction of the improvements and the *work performed as authorized by said resolution,* and in payment of the *contract in accordance* therewith. The bond further declares that it is payable from the collection of a special tax *which is a lien* against the real estate within the district. It further recites that *all things required to be done precedent* to the issuance *have been properly done* in the manner prescribed by the Montana laws.

The contract awarded April 26, 1920 (pp. 61-67) was arranged to cover the work authorized by the town for

itself and also the improvements for District No. 4. It must be read with such in view. It will be observed that the stipulated prices set forth (pp. 64-65) refer to the mains or pipe involved as "cast iron water *pipe*" of various dimensions; and the provisions for payment (p. 212) indicates clearly the arrangement whereby the special improvement bonds should pay for *pipes and hydrants* only.

The Montana statutes expressly provide that protests must be filed in writing within sixty days after the award of the contract on the part of the property owners who complains of any alleged irregularity, omission or defect, etc., and failing so to do the property owners is deemed to have waived the same. The intent of this statute (Sec. 5237) is to advise the town council seasonably of any irregularity, so that the same may be corrected, and of course it is equally effective in protecting those who purchase the bonds. In the *Belecz* case it was asserted in the answer of the town that none of the plaintiffs had filed such protests as required by the statute, and the reply of the plaintiffs admitted that such filing of protests had not been made. Notwithstanding this admission, Judge Horkan in the state court made findings of fact to the effect that eight plaintiffs had actually made such protests and filed the same within the time required; Judge Pray made the assertion that property owners filed such protests within such time.

Now in fact either of two things actually happened. Property owners must have either filed such protests or

they did not file such protests. Plaintiff at Portland, Oregon, a prospective purchaser of these bonds, was in no position to know, nor was it obliged to investigate *that condition.* The officers of the Town of Ryegate did know the truth, since the statute required such protests to be filed with the town clerk. If the protests were filed as found by Judge Horkan, and within the sixty day period, then those protests were filed before the issuance of the first parcel of bonds July 28, 1920, which was ninety-three days after the award of the contract; and the officers of the town must have known for at least thirty-three days that such protests were on file. The bonds were issued with a recital, which amounts to a declaration that the coast was clear. Had such protests been filed, it then became the duty of the council (Secs. 5241, 5252) to hear the protests and dispose of the same. If in fact such protests were filed and were not disposed of in legal fashion so as to support the bond issue, the recital was false. Under such conditions the town must be held liable itself. It had the authority and the right to determine the fact. The testimony in the record shows that no actual notice came to plaintiff until the bringing of the *Belecz* suit *eighteen months thereafter.* See pages 42-43 of this brief.

The town must take a position on this question. If *in fact no protests were filed,* the federal court should so hold, and the effect of such holding would be complete annulment of the proceedings in the state court and the validation of the bonds. In that condition it was the town's duty to make levies and enforce assessments and collections. Not having done so the town itself is liable

under the great weight of authority separately discussed herein.

It requires no argument to show that, had the recital stated that *protests were filed* and were undisposed of, *complaining that the proceedings were illegal,* plaintiff would have rejected the bonds. The record shown by the testimony of *Neale* (p. 164) is emphatic that plaintiff was *not interested* where there was threatened litigation. The town clerk furnished information to plaintiff on a form requested (pp. 171-175) which included the following (p. 173) (Question) "Any litigation pending or threatened affecting this issue—(Answer) No." This was furnished *August 12, 1920, more than 60 days after* the contract was awarded. Besides, plaintiff was furnished certificates—Exhibit "C" to deposition of *Roscoe* (p. 182) showing council's action approving estimates and issuance of bonds from time to time as the work progressed, which reaffirm in effect that all proceedings were regular, and no sense in plaintiff's request for information and certificates can be deduced on any other theory than the need of assurance of regularity and that the 60-day period had passed without protests being filed.

The purchaser had the right to rely on such a recital and certification and the nature of the improvement actually installed need not be inquired into by the purchaser, *Northwestern Bank v. Centreville,* 143 Fed. 81. A purchaser need not investigate the contents of a resolution referred to in the bond, where such would disclose illegality, but may rely on the recital of regularity. *Fairfield v. School District,* 116 Fed. 838.

## RIGHT TO DETERMINE ENTIRE CAUSE IN EQUITY

Under the heading *"Scope of Review"* we have shown the right to review this case as in equity, and since defendant's pleadings showed a trust relation and rendered no account of the performance of that trust, we now support our statement with the following authority and argument.

### I

**Points and Authority**

A municipality whose duty it is to take or hold collections of special assessments derived from levies imposed because of *special improvements,* and to make payments therefrom to bondholders on account of interest or principal, thereby becomes a *trustee* for the bondholders.

*Spydell v. Johnson,* 128 Ind. 235; 25 N. E. 889.
*New Orleans v. Warner,* 175 U. S. 120, 130; 44 L. Ed. 94, 102.
*Vickrey v. Sioux City,* 104 Fed. 164.
*Farson v. Sioux City,* 106 Fed. 278.
*Olmsted v. Superior,* 155 Fed. 172.
*Jewell v. Superior,* 135 Fed. 19.
*Chelsea Bank v. Ironton,* 130 Fed. 410.
*Warner v. New Orleans,* 87 Fed. 826.

### II

Equity has jurisdiction by reason of the *trust* and for an *accounting* as to any balance which has been collected from special improvements but not paid to the bondholders.

*2 Dillon Municipal Corporation* (5th Ed.) p. 1395.
*Spydell v. Johnson,* 128 Ind. 235; 25 N. E. 889.

*Washington County v. Williams,* 111 Fed. 801, 816.

(We refer to statement of rule in dissenting opinion of Judge Sanborn.)

## III

Where a court of equity has jurisdiction because of such trust relation, it may proceed generally to *adjudicate all other matters* and make all necessary orders, including enforcement of special assessments.

*2 Dillon Municipal Corporations* (5th Ed.) p. 1395.
*Spydell v. Johnson,* 128 Ind. 235; 25 N. E. 885.
*Washington County v. Williams,* 111 Fed. 801, 816. (Per Judge Sanborn.)
*Burlington Bank v. Clinton,* 106 Fed. 269.

## IV

*Moneys collected from special assessments* and held by a municipality *belong to the bondholders for whom it was collected,* and the obligation is not changed because state court decisions have adjudicated the improvement proceedings to be invalid.

*Gladstone v. Throop,* 71 Fed. 341, 347. (6th C. C. A. per Taft J.)
*Spydell v. Johnson,* 128 Ind. 235; 25 N. E. 889.
*Warner v. New Orleans,* 87 Fed. 826.

### Argument

The foregoing authority and its application to the case at bar needs little argument. We have, as in *Spydell v. Johnson, supra,* a situation where the municipality was bound to take the collection as made and hold

the same specially for the fund from which principal and interest on these bonds only might be paid. This was definitely established by Ordinance No. 29 (Tr. 46). We must recognize that defendant imposed this obligation on itself but for the benefit of the bondholders and before issuing the bonds. *It thereby declared a trust* and the fund created was a *special trust fund* for the *exclusive benefit of these bondholders.* Defendant made this ordinance and the proceedings a part of its Answer. It did *not render an accounting* nor *state a balance* in connection therewith, *nor did it allege* that *no balance* existed. The Answer in some detail, set up annual returns of the water-system during the period of operation preceding its filing, and thereby sought to show that as to such operation it had no balance on hand available for these bonds. Defendant's care in setting up this information must be contrasted with its failure to state what *assessments had been collected.* The reason lies perhaps in defendant's thought that net revenue derived from operating a water-system, installed and paid for from moneys furnished by plaintiff, might be an equitable asset of the bondholders, while moneys collected on account of assessments made under the levies which the state court adjudged to be illegal would be free. The Indiana case of *Spydell v. Johnson, supra,* is directly in point and to the contrary. That case was in equity. The opinion of Judge Taft, found in *Gladstone v. Throop, supra,* is directly in point. The court there conceded the improvement proceedings to be invalid but held the money collected belonged to the bondholders. That case was at law. The money was collected and no

accounting needed, the amount not questioned, nor were enforcement orders necessary.

The jurisdiction of equity in the administration of trusts is so well established as to need no argument. It is clearly stated by Judge Sanborn, 111 Fed. 816; and the further jurisdiction of equity to proceed generally and adjudicate all other matters involved when jurisdiction is established for any reason, is equally clear. The cases cited fully support the doctrine. There are, of course, thousands of cases which recognize the right of equity to clear up the entire matter once its jurisdiction has attached.

*2 Dillon, Municipal Corporations* (5th Ed.), Sec. 893, p. 1394:

"The usual remedy to enforce the duty of the municipality to provide the special fund for the payment of the bonds is doubtless to be found in mandamus. But in the Federal courts, mandamus will not issue as an original independent proceeding, but only in the exercise of a jurisdiction already acquired; and notwithstanding the existence of a direct remedy in the State courts by mandamus to enforce the duty of the municipality or its officers, and notwithstanding the fact that the municipality is not generally liable under the obligation, an action will lie against the municipality in the Federal courts to establish the validity and amount of the plaintiff's debt in which a judgment may be rendered establishing the right of the plaintiff to recover and his right to a mandamus or to enforce the special remedies provided. If a municipality collects the special assessment or fund out of which the bonds are payable, it holds such fund for the benefit of the creditors entitled to enforce the obligations of the bonds, and *when it has the money* in its treasury, *it cannot refuse to pay* the obligations *on the ground that the assessments are invalid or because the*

*bonds are illegal upon grounds which enure to the benefit of the persons subject to assessment only. Among the remedies* to which holders of improvement bonds are entitled *is a suit in equity against the municipality* and its officers *for an accounting of the money* which has been *received from assessments* and which has gone into the general funds of the municipality, and in such action the *bondholders may have a decree compelling the officers* charged with the duty of collecting the assessments *to perform their duty* in that regard on the principle that where a court of *chancery takes jurisdiction* of the cause for any purpose it retains it *for all purposes and administers complete relief* as the justice of the case may require. In addition to the remedy against the municipality by mandamus, the *holder* of improvement bonds *has a remedy by action against the city for the amount owing* on the bonds *or for damages* in the event that the city has clearly neglected its duty *in not taking steps to perfect the assessment,* in consequence whereof the assessment cannot be enforced."

In *Washington County v. Williams,* 111 Fed. at p. 816, we quote Sanborn, J.:

"Equity has jurisdiction of suits to execute trusts and to administer and distribute trust funds. This is a suit for that purpose. The $3,059.16 which the defendant has collected and placed in the hands of its treasurer by means of the levy of the tax to pay these bonds required by the statute is *charged by the law with a trust* for the benefit of the complainants. Neither the county nor the taxpayers nor any other party has any right to this money. The treasurer holds it in trust for the complainants, and any one or more of them has the right to institute and maintain a suit in equity, against this trustee and all the other holders of bonds who claim a share in it, to ascertain the respective rights of the claimants therein, to compel the execution of the trust and the distribution of the money. Insurance Co. v. Mead (S. D.) 82 N. W.

78, 82. This is one of the objects of this suit, and *this* alone *is sufficient to sustain the jurisdiction* of the court, *and,* having thus obtained jurisdiction, to *warrant it in proceeding to determine* the rights of these parties in the *entire subject* of this litigation."

The jurisdiction attaches by reason of the trust, and is not dependent upon the accounting and discovery, although those features of equity's jurisdiction are also present. Where a trust exists, the fact that an action at law might develop the facts to be discovered and permit the ascertainment of the balance owing does not deprive equity of its concurrent jurisdiction. The trustee in the instant case has duties other than mere payment from the fund; there are duties relating to and necessary in the maintenance of the fund. Levies, assessments, etc., are involved, and the trustee can be compelled to perform its duties of that nature as well as pay over the funds on hand. The trustee must be faithful to its trust. The servant must be loyal to its master. All of the trustee's activities and non-activities are proper subjects for review on the day of judgment. *Trice v. Comstock,* 121 Fed. 620, 623. Now defendant has seen fit to plead its trust relation, and has exhibited the declaration of a trust in its ordinances, but it showed no accounting therefor other than the annual water revenues. The showing is incomplete as to money matters, collections; it has told a tale of trouble found in the *Belecz* suit, but this is incomplete since that showing is applicable only to the affected properties and its decree goes no further. The court cannot accept with approval such a record of stewardship from a trustee. It is less than half an accounting viewed most favorably to defendant. Its suf-

ficiency is lacking as a trustee's account just as the Answer fails of sufficiency under the rules of pleading.

That the equitable *jurisdiction of trusts is fully concurrent* with law, and will be sustained on that account notwithstanding an alternative and adequate legal remedy, see: *Seymour v. Freer,* 8 Wallace 202, 215.

There are other matters of equitable cognizance entering into the case as stated in the Agreed Facts. The facts stipulated relating to the improvements, the *Belecz* suit, and related matters clearly require an independent determination by the Federal Court under the rule settled in *Burgess v. Seligman,* 107 U. S. 20. Remembering that under the present act a transfer from law to equity is proper when the issues raised so require, and that a jury-waived trial on Agreed Facts waives all forms of action, it must be clear that the required relief compels the use of equity's remedies. The flexibility in equity's decrees can alone meet the need. The efficacy of such decrees has been noted in *Fetzer v. Johnson,* 15 Fed. (2d) 145, and *Board of Education v. James,* 49 Fed. (2d) 91.

And if the Court in its own determination shall find that equity requires some adjustment of the costs as between the town and the improvement district, only a chancellor's decree can make such relief effective. And if this shall require a surrendering of the bonds issued, or the cancellation of some portion thereof, then only an apt decree can bring such about. The bonds in question are all held by plaintiff thus obviating the need of a decree touching priority in issuance and ownership, which is a recognized basis of equity, but the settlement and

adjustment of all details and amounts clearly calls for an *appropriate decree* if the Court in its independent determination shall review the matters as of the first instance were a timely suit brought to bar without laches, waiver, failure to protest, etc. The right in equity to determine a partial validity of bond issue and adjust the same is well-established. *Aetna Co. v. Lyon County,* 44 Fed. 329; *Dillon, Municipal Corporations,* pp. 385, 386;*Aetna Co. v. Lyon County,* 95 Fed. 325, 330; *Everett v. School District,* 102 Fed. 529; *Everett v. School District,* 109 Fed. 697.

The power of equity to compel every act of enforcement required to make effective the security of the bonds questioned is present where jurisdiction is otherwise established, and this includes the right to follow a special judgment under the practice of the Federal Courts such as *Mather v. San Francisco,* 115 Fed. 37, with enforcing orders. If necessary to grant appropriate relief, equity may order the joinder of the property-owners as additional parties. This is the teaching of *Burlington Bank v. Clinton,* 111 Fed. 439, 445, granting such orders following the final hearing. See also: *Burlington Bank v. Clinton,* 106 Fed. 269, 275.

**Suggestions of Adjustments**

If the court, in making its own determination of the issues advanced on behalf of the property owners, should find the equities to require an adjustment and reassessment, there are several applicable theories touching such adjustment. The first of these we will call for convenience

**Plan A**

The theory advanced under this plan is that of adjustment and assessment on the basis of 85% of the face value of the bonds aggregating.....$45,602.40
85% of the above is..... 38,762.04

**Plan B**

The theory advanced here is that of limiting the district's indebtedness to the pipes and hydrants only as installed by the contractor plus appropriate engineering charges, etc. A reading of the final estimates and awards (Tr. 247) shows the entire cost of all improvements, engineering and bond printing included, to be $57,619.22. The special improvement bonds issued were in amount $45,602.40. The difference between these figures is $12,016.82, which indicates the amount in cash paid to the contractor from the proceeds of $15,000.00 general bond issue. The difference between $15,000.00 and $12,016.82 is $2,983.19, which represents preliminary expenses and other deductions made by the town itself in connection with the entire improvement. An equitable distribution of this preliminary expense would be suggested as in proportion to the costs as figured between the pipes and hydrants on the one hand and the remaining improvements on the other. Accordingly we have the following computation, to which we have added 70% of the preliminary expense and 70% of the bond printing cost, which approximates the proportion of cost as between the two general divisions:

| | |
|---|---|
| 8271 ft. of 4″ pipe laid at $2.25 per ft. | $21,091.05 |
| 2726 ft. of 6″ pipe laid at $3.60 per ft. | 9,813.60 |
| 841 ft. of 8″ pipe laid at $5.04 per ft. | 4,238.64 |
| 13 Hydrants, complete at $174.40 each | 2,267.20 |
| | $37,410.69 |
| Add Engineering at 6% on above | $ 2,240.60 |
| Add 70% cost of Bond Printing | 72.80 |
| Add 70% Preliminary Expenses | 2,088.23 |
| Total | $41,812.32 |

**Plan C**

The theory advanced here is based on the suggestion that a cost of $1.50 per lineal foot is the maximum legal charge for pipe-laying, to which may be added the cost of pipe, hydrants, etc. To this we add the proportionate preliminary expense and bond printing and engineering on that portion of the construction which is not included in pipe-laying. The cost of the pipe itself was found by Judge Horkan (Tr. 87). We have the following computation:

| | |
|---|---|
| Cost of pipe itself (p. 87) | $17,726.42 |
| Cost of 13 Hydrants complete (p. 247) | 2,267.20 |
| | $19,993.62 |
| Add Engineering 6% on above | $ 1,299.60 |
| Legal cost laying pipe, 11,838 ft. at $1.50 | 17,754.00 |
| Add 70% Preliminary Expense | 2,088.23 |
| Add 70% Bond Printing | 72.80 |
| Total | $41,208.25 |

## Plan D

The theory advanced under this plan is that *improvements within the district* should be adjusted on the basis of 85% of the contractor's prices on pipes and hydrants only, engineering expense included on those items. Under *Plan B* the cost of pipe and hydrants plus engineering was found to be $39,651.29, based on contractor's prices.

| | |
|---|---|
| 85% Contractor's prices | $33,703.60 |
| Add 70% Preliminary Expense | 2,088.23 |
| Add 70% Bond Printing | 72.80 |
| Total | $35,864.63 |

The foregoing computations require some adjustment as against the town itself. The following work was done for the town as distinguished from the district:

| | |
|---|---|
| Reservoir excavation, 320 cu. yds. at $3.17 | $ 1,014.40 |
| Reservoir concrete, 117 cu. yds. at $37.50 | 4,387.50 |
| Reservoir equipment, complete | 1,425.00 |
| Well, excavation, 452 cu. yds. at $2.75 | 1,243.00 |
| Well, concrete, 89.1 cu. yds. at $40.00 | 3,564.00 |
| Pumping equipment, complete | 2,525.00 |
| Pump house | 1,625.00 |
| Frost Casing (extra) plus 15% | 363.83 |
| | $16,147.73 |
| Add Engineering at 6% | $ 968.87 |
| Add 30% Preliminary Expense | 894.96 |
| Add 30% Bond Printing | 31.20 |
| Total | $18,042.76 |

| | |
|---|---|
| Deduct therefrom amount General Bond Issue | 15,000.00 |
| Balance due from Town itself | $ 3,042.76 |

The foregoing computations are not precisely accurate and in the absence of complete information as to bond printing, etc., the record will not permit precision. It is apparent from the final estimates, however, that some portion of the special improvement bonds was made to pay for balances properly chargeable to the well, reservoir and pump-house items, and that the intended payment under the contract and specifications did not work out so that the $15,000.00 general bonds paid for the entire plant, excepting pipes and hydrants. If the matter is now open to such adjustment it is only fair, as between the town itself and the district, that the town should bear this extra expense which was made for the completion of its own improvements. There is no doubt of the town's liability to pay small excesses developed in connection with such improvements when the complete results cannot be foreseen. See *Dillon, Municipal Corporations* (5th Ed.), Sec. 813, pp. 1225-1232. *Salt Lake City v. Smith,* 104 Fed. 457.

**DEFENDANT IS LIABLE TO PLAINTIFF IN QUANTUM MERUIT, HAVING ACQUIRED, RECEIVED AND USED THE WATER WORKS AND DISTRIBUTING SYSTEM PROCURED AT PLAINTIFF'S EXPENSE AND HAVING GENERAL POWER TO ACQUIRE AND USE SUCH.**

The record touching this division of the argument bears directly upon the following stipulated facts: (Tr. 53)

> "e. *The true object* and purposes of the passage and approval of said resolution and the issuance of said general and special improvement district bonds *was the establishment and installation in and for the Town of Ryegate, and for a portion of its inhabitants of a* complete waterworks and a *complete waterworks system* consisting of reservoir, pumping plants, mains, and *all other connections and appliances necessary* to have a complete system *for the supplying of water for municipal purposes to said town, and water to a portion of the inhabitants thereof* and for the purpose set out in said resolutions."

We further find the following: (Tr. 56)

> "m. Said *water system and improvements specified* in said resolution *were so constructed and accepted and the said town has been and yet is receiving the income* from said system and improvements, *and said town and such of the inhabitants* thereof *as live within the limits of said district now have and are using said water system and improvements.* * * *"

It is important also to note: (Tr. 56)

> "l. From time to time, after said improvement district bonds were issued for completed and accepted work, *plaintiff* purchased and accepted said bonds at 85% of their par value with accrued interest from

said Security Bridge Company and *did* thus by the purchase of said district and said general bonds *furnish* to Security Bridge Company *all the money used* by it *to build and complete said waterworks system and the improvements specified in said resolutions* * * *"

**Points and Authorities**

I.

Under the Montana Constitution all power is vested in the people. The Constitution is not a grant but is a limitation thereof. Many Montana decisions so hold.

*Constitution of Montana,* Art. III, Sec. 1, Art. IV, Sec. 1, Art. V, Sec. 1.
*Great Northern Ry. Co. v. Public Ser. Com.,* 88 Mont. 180; 293 Pac. 294.
*Hilger v. Moore,* 56 Mont. 146, 182 Pac. 477.
*McClintock v. City of Great Falls,* 53 Mont. 221, 163 Pac. 297.
*Edwards v. County of Lewis and Clark,* 53 Mont., 359; 165 Pac. 297.
*State v. State Board of Equalization,* 56 Mont. 413; 185 Pac. 708; 186 Pac. 697.
*State ex rel. Smith v. District Court,* 50 Mont. 134; 145 Pac. 721.
*Northern Pacific Ry. Co. v. Mjelde,* 48 Mont. 287; 137 Pac. 386.
*Heckman v. Custer County,* 70 Mont. 84; 223 Pac. 916.

No citations of authority are necessary upon the general propositions of the *power* and the *duty* of a town *to supply itself and its citizens with water.* There is no limitation upon this in the constitution. The Montana constitution, however, does limit the power of its people to create an indebtedness. First, it limits the state; next,

the counties, and lastly, (Art. XIII, Sec. 6) the cities and towns, but as to the limitation of indebtedness in cities and towns, it makes an exception where greater indebtedness is required for the purpose of constructing a sewer or procuring a supply of water. The section in question reads as follows: (Art. XIII, Sec. 6)

> "No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate, exceeding three (3) per centum of the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district shall be void; provided, however, that *the legislative assembly may extend the limit* mentioned in this section, *by authorizing municipal corporations to submit the question to a vote of the taxpayers affected* thereby, *when* such *increase is necessary* to construct a sewerage system or *to procure a supply of water* for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

## II.

Under appropriate general laws the legislative assembly has acted under the constitution exception to the 3% limitation of indebtedness, thereby permitting increased indebtedness for the purpose of procuring a water supply.

*Montana Revised Code*, 1921, Sec. 5039 (subd. 64).
*McClintock v. Great Falls*, 53 Mont. 221; 163 Pac. 297.
*Edmunds v. Glasgow*, .. Mont. . . .; 300 Pac. 203.

III.

The Town of Ryegate had general power to procure a water supply for itself and its inhabitants under Subd. 64 of *Section 5039,* and the holding of an election upon the question was the mode of exercising its admitted power.

*Edmunds v. Glasgow,* .. Mont. ...; 300 Pac. 203.
*Carlson v. Helena,* 39 Mont. 82, 104, 114; 102 Pac. 39.

IV.

Having the power to procure a water supply the Town of Ryegate is liable to plaintiff for the reasonable value of the water supply and distributing system acquired, accepted and used by it, plaintiff having furnished all of the money which paid for the labor and materials entering in the installation, construction and cost.

*Hitchcock v. Galveston,* 96 U. S. 341; 24 L. Ed. 659.
*Marsh v. Fulton County,* 10 Wall. 676, 684.
*Louisiana v. Wood,* 102 U. S. 294.
*Read v. Plattsmouth,* 107 U. S. 568.
*Chapman v. Douglas County,* 107 U. S. 348.
*Gause v. Clarksville,* 5 Dill. 168, Fed. Cas. No. 5276.
*Gause v. Clarksville,* 1 Fed. 353.
*Warner v. New Orleans,* 87 Fed. 829.
*Bill v. Denver,* 29 Fed. 344.
*Bangor Sav. Bank v. Stillwater,* 49 Fed. 721.
*Dodge v. Memphis,* 51 Fed. 165.
*Geer v. School District,* 111 Fed. 682.
*Gilman v. Fernald,* 141 Fed. 941.
*Scott County v. Advance-Rumely,* 288 Fed. 739.
*Eyer v. Mercer County,* 292 Fed. 292, 1 Fed. (2d) 609.

*South Sioux City v. Hanchett Bond Co.,* 19 Fed. (2d) 476.

State authorities in accord are numerous. We cite:

*State v. Greer,* 88 Fla. 249.
*Bank v. Goodhue,* 120 Minn. 362; 139 N. W. 599.
*Durant v. Story,* 112 Okla. 110; 240 Pac. 84.
*Dakota Trust Co. v. Hankinson,* 53 N. D. 356, 205 N. W. 990.
*Oubre v. Donaldsonville,* 33 La. Ann. 390.
*Cole v. Shreveport,* 41 La. Ann. 839; 6 So. 688.
*Waitz v. Ormsby County,* 1 Nev. 370.
*Long Beach School District v. Lutge,* 129 Cal. 490; 62 Pac. 36.
*Thomson v. Elton,* 109 Wis. 589; 85 N. W. 425.

The Montana decisions have followed in the same trend:

*State v. Dickerman,* 16 Mont. 278, 288; 40 Pac. 698.
*Morse v. Granite County,* 19 Mont. 450; 48 Pac. 745.

And this Court on appeal from the Montana District Court has similarly expressed itself:

*Hill County v. Shaw & Borden Co.,* 225 Fed. 475, 477.

V.

And a town having in fact procured for itself public improvements, although originally intended to be paid exclusively by benefited property-owners, is liable itself when the special improvement proceedings fail because of invalidity.

*Barber Asphalt Co. v. Harrisburg,* 64 Fed. 688.
*Cole v. Shreveport,* 41 La. Ann. 839; 6 So. 688.

*Freese v. Pierre,* 37 S. Dak. 433; 158 N. W. 1013.
*Dakota Trust Co. v. Hankinson,* 53 N. Dak. 356; 205 N. W. 990.

And a town is liable in quantum meruit for the use of properties, though it had no authority to purchase the same.

*Hogansville v. Planters Bank,* 108 S. E. 480 (Ga. App.).
*Shoemaker v. Buffalo Steam Roller Co.,* 144 N. Y. S. 721.

**Argument**

It is quite apparent that the Montana constitution is not concerned with the kind of a water system, or whether it shall be one proposition or another, or whether it shall be sewerage systems or water systems, its concern is with the *question:* "Shall the limit of indebtedness which it provides be extended beyond the three per cent limit?" In discussing this provision of the Montana constitution and the reasonable interpretation to be given it, the Supreme Court of Montana has said:

"The proviso under which the legislature may authorize an extension of the limit is also clear in purpose, to-wit, to allow an extension of this limit when such extension (increase) is necessary to construct a sewerage system or procure a water supply." *Butler v. Andrus,* 35 Mont. 575, at 581; 90 Pac. 785.

"The orderly course of procedure would be to submit the question generally whether the indebtedness, not in excess of a definite amount within the limit, should be incurred; then the council would be left free, in case the indebtedness should be authorized, to

use its discretion in securing one supply or another, according as its judgment would dictate." *Carlson v. City of Helena,* 39 Mont. 82-114, at 106; 102 Pac. 39.

This provision is also a direct authority to the legislature and permits the legislative assembly to extend the limit by authorizing the submission of the question of extending the limit to a vote of the taxpayers. This the legislature has done in Montana by the enacting of Sub-division 64 of Section 5039, *Revised Codes Montana 1921,* which reads as follows:

"5039. Powers of city councils. The city or town council has power:

64. To contract an *indebtedness* on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds *for* the following purposes, to-wit: Erection of public *buildings,* construction of *sewers, bridges, water-works, lighting plants,* supplying the city or town with *water by contract,* the purchase of *fire apparatus,* the construction or *purchase of canals or ditches and water rights* for supplying the city or town with water, and the funding of outstanding warrants and maturing bonds; provided, that the total amount of indebtedness authorized to be contracted in any form, including the then existing indebtedness, must not, at any time, exceed three per centum of the total assessed valuation of the taxable property of the city or town, as ascertained by the last assessment for state and county taxes; provided, that *no money must be borrowed on bonds issued for* the construction, purchase, or *securing of a water plant, water system, water supply,* or sewerage system, *until the proposition has been submitted to* the *vote of the taxpayers* affected thereby of the city or town, and the majority vote cast in favor thereof; and further provided, that *an additional indebtedness shall be incurred, when necessary, to* construct a sewerage system or *procure a water supply* for the said

city or town, which shall own or control said water supply and devote the revenue derived therefrom to the payment of the debt. *The additional indebtedness* authorized, including all indebtedness heretofore contracted, which is unpaid or outstanding, *for* the construction of a *sewerage* system, shall not exceed *ten* per centum over and above the three per centum heretofore referred to, of the total assessed valuation of the taxable property of the city or town as ascertained by the last assessment for state and county taxes; and provided, further, that *the above limit of three per centum shall not be extended, unless the question* shall have been submitted to a vote of the taxpayers affected thereby, and carried in the affirmative by a vote of the majority of said taxpayers who vote at such election * * *" (The remaining portion of Subdivision 64 is of no concern to the question here under discussion.)

It will be noted that the legislative act above quoted concerns itself with carrying out the mandate of the constitution "to *submit the question*", and provides further that the 3% limit "shall not be extended *unless the question* shall have been submitted". The legislative act includes a further restriction to the effect that

> "*no money must be borrowed on bonds* issued for the construction * * * of a water plant * * * until the *proposition* has been submitted to the vote of the taxpayers * * *"

This restriction on the issuance of *bonds* is added by the legislative assembly to the restriction already made in the constitution, which refers only to *indebtedness.* The language of the act is

> "*additional indebtedness* shall be incurred *when necessary* to * * * procure a water supply * * *"

The Constitution therefore is gratified by an election which submits the question of exceeding the 3% limit. The matter of an election touching *bonds* refers only to the legislative act. If the election held shall cover both a proposed bond issue and the question of exceeding the 3% constitutional limit for a water supply, both the law and the constitution are gratified, although the bond issue may in amount not cover the entire authorized indebtedness. In other words, under an appropriate election a town may be limited to the issuance of a certain amount of bonds by reason of the legislative proposition, but the further question of exceeding the 3% limit under the constitution *permits additional indebtedness,* having no necessary or fixed relation to the amount of bonds. The town, therefore, under such an election has complete legislative and constitutional authority for the acquiring of a water supply upon favorable vote on the submitted questions, although it may be restricted under the legislative act to a specific amount of bonds to be issued in part.

In the case at bar, the Town of Ryegate issued $15,000 par value of general water bonds. The printed record does not include a transcript of the election proceedings under which these bonds were authorized and issued. Such an election, however, was duly held and at the election there was submitted the constitutional question of exceeding the 3% limit, and there was also submitted the further legislative question of issuance of $15,000 of general bonds. There is no dispute over this matter which was freely admitted in the trial, and evidence sustaining this position in the record is found

in the fact of the $15,000 par value of general bonds issued, which in themselves, together with the general sewer bonds of $15,000 par value referred to in the specifications of the construction contract (p. 212), necessarily disclose an exceeding of the 3% limit in the issuance of bonds alone. Further, the testimony of the witness *Roscoe* (p. 181) introduced, as Exhibit "A" attached to his deposition, a letter of John C. Thomson, an attorney of New York City, dated May 7, 1920, addressed to the Town Council of the Town of Ryegate, which letter expressed the legal opinion of this attorney on request from defendant herein. It will be noted that in this letter the following is found:

> "* * * I have examined the Constitution and statutes of the State of Montana, and *certified copies of the proceedings* of the Town Council of the Town of Ryegate, Montana, authorizing the issuance of said bonds, also an executed bond of said issue, No. 1.
>
> In my opinion said bonds have been authorized and issued in accordance with the Constitution and statutes of the State of Montana, and constitute valid and legally binding obligations of said Town of Ryegate, Montana."

Under the constitutional laws of Montana it was necessary that such elections be held, as we have hereinbefore demonstrated, and this record is in accord. The further question of the additional 10% within which additional indebtedness might be incurred under *Section 5039*, subd. 64, is in our opinion applicable only to the matter of a sewerage system. The language of the act seems to be clear in that respect. The question may not be important in this case since the amount of in-

debtedness would fall within the limitation of 13% in any event, but with respect to this construction see *Edmunds v. Glasgow,* 300 Pac. 203, where this language is recognized by the Supreme Court of Montana as being open to such construction.

The Supreme Court of Montana has had occasion to pass upon this question of extending the 3% limit, and the further question of issuing bonds, and it has said in its opinion found in *Carlson v. Helena,* 102 Pac. 39; 39 Mont. 82, at p. 104:

> "After the *authority to incur* an *indebtedness* beyond the constitutional rate has been granted, the requirements of the fundamental law should be deemed satisfied, provided the council proceeds with reasonable diligence and the amount of indebtedness incurred does not exceed the rate of the extension when calculated upon the basis of either assessment-roll.
>
> "It is said that the authority of the city to incur an indebtedness does not include an authority to issue bonds, and therefore that two elections were necessary to authorize the proposed issue, (1) To extend the limit and incure the indebtedness, and (2) to issue bonds. It is not necessary to inquire whether the power conferred upon a municipality to incur indebtedness does not imply the additional power to issue evidences thereof, in the form of negotiable securities. Here the authority is expressly given. The Constitution does not prescribe the mode by which the legislature may authorize submission to the taxpayers of the question whether an indebtedness shall be incurred. The legislature, therefore, was free to prescribe such method as it chose. The method of procedure and the form of the question to be submitted by the council are prescribed in sections 3454 et seq., Revised Codes. The form of the submission requires the electors to vote 'Yes' or 'No' upon the question

whether bonds shall be issued; so that, in voting upon this question, they authorize the debt to be incurred by the issuance of bonds. The contention must be overruled."

The special concurring opinion of Mr. Justice Smith in the foregoing case very aptly says: (32 Mont. at p. 114)

"I think the only legal method of procedure is to first obtain from the taxpayers a general consent to the *project of raising the limit of indebtedness,* and that the council should thereafter select the particular water supply. Any other consideration of the law will lead to the result that, if the council's first selection cannot be acquired, a new election will be necessary."

The legislature has acted under the power given it by the constitution to provide for an election upon the question of increasing indebtedness and it has also provided two methods for cities to supply themselves and their inhabitants with a water supply or system. By way of digression, we here make the suggestion that we repeatedly refer to this water supply as being of a two-fold character, namely, for the town, which includes all municipal purposes, fire protection, capacity to reduce insurance, etc., and water for domestic uses by a portion of the inhabitants. We do this advisedly because the stipulated facts in this case clearly recognize the two-fold nature of this system and agree that the town on the one hand and a portion of the inhabitants on the other, are using the water system and the testimony is undisputed that it is available for everybody within the corporate limits and its availability is made possible not

only physically but legally by general ordinances of the town as well.

But to return to the two methods of supplying a water system. The first method authorized by the legislature is by direct vote upon the "proposition which has been submitted". (Subd. 64, Sec. 5039, *Revised Code 1921.*) The second method is by the creation of a special improvement district under the authority of Subd. 80, Sec. 5039, and Chapter 56 of Part IV of the 1921 Revised Code, being Secs. 5225 et seq. The section specifies the purposes for which they may be created and among others, we find the following:

> "* * * Water works, water mains, and extensions of water mains; pipes, hydrants, hose connections for irrigation purposes; appliances for fire protection, tunnels, viaducts, conduits * * * and to maintain, preserve and care for any and all the improvements herein mentioned; and the construction or reconstruction * * * (of) pipes, hose connections for irrigation, hydrants and appliances for fire protection; * * *"

Other sections disclose the clear intention of authorizing under the special improvement theory the construction of such a water-system as is here under discussion.

The legality of the creation of this improvement district is clear, notwithstanding the decision of the state court in the *Belecz* case, nor is this Court thereby denied the right to go into the question of legality. A discussion of these subjects has heretofore been made in this brief and for that reason is not repeated here, but in this connection we again particularly refer to the *Mankato* case at page 138 of this brief. In other words, we

have here a city's duty toward itself; toward its inhabitants; its inherent power without limitation to discharge these duties; a constitutional exception to the limit of indebtedness otherwise placed upon the people of the state and a constitutional delimitation of power on the question of indebtedness for these purposes to enable it to discharge these natural duties; legislative action granting the right to vote upon it; an election held upon the question of extending the debt limit, and also the issuance of $15,000.00 general bonds under such electoral mandate; a city council's action after such an election and under legislative special improvement legislation, all looking to and authorizing the construction of the water system here under discussion. Then the Town of Ryegate acted under such authority, constructed for its own use and that of its inhabitants and now operates for its own use, and for its inhabitants' use—accessible to all—a water-system, for which it now refuses to pay.

Can this defendant town, knowing, as the stipulated facts disclose that it did, that plaintiff was to furnish, and did furnish all the money for this improvement, which the town now has and uses, refuse to repay this money so borrowed? This question is answered by the cases listed under *Points and Authorities V,* supra.

It matters not if the method of payment now sought to be enforced is beyond the authority of the special improvement legislation. This not only for the fact reasons, to-wit, the city's use and enjoyment of the water system as a municipal property, distinguished from the property of a special improvement district, but also because of substantive law. The leading cases

upon this subject come from the Supreme Court of the United States, an earlier one of which holds: *(Marsh v. Fulton,* 77 U. S. 676, 19 L. Ed. 1040, 1043)

"We do not mean to intimate that liabilities may not be iccurred by counties independent of the statute. Undoubtedly they may be. *The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."*

The leading case is, of course, *Hitchcock v. Galveston,* 96 U. S. 341, 24 L. Ed. 659, 661, wherein the Supreme Court of the United States held:

"In the view which we shall take of the present case, it is, perhaps, not necessary to inquire whether those cases justify the court's conclusion; for, *if it were conceded that the City had no lawful authority to issue the bonds, described in the ordinance and mentioned in the contract, it does not follow that the contract was wholly illegal and void, or that the plaintiffs have no rights under it.* They are not suing upon the bonds, and it is not necessary to their success that they should assert the validity of those instruments. *It is enough for them that the City Council have power to enter into a contract for the improvement of the sidewalks;* that such a *contract was made* with them; *that under it they have proceeded to furnish materials and do work,* as well as to assume liabilities; *that the City has received and now enjoys the benefit of what they have done and furnished;* that for these things the City promised to pay, and that after having received the benefit of the contract the City has broken it. *It matters not that the promise was to pay in a manner not authorized by law.* If payments cannot be made in bonds because their issue is ultra vires, it would be sanctioning rank injustice to hold that

payment need not be made at all. *Such is not the law.* The contract between the parties is in force, so far as it is lawful.

"There may be a difference between the case of an engagement made by a corporation to do an act expressly prohibited by its charter, or some other law, and a case of where legislative power to do the act has not been granted. Such a distinction is asserted in some decisions. But the present is not a case in which the issue of the bonds was prohibited by any statute. At most, the issue was unauthorized. At most, there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at farthest, only ultra vires; and, in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. *Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform.*"

A later case holds: (*Louisiana v. Wood,* 102 U. S. 294, 26 L. Ed. 153, 155)

"While, therefore, the bonds cannot be enforced, because defectively executed the money paid for them may be recovered back. As we took occasion to say in Marsh v. Fulton Co., 10 Wall. 676 (77 U. S. XIX., 1040), 'The obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.'

"It is argued, however, that, as the City was only authorized by law to borrow money at a rate of interest not exceeding ten per cent per annum, the money cannot be recovered back, because a sale of the bonds involved an obligation to pay interest beyond the limited rate, and the borrowing was, therefore, ultra

vires. There was no actual sale of bonds, because there were no valid bonds to sell. There was no express contract of borrowing and lending, and consequently no express contract to pay any rate of interest at all. The only contract actually entered into is the one the law implies from what was done, to-wit: that the City would, on demand, return the money paid to it by mistake and, as the money was gotten under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other."

Again the Supreme Court of the United States says upon this subject: (*Read v. Plattsmouth*, 107 U. S. 568, 27 L. Ed. 414, 417)

"In the present case, the statute in question does not impose upon the City of Plattsmouth, by an arbitrary Act, a burden without consent and consideration. On the contrary, upon the supposition that the bonds issued, as to the excess over $15,000, were void, because unauthorized, the City of Plattsmouth received the money of the plaintiff in error, and applied it to the purpose intended, of building a school house on property, the title to which is confirmed to it by the very statute now claimed to be unconstitutional, and an obligation to restore the value thus received, kept and used, immediately arose. This obligation, according to general principles of law accepted in Nebraska, was capable of judicial enforcement. (Citing cases).

"As was said by Mr. Justice Field, in N. O. v. Clark (supra): 'A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law, no more so than an appropriation Act providing for the payment of a preexisting claim. The constitutional inhi-

bition does not apply to legislation recognizing or affirming the binding obligation of the State, or of any of its subordinate agencies, with respect to past transactions.' "

These principles of law (and common honesty) have affirmance both in Supreme Court and Federal Court cases from Montana. In *State v. Dickerman,* 16 Mont. 278, 288; 40 Pac. 698, we read:

"The appellant contends that the school district did not become indebted to or liable to repay the relator the money advanced by it to pay warrants issued for the construction of a school building in said district under the contract entered into with relator. This contention proceeds, and is sought to be maintained, upon the theory that trustees had no authority in law to enter into such contract with relator; that said contract is for that reason void, and, being void, the relator is not entitled to recover the amount advanced thereunder.

"The doctrine here contended for by appellant is fully discussed, and a great many authorities collected, in Brown v. City of Atchison, 39 Kan. 37, 17 Pac. 465. In this case the court says: 'From the authorities we think the following principle may be educed: Where a contract has been entered into in good faith between a corporation, public or private, and an individual person, and the contract is void in whole or in part, because of a want of power on the part of the corporation to make it or enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be re-

quired to do equity towards the other party, by either rescinding the contract and placing the other party in statu quo, or by accounting to the other party for all benefits received for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit.

"In Pimental v. San Francisco, 21 Cal. 352, the city had received money from the unauthorized sale of land, and refused to refund the same. In speaking of the rights of the purchaser to recover money paid for said lands at said void sales, Mr. Chief Justice Field says: 'This alleged want of privity, as we understand it, amounts to this: That, inasmuch as the mayor and land committee had no authority to make the sale, they had no authority to pay the money which they received from the bidders into the treasury of the city, and therefore no obligation can be fastened from such unauthorized act upon the city. The position thus restricted in its statement is undoubtedly correct, but the facts of the case go beyond this statement. They show an appropriation of the proceeds, and the liability of the city arises from the use of the moneys or her refusal to refund them after their receipt. The city is not exempted from the common obligation to do justice, which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property, which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor, from the like obligation. (Argenti v. San Francisco, 16 Cal. 282). The legal liability springs from the moral duty to make restitution; and we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics. Its command always is to do justice.' From these authorities it seems clear that if, in making the contract un-

der discussion, the trustees exceeded their authority, still there was created thereby a liability to refund the money advanced by relator under and in pursuance of said contract. The most, we think, that can be said in this case, is that there was an imperfect or defective attempt to comply with the law on the part of the trustees in the issuing of the bonds of the district. They had the authority under the law to issue them for the purpose for which they were issued, but failed to give a sufficient notice of the purpose and conditions thereof in providing for the election to authorize their issuance. Nor is any bad faith or fraud alleged in the issuance of said bonds. If the bonds had been declared void, we think it could hardly be contended that the contract with relator to advance money on them as security, for the building of the school house, would have been considered void for want of authority in the trustees to make the same. And, besides, the contract, so far as relator is concerned, has been fully executed, and we think the doctrine of ultra vires can be invoked with less force here than in cases of executory contracts. *The school district secured the benefit of relator's money, advanced in good faith; and we think it would be a most inequitable and unjust holding to say the district assumed no liability on account thereof, and that relator is left without a remedy, under the circumstances of this case."* .

This Court affirming a decision by U. S. District Judge Bourquin upon a Montana case has said: *(Hill County v. Shaw & Borden,* 225 Fed. 475)

"It is a doctrine of the courts, however, now well established that sanction will be given a cause of action proceeding as for *quantum meruit,* or for recovery of property or in trover, where the property has been converted, aside from the contract and independent thereof, where the contract is merely malum prohibitum, not malum in se nor involving moral turpitude, and does not contravene public policy, and

where the statute imposes no penalty for its infraction. This upon the principle that the courts will always try to do justice between the parties where they can do so consistently, with adherence to law. Thus it was held, in City of Concordia v. Hagaman et al., 1 Kan. App. 35, 41 Pac. 133, that:

'In the absence of a penal prohibitive statute, on grounds of public policy alone, an express contract entered into between the mayor and council of a city of the second class and one who is at the time a councilman of such city, for the performance of a service for the city, will not be enforced. Such contract, while not absolutely void, may be avoided by the city, at will, so long as it remains executory; but *when it was entered into in good faith,* was, *for* the *doing of lawful* and necessary *work* for the city, and has been, without objection, *fully executed,* the city receiving and retaining the benefit thereof, a *recovery may be had on the quantum meruit* for what the services were reasonably worth.'

"Parkersburg v. Brown, 106 U. S. 487, 503, 1 Sup. Ct. 442, 455 (27 L. Ed. 238), was a case for recovery against the city of certain realty which had been conveyed to a trustee as security for a loan by the issuance of bonds, which bonds it proved the city had no authority to issue, because the act under which the city authorities proceeded was declared unconstitutional. Of this state of the case the court said:

'There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely malum prohibitum, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received.'

"So it was said in Chapman v. County of Douglas, 107 U. S. 348, 355, 2 Sup. Ct. 62, 68 (27 L. Ed. 378):

'As the agreement between the parties has failed by reason of the legal disability of the county to perform its part, according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in Marsh v. Fulton County, 10 Wall. 676, 684, (19 L. Ed. 1040), and repeated in Louisiana v. Wood, 102 U. S. 294 (26 L. Ed. 153), 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute will compel restitution or compensation.' * * * The purchase itself, as we have seen, was expressly authorized. The agreement for definite times of payment and for security alone was not authorized. It was not illegal in the sense of being prohibited as an offense; the power in that form was simply withheld. The policy of the law extends no further than merely to defeat what it does not permit, and imposes upon the parties no penalty. It thus falls within the rule, as stated by Mr. Pollock, in his Principles of Contract (264): 'When no penalty is imposed, and the intention of the Legislature appears to be simply that the agreement is not to be enforced, then neither the agreement itself nor the performance of it is to be treated as unlawful for any other purpose.' "

"And again, in Pullman's Car Co. v. Transportation Co., supra, the court, quoting from 139 U. S. 60, 11 Sup. Ct. 489, 35 L. Wd. 69 (Central Transp. Co. v. Pullman's Car Co.) says:

'The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract, to be recovered back, or compen-

sation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or failing to do that, to make compensation for, property or money which it had no right to retain. To maintain such an action is not to affirm, but disaffirm, the unlawful contract.' "

A case which is cited as a leading authority on this question of *quantum meruit* following contracts entered into in good faith for property within the power of the corporation to purchase comes from Minnesota, *Bank v. Goodhue,* 120 Minn. 362, 139 N. W. 599:

"The trial court found that plaintiff loaned the money to the village in good faith, and that the same was expended as just stated. Both transactions were illegal and void for the reason that the village *council was not authorized* to make such a loan of money *without first submitting the question to the legal voters* for their approval. The *question was not so submitted* as to either loan. The *first loan was illegal and void for the further reason* that the *president* of the village council, who as such participated in the transaction, was also a managing officer of plaintiff bank, and *was prohibited by law from entering into any contract* with the village in which his bank was interested. Section 731, Rev. Laws, 1905.

"Plaintiff brought this action to recover the amount so loaned, having first demanded repayment, on the ground of money had and received. Plaintiff conceded in its complaint the invalidity of the warrants, and they were brought into the court for the use of defendant; and the action is predicated, not upon the contract, but upon the alleged implied obligations of the village to repay the money. The trial court ordered judgment for the plaintiff, and defendant appealed from an order denying a new trial.

"The only question presented is whether, on the facts stated, which are not in dispute, an action will lie for money had and received; or, as otherwise expressed, whether a municipal corporation is liable in assumpsit upon an implied contract to pay for what it has received, where the express contract pursuant to which it received the same is invalid because of the failure of its officers to comply with statutory requirements.

"1. The courts are in full harmony in holding that one who deals with a municipal corporation in respect to a matter beyond its corporate powers can have no relief, either in law or in equity. Contracts so entered into are wholly void, because prohibited, of which all are required to take notice. But there is a sharp conflict in the adjudicated cases upon the question of liability where the corporation is vested with power to enter into a particular contract, and its *invalidity arises solely from the failure to comply with essential requirements of law.* In such cases many courts of high standing hold that the municipality may be compelled to do justice, and recovery is allowed as upon an implied contract to pay for what it has received. (Citing cases). In short, the 'doctrines of assumpsit are applicable to municipalities as well as to natural persons, and the action may be maintained on any of the common counts,' 'not from any contract entered into on the subject, but from the general obligation to do justice, which binds all persons whether natural or artificial.' Ingersoll, Pub. Corp. 299. The rule stated has often been applied in cases of borrowed money, where the money has been paid into the municipal treasury, and subsequently expended for legitimate municipal purposes. Fernald v. Gilman (C. C.) 123 Fed. 797, and authorities cited in Ingersoll, Pub. Corp. supra. The opposite view of the question proceeds upon the theory that to permit a recovery in such cases results for all practical purposes to upholding the invalid contract, *thus enabling the municipality to do indirectly that which it could not do directly.* The courts so holding apply

the doctrine of ultra vires strictly, and refuse relief where the contract was entered into irregularly or in violation of law, as well as where the subject-matter was beyond the power of the corporation. The question on facts precisely like those here disclosed has never been presented to this court, *though in analogous cases the tendency of our later decisions has been in harmony with the rule of liability applied by the authorities cited.* In this case the money was loaned to the municipality by plaintiff in good faith, it was paid into the village treasury, and subsequently expended for a purpose authorized by law. The forms of law were not complied with in effecting the loan, and the contract was invalid for that reason. Yet the village received the money, and ought in equity and good conscience return it. And, though we have held that the doctrine of ultra vires is applied to municipal corporations with greater strictness than to private corporations, the doctrine really has no application to the case. If the question was whether the contract was valid, the decision necessarily would be that it was not. This action proceeds upon that theory. In that view the express contract disappears, because unauthorized, and the rule of implied liability takes its place. We are unable to assign a good reason for differentiating between the private and the municipal corporations as respects the rule of justice and common honesty. The private corporation in a case of this kind would not be heard to dispute its liability, nor would a public corporation be permitted to do so where, as in the case at bar, there is no question of fraud or collusion, and no concerted purpose between the village officers and plaintiff intentionally to evade or violate the law. A situation of that kind would present a question of fraud, and, both parties being participants, the courts would probably decline to aid either. The finding of good faith in this case negatives any such situation. Though defendant at one stage of the trial offered some evidence tending to show that the question whether the loan could properly be made without a favorable vote of the people

was brought before the council, yet the evidence offered fell short of disclosing a fraudulent purpose intentionally to evade the law, and the ruling of the court excluding it is not assigned as error. So that whether such a purpose participated in by both parties, the city authorities and the other contracting party, would present a case of nonliability, we need not determine. As heretofore stated, our later decisions on principle sustain the rule of liability on facts like those here presented. (Citing cases). We follow and apply the rule adopted in these cases, and hold, on the facts found by the trial court, defendant liable as upon an implied promise to repay the money."

A Federal decision often cited holds: (*Geer v. School District*, 111 Fed. 682, 684)

"From the foregoing provisions of the laws of Colorado, it is obvious, in our opinion, that it was left to the voters of school districts to determine whether there should be one or more buildings, how much they should cost, and whether they would raise a tax to pay for the same themselves, or whether they would create a bonded indebtedness, and saddle the payment of the same upon posterity. The record of this case shows that they attempted to adopt the latter course. They secured a valuable school building, and attempted to pay for the same by the issue of bonds which were, ab initio, void. The question for our determination is whether, under the constitution and laws of Colorado, the proceedings taken and acts done by the district created an indebtedness which may be lawfully asserted against it, notwithstanding the fact that the person from whom it borrowed the money unwittingly accepted void bonds as evidence of his right against the district.

"It is urged upon us that the only indebtedness which the district might create for the building of school houses was a bonded indebtedness, and that inasmuch as there was a statutory barrier against the creation of any such indebtedness in excess of 3½ per

cent. of the assessed value of the property of the district, such barrier interposed a fatal objection to a recovery on the original consideration paid for bonds issued in excess of that limit. In the light of the foregoing analysis of the constitution and laws of Colorado, we cannot agree with this view. On the contrary, we are of opinion that the constitution and all the statutes relating to the subject in question, including section 4057, upon which reliance is mainly placed, clearly contemplate and provide for the creation of a general indebtedness to be liquidated by concurrent taxation if the qualified electors of the district so determine, as well as for the creation of a bonded indebtedness to be paid at a distant time in the future. It follows that the limitation as to the amount of permissible bonded indebtedness has no application to the other kind of indebtedness which might be created for the building of school houses, and which by the provisions of the law is limited only by the necessities of the district according to the judgment of the duly-qualified electors."

One of the important cases because of the frequency of its citation and further because it reversed the District Court and held the City liable on contract although it had stipulated that the work should be paid for by assessments and that the City would not otherwise be liable, comes from the Circuit Court of Appeals of the Third Circuit. It bases its decision largely upon the case of *Hitchcock v. Galveston* above cited and holds directly to the point that the City was the one that entered into the contract and it having broken its contract by giving invalid bonds and having as a city benefited from the improvement, it was held liable. The decision cites a number of cases where contractors were permitted to recover against the City although they had

agreed to look to the assessments alone for their payments.

The case referred to above is *Barber Asphalt Co. v. Harrisburg,* 64 Fed. 283; certiorari denied 163 U. S. 671. Other cases holding a town liable generally, because of invalidity in the proceedings had for special improvements to be paid exclusively by the benefited property owners are:

*Dakota Trust Co. v. Hankinson,* 53 N. Dak. 356; 205 N. W. 990.
*Durant v. Story,* 112 Okla. 110; 240 Pac. 84.
*Freese v. Pierre,* 37 S. Dak. 433; 158 N. W. 113.
*Cole v. Shreveport,* 41 La. Ann. 839; 6 So. 688.
*Oubre v. Donaldsonville,* 33 La. Ann. 390.

And the courts have held that where a municipality has used properties under contracts of purchase, which were in themselves void by reason of lack of power as construed by the courts, yet the municipality would be held liable for the reasonable value of the *use* thereof.

*Hogansville v. Planters Bank,* 108 S. E. 480 (Ga. App.)
*Shoemaker v. Buffalo Steam Roller Co.,* 144 N. Y. S. 741.

It must be borne in mind that the Town of Ryegate has used the water-system and the distributing plant for a period of eleven years without paying anything therefor; and common justice requires that payment should be made by the town for the use and benefit of this property under every doctrine which we have been able to find in the adjudicated cases.

A number of the cases cited deal with instances where *no election* was held. This is particularly true of *Eyer v. Mercer County,* 292 Fed. 292, and *Bank v. Goodhue,* 120 Minn. 362; 139 N. W. 599, from which case we have quoted a liberal excerpt. In the case at bar there was an election and the vote taken was favorably expressed for the procuring of a water supply for the Town of Ryegate, which should be owned and controlled by the town, and the revenues derived therefrom should be devoted to the payment of the debt. Judge Pray's decision coming nearly 17 months after the trial, completely overlooked the election as held and considered only that no election had specifically voted the credit of the town for the Special Bonds of District No. 4.

The recent opinion in *Edmunds v. Glasgow,* 300 Pac. 203, clears up the whole question of "power" to acquire a water-supply, etc. That power *was granted* towns by the legislature pursuant to the Constitution, a grant *in praesenti*—"town has power" (Sec. 5039, Subd. 64). The legal requirement of a favorable vote on an election on the "question" of exceeding the 3% limit, is the mode of its exercise. The vote *does not grant the power,* as Judge Pray assumes. The town already had it. Having the power it may, though irregularly, acquire the water-supply, etc. Such acquisition is not *ultra vires.*

## DEFENSES OFFERED BY THE TOWN OF RYEGATE

(Page references, unless otherwise mentioned, indicate *Printed Transcript.*)

### First Defense—Constitutional Debt Inhibition

The affirmative defenses are disclosed in the Answer

(p. 27). The "first affirmative defense" pleads facts and figures intended to show the Town of Ryegate as already indebted to the constitutional limit, and that if the town were imposed with the obligation of paying the special improvement bonds the indebtedness of the town would greatly exceed the indebtedness limit. This contention is covered at pages 135-142 of the brief insofar as such obligation may grow out of the obligation involuntarily imposed upon the town by reason of its failure to perform its duties in the premises. That argument need not be here repeated. The law is clear that such involuntary obligation is not a "debt" falling within the constitutional inhibition.

The effect of the constitutional provision when considered in connection with the obligation of the town in taking the improvements as for its own. That discussion will be found in another portion of this brief beginning at pp. 190-213, and we shall not discuss that line of authority here.

**Second Defense—Price Paid**

The "second affirmative defense" (p. 29) alleges that plaintiff purchased the bonds in question at 80% of their face value.

Before passing this second defense however we call the Court's attention to the fact that this second defense is not a good pleading under Montana Statutes. At most it is an assertion that there is no liability for 100%, but that the liability if any is only for the amount actually paid for the bonds, to-wit, 85%. This is clearly a partial defense.

Sec. 9146, *Revised Code, 1921* provides:

> "A defendant may set forth, in his answer, as many defenses or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defense or counterclaim must be separately stated and numbered. Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer."

The question of partial defense, however, is covered in the next section (Sec. 9147), which provides:

> "A partial defense may be set forth, as prescribed in the last section; *but it must be expressly stated to be a partial defense* to the entire complaint, or to one or more separate causes of action therein set forth. Upon a demurrer thereto, the question is whether it is sufficient for that purpose. Matter tending only to mitigate or reduce damages, in an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, is a partial defense, within the meaning of this section."

This section has been interpreted by the Montana Supreme Court to require a special pleading of partial defense:

*McKim v. Beiseker,* 56 Mont. 330, 336; 185 Pac. 153.
*Cornell v. G. N. Railway,* 57 Mont. 177, 195; 187 Pac. 902.

and the Federal Court for the Montana District has expressly held that a partial defense must be set forth in the words of the statute.

*U. S. v. Mullan Fuel Co.,* 118 Fed. 663, 668.

The Agreed Facts stipulate that these bonds were purchased at 85% face value. This defense can be nothing more than a partial defense, and we have shown at pages 60-62 of this brief that plaintiff's position is that of a bona fide holder, and authorities grouped under different heads throughout this brief clearly show that a bondholder in good faith is protected at least to the extent of his investment, no fraud being shown. Plaintiff's position in this case is that of one asking only the amount paid for the bonds plus interest thereon.

**Third Defense—Advice of Counsel Relied Upon, Etc.**

The "third separate defense" (p. 29) is to the effect that, in doing what it did in creating Special Improvement District No. 4, the town council had employed skilled counsel, whose advice was followed in every respect. As shown in other portions of this brief it is no excuse that the town was mistaken, although acting in the best of faith in making its arrangements. This is particularly developed in the opinion of *Barber Asphalt Co. v. Harrisburg,* 64 Fed. 283. It is also pleaded that Security Bridge Company relied upon its own counsel, who was skilled in such matters, and accepted the bonds in question knowing them to be special improvement bonds and not obligations of the town itself. In other portions of this brief we have shown that knowledge of the proceedings on the part of the purchaser or contractor does not relieve the obligation to make valid assessments. *Barber Asphalt Co. v. Harrisburg, supra;* and see *Eyer v. Mercer County,* 292 Fed. 292. It is further pleaded that plaintiff herein relied solely upon

the advice of its own counsel, who were skilled in such matters, and purchased the same knowing the town not to be liable itself and under the belief that the proceedings had were valid and binding obligations of the district. These allegations were denied in the Reply, but the cases developed in other portions of this brief, of which *Barber Asphalt Co. v. Harrisburg, supra,* is an example, clearly show that if the allegations are to be taken as wholly true the town is nevertheless liable for its failure to have made those proceedings legal and valid ones.

**Fourth Defense—Proceedings in Belecz Suit**

We come now to the most important of the defenses, the "fourth affirmative defense," which deals with the *Belecz* suit in the state court. Under appropriate headings we have already discussed the effect of this state suit as being insufficient as a bar under the doctrine of *res judicata;* and its inapplicability under the doctrine of *stare decisis* has been fully covered and discussed.

We believe the record as made and stipulated under the Agreed Facts to foreclose any question as to the actual improvement made within the district being different from the improvement resolved upon in the ordinances relating to the creation of the district and the notice relating to protests in that connection. As set forth at pages 90-96 of this brief we feel that the record is emphatic in its admissions and stipulations covering the nature of the improvements.

However, in view of the narrations made in the "fourth affirmative defense" we will briefly touch upon

the law relating to the contentions made in the state case without conceding the sufficiency of the record herein for such determination as a court has a right to require. These allegations are found (pp. 31-34) and appear to be a fair statement of the allegations contained in the *Belecz* pleadings, which are made an Exhibit to the Agreed Facts herein (pp. 68, 76-80). The attack made in the state court can be fairly grouped as follows:

1—Lack of jurisdiction to create Improvement District No. 4 or proceed with the installation "of said mains," it being alleged that the description in the resolution of intention was "construction of pipes, hydrants and hose connections for irrigating appliances and fire protection," which gave no definite information as to the specific character, extent or nature of said improvement; nothing in said description advised that a waterworks system or a system of mains was contemplated or would be installed, and that description included only pipes, hydrants, etc., did not include waterworks, system of mains, reservoir, pumping plant; that the improvements were entirely different and less extensive than the improvements actually made; that the description recited that improvements would be made in accordance with plans and specifications to be prepared, which were not then prepared, and were not on file or available; that the notice published relating to protest was defective in the same way.

2—That the cost of improvements exceeded the sum of $1.50 per lineal foot plus the cost of pipes laid, which was contended to be in excess of the legal limit.

3—That no notice of any kind was given of the letting of the contract for the improvement; that the contract price when let greatly exceeded the estimated cost and both contract price as agreed and actual cost

of construction was out of proportion to the value of the improvements.

4—That the special improvement bonds were not salable at par and the town council and mayor with such notice negotiated the agreement with the contractor, who took the bonds in payment of the contract price, the contract having been increased in price in order to take care of the discount and that certain extras were included therein.

### *Character of Improvements, Etc.*

Under the first group we have in repeated form the same allegations and contentions that the improvements actually made were entirely different from those resolved upon. This has been sufficiently discussed at pages 90-96 of this brief and we wish at this time to say nothing further other than that all the *references* available *in this record agree and show that the improvements* actually made within the district *were pipes and hydrants in fact.* The pleadings *admit such were constructed* and the *Agreed Facts stipulate that such were installed,* and the *Minutes of the Council indicate approval* of estimates for the *installation of pipes and hydrants.* The blue-printed *map shows* nothing but *pipes and hydrants installed* within the district. There is no record to the contrary other than the mere statement in the findings made by the state court, with respect to which no supporting evidence was offered whatever in the case at bar.

That portion of the first group which suggests insufficiency of the notice published for the hearing of protests requires the same answer as heretofore suggested respecting the contention of difference in the

improvements. We call attention, however, to the case of *Mansur v. Polson,* 45 Mont. 585; 125 Pac. 1002, decided in 1912, in which case it was held, in a suit brought to enjoin the proceedings *before* the work was commenced, that a notice relating to street improvements, which included graveling, was not defective because the contract awarded had omitted graveling. Contentions as to lack of availability of the plans and specifications must be considered *after* the happening of the work as the merest irregularity. The cases touching on this matter will be mentioned hereafter.

### *Legal Cost Limit*

Under the second grouping indicated by us, complaint was made of the cost of the improvement as exceeding $1.50 per lineal foot plus cost of the pipes laid. We shall show by the cases hereafter that a cost which develops out of the construction of the work which may be in excess of that first contemplated either by law or by estimates, cannot invalidate the contract itself. A contract entered into cannot be defeated because the ultimate cost is greater than that first contemplated. *At most it may be invalid for the excess.*

### *Notice—Estimates, Etc.*

Under the third group as stated by us, complaint was made that no notice was given of the letting of the contract for the improvement, and that the contract price when let was in excess of the estimated cost, and that both contract price and the actual cost of the construction was out of proportion to the value of the im-

provements to the property. The record herein discloses that publication was made of the notice to bidders (p. 214). Under this notice 8 P. M. April 14, 1920, was fixed for the time of receiving sealed bids for the construction. It appears that Security Bridge Company made a bid (p. 215) and this bid disclosed an offer on the part of that company to enter into a contract within ten days from that date. Any interested property owner was in a position to know from the publication when the bids would be received. His attendance at that time or inquiry thereafter would have given him desired information as to the bid made by the Security Bridge Company and the time within which the contract should be awarded. This should be a sufficient practical notice. However, we know of *no law,* and none has been suggested by defendant in its pleadings or otherwise, which *requires such notice* of the letting of a contract as complained of.

The further complaint was that the contract price was in excess of the estimate made and that the work as completed was in excess of and out of proportion to the value of the improvements made. The answer to this may be found in the Statute (Sec. 5227, Revised Code 1921) which provides only that "an approximate estimate of the cost thereof" need be made in the resolution of intention, and that the published notice shall state "the estimated cost thereof." Cases dealing with the matter of estimates will be shown hereafter, which support the position that the estimate is not conclusive unless made so by statute, and that mistaken estimates do not invalidate the contract in whole, but that the

contracts are valid up to the amount of the estimates, even where the law prohibits costs in excess thereof.

The contention that the cost of the construction is wholly out of proportion to the value of the improvements is met by the law which proceeds on the theory that properties improved in such fashion have their values enhanced by the cost of the improvement. In any event the record supplies no information with respect to the value of the property itself. In the absence of such showing this presumption must obtain.

### *Bonds Sold Below Par*

The fourth grouping deals with the contention that the bonds were sold at less than par by the arrangement concluded whereby the contractor took the bonds at par but increased the prices on the work in order to absorb that discount, all of which was alleged to have been done with the knowledge of the mayor and town council. For the present we content ourselves with saying that, conceding the truth of all the matters as alleged, with respect to which we must note in passing that no evidence or supporting testimony was introduced in the case at bar, such a sale would not invalidate the obligation to pay what the work was worth on a par basis, particularly when the work is completed and no action taken to prevent its installation, but the attack is made after the improvements are fully constructed, installed and accepted.

We will briefly refer to the following groups of authority touching upon the matters hereinbefore discussed, the length of this brief being such that we do

not care to set forth the full discussion which the cases justify, in view of the record herein, which should not open these questions for such determination as would be proper had defendant brought in evidence and testimony to support the *Belecz* allegations as a basis for redetermination in the federal court which is required under the doctrines of *Burgess v. Seligman,* 107 U. S. 20.

**Acquiescence, Delay and Waiver**

Plaintiffs in the *Belecz* case admittedly were in the position of having brought a suit some fourteen months after the completion of the work and nearly two years after the publication of the notices with respect to protests against the creation of the district. In the case at bar plaintiff herein must insist that its rights were fixed long prior to the bringing of the *Belecz* suit, and that being true the cases and the Montana statutes dealing with the matter represent real and tangible rights which accrued to plaintiff when it purchased the bonds. The cases dealing with property owners who bring suit before the work is commenced, and who are diligent in preventing the construction of work with respect to which they complain of defects, have no bearing whatever on plaintiff's rights herein or as affected by the *Belecz* proceeding.

We look first to the general law on waiver of rights by a property owner who stands by and permits the improvements to be made acquiescing therein, or with no more than a mere protest, but who resists collection of the assessment after his property has been benefited.

Such a property owner has no *right* to complain in equity. Plaintiff herein has rights based in part on such acquiescence as well as upon the 60-day statutes. We refer to the following:

**Authorities**

Where the law itself has provided a method for hearing objections before the council the property owner who does not exercise his right so to be heard will be held to have waived his right to object later.

*Moore v. Yonkers,* 235 Fed. 485; 9 A. L. R. 590.

Montana follows the rule so generally expressed in

Montana follows the rule as to estoppel and waiver so generally expressed in nearly every equity court in the country.

*Sec. 5237, Montana Revised Code 1921.*
*Harvey v. Townsend,* 57 Mont. 407; 188 Pac. 897.
*Power v. Helena,* 43 Mont. 336; 116 Pac. 415.
*Swords v. Simineo,* 68 Mont. 164; 216 Pac. 806, 809.
*Billings Assn. v. Yellowstone County,* 70 Mont. 401; 225 Pac. 996.

See also *Partee v. Cleveland Trinidad Co.,* 172 Pac. 945 (Okla.); 9 A. L. R. 606, holding that a property owner, who did make a protest before the commissioners and was overruled, but who did not proceed further either by appeal or by a suit in equity to restrain the proceedings, cannot stand by, see the work done, speculate upon the result thereof, and thereafter oppose the enforcement of the assessments.

*Damron v. Huntington,* 82 W. Va. 401; 96 S. E. 53; 9 A. L. R. 623, holds that one who protests but

whose protests are overruled, is not protected unless he further acts promptly in seeking an injunction to preserve the rights complained of, otherwise he will be compelled to have waived his rights by permitting valuable improvements to be made. Other important cases are *Bartlesville v. Holm,* 40 Okla. 467; 139 Pac. 273; 9 A. L. R. 627, and a great mass of authority compiled in the note in 9 A. L. R. following these cases, the note exhaustively covering the authorities as of the time of its preparation. (This note in itself is so voluminous as to cover 200 pages of printed matter, and is respectfully referred to in this matter.)

We specially refer to a few cases gleaned from different courts. In *Johnston v. Hartford,* 96 Conn. 142; 113 Atl. 273, the city charter required a vote where an expenditure exceed $25,000. The court holds an order made without such approval is not invalid for any purpose. A property owner who stands by, permits improvement work to be done, is estopped from later attacking validity of assessment on that account. In this case a period of one year had elapsed and a *protest had been made,* but no litigation prosecuted, although *a suit had been filed.* Laches was not relieved by mere filing; it must be followed up by a diligent prosecution.

*O'Brien v. Wheelock,* 184 U. S. 450, 491; 22 Sup. Ct. 354; 46 L. Ed. 636, supports the rule referred to, even where denial is made of the power to incur the obligation complained of. See also *Atkinson v. Newton,* 169 Mass. 240; 47 N. E. 1029, involving some slight variation in cost.

*Jones v. Gable,* 150 Mich. 30; 113 N. W. 577; *Farr v. Detroit,* 136 Mich. 200; 99 N. W. 19; *Vickery v. Hendricks County,* 134 Ind. 554; 32 N. E. 880, enforce the doctrine, even where lack of statutory power is asserted. To prevent such, an owner who is benefited, must act before the improvement is made. He cannot wait until the benefits have accrued and then claim statutory defects. *Avis v. Allen,* 83 W. Va. 789; 99 S. E. 188, requires suit to be brought before the work is done.

*Butters v. Oakland,* 58 Cal. App. 294; 200 Pac. 354, and *Raines v. Clay,* 161 Ga. 574; 131 S. E. 499, hold the making of a protest does not save property owner's position. His opposition must go further than mere protest; he must bring suit for injunction, or be estopped thereafter from complaining of the improvements made. *Mayor v. Brown Bros.,* 168 Ga. 1; 147 S. E. 80, expounds the rule as being broader than an estoppel. Immediate action is required to prevent the construction if one is not willing to pay for the improvement thereafter. *Marietta v. Kile,* 40 Ga. App. 73; 149 S. E. 54; *Farris v. Manchester,* 168 Ga. 653; 149 S. E. 27; *Cochran v. Thomasville,* 167 Ga. 579; 146 S. E. 462, hold that a litigating property owner must do equity; that is, offer to pay the fair value of the improvements before relief can be expected. *St. Louis v. Prendergast Co.,* 288 Mo. 197; 231 S. W. 989; affirmed 260 U. S. 469, holds that the same rule applies where jurisdictional defects are complained of. *Haislup v. Union Const. Co.,* 70 Ind. App. 308; 123 N. E. 426, holds a property owner who stands by is estopped, even where the proceedings are held to be void. *Breakenridge v. Newark,* 94

N. J. Law 361; 110 Atl. 570, holds where no jurisdiction obtained, the ordinances not having been passed under the appropriate laws, the property owner is estopped by acquiescence. *Platt v. Columbia,* 131 S. C. 89; 126 S. E. 523, is a case where the improvement was made without consent of the requisite number of voters, two-thirds being required, but not secured. A property owner standing by, is estopped to complain of improvements after completion.

The best recent case so far as analysis and discussion of the principles involved will be found in *Bass v. Casper,* 205 Pac. 1008; 28 Wyo. 387; 208 Pac. 439, wherein the court enters into a full and general discussion of the rights of property owners to attack proceedings after completion of improvements, where laws provide a means for hearing and adjustment of claims before the council, etc., With great care it analyzes the provisions of the Wyoming statutes and compares them with statutory provisions in other states.

A recent case which explains the underlying principles which may be applied in testing what defects are waived by failure to object is *Southlands Co. v. San Diego,* 297 Pac. 521. The tests suggested by the court in this opinion are the following:

1—Could the town council body under its powers correct the defect complained of?

2—Could the state legislature in setting up the statutory practice and proceedings have omitted the step complained of as being defective or lacking?

That case holds that if the town council could correct the defects under its power, or the state legislature

might have provided a practice which omitted the step altogether, the matter must be considered as an *irregularity,* and not a fundamental right which cannot be waived.

**Argument**

Applying these tests to the matters in the case at bar and in the *Belecz* case, what do we find with respect to all matters of cost, estimates of cost, statutory limitation of cost per front foot or lineal foot; matters with respect to the sale of bonds and price; notice of the specific character, nature and extent of improvements? We are obliged to say that the legislature could have waived any or all of these. There are but a few fundamentals, and these are due process, the right to a hearing in a reasonable way upon notice, and such a description of the boundaries of the district as will advise a property owner that his property is involved; and perhaps a description of proposed improvements sufficient at least to know their general nature. Other details can be left to the town council in working out price; the time involved, the method of payment. By the California test there was nothing whatever in the *Belecz* case to give the court pause.

***Estimated Cost, Etc.***

The fact that *no plans or estimates* were *on file* is not a ground of complaint by a property owner after the completion of the work, he having permitted the work to be completed without interference. *Wingate v. Astoria,* 39 Or. 603; 65 Pac. 982; *New Albany v. Crumbo,* 37 N. E. 1062; 10 Ind. App. 360.

The same rule obtains where *no estimates whatever* have been furnished, the work being completed. *Elkhart v. Wickwire,* 121 Ind. 331; 22 N. E. 342; *Walsh v. First Nat. Bank,* 139 Mo. App. 641; 123 S. W. 1001.

In *Branting v. Salt Lake City,* 47 Utah 296; 153 Pac. 995, an exhaustive discussion is made as to the power of a municipality to contract for improvements in excess of the estimates made, that case being one where the resolution of intention and corresponding notice made an estimate of $1.30 per front foot for a sewer improvement. The contract was let on the basis of $2.15 per front foot, notwithstanding a tender by the plaintiff property owner of $1.30 in payment of his assessment. The court held that equity would give no relief, the property owner having stood by and permitted the improvement to be completed. The procedure in Utah is given a thorough discussion and compared with other states, including Montana. The court holds the "estimate" not to be jurisdictional where the procedure permits a second hearing for the correction of assessments, which is the procedure in Montana. (Secs. 5237-5241-5243, *Revised Code 1921.*)

In *Pope v. Rich,* 293 S. W. 373 (Mo.), the estimate was $3,978.15. The contractor bid on a unit basis, which aggregated $3,799.50. The completed work cost $5,553.33. The Missouri statute read as follows:

> "No contract shall be entered into for any * * * improvements * * * exceeding such estimates."

The court held under that statute that the contractor's bid should prevail, since the extra cost had developed

from overhaul not covered by the contract, otherwise the engineer's estimate would have been the limitation. A contract would be invalid *only for such excess.* To the same effect is *Collins v. Ellensburg,* 68 Wash. 212; 122 Pac. 1010, which involved sewer improvements estimated at $6,000.00; actual cost $11,147.04; levy held good up to $6,000.00, following *Chehalis v. Cory,* 64 Wash. 367; 116 Pac. 875, where the estimate was $6,000.00, actual cost $14,812.50.

In *Pointer v. Chelsea,* 125 Okla. 278, 257 Pac. 785, contract was on a unit basis. The estimate was $142,-537.35; the completed work exceeded $150,000.00; no fraud was involved; held, the estimate was not jurisdictional but a mere irregularity and assessments for the *full amount* would not be set aside after the completion of the work.

In *Ennever v. Harrington Park,* 150 Atl. 571; 8 N. J. (Misc.) 448, the engineer's estimate covered 6,500 square yards of pavement, pavement actually laid covered 8,009.3 yards, and extra cost was in excess of $4,800.00. The excess was held not important.

The foregoing authorities pretty well cover costs, whether in excess of the "estimate" made in the notice, or in excess of a statutory figure such as $1.50 per lineal foot as to laying pipes, it being clear that *unless the statutes prohibit the cost from exceeding the estimate,* the *actual* costs, in the absence of fraud will be sustained, and that in all such cases the "estimate" or statutory amount is valid. If Judge Horkan was correct in a finding made in the state court (p. 87) then we have a value of $17,726.47 placed upon the pipe itself actually

used in the construction. This finding shows that 11,838 lineal feet of pipe were laid. This was also shown in the Council's Minutes (pp. 246-247). Laying this pipe at $1.50 per lineal foot we find $17,754.00 a legal limit for the cost of laying. This does not include hydrants, with respect to which thirteen were installed, as shown by the minutes above referred to, at a gross cost of $2,267.20. The total cost of pipe and hydrants plus the cost of laying the pipe is therefore $37,747.82. If to this shall be added the engineering expense at 6%, which was actually paid by the contractor as disclosed (p. 247), a total gross of $38,947.29 is reached. This is actually greater than plaintiff's demand herein, which is $38,762.06 (p. 55).

***Changes in Improvements***

The cases dealing with changes in the improvements actually made are practically to the same effect as those dealing with excess costs. No fraud being shown, reasonable differences are not of jurisdictional importance. This has been held by Montana in *Mansur v. Polson, supra,* where the change was that of omitting "gravelling" from the contract. We call attention to cases dealing with changes found in *Ennever v. Harrington Park,* 150 Atl. 571, where street corners were widened thereby making additional improvements, whereby the area paved was increased more than 20%, and this added cost was sustained. *In Richardson v. Denison,* 189 Ia. 426; 178 N. W. 332, a six-inch pavement was laid instead of seven-inch as called for by the original resolution. The difference exceeded 14%, but in the absence

of a showing that the pavement as laid was not practically sufficient for the purpose intended, the court refused to disturb the proceeding. In *Janutola, etc. Co. v. Taulbee,* 211 Ken. 356; 277 S. W. 477, street grading only was resolved upon in the initial resolution, while the contract covered grading and *drainage.* This was held good, first, as a matter of common sense and prudence, in order to protect the grading done; and second, because the notice stated that the work would be done in accordance with plans and specifications, to which reference had been made. (The notice in the case at bar also referred to the specifications which were to be filed thereafter.) Other cases dealing with the subject are: *Nelson v. Kearny,* 132 Atl. 299 (N. J.), *McArthur v. Picayune,* 156 Miss. 456; 125 So. 813. See also: 16 S. W. (2d) 1026, reaffirming the doctrine of the *Janutola* case on a second appeal.

### *Value to Property*

The contention advanced that the cost of the improvement was out of proportion to the value of the improvements is not open to a property owner after the completion of the work. This was determined in *Power v. Helena,* 43 Mont. 336; 116 Pac. 415, the case being one of a sewer improvement and the property involved was so located as not to be drained into the sewer under any possible arrangement. That case was published before the proceedings involved in the case at bar were initiated and fixed the Montana law for the purposes of determining plaintiff's rights herein. In that case *no benefit* could result to the property from the sewer

improvement involved. Had the property owner proceeded in timely fashion he could have had relief, but having waited until the work was completed his rights were gone under the 60-day statute. The *record* discloses no lack of value in any event.

### *Bond Disposal Below Par*

The matter of bond sales at less than par has been brought before the courts in other states under somewhat similar statutes and these decisions are worthy of our investigation. The State of Georgia has a statute providing that special improvement bonds:

> "Shall be sold at not less than par * * * or * * * shall be turned over * * * to the contractor at par value in payment * * * for the contract."

This is strong and clear language, much better phrased than the language of the Montana Statute, which the court in the *Evans* case refers to as awkward.

In *Bainbridge v. Jester,* 157 Ga. 505; 121 S. E. 798; 33 A. L. R. 1406, the Georgia court had before it a suit brought by a property owner and as representative of all who cared to join, praying an injunction against the city of Bainbridge and its officials to stay execution on account of property sales under levies made for special paving assessments. It appeared that the contractors in making their bids offered in each case alternative bids, *one for cash* and *one in bonds;* the successful bid was cash $1.29, bonds $1.65, and was awarded on the bond basis of $1.65 and assessments made accordingly. It was contended in the trial court that this condition invalidated the contract itself and was a proper basis for *set-*

*ting aside all* of the assessments against the property owners. On appeal the supreme court held that property holders were estopped from attacking this assessment when they stood by and permitted the property to be improved, making no move until the work was completed; that they then came too late, this on the general principle of laches. The same contract developed further litigation. See *Floyd v. Bainbridge,* 164 Ga. 316; 138 S. E. 851, and still later the case of *Bower v. Bainbridge,* 168 Ga. 616; 148 S. E. 517. In all of these cases the identical contract and underlying facts existed. In every case the court held the parties to be estopped by reason of their having permitted the work to progress without prosecuting any restraining suit. In the last case of *Bower v. Bainbridge* it was shown that the plaintiff *had* protested. This was *held not* in itself to be *enough.* A mere protest was insufficient to protect the plaintiff against claim of estoppel or laches. Further, however, the court held that had the plaintiff in the *Bower* case tendered into court the *cash* value of improvement, that is $1.29 per square yard rather than the $1.65 per square yard as assessed, the case would be different and a reassessment ordered. In the absence of such tender equity could not grant relief to one who did not offer to do equity on his part.

The State of Oklahoma has a series of decisions dealing with similar situations. *Kerker v. Bocher,* 20 Okla. 729; 95 Pac. 981, involved a contract which carried a provision within itself that the contractor would grant a *40% discount* to those property owners who paid cash for the improvements before the securities were issued.

This was held insufficient to invalidate the assessments. *Tulsa v. Weston,* 102 Okla. 222; 229 Pac. 108, 122, was a suit to enjoin assessments on account of improvements contemplated. It appeared that preliminary resolutions had regularly been enacted and adopted. The plan for payment in tax bills was disputed. The engineer's estimate, as made up, included a 15% market discount on the tax bills. The complaint also asserted fraud and collusion in this respect, by which the contract was claimed to be wholly void. Held that the proceedings, having been regularly adopted and in compliance with the law, a contract let thereunder must be considered final and conclusive as to price, in the absence of fraud or mistake, which the court did not find. Further, since the plaintiffs had not offered either to pay their assessments at the cash price, or to take up the tax bills at par, they could not be given consideration in a court of equity, it being apparent that the relief sought *was to evade any payment whatever* and secure the improvements at no cost to themselves. An effort was made to review this case in the United States Supreme Court, which, of course, dismissed the same for lack of jurisdiction (269 U. S. 540).

In *Beggs v. Kelly,* 110 Okla. 274; 238 Pac. 466, an injunction was sought against enforcement of assessments and to set aside assessments on account of paving within the city. The trial court directed a new assessment at 85%. The bonds to be used in payment for the construction work had been figured at 85% par value, the engineer having added 15% in his estimates to take care of such market discount. The work had been com-

pleted, the contractor had settled with one of the property owners for its share of the assessments at a 20% cash discount. The position in the lower court was, on the part of the plaintiff, that the assessments should be *invalidated in their entirety.* The city's position in the trial court was to hold the assessments liable for the *full 100%.* The supreme court followed the Supreme Court of Georgia's reasoning expressed (since departed from in that respect) in ***Bainbridge v. Jester;*** held the contract *not* invalid; and that the parties were estopped *after completion* of the work from enjoining assessments, and liable for the 100%.

By way of further authority, we quote from

*Dillon, Municipal Corporations* (5th Ed.) pp. 1400-1401:

"In disposing of the bonds, municipalities are frequently prohibited from selling them 'at less than the par value thereof.' The words 'par value' when so used mean a value equal to the face of the bonds and accrued interest to date of sale. * * * A *sale* of the bonds *at less than par,* contrary to the statutory direction, *does not affect the fundamental power* of the municipality *to make and issue the bonds; it is a mere irregularity in the exercise of its powers,* and the validity of the bonds is not affected thereby in the hands of innocent purchasers for value." Citing: St. Paul Gas Light Co. v. Sandstone, 73 Minn. 225; Citizens' Sav. Bank v. Greenburgh, 173 N. Y. 215; Mercer Co. v. Hackett, 1 Wall. 83; Woods v. Lawrence, 1 Black (U. S.), 386; Montpelier National Life Ins. Co. v. Huron Board of Education, 63 Fed. Rep. 778; Gladstone v. Throop, 71 Fed. Rep. 341; Greenburg v. International Trust Co., 94 Fed. Rep. 755; same bonds, 173 N. Y. 215; Knapp v. Newtown, 1 Hun (N. Y.), 268; Sherlock v. Winnetka, 68 Ill. 530; Atchison v. Butcher, 3 Kans. 104.

### *Belecz Facts*

Let us now look at the *Belecz* case and its surrounding facts:

The contention advanced as jurisdictional was specious in its contention that pipes, hydrants, etc., are wholly different from the improvements actually installed. The merest inspection of the map, Exhibit No. 1, attached to the Agreed Facts shows that nothing has been installed *within* District No. 4 other than pipes and hydrants, and the minutes of the meeting of November 24, 1920 (set up pp. 246-247) disclose that there was laid altogether:

| | |
|---|---|
| 8271 Lin. Feet 4" C I *Pipe* at $2.55.... | $21,091.05 |
| 2726 Lin. Feet 6" C I *Pipe* at $3.60.... | 9,813.60 |
| 841 Lin. Feet 8" C I *Pipe* at $5.04.... | 4,238.64 |
| 13 Fire *Hydrants* at $174.40..... | 2,267.20 |

The other matters referred to in the minutes touching excavation and construction at the reservoir and the pumping plant will, upon inspection of Exhibit No. 1, be found to be *entirely outside* the boundaries of the district. When the plaintiffs in the *Belecz* case stated in their complaint that there was nothing in the description advising plaintiffs that a water works system or a system of mains was contemplated, it must be read in connection with the whole record, which shows, and the Agreed Facts *affirmatively stipulate,* that the plan was that *$15,000 of general bonds* would be for the *reservoir, pump-house, pumping plant* and so much of the mains as it would cover, and the balance, which was in fact pipes and hydrants, would be taken care of through the

payment of special improvement district bonds. There is no magic in the words "water-works" or "water works system" as alleged in the *Belecz* complaint. The water-works involved in this case, as common sense indicates, are the well, included in the pumping plant, the pump house and the reservoir; all of the rest was made up of pipes and hydrants, and although the record does not show great detail, we have no doubt the hydrants had hose connections which could be used for irrigating appliances and fire protection. These are shown to be fire hydrants, and we believe that in its judicial knowledge the court recognizes that fire hydrants have hose connections. Improvement District No. 4, therefore, was created for the purpose of installing pipes, hydrants, etc.; they were installed under a single contract, which is in itself not illegal, which also provided for the construction of the water-works, (the reservoir, pump house, pumping plant) in addition to the pipes and hydrants. The Specifications provided that the $15,000 should go to the payment of the reservoir, pumping plant, pump house and so much of the mains as it would cover. There is not a word in the specifications to show that any of Special Improvement Bonds was predetermined to pay any portion of the cost of anything except that of pipes and hydrants. Now if it be true that in final estimates and settlement some portion of the bonds went to pay for some fraction of the cost of the pump house, reservoir or pumping plant, because of the insufficiency of the $15,000 general bonds proceeds to cover the same, then a court of equity may properly impose that portion of the expense upon the town itself, because there

is no doubt of the law that some unexpected increase of expense incurred in good faith in connection with improvements payable out of a general bond issue may legally be added to the expense of the town generally. See *Dillon, Municipal Corporations* (5th Ed.), Sec. 813, pp. 1225-1229.

If some portion of the cost assessed against the special improvement district was actually expended for some portion of the system outside the boundaries of the district, that amount may be determined by a court in equity, and, if suit be seasonably brought, this might result in some further charge as to a portion of the water mains which should be borne by the town generally and for which the special improvement district should be excused.

**Property Owners Estopped**

It seems to us, however, that after the work had been completed, Mike Belecz and the State Bank of Ryegate and other important citizens, should not be heard to complain after they had stood by and seen the expenditure of considerable sums of money on account of labor and material, so much so that there appears to have been invested by the contractor and the plaintiff herein money sufficient to purchase and install over two miles of water pipe sufficient to distribute water among the inhabitants of the district, and thirteen fire hydrants to provide a method of protecting against fire which might ravage and destroy their property. There is no doubt that all of these plaintiffs who had improved properties secured from their insurance companies re-

duced insurance rates upon the completion and operation of this system. They have saved in the intervening years substantial and considerable sums of money made possible by the construction of this system and the funds furnished to install the same by the plaintiff herein. Insurance premiums on stocks of goods, grain in warehouse, etc., are important expense items to a business; and if without fire-protection are often prohibitory in rates. The domestic user of water if forced to supply his own water from his own well in a semi-arid country would have a tremendous individual expense, plus personal inconvenience; no practical value to the plumbing attached to the sewerage system installed and to be paid for; no practical method of garden or lawn irrigation; and even the more serious aspects of impure water and faulty if not unhealthy sewage conditions. These conveniences and sanitary values are now freely enjoyed at the expense of the plaintiff, other than mere operative expense. It is difficult to express one's self touching the principles of morality and common honesty herein, where the Belecz plaintiffs asked the court to *excuse them from paying anything whatever* on account of the improvements installed and the benefits they enjoy therefrom.

No doubt it may be answered by defendant that these property owners and citizens are general taxpayers and as such they contribute something in the way of general taxes to take care of the interest on the $15,000 of general bonds, and that the benefits derived from the entire water system is paid for in that respect. If this were true, which cannot be conceded, it would be no

more than saying that because these citizens have other obligations which happen to attach themselves to the water system, they prefer and choose to be understood as willing to pay for the well and reservoir, and perhaps the pumping plant, but that plaintiff herein should expect nothing further, a sort of scaling down of their obligations by which in truth they pay some obligations and refuse altogether to pay others, a type of fractional or percentage honesty. Pertinently applied it merely means that they are willing to pay the *holders of the general bonds,* among whom plaintiff is *not* included, but do not care to pay the holders of the *special bonds* at all. Of course a reply to this would be that the taxes generally of the taxpayers only go to pay for the well, reservoir, pump house, etc., and that the distributing pipes and hydrants give them as great a service as does the pumping and storage portion of the system. In this respect the suggestions as to the insurance premiums would be equally pertinent. The distance from the reservoir, if water were stored there independently, or the distance from the well, which is completely across the town from the reservoir, is so remote from the locations of the property owners who seek to escape payment of their assessments, that if the distributing system were entirely cut off, insurance rates would immediately rise, since proximity to the hydrants, etc., is necessary in securing low insurance rates.

The cases are replete with expressions from courts touching upon similar matters. In *Fetzer v. Johnson*, 15 Fed. (2d) 145, 152, the court commenting on the benefits derived from drainage district improvements,

in which some of the land owners had paid their assessments while Johnson declined so to do and brought suit, said:

> "Some of the other landowners paid their assessments of benefits in full before the bonds were issued, and the balance needed to pay for the improvements was raised by the issuance and sale of the district's bonds. Their proceeds went to pay for improvements of Johnson's lands, not only the lands he owned when the district was created but other lands in the district which he bought after the improvements were made; and from the assessments on all of which he sought relief in the state court. A more inequitable attitude than that taken by Johnson can hardly be conceived. He asks that a court of conscience stay its hand and refuse relief while he will enrich himself at the expense of Fetzer." (the bondholder)

In the case at bar we have exactly that same general condition; the property owners in Ryegate would enrich themselves at the expense of plaintiff herein, who in good faith and for value bought the bonds issued by the town and furnished the money which provided for the town and its inhabitants a water distribution system, which it has used for more than eleven years at the present time and has paid on principal absolutely nothing. Under these circumstances we submit to the court that the proceedings in the state court cannot be followed as a *stare decisis,* and under all of the circumstances the state proceedings mean nothing other than a history of the conduct of certain citizens and town officials, whose moral sense deflated with the interruption of the town's prosperity.

### *Montana Law*

Montana cases are not lacking in support of the general rule of equity that laches and estoppel will prevail against a property owner who sits by and permits his lands to be improved, and thereafter seeks to resist payment therefor. In *Swords v. Simineo,* 68 Mont. 164; 216 Pac. 806, 808, the court said:

> "It has been held by this court that the owner of property within a special improvement district *cannot sit by and see improvements made benefiting his property and increasing its value, and then, after such improvements are made, refuse to pay for the same.* Power v. City of Helena, 43 Mont. 336, 116 Pac. 415, 36 L. R. A. (N. S.) 39. The complaint, as we stated before, does not disclose when the improvements were made. If he acquired his property prior to the making of the improvements, he is liable for the cost for the reasons stated in the Power Case. If he acquired his property after the improvements were made, he could not free it from liability to bear its proper part of the cost, even though he be a mandatory of the government." (Plaintiff was receiver of a national bank).

### *60-day Protest Statute*

In addition to the general rule of equity above referred to, there is a Montana statute, (Sec. 5237, *Revised Code, 1921)* which provides for the filing of a written protest, within sixty days after the date of the award of the improvement contract, specifying the defect, irregularity, etc., complained of, and a property owner failing so to protest will be deemed to have waived his right to complain. This statute is supported. *Shapard v. Missoula,* 49 Mont. 269; 141 Pac. 544; *Power v. Helena,* 43 Mont. 336; 116 Pac. 415.

### *Statute of Limitations*

We also call attention to the provisions of Sec. 9040, *Revised Code, 1921,* (enacted in 1919) which is a statute of limitation. It will be found in the following language:

> ***"9040. Actions to restrain bond issues, time for bringing.*** *No action cen be brought for the purpose of restraining the issuance and sale of bonds by any* school district, county, city, or *town* in the state of Montana, or for the *purpose of restraining the levy and collection of taxes for the payment of such bonds,* after the expiration of sixty days from the date of the order authorizing the issuance and sale of such bonds, on account of *any defect,* irregularity, or informality *in* giving *notice,* or in holding the election upon the question of such bond issue."

This act was in effect when the events herein transpired. We call attention to the language of this act, which is to be contrasted with the language of other statutes of limitation (Secs. 9027-9035). The preamble to the general statute of limitations reads:

> "The *periods prescribed for* the *commencement* of actions * * **are* as follows * * * within ten years * * * within eight years, etc. * * *"

The words used in Section 9040 are quite different; it is the language of prohibition; it declares: "No action *can be brought* for the purpose of restraining, etc. * * *" This language means something different from the language which merely *prescribes* a period. After the expiration of sixty days from the date of the order for the issuance and sale of the bonds the statute declares "No action can be brought," and this is the language of an absolute bar. Under this statute a court

has no jurisdiction over such an action. It differs from the usual statute of limitation which may be waived by an appearance. Under Section 9040, irrespective of waiver, the action cannot be brought, *the cause of action is destroyed.*

Under Ordinance No. 29 (pp. 40-46) by Section 1 it was declared "there shall be executed and *issued* negotiable coupon bonds" of District No. 4, and in the same section:

> "Said bonds *shall be issued,* dated and delivered *from time to time as may be necessary* in payment for the work * * **as the work progresses* * * *"

Under Section 6 (p. 45) it provided:

> "Each of said bonds shall be signed by the mayor and town clerk * * * and *said officers are hereby authorized* and directed * * * to execute the same * * * *in accordance with the proceedings heretofore had* * * *"

This ordinance was approved June 9, 1920. The language certainly authorizes the *issuance* of the bonds in question to be delivered when necessary as the work progresses. The contract had been awarded April 26, 1920. This statute thereby barred a suit touching the matters after August 9, 1920. The various meetings held in connection with the approval of estimates and awards (pp. 240-247) covered a period extending from July 28, 1920, to November 24, 1920. These minutes show that the *issuance of certain bonds* were directed by the council. The language of the several minutes varies in terminology but has a common meaning. Sixty

days after November 24, 1920, was an absolute limitation of the period if the earlier ordinance of June 9, 1920, were not already sufficient. For reasons respecting which we are not advised, in its defense to the *Belecz* suit the Town of Ryegate appears not to have raised the bar of this statute , thus disclosing further neglect and culpability on its part. Considering its inflexible language, it is submitted that this statute establishes a right of the bondholders. The U. S. Supreme Court is authority on this doctrine dealing with the Interstate Commerce Act and its two-year period for bringing of actions. The language of that Act is:

"Shall be filed * * * *within* two years, and *not* after * * *"

The Montana law declares:

"No action *can be brought* * * * *after* * * * sixty days * **"

If anything the Montana law is the more emphatic. The limitation destroys the cause of action. It cannot be waived. *Kansas City So. Ry. v. Wolf,* 261 U. S. 133, 43 Sup. Ct. 259; *Danzer Co. v. Gulf & S. I. Ry.,* 268 U. S. 633, 45 Sup. Ct. 612.

As to *any defect in the notice* the *Belecz* plaintiffs therefore had *no* right to bring an action, the Town could not waive the statute, and the proceedings based thereon cannot affect the bondholders' rights which are entitled to full protection against such.

## DISCUSSION OF EVANS v. HELENA

The opinion of the Montana Supreme Court in *Evans v. Helena,* 60 Mont. 577, 199 Pac. 445, was published in July, 1921. That opinion, without doubt, was the inspiration for the filing of the *Belecz* suit several months thereafter. The *Evans* case was brought by a diligent property owner against the City of Helena to restrain the performance of work under a contract relating to street improvements. The case is important because the issues raised were somewhat similar to those in the *Belecz* suit against the Town of Ryegate. In the *Evans* case it was complained that the work to be performed varied widely from that stated in the resolution of intention and referred to in the notice relating to protests when the special improvement district was about to be created. We have referred to this feature of the matter in an earlier portion of this brief and it is enough now to say that the improvements contracted for in the *Evans* case were markedly different, in that storm-sewers were included in the contract which were not mentioned in the resolution and notice, and the change of parking widths, destruction of old street-curbing, etc., were equally lacking. The suit being brought before the work had commenced, the court decided, and we think properly, that an injunction should issue to restrain the performance of the work. We have shown repeatedly in this brief that the *work done* in the Town of Ryegate *was the installation of pipes and hydrants in fact,* and the *Evans* case is not applicable thereto.

A second contention in the *Evans* case related to the difference in contract price from that estimated and

published in the notice. The difference was not very large and the court passed the contention.

The third contention in the *Evans* case related to the disposal of the bonds whereby the contractor took the bonds at par prices, it being contended that with the knowledge of the town the contract price was increased to take care of a market situation which made impossible a cash sale at par. This was the first decision of the supreme court passing on the statute (Sec. 5250). The *Evans* trial showed testimony on the part of two different councilmen who were called as witnesses, each of whom testified that the market condition was known to him and was taken into consideration, and that he would not have awarded the contract had the market been otherwise. A third witness, an unsuccessful bidder, testified that in figuring his bid he took into consideration that the bonds could not be sold at a better price than ninety. With this record before it the supreme court held the statute to contemplate that bonds should *not* be sold when a market condition did not permit their sale at par and that the payment of the inflated contract price in bonds rather than cash was the same as a sale below par. The court seems to say that when a market condition is such that the bonds cannot be sold at par, the statute should operate to prevent their issuance and sale. The suit being brought before the work was commenced or any of the bonds issued, the court properly enjoined the issuance of the bonds, and such was the further holding of that case.

The *Belecz* complaint was drawn to take advantage of the *Evans* decision, as a casual reading will demon-

strate. We point out the following important differences, referring now to the matter of bond disposal:

First—The *Evans* case was brought *before* any of the work was done or any of the bonds issued. Under such circumstances the court properly should restrain irregularity in order that the matters may be corrected. Contrast this situation with the *Belecz* complaint, filed twenty months after the contract was awarded, and more than a year *after* the *issuance of all* of the *bonds and* the *completion of all* of the *work*. Equity looks with a different eye on the property-owner who is diligent, than one who sits by and speculates upon the result and the attendant cost and, after the work is completed and the contractor has expended for labor and materials all that has been required, and investors, upon the faith of the pledge, have given their funds as a loan to the property owners and the town resists payment of his assessments on grounds relating to initial irregularities and defects which were as well known to the property owner at the time the contract was awarded as it was twenty months thereafter.

Second—The *record* made in the *Evans* case was fairly complete in showing the market condition touching disposal of the bonds at less than par. In the record herein there is nothing to support the *Belecz* plaintiffs touching the bond market in the Town of Ryegate. The court cannot assume that the bonds were in fact disposed of under a scheme whereby the town and the district did not receive their money's worth. We must consider the time of the construction work and the proposed improvements. The entire country, as the court

judicially knows, was at the apex of a great inflation in the years 1919 and 1920. Prices were extremely high, both as to labor and material. A contractor, in order to be safe in making a bid, because of rapidly advancing prices of material as well as wages, was obliged to figure a margin of profit which under more stable conditions might seem high. The record discloses that the same contractor installed the sewerage system (p. 212) and that the specifications herein covered both sewerage and water systems. It may well be that the contractor was willing to forego all of the profit to be derived from the distributing pipes and hydrants installation, by disposing of the special improvement bonds at eighty-five, the contractor looking only to the profit which he should earn from the other work being done, including that portion of the water system paid for by the general bond issue and the sewerage construction. In a small town somewhat remote from supply of materials a 15% profit in 1920 would not be out of line, and that a contractor saw fit to waive his profit on one portion of the work in order that he might carry the entire job, suggests a very reasonable proposition.

The fact that plaintiff bought the bonds at eighty-five reflects no more than that in order to dispose of a relatively small issue and profitably carry the necessary expense involved in operating its business, particularly that of its investigators who first visited Ryegate, its salesmen, who thereafter should be obliged to meet customers, and incidental advertising and circulars, a price of eighty-five would not be out of line to retail at par a 6% bond. Most certainly nothing in the record indicates

or intimates overreaching in these transactions. Everyone then acted in the best of faith. There is nothing herein to indicate that the town officials acted under the impression that the bond market was such that the bonds would not be sold at par.

If it is to be argued under the *Evans* case that the statute deprives the town of power to issue bonds during the pendency of a subpar market, then we suggest the practical impossibility of determining such a market condition, particularly when dealing with securities of smaller municipalities. A small town has no open listed market where quotations can be accurately determined at a given time; the funded indebtedness is small in amount, particular buyers must be contacted. Whether a sale is subnormal depends entirely upon the success of a particular buyer and seller. It cannot be as a matter of law that special improvements determined upon in regular proceedings, and contracts entered into for the improvements as authorized by law, can thereafter be invalidated because of the result obtained in the sale of the bonds, the success or nonsuccess of which is to be *subsequently* determined on the principles of barter. There must be a more reasonable construction to be given the statute when applied to smaller municipalities, unless the language of the statute permits no other meaning whatever.

Third—The *Evans* case was the first determination of the Montana Supreme Court touching this statute in question. That determination was not made until more than a year after the contract in question was awarded and the bond authorized. A federal court is not bound

to accept a construction of a state statute made by the highest court of a state made subsequent to the entering into of the contract litigated in a federal court, which must exercise its independent judgment; and the cases almost uniformly observe that rule and depart from a state court's construction when its application would be a denial of justice. *Burgess v. Seligman,* 107 U. S. 20; *Thompson v. Perrine,* 103 U. S. 806, 817; *Tulare District v. Shepard,* 185 U. S. 1, 12, 18, 26; *Mankato v. Barber Co.,* 142 Fed. 329.

The trial court in the case at bar did not pass upon this contention. Judge Pray appears to have assumed that the decision in the state court made in the *Belecz* case governed the matter as a *res judicata.* Earlier portions of this brief have demonstrated the fallacy of this assumption and of course the *Belecz* decision has no value as *stare decisis* coming after the contract was entered into.

## CASES RELIED UPON BY JUDGE PRAY

Judge Pray's opinion in the case at bar (pp. 94-112), reported in 50 Fed. (2d) 219, relies upon the following authorities, which we shall briefly discuss.

The cases of *Rogers v. Omaha,* 76 Neb. 187; 107 N. W. 214, and *Bell v. Kirkland,* 102 Minn. 213; 113 N. W. 271, in no way oppose the contentions of plaintiff, but on the contrary are supporting authorities for plaintiff, and the case of *Moore v. Mayor,* 73 N. Y. 238, is entirely favorable to plaintiff's position so far as it goes, the facts being distinguishable.

*Gagnon v. Butte,* 75 Mont. 279; 243 Pac. 1085; *Capitol Heights v. Steiner,* 211 Ala. 640; 101 So. 451, and *Bank v. Weiser,* 30 Idaho 15; 166 Pac. 213, may be grouped together. Those cases deny the bondholder the right to hold the city for failure to make collections, etc., but the *statutes* involved *specifically denied any right against the city,* and further provided a right in the bondholder to foreclose his lien directly and without the city's assistance. The more recent decision of *Steiner v. Capitol Heights,* 213 Ala. 539; 109 So. 682, makes this clear. We have already discussed the *Gagnon* case and have shown *the statutes involved* in that case to *have been repealed* prior to the Ryegate happenings, and that the present Montana laws do not carry comparable provisions. Further, there was no laches on the part of the bondholders of the Ryegate issues because there had been no default, and therefore no right to ask a court's assistance, when the property owners in the *Belecz* suit undertook to destroy the underlying security.

*Stanley v. Great Falls,* 86 Mont. 114; 284 Pac. 134, deals with the constitutionality of the revolving fund act of 1929 and the language quoted by Judge Pray is used by way of argument to show the private interests in the unpaid bonds sought to be redeemed out of the revolving fund, thereby disclosing the unconstitutional feature of applying public funds to a private purpose. The case is not in point.

*State v. Jeffries,* 83 Mont. 76; 270 Pac. 638, holds county property to be subject to an improvement assessment. It also holds that special improvement liens are

extinguished by general tax foreclosures. It has no bearing on the case at bar.

*In re Pomeroy,* 51 Mont. 119; 151 Pac. 333, deals with retrospective laws touching escheat.

*Windfall City v. Bank,* 172 Ind. 679; 87 N. E. 894, correctly states the rule as to the initial liability for the payment of special improvement securities. The case holds the city not liable for an assessment which had been made on school property which was exempt. The opinion cites with approval *Spydell v. Johnson,* 128 Ind. 235; 25 N. E. 889, discussed at greater length in an earlier portion of this brief under the equity jurisdiction applicable. The more recent case of *Dublin v. State,* 198 Ind. 164; 152 N. E. 812, shows the Indiana rule to be in accord with the great weight of authority in holding a municipality liable for its breach of duty in such cases.

The cases of *Morrison v. Morey,* 146 Mo. 543; 48 S. W. 629; *Castle v. Louisa,* 187 Ky. 397; 219 S. W. 439, and *Atkinson v. Great Falls,* 16 Mont. 372; 40 Pac. 877, all hold in accord with the great weight of authority that the "indebtedness" inhibited by the constitution does not include special improvement obligations where the city has not directly pledged its own credit as of the first instance. We fully agree, as heretofore discussed, this has nothing to do with its liability for breach of duty to make valid assessments, etc.

*Deer Creek District v. Doumecq District,* 37 Idaho 601; 218 Pac. 371; is opposed to the federal rule and the great weight of authority with respect to estoppel. It is based on the peculiar provision of Idaho's Constitution. Montana has no comparable provision.

*Mittry v. Bonneville,* 38 Idaho 306; 222 Pac. 292, deals with bonds partially in excess of the legal limit and holds them good up to that limit, and bad only as to the excess. This has no direct bearing on the case at bar.

*Hitchcock v. Galveston,* 96 U. S. 341, is a case holding the city for a *quantum meruit.* The facts do not show the city to have had no direct liability, but the theory of the case and the sustaining argument is in favor of plaintiff's position here. With respect to such contentions it has been cited innumerably in the later decisions of the federal court. It does not oppose plaintiff's position.

*Litchfield v. Ballou,* 114 U. S. 190, does not pass upon the liability of a town under similar constitutional provisions, where the town has been guilty of a breach of duty. In this case the assessments and levies made do not partake of special improvement character. They were bad because of a failure to hold an election authorizing the excess indebtedness. Justice Miller, while emphasizing the value of the constitutional limitation does not hold that the town would not be liable for the return of property which can be identified, or for the payment of its value if it has used the same. The case involved an asserted equitable lien upon the water system, with respect to which the complainants hold only a fraction of the bonds, and the water system had been constructed with moneys secured from many other sources, including general taxation. The court was powerless to identify the property, which in equity belonged to the complainant, but it is clear that had it been able so to do the complainant would have had relief. *Litchfield v. Ballou* has

been cited in numerous cases. We respectfully refer to Judge Kenyon's discussion and distinction found in *Scott County v. Advance-Rumley,* 288 Fed. 739; 36 A. L. R. 937, which last case holds that a general estoppel will be raised against a municipality where it has used the property, notwithstanding contract void as made without prior appropriation. He shows that under inequitable circumstances a municipality will be estopped to deny its liability. Careful research is shown in this opinion, which is commended to the court for a careful reading.

*Eaton v. Shiawassie County,* 218 Fed. 588, held a contract void as to the excess in connection with a courthouse construction in Michigan. The Circuit Court of Appeals for the 6th Ciruit for itself construed the Michigan Constitution to prevent such excess. This had nothing to do with a special improvement or a breach of duty connected therewith. We contrast this decision with the more recent case in the same circuit of *Eyer v. Mercer County,* 292 Fed. 292, affirmed at 1 Fed. (2d) 609. The *Mercer County* case held the county liable, notwithstanding its failure to hold an election, and notwithstanding apparent knowledge of defects on the part of the noteholder who advanced the funds in the first instance. The principle is one of common honesty and morality. Where the money has been received it must be repaid when applied to an authorized municipal purpose.

*Santa Cruz v. Wykes,* 202 Fed. 357, is a decision by this court which holds the City of Santa Cruz liable for bonds which may have been invalid when issued, but subsequent legislation permitting a larger percentage of

indebtedness to be created was effective to validate them. The case discusses the broader liability of a municipality when dealing with a water-system and other activities which are proprietary in their nature as distinguished from governmental. The case is an authority in plaintiff's favor if it has any bearing at all.

*Moore v. Nampa,* 18 Fed. (2d) 860, was decided by this court recently. It was thereafter reviewed on certiorari by the Supreme Court. (See 276 U. S. 536, 48 S. Ct. 340). The case originated in the District Court of Idaho. The City of Nampa made a sewer improvement under the Idaho laws.

The Idaho statute provides that no contract shall be made for work at a price in excess of the estimate. The language is prohibitory. The Montana statutes do not prohibit such excess, the resolution of intention need only be an "approximate estimate."

The Nampa *bonds in question were entirely an excess issue.* The original estimate upon which bonds were issued had been found insufficient upon the completion of the work and supplemental ordinances were adopted which attempted to legalize a defective estimate with respect to which there was no statutory authority whatever. It must be recognized that a municipal corporation has no powers except as granted by the legislature. It was therefore *wholly without power at any time under any circumstances to issue valid bonds for the excess costs.* Montana has no similar legislation unless it be found in the statute relating to a price of $1.50 per lineal foot for the cost of laying pipes, which under the authorities would be valid to that amount under any cir-

cumstances. The Ryegate issue involved herein is not an excess issue, even under that construction.

The Idaho statutes include a thirty day limitation for the bringing of suits by property owners to test the legality of improvement proceedings. The excess bonds were authorized January 10, 1921. A property owner, Lucas, brought a suit February 5. The bonds were delivered March 8 to a bond house notwithstanding, who sold them to the plaintiff July 13. The bonds carried a general recital as to the validity and the performance of all things necessary to be done, happened and performed. Certain officers of the city signed a separate but false certificate to the effect that no litigation was pending or threatened, which accompanied the bonds at the time of their delivery, March 8. Upon this false certificate *and the transcript of the proceedings, which disclosed the issue to be wholly an excess issue,* attorneys for the bond house gave an opinion that the bonds were legal.

The property owners' suit proved to be successful and the bond issue was invalidated and the assessments enjoined against by the Supreme Court of Idaho. Thereafter the owner of the bonds brought his action *in tort* for *neglect* and *false representations* made. The neglect contended for was failure to make valid ordinances respecting the excess upon which valid assessments could be predicated, and the false representations were declared upon as growing out of the recitals and the separate, unofficial but false certificates as to no pending litigation.

The Federal Supreme Court holds there to be no such neglect, since the proceedings were wholly that of attempted authorization of excess bonds which were necessarily invalid. They were void from the beginning, there being no power to issue excess bonds under any conditions. That being true, there was no obligation to make valid assessments to support them.

The Federal Supreme Court further holds that the representations complained of *were not made to the bondholder* who purchased his bonds months after this representation was made to the bond house. No representations had been made by the officers of the town to the bondholder at all. There was no legal authority for these officers to make such a certificate to anyone. And further, the opinion of attorneys to the effect that the issue was valid could not bind the city, they being mere expressions of opinions of other parties.

The case further discloses that *the transcript* of the proceedings furnished *fully disclosed all of the defects, and* since knowledge of the law is imputed to all parties dealing therewith, it must be held that *knowledge of illegality was brought home to the bond house.* Being special improvement bonds and not negotiable, the ultimate purchaser had no better right than did the bond house.

This has no bearing whatever as determinative of the matters in the case at bar. Reygate was not dealing with an excess bond issue. The transcript of the proceedings, if furnished, could not disclose under any circumstances that the entire issue was void for excess, whether it be in excess of estimated costs or of the cost

of pipe plus a legal laying cost. The Montana statutes do not prohibit excessive costs *ex vi termini.*

It must be noted with care that the *Nampa* case was reviewed on a certiorari based upon a number of cases cited in the note as being in conflict with the decision of 18 Fed. (2d) 860. The cases noted include *Barber Asphalt Co. v. Denver,* 72 Fed. 336; *Barber Asphalt Co. v. Harrisburg,* 64 Fed. 283 (certiorari denied 163 U. S. 671); *Mankato v. Barber Asphalt Co.,* 142 Fed. 329; *Bates County v. Wills,* 239 Fed. 785, 789; and others. In concluding his opinion Justice Butler takes pains to say that the *Nampa* case does not conflict with these authorities, which our earlier discussion has shown to be in accord with plaintiff's position in the case at bar. Further he limits the opinion to the precise form of action and allegations of negligence made.

## ERRONEOUS ASSUMPTIONS BY JUDGE PRAY

In reading the opinion of Judge Pray we are impressed with the court's errors in *assuming facts and* underlying *conditions to exist, which assumptions are inaccurate* and *not in harmony with the existent facts and history.* Judge Pray in passing refers to the bond issue as having "been declared illegal and void." (p. 94) The State Court did not so decree as we have heretofore demonstrated. Its decree touched only the levies and assessments made on the specific real estate described (p. 91). Again (p. 95) the court is inaccurate in referring to the improvements actually installed as a "waterworks," "water system of reservoirs, pumping plant," etc., whereas the scheme was planned (p. 212)

to pay for those items out of the $15,000.00 general bond issue. And the court *in the absence of a record herein* states (p. 95) that timely protests *were filed as provided by law,* whereas no such *issue* was before the court and the town in the *Belecz* case had sworn (p. 82) that *no* such protests were made, and the *Belecz* plaintiffs admitted (p. 83) such assertion!

Plaintiff's position is inaccurately stated by the court (p. 96)) to mean that the town had no authority to create special improvement districts. That is not plaintiff's position as the pleadings demonstrate, but some argument was made to the court that if the town had no authority to create District No. 4—an improvement for the entire town's benefit, though at the expense of property within the district only—one theory— the town would be liable under its general powers in quantum meruit. That is an alternative theory of liability on the town's part; but plaintiff, as this brief discloses, contends that the town created the district and further breached its duties relating to valid assessments, etc., touching the same.

Again (p. 97) the court refers to the bonds being declared invalid, excepting the $15,000. There was no declaration or decree of any bond invalidity. The court errs again (p. 97) in saying the town found $15,000 to be the maximum amount of issue possible without taxpayers approval. Under the Montana laws (Sec. 5039, subd. 80) *no bond can be issued without a taxpayers vote* of approval. There is no record herein of such a question being raised or discussed much less "found." This statement is wholly *ex gratia,* and the

error is repeated (p. 98) when the court states that the method adopted was to do indirectly what it could not directly do "without an election and favorable majority vote." The law required an election, and an election was held on the general bond issue and the question of exceeding the 3% limitation. The *law makes no limit* on such bonded debt for acquisition of a water system (Sec. 5039, subd. 80) since the ten percentum limit applies *ex vi termini* only to sewerage systems. *Edmunds v. Glasgow,* 300 Pac. 203.

Again (p. 98) Judge Pray states that plaintiff claims to have no recourse against the district because of the State Court decree. The reason stated is an error. Plaintiff has no right directly against the district because the district is not an entity; it is not a municipality; it cannot be sued; it has no officers; it has no legal status other than a mere physical subdivision of a town. It is about the equivalent of a precinct. Plaintiff's rights are of necessity against the town, even as a foundation for enforcement against the properties. It is also charged with certain duties in the premises. The former statutes gave the bondholders a direct right of enforcement against the benefited properties, but that was repealed as heretofore explained in discussing *Gagnon v. Butte,* 75 Mont. 279, 243 Pac. 1080.

Further (p. 99) the court asserts that if the question had been submitted to the taxpayers the town's obligation would be clear. The $15,000 bond issue and the question of exceeding the constitutional 3% limitation were submitted to the taxpayers and favorably voted upon. But the court assumes no election to have been

held (p. 100) in order to save expense. *This is entirely a mistake.* An election was held and the expenses incurred, and the $15,000 issue is based thereon. The court (p. 103) once more assumes that $15,000 was the maximum direct obligation which the town could legally incur. That is wholly wrong. The Constitution, Art. XIII, Sec. 6, makes no limit as to water supply, etc., if a vote is had; and the Legislative Assembly (Sec. 5039, subd. 80) made no limit against water, but fixed a 10% limitation on sewer, while requiring an election and vote in order to validate *any amount of bonds,* irrespective of limitations. This error in the assumption of no election is repeated (p. 111). Apparently Judge Pray has believed the election should have specifically authorized as a direct obligation of the town, the $45,-602.40 issue of special bonds involved herein. That is not necessary under the doctrine of *Carlson v. Helena,* supra. In these erroneous assumptions of fact may be found support for plaintiff's *Assignments of Error* Nos. I, V, VI, VII and VIII.

The court (p. 109) assumes that questions might be advanced before the State Court, but not in the Federal Court now. This error grows out of the legal assumption of *res judicata* which is of course not involved. See pages 63-72 of this Brief.

## LIABILITY BASED UPON UNJUST ENRICHMENT

At the opening of this brief we have suggested the application of the broad principle of unjust enrichment as an underlying basis of liability asserted herein. Here and there throughout the cases one will occasionally find the expressions of judges to the effect that municipalities on the principles of common honesty and morality have no more right to enrich themselves at the expense of contractors or bondholders than a private corporation or an individual. This is particularly true where the municipality has received the benefits in the form of a municipal plant. And in the case at bar it must be remembered that a water-system and distributing mains and hydrants are involved, which, although they may as to the latter be a proper basis for a special improvement within a special improvement district, they may on the other hand properly be classified as a general improvement for a municipality itself and for its inhabitants irrespective of the confines of an improvement district. This is the more emphatic when, as in the case at bar, the Town of Ryegate had no other municipal water system whatsoever. It is indeed assumed by Judge Pray that the town might have installed the entire water-system and the distributing mains at the expense of the town had the procedure been so developed.

The principle of unjust enrichment referred to was a favorite one with the late Dean Ames of Harvard Law School. To show the history of this underlying liability we refer to *"Lectures on Legal History"* (1913, University Press, Cambridge). This volume was published

after the death of Mr. Ames and contains his lectures on legal history touching various actions, their origin and underlying bases of liability. His Lecture XII (pp. 120-128) deals with the history of "Simple Contracts Prior to Assumpsit", and at pages 127-128, the author points out that as early as the 15th Century, obligations were enforced, although a promise was not present, money having been paid and received under expectation that performance would be made. A defendant might not rely upon the common law being insufficient to supply a remedy and equity would enforce the right and prevent defendant enriching himself at the expense of plaintiff.

In Lecture XX (pp. 233-242) the "Origin of Uses" is historically traced and the author points out (p. 234) the difference between legal and equitable relief in the early days, especially noting that where equity offered an exclusive remedy, as in recovering specific property by reason of fraud, return of consideration for a promise upon defendant's refusal to perform, etc., the author points out that in most of these cases it would be found that plaintiff was seeking restitution from a defendant who was trying to unconscionably enrich himself at plaintiff's expense, and that this early English equity of the 14th Century was giving effect to an enlightened sense of justice in order to supplement the rigor of the common law.

In his Lecture XIV on the subject of "Implied Assumpsit", which is also found in 2 *Harvard Law Review* 53, the author deals with the development of implied assumpsit and distinguishes quasi-contracts, pointing

out that quasi-contract rests upon the fundamental principle of justice, that no one ought to unjustly enrich himself at the expense of another. This discussion (pp. 160 to 166) shows the development of the action for money had and received as applicable thereto, traces its development through the earlier years until fully established in the days of Lord Mansfield.

We have referred to the foregoing to support the early statement of this brief and to show the broad principle as underlying not only general equity, particularly the law of constructive trusts, and to show the early tendency of equity to grant relief where the rigid principles of the common law were unresponsive. Then the development of the common law actions in the later years, and particularly the action of indebitatus assumpsit in Lord Mansfield's day, brought substantially the same relief, but based upon the identical principles, into the law courts. Applied to the case at bar, therefore, it is immaterial whether, so far as underlying principles are concerned, relief should be granted as in equity or at law, although the necessity of securing an accounting and to enforce necessary orders looking toward relief, make the remedies of equity as administered today more appropriate than the judgments had at law, unless the case is to be wholly determined upon the liability of the town itself in its breach of duties, with respect to which a judgment at law against the town for the full amount will fully compensate plaintiff herein.

See also text by Prof. Williston touching "unjust enrichment" found *I Williston "Contracts"*, pp. 4, 5,

and statement of Cochran J. at 292 Fed. 297, 298, in *Eyer v. Mercer County.*

In his opinion (Tr. 109, 110) Judge Pray states that many taxpayers are not benefited by the improvement made and had had no right to object thereto; and relied on the expressions of the Washington Supreme Court in the *German-American Bank* case in his position. Let us note first that that case and also the *Gagnon* case dealt with *street grading* improvements, which almost exclusively benefits the abutting property. The case at bar deals with the town's only supply and distribution of *water,* a first necessity to a community in a semi-arid locality, and such a necessity as to secure special Constitutional recognition for increased indebtedness. Many authorities refer to a water supply as the first of municipal needs both for domestic use necessary to health and comfort and protection against fire. Next let us note the construction shown by the map to be one where the pipes and hydrants are so located as to give the very greatest protection and use for the entire town, and so installed as to be the foundation of future extensions at a minimum cost. Again let us note that the taxpayers were liable on the general obligations of the town, the proceeds of which procured the water supply, reservoir, pumping-plant, etc., but did not provide distributing mains, much less fire hydrants. The general taxpayers' investment in well, reservoir, pumping-plant, etc., was practically valueless without the distributing pipes and hydrants, so that in fact the entire benefit secured by such taxpayers is in fact directly attributable to the pipes and hydrants paid for by plaintiff. Suppose these

outside taxpayers had successfully protested and defeated a proposal to acquire the distributing system, then their property would have had *no practical benefit whatever*. Further, we repeat that plaintiff was guilty of no lack of diligence, since no default had occurred prior to the *Belecz* suit and the attempt of the benefited property owners to escape liability for paying for the improvements which they were enjoying. To say the general taxpayers received no benefits in the case of water supply plus fire protection cannot be in accord with the actual facts. The property owners have been enriched at plaintiff's expense and the town is directly enriched as the owner of the improvement system which it operates as a proprietary business, respecting which its position is identical to that of an individual or private corporation; and unless the standards of municipal honesty are to be lowered to and supported at the level of one who acquires property of another under promise of payment, but who thereafter refuses to pay therefor, though using the same to his profit or comfort, the Town of Ryegate must be held liable to plaintiff herein. We are not dealing with such a *special* improvement as paving, sidewalks, curbing, lighting or even sewerage. This case deals with necessary water for the town.

## CONCLUSION

Briefly let us summarize the features of this case and the applicable law.

It is clear that defendant town should account fully to plaintiff with respect to moneys collected but not paid over to plaintiff as holder of all the bonds in question. Assignment of Error I is well taken in this respect.

There is no legal requirement that notice of the letting of the construction contract be given property owners. The published notice to bidders, however, gave equivalent information to those who might be interested. No issue in the pleadings is made touching such notice. The trial court erred in making such a finding and in basing responsibility of plaintiff thereon. If such a notice were required, it was defendant's duty, not plaintiff's, to give it. Absence of such notice could not legally assist the position of property owners who did not move to contest proceedings for more than 18 months. Assignment of Error II is well taken.

The testimony of *Thien* (p. 210) did not permit the introduction of evidence as to the estimate at the time of the contract's award. The court's finding thereon was not supported by the record, and Assignment of Error III is well taken.

The pleadings in the *Belecz* case, as frequently mentioned, alleged on the part of the town, and the Belecz plaintiffs by reply admitted, that no protests had been filed within the 60-day period. Judge Pray's finding that protests were duly filed is a plain mistake. Assignment of Error IV is well taken.

A scrutiny of the map of Ryegate and the location of the pipes and hydrants in relation to the town, plus the testimony of Roscoe (pp. 183-185), which is uncontradicted, conclusively shows the improvements as made to contemplate future additions at small expense to serve the entire town. The map shows mains and fire hydrants to be located at the very outside boundaries of District No. 4, so that the area for a considerable distance outside had the full benefit of fire protection and could attach service pipes for domestic use at very slight additional expense. The entire plan was plainly for the general benefit of the town and practically all of its inhabitants. Not a single dwelling outside the district was or is too remote to make a practicable service connection. Assignments of Error V and VI are well taken.

Assignment of Error VIII touches the Constitutional limitation of indebtedness. If the town is held liable for damages in failing to perform its duties in making valid assessments, then that liability is not "voluntarily" created and under all the authorities cited, the Constitution does not affect such. With respect to *quantum meruit,* the town voted to exceed the limit, it had the general power to acquire a water system, it has accepted and now uses such a system. In paying therefor it is not violating the Constitution but acting thereunder. And if there had been no such election, a respectable line of authority holds the town liable under general principles of honesty and justice, it having power under some circumstances, or use of certain methods, to acquire a water system, etc. Assignment of Error VIII is clearly well taken.

Assignment of Error VII goes to the entire subject of liability. We have shown several theories of such. There is no escape from liability whether at law or in equity for the moneys already collected; for damages in failing to set up valid machinery for collection, assessments, etc., or for the reasonable value of the system it has acquired and refuses to pay for. We have so fully discussed this liability that we only repeat that the defendant town cannot in equity or law be permitted to have and use this improvement without payment of the resultant obligation. Municipal morals are no different than those of individuals or private corporations.

Respectfully submitted,

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RYEGATE MONTANA
WATER SYSTEM
DISTRICT No. 4.
LEGEND
WATER MAINS
HYDRANTS
DISTRICT BOUNDARY
BUILDINGS
RESERVOIR
CITY LIMITS
DISTRICT BOUNDARY
FOURTH AVE.
SECOND AVE.
ALLEY
RAILWAY
AVE.
MAIN
CHICAGO MILWAUKEE AND ST. PAUL RAILWAY
SECOND FLOOD
WELL
N
RIVER
SECTION 6
SECTION 5
SECTION 7
SECTION 8