No. 6564

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

LUMBERMEN'S TRUST COMPANY,
a corporation,

Appellant,

—vs.—

THE TOWN OF RYEGATE, MONTANA,
a municipal corporation,

Appellee.

Brief of Appellee

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

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INDEX

Pages

General Statement 1

Town Not Liable, Regardless of Constitution 4

Constitutional Inhibition 19

Appellant's Cases on Constitutional Question 36

Appellant's Criticism of Judge Pray's Decision 41

Questions That May Be Considered Upon Appeal 48

No Privity Between Appellant and Appellee 60

Scope of Review 65

Right to Determine Entire Case in Equity 69

Plan A 72

Plans B and C 73

Plan D 74

The Belecz Case 75

Insufficiency of Description 79

Right to Sue in Federal Court 88

Res Judicata and Stare Decisis 89

Quantum Meruit 94

Recitals in Bonds 103

Appellant Not Bona Fide Holder 109

No General Liability from Town to Bondholder 114

Defenses Offered by the Town of Ryegate 120

CASES CITED

Pages

Addyston Pipe Co. v. Corry, 46 Atl. 1035 36-39-48-55-118
Aetna Co. v. Middleport, 124 U. S. 534, 8 S. Ct. 625 60-61
Albany Perforated Wrapping-Paper Co. v. John Hoberg Co., 109 Fed. 589 48-54
Atkinson v. Gt. Falls, 16 Mont. 372 20
Barber Asphalt Co. v. Denver, 72 Fed. 336 117
Barber Asphalt Co. v. Harrisburg, 64 Fed. 283 118
Bates v. Coe, 98 U. S. 31 48-51
Bates County v. Wills, 239 Fed. 785 117
Beggs v. Kelly, 238 Pac. 460 5-15
Billings Hdwe. Co. v. Bryan, 63 Mont. 14, 206 Pac. 418 115
Board of Education v. James, 49 Fed. (2d)91 111
Boston v. McGovern, 292 Fed. 705 20-27
Bozeman v. Sweet, Causey, Foster & Co., 246 Fed. 370 ... 20-27-37
Brooks v. Oakland, 117 Pac. 433 5-15
Buchanan v. Litchfield, 102 U. S. 278, 26 L. Ed. 138 20-23-25-103-106-119
Burgess v. Seligman, 107 U. S. 20 91-92
Butler v. Andrus, 35 Mont. 575, 90 Pac. 785 20-24
Caldwell v. Guardian Trust Co., 26 Fed. (2d) 218 111
Capitol Heights v. Steiner, 101 So. 451 5-15
Castle v. City of Louisa, 219 S. W. 439 5-15
Commerce Trust Co. v. Chandler, 284 Fed. 737 48-55
Commercial Bank v. Portland, 33 Pac. 532 118
Corpus Juris, Vol. 3, Sec. 618, Pages 718-19-20 48-49
Corpus Juris, Vol. 3, Sec. 625, Page 730 48-49
Corpus Juris, Vol. 44, Page 1131 20-35
Corpus Juris, Vol. 49, Sec. 333 (2), Pages 265-6 75-77
Cuddy v. Sturtevant, 190 Pac. 909 112
Dakota Trust Co. v. Hankinson, 205 N. W. 990 112
Dayton-Goosecreek Rly. Co. v. U. S., 263 U. S. 456, 44 S. Ct. 169 48-49
Deer Creek Highway Dist. v. Doumecq Highway Dist., 218 Pac. 371 20-31-95-100
DeJohn v. Alaska Natanuska Coal Co., 41 Fed. (2d) 612 ... 48-52

CASES CITED (Cont'd)

Pages

Dennis v. Willamina, 157 Pac. 799 118
Denny v. Spokane, 79 Fed. 719 36-40-118
Denver v. Denver Union Water Co., 246 U. S. 178, 38 S. Ct. 278 48-50
District Township of Doon v. Cummins, 142 U. S. 366, 12 S. Ct. 220 20-27-103-107
Dixon v. Field, 111 U. S. 83, 4 S. Ct. 315 103-106
Douglas County Commissioners v. Bowles, 94 U. S. 104 69
Duval Cattle Co. v. Hamphill, 41 Fed. (2d) 433 48-55
Eaton v. Shiawassee County, 218 Fed. 588 20-32-91-93
Edmunds v. Glasgow, 300 Pac. 203 36-103-106
Elkan v. Sebastian Bridge Dist., 291 Fed. 532 48-55
Evans v. Helena, 60 Mont. 577, 199 Pac. 445 76-82-85-87-89-90
Fairfield v. School Dist., 116 Fed. 838 112
First Nat. Bank v. Silver, 45 Mont. 231, 122 Pac. 584 75-77
Flagg v. School Dist., 58 N. W. 499 112
Flash v. Connecticut, 109 U. S. 371, 3 S. Ct. 263 91-93
Ft. Dodge El. L. & P. Co. v. City of Ft. Dodge, 89 N. W. 7 118-120
Gable v. Altoona, 49 Atl. 371 120
Gagnon v. Butte, 75 Mont. 279, 243 Pac. 1085 5-12-18-42
German Ins. Co. v. City of Manning, 95 Fed. 597 60-63
Gillette-Herzog Mfg. Co. v. Canyon County, 85 Fed. 396 95-103
Gould v. Paris, 4 S. W. 650 20-27
Great Northern Utility Co. v. Public Service Commission, 88 Mont. 180, 293 Pac. 294 95
Grosse, In re, 24 Fed. (2d) 305 48-55
Hampton v. Board of Commissioners, 43 Pac. 324 95-101
Harding v. Giddings, 73 Fed. 335 48-55
Hasbrouck v. Milwaukee, 80 Am. Dec. 718 5-15
Hedges v. Dixon County, 150 U. S. 182, 14 S. Ct. 71 20-27-60-63-103-107
Helena v. United States, 104 Fed. 113 48-52
Henderson v. Winstead, 215 S. W. 527 60-64

CASES CITED (Cont'd)

Pages
Hiland Park Mfg. Co. v. Steel, 232 Fed. 10 91-94
Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659 15-95-96-118
Holden v. Circleville L. & P. Co., 216 Fed. 490 91-94
Hough v. Rocky Mountain F. Ins. Co., 70 Mont. 244, 224 Pac. 858 75-77
Hull v. Burr, 234 U. S. 712, 34 S. Ct. 892 48-49
Jones v. Portland, 58 Pac. 657 118
Kansas City Life v. Shirk, 50 Fed. (2d) 1046 65-66-67
King Cattle Co. v. Joseph, 199 N. W. 437 109-110
Kuhn v. Fairmont Coal Co., 215 U. S. 345, 303 S. Ct. 140 91-93
Lake County v. Graham, 130 U. S. 674, 9 S. Ct. 651 20-26-103-107
Lake County v. Rollins, 130 U. S. 662, 9 S. Ct. 651 20-26
Lamar W. El. & L. Co. v. City of Lamar, 26 S. W. 1025 20-27
Leathe v. Thomas, 97 Fed. 136 48-55
Lepley v. Ft. Benton, 51 Mont. 551, 154 Pac. 710 20-24
Litchfield v. Ballou, 114 U. S. 190, 5 S. Ct. 820 20-23-24-28-35-44-119
Long Beach School Dist. v. Lutge, 62 Pac. 36 113
Louisville & Nashville R. Co. v. F. W. Cook Brewing Co., 223 U. S. 70, 32 S. Ct. 189 48-51
Mankato v. Barber Asphalt Co., 142 Fed. 329 36-38-117-118
Mayo v. Town of Washington, 29 S. E. 343 20-32
Mayor v. Planters' Bank, 108 S. E. 480 95-101
McClintock v. Gt. Falls, 53 Mont. 221 20-28
McEwan v. Spokane, 47 Pac. 433 118
McEwin v. Union Bank & Trust Co., 35 Mont. 470, 90 Pac. 359 75-77
McQuillin on Municipal Corporations, Vol. IV, Sec. 1796 76-83
Mercer County v. Eyer, 1 Fed. (2d) 609 45
Messinger v. Anderson, 225 U. S. 436, 32 S. Ct. 739 91-93
Mittry v. Bonneville County, 222 Pac. 292 20-31-95-100
Moore v. City of Nampa, 18 Fed. (2d) 861 5-14-46
Moore v. City of Nampa, 276 U. S. 536, 48 S. Ct. 340 5-14-46-103-109

CASES CITED (Cont'd)

Pages

Morrison v. Morey, 48 S. W. 629 5-15

Mote v. Incorporated Town of Carlisle, 233 N. W. 695 5-15

New First Nat. Bank v. Weiser, 166 Pac. 213 5-15

New Orleans Board of Liquidation v. Louisiana, 179 U. S. 622, 21 S. Ct. 263 91-93

Northwestern Bank v. Centervivlle, 143 Fed. 81 112

O'Brien v. Wheelock, 184 U. S. 450, 22 S. Ct. 354 20-27-60-63

Oklahoma City v. Orthwein, 258 Fed. 190 117

O'Neil v. Portland, 113 Pac. 655 118

Otis v. Cullom, 92 U. S. 447 60-63

Palmer v. Helena, 19 Mont. 61, 47 Pac. 209 20-24

Palmer v. Helena, 40 Mont. 498, 107 Pac. 498 20-24

Parker v. Butte, 58 Mont. 531, 193 Pac. 748 36-41

Perkins v. Boston & A. R. Co., 90 Fed. 321 91-94

Philadelphia Co. v. New Whatcom, 19 Wash. 225, 52 Pac. 1063 117

Potter v. Cincinnati I. & W. R. Co., 272 Fed. 688 48-55

Presidio County v. Noel-Young Bond Co., 212 U. S. 58 111

Prince v. Quincy, 105 Ill. 215, 21 N. E. 768 36-38

Read v. Lewis and Clarke County, 55 Mont. 412, 178 Pac. 177 115

Reilly v. Altoona, 19 N. E. 508 118

Richardson v. Grant County, 27 Fed. 495 95-102

Rodriguez v. Vivoni, 26 S. Ct. 475 48-51

Salt Lake City v. Smith, 104 Fed. 457 75

Santa Cruz v. Wykes, 202 Fed. 361 20-30-45

School Dist. No. 1 v. City of Helena, 87 Mont. 300 43

Schuk, Estate of v. Hauck, 66 Mont. 50, 212 Pac. 516 75-77

Scott County v. Advance-Rumley, 288 Fed. 739 44

Shapard v. Missoula, 49 Mont. 269, 141 Pac. 544 76-82-87-89-90

Smith v. Broderick, 40 Pac. 1033 20-27

Smith v. Pac. Improvement Co., 172 N. Y. S. 65 109-111

Stanley v. Gt. Falls, 86 Mont. 114, 284 Pac. 134 5-9

Stanley v. Jeffries, 86 Mont. 114, 284 Pac. 134 5-9

CASES CITED (Cont'd)

Pages

State v. Helena, 24 Mont. 521, 65 Pac. 99.....20-22-28-35-119-120
State v. West Duluth, 78 N. W. 115.....111

Statutes of Montana:

Constitution:

Art. III, Sec. 1.....95
Art. IV, Sec. 1.....95
Art. V, Sec. 1.....95
Art. XII, Sec. 11.....5-11
Art. XIII, Sec. 6.....20-21-28
Art. XV, Sec. 13.....11

Revised Codes, 1907:

Sec. 3413.....84
Secs. 3413 to 3416.....80
Secs. 3413 to 3417.....76-79-80
Sec. 3418.....76-79

Revised Codes, 1921:

Sec. 2269.....71
Sec. 5033, Sub. 3.....103-105
Sec. 5034, Subs. 3, 4, 5 and 8.....103-105
Sec. 5039, Sub. 64.....5-29-47-95-97
Sec. 5083.....103
Sec. 5205.....103-104
Sec. 5206.....103-104
Sec. 5207.....103-105
Sec. 5211.....103-105
Sec. 5214.....103-105
Secs. 5225 to 5257.....42
Secs. 5225 to 5265, Chap. 56, Part IV.....5-6-95-97
Sec. 5226.....73
Sec. 5238, Subs. (a) and (b).....42
Sec. 5238.....6
Sec. 5240.....6-42-124
Sec. 5247.....6

CASES CITED (Cont'd)

Pages

Sec. 5249 7-42
Sec. 5250 7-43
Sec. 5252 36-41-43-89
Secs. 5278 to 5281 29-103-105
Secs. 9027 to 9041 125

Session Laws:
1913, Chap. 89 42-76-79-80-81-82-84
1915, Chap. 142 76-80-81-84
1919, Chap. 175 76-80-81-84
1929, Chap. 24 5-9

Steiner v. Capitol Heights, 105 So. 682 5-15
Sutliff v. Board of County Comm'rs., 147 U. S. 230, 13 S. Ct. 318 103-108
Swanson v. Ottomwa, 106 N. W. 9 60-64
Tecumseh v. Butler, 298 Pac. 256 20-27
Thomas v. Kansas City So. Rly. Co., 277 Fed. 708 48-55
Towle v. Pullen, 238 Fed. 107 48-55
Troy Bank v. Russell County, 291 Fed. 185 112
Tulare Irrigation Dist. v. Shepard, 185 U. S. 1 69
Tuttle v. Claflin, 76 Fed. 227 48-54
U. S. v. Kettenbach, 208 Fed. 209 48-53
U. S. C. A., Sec. 398 65-66
U. S. Judicial Code, Sec. 274b 65
U. S. Mortgage Co. v. Sperry, 138 U. S. 313 15
U. S. Trust Co. v. New Mexico, 183 U. S. 540, 22 S. Ct. 172 65-67
White River Sav. Bank v. Superior, 148 Fed. 1 5-15
Wilson v. Merchants L. & T. Co., 183 U. S. 121, 22 S. Ct. 55 65-66
Windfall City v. First Nat. Bank, 87 N. E. 984 5-15
Wolfberg v. State Mutual Life Assurance Co., 36 Fed. (2d) 171 48-55
Yazoo & M. V. R. Co. v. Adams, 21 S. Ct. 729, 181 U. S. 580 91-93
Zacary v. City of Wagoner, 292 Pac. 345 20-27

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Appellee.

Brief of Appellee

GENERAL STATEMENT

This action was begun by appellant for the purpose of imposing a general liability upon appellee in the sum of $45,602.42, with interest thereon at six per cent per annum from January 1, 1922, in violation of the constitutional provisions of the State of Montana.

In the year 1919 it was desired to secure the benefit of a water supply and distribution system for a portion of the Town of Ryegate, Montana. The total cost of the work done was $60,602.42. Of this amount the Town of Ryegate raised the sum of $15,000.00 by the issuance and sale of its general obligation bonds of the par value of $15,000.00. To raise the addi-

tional sum of $45,602.42 the town attempted to create a special improvement district within the corporate limits of the town, embracing approximately one-sixth of the area of the town, and bonds of such special improvement district in the sum of $45,602.42 were issued and delivered to the contractor as the work progressed, in payment therefor. (Tr. 53 and map of town, copy of which is attached to appellant's brief.) The general obligation bonds in the sum of $15,000.00 are conceded to be valid and are in no way involved in this litigation. The indebtedness represented by the special improvement district bonds is the subject of this litigation.

The first assessment on property in the district for payment of interest and a portion of the principal of said special improvement district bonds became due November 30, 1921. In January, 1922 various persons owning property in the district instituted actions against the Town of Ryegate and the county treasurer of Golden Valley County, Montana, in which that town is situated, to restrain the collection of such assessments, the duty being imposed by the laws of Montana upon the county treasurer to make such collections. The grounds upon which it was sought to restrain such collection are set forth in subdivision V of appellee's answer. (Tr. 31) That litigation resulted in decrees holding that such assessments were null and void and restraining any attempt to collect same. (Tr. 89) No appeal has ever been taken from any of said decrees.

The only issue before the trial court was whether a money judgment for the sum of $45,602.42, with interest thereon, could be rendered against the town as for money had and received or on an implied contract for the balance due on the construction on such water system, evidenced by the invalid bonds of the

special improvement district of the town. (Tr. 8, 9, 94, 95, 96, 98, 111 and 179).

In appellant's brief there are numerous statements that an election was held in the Town of Ryegate to authorize the issuance of the general bond issue of $15,000.00 and to increase the general indebtedness of the town above the constitutional limit of three per cent. The record fails to show any justification for such statement. In "stipulation as to facts" (Tr. 82) it is agreed that the town could not legally and constitutionally issue sufficient general bonds to cover the entire cost of installation of the water system. In appellant's complaint (Tr. 2 to 9) there is no statement that any part of the cost of the system was paid by a general bond issue of the town.

Appellant, who purchased the bonds from the contractor, was not known to have any interest in the transaction until long after the contract for the construction of the system and payment therefor by the issuance and delivery of the bonds in question was entered into. (Tr. 204, 205, 206, 207, 208, 230, 232, 233, 234, 235, 236, 248 and 249). Appellant's name never appeared in the minutes of the town council. (Tr. 123). The improvement district bonds were accepted by the contractor in full payment of cost of constructing system over and above that paid by the issuance and sale of the general bonds of the town. (Tr. 117, 129, 213). Contrary to the allegations of appellant's complaint, the officers of the town did not importune appellant to buy the bonds in question. (Tr. 230, 231, 232 and 236). There is no testimony in the record that the officers of the town ever did so.

On page 270 of appellant's brief it is asserted that "not a single dwelling outside the district was or is too remote to make

a practicable service connection" with the water system in question. In "stipulation as to facts" (Tr. 57) it appears that "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 purpose, as the same was installed."

As the issues were framed and presented to the trial court, only two questions arose:

1. Is a city or town in Montana liable for a debt represented or evidenced by the bonds of a special improvement district therein, which, by their terms, are made payable from a special fund derived from special assessments upon and against the real property within the district?

2. If so, can the Town of Ryegate be held liable in the case at bar in view of the provisions of Section 6 of Article XIII of the Constitution of Montana?

We shall discuss those questions, and they were the only ones presented to the trial court for its determination, in the order named.

WOULD THE TOWN OF RYEGATE BE LIABLE FOR THE PAYMENT OF THE INDEBTEDNESS IN QUESTION IF IT WERE NOT FOR THE INHIBITION OF THE CONSTITUTION OF MONTANA?

POINT AND AUTHORITIES

The statutes of Montana provide that all warrants and bonds of a special improvement district are payable from a special fund derived from special assessments upon the real property within the district and that such bonds and warrants shall so

state. Because of such statutory provisions, there is no liability from appellee to appellant.

> Chap. 56 of Part IV, Secs. 5225 to 5265, R. C. M. 1921; Chap. 24, 1929 Session Laws of Montana; Stanley v. Jeffries, 86 Mont. 114, 284 Pac. 134; Stanley v. Gt. Falls, 86 Mont. 114, 284 Pac. 134; Gagnon v. City of Butte, 75 Mont. 279, 243 Pac. 1085; Moore v. City of Nampa, 18 Fed. (2d) 861; Moore v. City of Nampa, 276 U. S. 536, 48 S. Ct. 340; New First Nat. Bank v. City of Weiser, 166 Pac. 213; Town of Capitol Heights v. Steiner, 101 So. 451; Town of Windfall City v. First Nat. Bank, 87 N. E. 984; Castle v. City of Louisa, 219 S. W. 439; Morrison v. Morey, 48 S. W. 629; White River Savings Bank v. Superior, 148 Fed. 1; Steiner v. Capitol Heights, 105 So. 682; Brooks v. City of Oakland, 117 Pac. 433; City of Beggs v. Kelly, 238 Pac. 460; Sec. 11, Art. XII, Constitution of Montana; Hasbrouck v. City of Milwaukee, 80 Am. Dec. 718; Mote v. Incorporated Town of Carlisle, 233 N. W. 695.

ARGUMENT

In discussing this question, frequent references are made to statutory provisvions, and while the proceedings which are involved in the determination of this case were carried on in the years 1919 and 1920, the codes of 1921 contain the statutes which were then applicable, and for convenience we will refer to those codes instead of to the session laws then existing.

Two complete systems are provided by our law, under either of which the benefits of public improvements such as water works and sewer systems may be secured by the inhabitants or a portion of the inhabitants of a city or town. One of these systems is provided for by paragraph 64 of Section 5039 of the 1921 Political Code. Thereunder it is provided that a city or town council has power to contract an indebtedness on behalf of a city or town for the construction of a water works system supplying the city or town after the proposition has been sub-

mitted to the vote of the taxpayers affected thereby and the majority vote cast in favor of the improvement. Thereunder, of course, the debt becomes and is a general obligation of the city or town. The other of these systems is provided for in Sections 5225 to 5265 of the 1921 Political Code and contemplates the creation of a special improvement district embracing the property to be benefited by the improvement, and providing for the payment of the cost of the improvement to be borne by the property benefited.

It sufficiently appears from the pleadings and the evidence that the latter method was adopted for the construction of that part of the water system of the Town of Ryegate whose cost is represented by the bonds held by the appellant herein.

We shall later discuss the effect of the constitutional provision of Montana with reference to limitations on indebtedness of cities and towns, but we now contend that regardless of the constitution of Montana the claim of the appellant herein cannot be imposed as a general obligation upon the Town of Ryegate.

As we have indicated, the debt to appellant was incurred under the law which is now embodied in Sections 5225 to 5265 of the Political Code of Montana for 1921. That law provides for the creation of special improvement districts and for the construction and installation therein of the particular public improvement specified, including water system. Section 5238 provides that the city council shall assess the entire cost of the improvement against the property included in the district in accordance with one of the two methods therein indicated. Section 5240 provides that the city council shall levy a tax upon all property included within the district to defray the cost of the improvement. Section 5247 provides that the assessment so

levied shall constitute a lien against the property upon which it is made and levied. Setcion 5249 provides that all costs and expenses incurred in the construction of the improvements specified shall be paid for by special improvement bonds or warrants which shall be drawn against the special improvement district fund created for the district. Section 5250 provides that, whether provided for in the call for proposals or not, all contracts let shall be payable in the bonds or warrants of the district.

Appellant's Exhibit A (Tr. 10) is a copy of the resolution of intention to create Special Improvement District No. 4. Section 8 thereof is as follows:

> "That all the cost and expense incurred in the construction and making of such improvements shall be paid by Special Improvement District Bonds, with interest coupons attached; such bonds shall be drawn in substantially the form provided by law in such cases and shall be drawn against 'Special Improvement District Fund No. 4', hereafter to be ordered and created, and that the entire cost and expense of said improvement shall be paid by said Special Improvement District. The entire cost of said improvements shall be assessed against the entire district, each lot or parcel of land within said improvement district to be assessed for that part of the whole cost of said improvements which its area bears to the entire area of said district, exclusive of streets, avenues, alleys and public places." (Tr. 14).

Section 2 of Ordinance No. 28, authorizing the execution and delivery of coupon bonds in payment for the work and improvements in this special improvement district, provides:

> "That the entire cost and expense of making and installing said improvements shall be paid in ten (10) equal annual installments, and bonds therefor are to be drawn against the fund of said Special Improvement District No. 4, *and made payable exclusively from said fund.*" (Tr. 39).

As alleged in the complaint herein, contract for construction of water system was let to the Security Bridge Company, and the specifications attached to the contract provide the method of payment to the contractor in the following words:

> "The Town now has avaivlable from the proceeds of general obligation bonds, $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 * * * and such of the main water 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 * * * . *These bonds will be accepted by the contractor in full payment for such work at their par value."* (Tr. 212-213).

The bonds themselves provide:

> "The Treasurer of the Town of Ryegate, Montana, will pay to the bearer on the 1st day of January, 1930, the sum of Five Hundred ($500.00) Dollars, as authorized by Resolution No. 14, as passed on the 17th day of February, 1920, creating Special Improvement District No. 4, for the construction of the improvements and the work performed as authorized by said Resolution to be done in said District, and all laws, resolutions and ordinances relating thereto, in payment of the contract in accordance therewith. * * *
>
> "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 as described in said Resolution No. 14 as well as in Resolution No. 10 passed and adopted December 30th, 1919." (Tr. 16).

There is not a word in the law which authorizes an inference that the credit of the town is pledged as security for the indebtedness incurred in connection with the construction of the improvements in a special improvement district, nor is there a word in any resolution or ordinance of the town council of

Ryegate, or in the contract or in the bonds themselves which justifies the assumption that the Town of Ryegate is in anywise responsible for the debt created.

Our supreme court has very recently passed upon the action of the legislature of Montana whereby it attempted to do by the enactment of a law what this court is asked to do by judicial decree.

It is a matter of common knowledge that for some years past there has been a continual and increasing default in the payment of special improvement district bonds of cities and towns throughout Montana, with the result that that particular class of securities has, to some extent at least, lost its appeal to investors as a safe and conservativev investment. Our legislative assembly attempted to remedy the situation by the enactment of Chapter 24 of the 1929 Session Laws, which authorizes cities and towns to create a revolving fund by general taxation, to be used for making up delinquencies in special improvement district funds. In a nut shell, towns and cities were to be authorized to assume as general obligations the debts of their special improvement districts.

Recently two cases were submitted to the Montana Supreme Court from Great Falls, wherein the validity of this law was considered. The two cases were disposed of as one by that court. Those cases are Stanley v. Jeffries and Stanley v. Great Falls, 86 Mont. 114; 284 Pac. 134. In the first case the question considered was the validity of the law insofar as it applied to special improvement districts to be created after the law went into effect. Therein the court said:

> "When, therefore, the Legislature provided that, as to special improvement districts created in the future, a fund

shall be created to insure the prompt payment of bonds and warrants issued in payment of such improvements, it but modified the special improvement district law to impose upon the general public, within the municipality, a conditional obligation to pay a small portion of the cost of erecting the public improvement, whereas it might have, lawfully, imposed a much greater burden upon the municipality."

In the second case the question was as to the validity of the law insofar as it applied to special improvement districts created before its enactment, and in considering that question our supreme court said:

"Herein the legislature did not attempt to impose a liability upon the people with respect to past transactions, but merely gave them the option to impose such a burden upon themselves if they saw fit, which, in so far as this inhibition of the Constitution is concerned, they may do. In re Pomeroy, 51 Mont. 119, 151 P. 333.

"The act does not offend against the prohibition contained in section 13 of article 15 of the Constitution.

"However, what is the purpose of the act in so far as it deals with special improvement district bonds and warrants issued prior to the date thereof? Such bonds and warrants were, it is true, issued for the purpose of constructing a public work, and consequently issued for a public purpose, but the transaction has been completed and the bonds and warrants accepted in full settlement thereof; they have passed into the hands of individuals or corporations. *With respect to these, there is no duty or obligation resting upon the city other than to enforce and obey the provisions of the special improvement district laws;* if this is done, and still a loss is suffered by reason of deficiencies in that law, *the loss falls upon the holders of the bonds and warrants, and not upon the city.* * * *

"Here the situation discussed in Stanley v. Jeffries is reversed. The purpose of the act, in so far as it authorizes the assumption of liability for losses suffered by the holders of bonds and warrants issued prior to the passage of the act, must be held to be reimbursement of those holders for such losses, and, although it is urged that such action would

> tend to rehabilitate the city's credit, such a purpose, if it existed, must be held to the secondary or incidental purpose. * * *
>
> As it clearly appears that the portion of the act now under consideration authoriezs the levy and collection of taxes for a private purpose, it is violative of section II, art. 12, of the Constitution, and cannot stand."

Certainly the latter decision is directly opposed to the contention of appellant. If a city or town may be held liable on implied contract or otherwise for the indebtedness represented by special improvement district bonds, the city or town is primarily the debtor and the credit of every city and town in the state is pledged to the payment of every special improvement district bond issued in the state, provided they cannot for any reason be paid out of the funds of the special improvement district itself, and there could be no objection, constitutional or otherwise, to a law authorizing cities and towns to recognize that indebtedness and to make provision for its payment as a general obligation out of their general funds. However, as our court says with respect to these bonds and indebtedness, there is no obligation resting upon the city other than to enforce the provisions of the special improvement district laws, and if there be a loss that loss must fall upon the holders of the bonds.

> "The legislative assembly shall pass no law for the benefit of a railroad or other corporation or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the state a new liability in respect to transactions or considerations already passed." Sec. 13, Art. XV, Constituiton of Montana.

Under that section of our constitution, if the legislature of Montana should attempt to pass a law compelling the various towns and cities of the state to assume, as a direct obligation

of the municipality, the special improvement district bonds of such municipality which, for any reason, had not been paid out of the collection of district assessments, such act would be unconstitutional. It would be equally unconstitutional for this court to grant the relief prayed for by appellant, which, in effect, would be judicial legislation.

In the case of Gagnon v. City of Butte, 75 Mont. 279, 243 Pac. 1085, our court said:

> "'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 of 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 in 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.' (2 Dillon on Municipal corporations, 5th ed., sec. 827.) * * *
>
> "Primarily, the city of Butte incurred no personal ilability to the contractor who did the work. It was merely constituted *an instrumentality of the law* in initiating and carrying out the improvements and in collecting the money due upon assessments made by it against the property benefited in order to pay the obligations incurred in execution of the work. * * *
>
> "The plaintiff was chargeable with knowledge of the nature and terms of the city's obligation with respect to the bonds, and to now permit him to hold the general taxpayers responsible because of the neglect of duty on the part of the city treasurer would be manifestly unjust.
>
> "Reason in support of our conclusion is well stated by Mr. Chief Justice Scott, speaking for the supreme court of Washington in German-American Savings Bank v. Spokane, supra, which we take the liberty of adopting: 'The

question goes much beyond the interests at stake here, and hardships are bound to result however the principles are settled. On the one hand, we have the rights of the general city taxpayer to consider; he may have paid like assessments with reference to his own property, and it is certainly a hardship to call upon him to make good a failure on the part of some other property holder to pay such an assessment, especially where the threatened burden is so excessive, in view of the high rule of property valuations prevailing in assessing for tax levies, and the liberal public debt limits allowed. In some instances it would come near the confiscation of his property. It is not a satisfactory answer to such a man to say that he must be bound by the negligence of men elected to act in a governmental capacity over a town wherein he may be residing, for it leaves him small chance of escape. * * * On the other hand the warrant holders have parted with value for these obligations, either in performing the work, where the warrants are held by the original parties, or in the amount paid for purchasing them, in the case of subsequent holders. As a matter of justice they are entitled to payment, and we have their interests to consider. * * * After all that can be said and done, however, as a matter of fact and law, where one of two parties must suffer, the loss should fall upon the one who has had the best opportunity to protect himself and is the most at fault. * * * While perhaps such general taxpayer might have compelled the city officers to act after the work was done, and the danger of loss to him imminent, the contractor or warrant holder had this same right, and the courts have all the time been open to him. By force of the contract such officers should be held to be more directly his agents or representatives than the agents of the general taxpayers for the purposes of the assessment, if they were such taxpayers' agents at all in the premises. By the contract the contractor has in effect adopted the machinery provided for raising his money through the acts of such officers'."

On page 284 of the Montana Report the court called attention to the fact that the bondholder had never "resorted to mandamus or other appropriate legal proceedings to compel the city authori-

ties to make collection of the delinquent assessments." So in the instant case, no such action was ever taken by the appellant.

This court has cited the Gagnon case with approval in the case of Moore v. City of Nampa, 18 Fed. (2d) 861. There it is said:

> "It is to be borne in mind that the officers of the defendant, in making the improvement, were not performing corporate functions of the defendant. They were exercising a special power vested in them with reference to local improvements, in which the city as a whole was not concerned. In doing so they were successors to powers which prior to 1917 had been exercised through a 'sewer construction committee,' distinct from the city council, appointed for the purpose of authorizing and carrying out sewerage improvements. In all the transactions here involved they were but *instrumentalities for originating, carrying out, and* paying for the expense of local improvements, the cost of which was assessable against the property benefited thereby. In this fact is an insuperable obstacle to the right of the plaintiff to recover herein, for the officers of the city were not acting on its behalf, and they had no authority to bind it by any act or failure to act in the premises. It is well settled that municipal corporations possess no inherent power to levy assessments for local improvements, and that their only authority to do so is to be found in legislative acts."

It is true that the question presented in that case differs from that which is involved in this litigation, but the language there used is certainly applicable to the facts here considered.

That decision was affirmed by the Supreme Court of the United States, 276 U. S. 536, 48 S. Ct. 340. Mr. Justice Butler delivered the opinion of the court. He called attention to the fact that the bondholder insisted that the city was negligent in failing to make a proper estimate and valid assessment and in causing the issuance of a false certificate. The suit was for tort and damages were claimed because of negligence and mis-

representation; that each bond contained recitals to the effect that all things required by law had been done to make the bonds valid obligations of the city; that the Supreme Court of the United States, in U. S. Mortgage Co. v. Sperry, 138 U. S. 313, had held that respondent's faith or credit is not pledged and that the value of the bonds depends upon the validity and worth of the assessments. Mr. Justice Butler went on to say that actionable negligence cannot be predicated on the failure of defendant's officers properly to assert their powers and perform their duties in respect of the estimate, assessment and contract for construction. Such failure was not a breach of duty owed by the city to the bondholder, who had no relation in the matter until long after the bonds had been issued and sold to another; that no recovery could be had by reason of the certificate issued by the city, falsely stating that there was no suit in respect of the creation of the district, the construction of the sewer or the issuance of the bonds, there being no law requiring or authorizing the making of such certificate, and that, as no actionable negligence or misrepresentation was shown, the complaint did not state a cause of action.

To the same effect are the following cases:

> Hasbrouck v. City of Milwaukee, 80 Am. Dec. 718; Mote v. Incorporated Town of Carlisle, 233 N. W. 695; New First National Bank v. City of Weiser, 166 Pac. 213; Town of Capitol Heights v. Steiner (Ala.) 101 So. 451; Town of Windfall City v. First Nat. Bank (Ind.) 87 N. E. 984; Castle v. City of Louisa (Ky.) 219 S. W. 439; Morrison v. Morey (Mo.) 48 S. W. 629; White River Sav. Bank v. Superior, 148 Fed. 1; Steiner v. Capitol Heights (Ala.) 105 So. 682; Brooks v. City of Oakland (Cal.) 117 Pac. 433; City of Beggs v. Kelly (Okl.) 238 Pac. 460.

Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659, and

other cases cited and relied upon by counsel for appellant, are not in point under the issues in the case at bar. The rule laid down in those cases is that where a municipality or other public corporation creates a debt which is not forbidden by law and receives the benefit thereof and the bonds or other evidences of that indebtedness are unenforceable, the holder may recover from the city or other municipality on contract implied by law. This is apparent from the Hitchcock case, where the court says:

> "It is enough for them that the city council have power to enter into such a contract for the improvement of the sidewalks and that such a contract was made with them, that under it they have proceeded to furnish matedials and do work, as well as to assume liabilities, and that the city has received and now enjoys the benefit of what they have furnished and done; that for these things *the city promised to pay.*"

The essential element present in the Hitchcock case, that the city or town *entered into a contract and promised to pay,* is here missing. As is said by this court, the supreme court of Montana, and all the other courts referred to above, the municipality in such a case as this does not, as a municipality, enter into any contract, *nor does it promise to pay.* The town officers of Ryegate were not acting in its behalf and had no authority to bind it by any act or failure to act in the premises. The town of Ryegate did not and could not promise to pay the contractor named for its work in constructing the improvements in District No. 4. What it did do, and all that it did do or could do, was to promise to deliver to the contractor the bonds of Special Improvement District No. 4 in payment for the work done and to make the assessment against the property in the district and pay the proceeds over to the contractor, and the contractor agreed to accept those bonds *as full payment therefor.*

It is true that in the Hitchcock case the cost of the improvements was ultimately to be paid by the owners of the property fronting thereon, but the city, by contract, was primarily liable for the payment of the cost of the improvement, and, as the court says:

> "The resort to the land owner is to be after the work has been done, after the expense has been incurred, and it is to be for the reimbursement of the city."

Such is not the law of this state.

Counsel have, at various places in their argument, advanced and expatiated upon the moral and equitable argument that the Town of Ryegate had obtained the benefit of the work done in the improvement district in question and that, therefore, this court should find some way of compelling the town to pay therefor. In the first place, this is an argument which should properly have been advanced in the suits wherein the town and county officers were enjoined from collecting the special improvement assessments to pay the bonds held by plaintiff. The property owners within the district were the persons actually and directly benefited by the construction of the water system. If anyone was morally obligated to the plaintiff herein it was the person whose property was included within the improvement district and assessed to pay the cost thereof. It appears in the "stipulation as to the facts" herein that the Lumbermen's Trust Company had its own counsel associated in the defense and trial of those actions; that judgments were entered and that no appeals were ever taken therefrom. (Tr. 6) It was in those suits that the equitable questions now presented should have been urged, particularly in view of the following situation:

Counsel in their brief make the general statement that Special Improvement District No. 4 of the Town of Ryegate "for prac-

tical purposes included the town." Just what counsel mean by "for practical purposes" we do not know. As a matter of fact, the district did not include all of the town. The Town of Ryegate is a small community and, as shown by paragraph M of the stipulation as to the facts (Tr. 56, 57), there are thirty business houses, certain public buildings and sixty-one residences in the town which are embraced within the district and thirty-five residences, four warehouses and sub-station of the Montana Power Company which are in the Town of Ryegate but are not embraced within the improvement district. Of that number there are thirteen residences and two warehouses which receive no benefit from the improvement district except fire protection and twenty-two residences and two warehouses which receive no benefit of any character from the water system. Only about one-sixth of the area of the town is in the district. (See map attached to appellant's brief.) If appellant were to recover in this action the relief sought, this property which is not benefited in the slightest degree by the water system and whose owners never had a chance, directly or indirectly, to be heard before the indebtedness was incurred, would be bound for its proportionate share thereof.

It is admitted that "plaintiff purchased said special improvement district bonds fom the 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 power of the defendant with reference thereto and the methods provided and authorized for the payment thereof." (Tr. 60). It occurs to us that the language of our supreme court in the case of Gagnon v. City of Butte, 75 Mont. 279, is particularly applicable. There it is said:

> "The plaintiff was chargeable with knowledge of the nature and terms of the city's obligation with respect to the bonds ,and to now permit him to hold the general taxpayers responsible because of the neglect of duty on the part of the city treasurer would be manifestly unjust."

Counsel devoted considerable effort in the trial of this cause to establish their claim that the officers of the defendant town were aware of the fact that the Security Bridge Company was selling the special improvement bonds to the plaintiff. All of the aldermen and city officers who were available at the time of the trial appeared and denied plaintiff's contentions in that particular, and when this court reviews the evidence in this case we believe it will be found that the positive statements of witnesses for the defendant preponderate over the extremely uncertain and indefinite recollections of Mr. Neal and Mr. Roscoe. (Tr. 206, 207, 230, 231, 232, 233, 234, 235, 236, 248, 249). Howevevr, be that as it may, counsel have absolutely failed to show what effect that fact of knowledge, if there were knowledge, would have upon this case. Manifestly, the officers of the Town of Ryegate knew that someone was furnishing the money to do the work. Whether that person was the contractor or someone else appears to us to have absolutely no bearing upon the question here involved. If it has any bearing, counsel have failed to indicate what it is.

SECTION 6 OF ARTICLE XIII OF THE CONSTITUTION OF MONTANA BARS THE RECOVERY OF ANY SUM BY APPELLANT.

POINT AND AUTHORITIES

When the contract for the construction of the water system was entered into the outstanding and unpaid indebtedness of the Town of Ryegate was $15,584.87. The assessed value of all property in the town was then $577,005.00. From that time

until the last special improvement district bond in question was delivered the indebtedness of the town increased and the assessed valuation of the property in the town decreased. (Tr. 27, 28). Three per cent of the assessed valuation of property in the town on date of contract was $17,310.15. Section 6 of Article XIII of the Constitution of Montana limits the indebtedness of towns to three per cent of assessed value of property in the town, unless an increase of indebtedness is authorized by the vote of taxpayers. Because of that constitutional limitation, appellant is not entitled to any relief in the case at bar.

> Sec. 6, Art. XIII, Constitution of Montana; State v. City of Helena, 24 Mont. 521, 65 Pac. 99 (decided Dec. 17, 1900); Buchanan v. City of Litchfield, 102 U. S. 278, 26 L. Ed. 138; City of Litchfield v. Ballou, 114 U. S. 190, 5 S. Ct. 820; Butler v. Andrus, 35 Mont. 575, 90 Pac. 785; Palmer v. City of Helena, 19 Mont. 61, 47 Pac. 209; Palmer v. City of Helena, 40 Mont. 498, 107 Pac. 498; Lepley v. City of Ft. Benton, 51 Mont. 551, 154 Pac. 710; District Township of Doon v. Cummins, 142 U. S. 366, 12 S. Ct. 220; Hedges v. Dixon County, 150 U. S. 182, 14 S. Ct. 71; O'Brien v. Wheelock, 184 U. S. 450, 22 S. Ct. 354; City of Boston v. McGovern, 292 Fed. 705; McClintock v. City of Gt. Falls, 53 Mont. 221; City of Santa Cruz v. Wykes, 202 Fed. 361; Deer Creek Highway Dist. v. Doumecq Highway Dist., 281 Pac. 371; Mittry v. Bonneville County, 222 Pac. 292; Mayo v. Town of Washington, 29 S. E. 343; Eaton v. Shiawassee County, 218 Fed. 588; Atkinson v. City of Gt. Falls, 16 Mont. 372; 44 C. J. 1131; Lake County v. Rollins, 130 U. S. 662, 9 S. Ct. 651; Lake County v. Graham, 130 U. S. 674, 9 S. Ct. 651; City of Bozeman v. Sweet, Causey, Foster & Co., 246 Fed. 370; Smith v. Broderick, 40 Pac. 1033; Lamar W. El. & L. Co. v. City of Lamar, 26 S. W. 1025; Gould v. City of Paris, 4 S. W. 650; City of Tecumseh v. Butler, 298 Pac. 256; Zacary v. City of Wagoner, 292 Pac. 345.

ARGUMENT

With the issuance, sale and delivery of the general bonds of

the Town of Ryegate in the sum of $15,000.00 in April, 1920, the town had nearly reached its constitutional limit of indebtedness and when the assessment roll for that year was completed the indebtedness of the town was in excess of the constitutional limitation. (Tr. 27, 28, 59). If it should be held that the Town of Ryegate had become indebted to appellant in the sum of $45,602.00 on account of the purchase of the special improvement district bonds in question by the appellant from the contractor, then such debt was illegal and unconstitutional and no judgment may be entered in favor of appellant and against appellee.

Section 6 of Article XIII of the Constitution of Montana is as follows:

> "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."

It is admitted that on April 26, 1920, when the contract was entered into for the construction of the water works system for the town of Ryegate the outstanding and unpaid indebtedness of that town was $15,584.87, and that, as each installment of

the bonds of the district was delivered, this indebtedness was slightly increased, and on December 31, 1926, when this action was instituted, such general outstanding indebtedness amounted to $19,462.07. It also appears that on April 26, 1920, the valuation of all property within the Town of Ryegate was $575,-0005.00, which presumably would be based upon the 1919 assessment, as the assessed value for the year 1920 was $420,006.00. At the time this suit was instituted such assessed valuation was $370,949.00. (Tr. 27, 28, 59).

It appears, therefore, that in the spring and summer of 1920, when the contract for the construction of the Ryegate water works was entered into and the appellant purchased the special improvement bonds aggregating the sum of $45,602.42, the Town of Ryegate was already indebted up to nearly three per cent of the taxable property therein, and ever since the 1920 assessment has been indebted in excess of three per cent of its assessed value. If the defendant town is now to be charged with the payment of appellant's claim, the total amount of that indebtedness so to be imposed is in excess of the constitutional limit.

In the first place, we believe there is no doubt that the constitutional provision quoted above applies as a bar to all kinds of indebtedness, whether incurred under an express contract or under an implied or quasi contract, such as is here sought to be enforced in an action which the appellant designates as one brought in equity for money had and received.

Thus, in the case of State v. City of Helena, 24 Mont. 521, 65 Pac. 99 (decided Dec. 17, 1900), our court says:

> "The prohibition is against becoming indebted, —that is, voluntarily incurring a legal liability to pay, * * * 'in any manner or for any purpose,' when a given amount of indebtedness has previously been incurred. It could hardly

be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe the convention did not intend what the words convey. A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition. If a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs, the liability is absolute, —the debt exists, —and it differs from a present, unqualified promise to pay only in the manner by which the indebtedness was incurred. * * * "

"In Buchanan v. City of Litchfield, 102 U. S. 278, 26 L. Ed. 138, and City of Litchfield v. Ballou, 114 U. S. 190, 5 S. Ct. 820, 29 L. Ed. 132, the construction placed upon that section of the Illinois constitution before the court in City of Springfield v. Edwards, and Law v. People, is approved. In the latter case, Mr. Justice Miller, speaking for the court, says: 'The language of the constitution is that no city, etc.' shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property.' It shall not become indebted. Shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose. No matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever. If this prohibition is worth anything, it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law.' Such was the interpretation by the highest court in the land of this constitutional provision of the state of Illinois when our own Constitution containing a like provision was adopted."

"Our attention is called by counsel to the exceeding hardship of this case upon those whose money it is alleged has

supplied the city of Litchfield with a system of water works, the benefits of which are daily enjoyed by its inhabitants. *The defense is characterized as fraudulent and dishonest. Waiving all considerations of the case in its moral aspects, it is only necessary to say that the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases.*"

The last paragraph quoted from that case is peculiarly pertinent to the contentions made by counsel for appellant.

The rule laid down in that case is referred to with approval in the following Montana decisions:

Butler v. Andrus, 35 Mont. 575, 90 Pac. 785; Palmer v. City of Helena, 40 Mont. 498, 107 Pac. 498; Lepley v. City of Ft. Benton, 51 Mont. 551, 154 Pac. 710; Palmer v. City of Helena, 19 Mont. 61, 47 Pac. 209.

In the case of City of Litchfield v. Ballou, 5 S. Ct. 820, 114 U. S. 190, the supreme court of the United States says:

"This is an appeal from a decree in chancery of the circuit court for the Southern district of Illinois. The suit was commenced by a bill brought by Ballou against the city of Litchfield. Complainant alleges that *he is the owner of bonds,* issued by the city of Litchfield, to a very considerable amount. *That the money received by the city for the sale to him of these bonds was used in the construction of a system of water-works for the city, of which the city is now the owner.* He alleges that one Buchanan, who was the owner of some of these bonds, brought suit on them in the same court, and was defeated in his action in the circuit court and in the supreme court of the United States, *both of which courts held the bonds void.* He now alleges that, though the bonds are void, *the city is liable to him for the money it received of him, and as by the use of that money the waterworks were constructed, he prays for a decree against the city for the amount, and if it is not paid within a reasonable time, to be fixed by the court, that the water-works of the city be sold to satisfy the decree.* The bill also charges that he was *misled to purchase the bonds by the false statements of the officers, agents, and attorneys of the city, that the bonds were valid.* * * * The

bonds were held void in the case of Buchanan v. Litchfield, 102 U. S. 278, because they were issued in violation of the following provision of the constitution of Illinois:

'Article IX.

'Sec. 12. No county, city, township, school-district or other municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on 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.'

It was made to appear as a fact in that case that at the time the bonds were issued the city had a pre-existing indebtedness exceeding 5 per cent. of the value of its taxable property, as ascertained by its last assessment for state and county taxes. The bill in this case is based upon the fact that the bonds are for that reason void, and it makes the record of the proceedings in that suit an exhibit in this. But the complainant insists that, though the bonds are void, he city is bound, *ex aequo et bono,* to return the money it received for them. It therefore prays for a decree against the city for the amount of the money so received. * * * But there is no more reason for a recovery on the implied contract to repay the money than on the express contract found in the bonds.

The language of the constitution is that no city, etc., 'shall be allowed to become *indebted in any manner or far any purpose* to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property.' *It shall not become indebted. ...Shall not incur any pecuniary liability. It shall not do this in any manner; neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose; no matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever. If this prohibition is worth anything it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law."*

In the above case it was contended that although the bonds were void the city was liable for the money received and that if not repaid within a reasonable time the water works should be sold to satisfy the decree. The bondholder also alleged that he was misled in the purchase of the bonds by false statements of the officers, agents and attorneys of the city, that although the bonds are void, the city is bound, *ex aequo et bono,* to return the money it received for them and that there was an implied contract for the repayment of the money. These same questions are raised by appellant in the case at bar. They were all decided adversely to appellant in the Litchfield case.

To the same effect is the decision of the supreme court of the United States in Lake County v. Rollins, 130 U. S. 662, 9 S. Ct. 651, in which was involved the same constitutional question. In speaking of the provisions of the constitution, the court said:

> "If courts, to avoid hardships, may disregard and refuse to enforce their provisions, then the security of the citizens is imperiled. * * * Neither can we assent to the position of the court below that there is, as to this case, a difference between indebtedness incurred by contracts of the county and that form of debt denominated '*compulsory obligations*'."

Again, in Lake County v. Graham, 130 U. S. 674, 9 S. Ct. 654, a similar question was before the supreme court of the United States with a like result. It was there held that purchaser of bonds, such as those involved in that case, is held to know the constitutional provisions and the statutory restrictions bearing on the question of the authority to issue them and that there was no estoppel as to the constitutional question because of recitals in the bond. The court said:

"Otherwise it would always be in the power of a municipal body to which power was denied to usurp the forbidden authority by declaring that its assumption was within the law. This would be the clear exercise of legislative power and would suppose such corporate bodies to be superior to the law itself."

The rule laid down in those cases is approved in the following decisions:

District Township of Doon v. Cummins, 12 S. Ct. 220, 142 U. S. 366; Hedges v. Dixon County, 14 S. Ct. 71, 150 U. S. 182; O'Brien v. Wheelock, 22 S. Ct. 354, 184 U. S. 450; City of Boston v. McGovern, 292 Fed. 705; Smith v. Broderick, 40 Pac. 1033; Lamar W. El. & L. Co. v. City of Lamar, 26 S. W. 1025; Gould v. City of Paris, 4 S. W. 650; City of Tecumseh v. Butler, 298 Pac. 256; Zacary v. City of Wagoner, 292 Pac. 345.

This court, in City of Bozeman v. Sweet, Causey, Foster & Co., 246 Fed. 370, held that a bond issue for water works and sewer purposes in excess of the constitutional limitation of three per cent must be authorized not only by a vote of the taxpayers in favor of the proposed issue but also by vote on the express question of an increase of the debt limit over the three per cent fixed by the constitution. This court said:

"Without carrying the discussion any farther, our judgment is that the principle that statutes authorizing municipalities to incur obligations in excess of those which are ordinarily permitted to be incurred should be strictly construed."

Counsel for appellant seek to avoid the effect of the decision of the court in the Litchfield case, but the decisions of the supreme court of the United States in that case and in the other cases cited above have never been departed from and they present an insuperable obstacle to the granting of any relief to appellant.

Counsel for appellant, however, appear to advance two propositions, as follows:

(1) Under the provisions contained in the section of the constitution referred to there is no limit upon the indebtedness which may be incurred by a municipality to procure a supply of water.

(2) The legislature, by providing for the construction of water works under the special improvement district law, has, by some subtle, undefined means, enabled municipalities to evade or avoid the inhibitions contained in the constitution.

We will refer to these contentions in order.

In support of the first proposition advanced by appellant to the effect that under the express wording of the provision in the latter portion of Section 6 of Article XIII of the constitution there is no limit to the indebtedness which may be incurred by a municipality in securing a water supply, they call attention to the power of a town to supply itself and its citizens with water.

This may be conceded without affect upon the constitutional question involved, for, as is said in the Helena water case above referred to and in the case of Litchfield v. Ballou, supra, if an act is not done in accordance with the constitution "it shall not be done for any purpose, no matter how urgent, how useful, how unanimous the question." In other words, the question of necessity or expediency plays no part in the construction of the provision referred to.

Counsel also cite McClintock v. City of Great Falls, 53 Mont. 221, in support of their interpretation of the Montana constitution.

The nub of the rule laid down by our supreme court in that

case is contained in that portion of the sentence providing "except that it must have the approval of the taxpayers affected thereby."

While counsel are far from clear in explaining their position in this matter, we can only assume that they contend that in view of the constitutional provision referred to the Town of Ryegate had inherent power to become indebted to appellant and that the failure to submit the question to the vote of the taxpayers affected thereby simply constituted an irregularity which would not relieve the town from liability. In other words, apparently a distinction is attempted to be drawn between a case where the incurring of the indebtedness was *ultra vires* because the municipal corporation was without power and another case where it was invalid because the statutory formalities had not been followed. It will be noted that no authority whatever is cited in support of this important link in the chain of appellant's argument, and it is our contention that such a distinction is not permissible in this case.

Our constitutional provision is that the legislative assembly may extend the debt limit by authorizing municipal corporations to submit the question to a vote of the taxpayers to be affected. Acting thereunder, our legislature adopted Paragraph 64 of Section 5039 of the Political Code, providing that no indebtedness shall be incurred for the construction of a water works system "until the proposition has been submitted to the vote of the taxpayers affected thereby and the majority vote cast in favor thereof." The legislature also enacted Sections 5278 and 5281 of the Political Code for 1921, providing in detail how such elections should be called and held. Under similar constitutional and statutory provisions, we believe it is

always held that the failure to hold the election and to secure approval from a majority of the taxpayers is not merely an irregularity or informality which may be waived or overlooked, but, on the contrary, it goes to the very essential and fundamental question of power.

In the case of City of Santa Cruz v. Wykes, 202 Fed. 361, this court, in considering a similar constitutional provision of the State of California, said:

> "By the Constitution of the state of California (section 18, art. 11) it is provided:
>
> 'No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void.'
>
> This is an inhibition against which a municipality cannot incur any indebtedness exceeding in any year the income and revenue provided for it for such year except in a certain mode or manner prescribed. *The mode, therefore, becomes the measure of the power of the municipality to incur an indebtedness beyond the measure fixed by the fundamental law.* That is to say, before the city can incumber itself with such excess indebtedness, it must have the consent of two-thirds of its qualified electors to that purpose, and when it has obtained such consent, provision shall be made for collection of an annual tax sufficient to pay the interest on such indebtedness annually, and to create a sinking fund sufficient to discharge the principal within 20 years.
>
> The power to create the excess indebtedness does not abide with the municipality or its common council alone,

but with the assent of two-thirds of its electors. It is only when that assent is had that it may proceed."

In the case of Deer Creek Highway District v. Doumecq Highway District (Ida.) 218 Pac. 371, the court said:

"Almost all of the authorities agree with the holding of this court in School District v. Twin Falls County, supra, that there can be no estoppel if the contract was expressly prohibited by the Constitution or statute, or if it was entirely beyond the power of the municipality. Appellant relies strongly on Argenti v. City of San Francisco, 16 Cal. 255, and Pimental v. City of San Francisco, 21 Cal. 351. While some of the language used in these opinions, isolated from the context, would seem to bear out appellant's contention, the decisions as a whole do not go the length of holding that there may be a recovery upon quantum meruit where a municipality has entered into a contract rendered void by express constitutional or statutory prohibitions. The true doctrine is expressed by Chief Justice Field in Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96, as follows:

'A municipal corporation, acting under a charter expressing the mode in which its contracts for the improvement of its property shall be made, cannot be rendered liable for improvements made in the absence of such contract, on the ground of an implied contract to pay for benefits received. *The law never implies an agreement against its own restrictions and prohibitions; it never implies an obligation to do that which it forbids the party to agree to do*'."

In the case of Mittry v. Bonneville County (Ida.) 222 Pac. 292, the court says:

"When an indebtedness is forbidden by the Constitution and statutes of this state without the authority of a bond election, and the people at such election authorize the commissioners to incur indebtedness in a certain amount, the commissioners cannot incur a valid indebtedness above such amount. For reasons given in Deer Creek Highway Dist. v. Doumecq Highway Dist., supra, and which need not be repeated here, any indebtedness above the amount in the courthouse fund was void and cannot be recovered on quan-

tum meruit or in assumpsit. Respondent, dealing with the county, was bound to take notice of constitutional and statutory limitations of its powers in regard to incurring indebtedness. Deer Creek Highway Dist. v. Doumecq Highway Dist., supra."

In Mayo v. Town of Washington (N. C.) 29 S. E. 343, the court says:

> "To enable a municipal corporation to borrow money or to loan its credit for any purpose, except for the necessary expenses of the corporation, there must be an act of assembly passed and ratified, as required by the constitution, authorizing it to submit the proposition to the people. Bank v. Town of Oxford, 119 N. C. 214, 25 S. E. 966; Board of Com'rs. v. Snuggs, 121 N. C. - - -, 28 S. E. 539. And the question must then be submitted to and ratified by a majority of qualified voters thereof. It requires both the authority to submit the proposition and the ratification by a majority of the qualified voters to warrant the creation of the debt and the issue of the bonds."

A case directly in point is that of Eaton v. Shiawassee County, 218 Fed. 588, where the court says:

> "If it is assumed that the entire $30,000 borrowed is sufficiently traced to an investment in the courthouse building, we meet the question whether it is possible for the lender to recover his money upon the theory of an implied liability or quasi contract or equitable liability, or whatever it may be called, when he cannot recover upon the contract which he actually made, because that contract was forbidden by law. Plaintiff concedes there could be no recovery on the contract. His position is that where a municipal corporation has received plaintiff's money and retains it or its benefits and had inherent power to borrow the money from plaintiff, but only failed in some statutory step, the municipality will not be permitted to keep the benefit and refuse to pay the money. This proposition is essentially based on the difference between cases where the borrowing was ultra vires because the corporation was without power, and cases where it was ultra vires because the active agents of the corporation were without power. * *
>
> "Further study of the very numerous decisions now re-

viewed in the briefs of counsel suggests no occasion to modify this statement; and it only remains to determine whether the present case is within the rule or within the exception as stated by Judge Richards. We may properly assume, also, for the purposes of this opinion, that plaintiff's suggested distinction is a correct one, and that we may not say that 'the loan itself was one in excess of its authority to create a debt,' unless the lack of authority pertains to the inherent powers of the municipal corporation itself, as distinguished from the delegated powers of its officers and agents. This distinction will reconcile some of the seeming conflict in the cases; some, it will not; but, unless it exists and is properly here applicable, plaintiff confessedly has no case. Plaintiff says that since the county had the right to make this loan, if authorized by vote, the lack of a vote presents a defect of the second class; the power existed, but a prescribed step in its execution has been omitted. This theory will not reach such a constitutional limitation as that herein involved. The county of Shiawassee is a municipal corporation — a corporate entity. It is erroneous to say that this corporation has the power to make such a loan if only it proceeds in the right way, viz., by vote of the people. The electors are a body of individuals distinct from the corporation. The county, as an entity, has no power to compel a favorable vote of the people. The obtaining by the corporation of the right to such borrowing rests upon the discretion—even upon the caprice—of another body, the electors. Until that approval has been given, the county is as much without power as if the electors had no right to confer it. This view of the real source of power seems to us clearly to meet the position upon which alone plaintiff's case might otherwise perhaps stand. To accept the contrary view is to say that because a municipality may, on application, be granted additional, but now nonexistent, power, it shall now be deemed to have that power, though it has not applied and though its application, if made, might have been refused. It is clear to us that if plaintiff may recover indirectly, by an action for money had and received, money which the plaintiff has loaned in the face of such a constitutional provision, the substantial force of the prohibition is destroyed. Whether the money has been honestly ex-

> pended for the real benefit of the county cannot be controlling, as the present case illustrates. The electors decided that the county should have and should become indebted for a $75,000 courthouse only. The board of supervisors thought that the county ought to have and ought to borrow therefor $125,000. If good faith and actual honest expenditures make the criterion, the control which the Constitution reserves to the voters is destroyed. We must conclude that this indebtedness 'was in excess of (the county's authority to create a debt,' and that the action, as one for money received and expended on the courthouse, cannot be maintained."

Under the authorities above referred to we feel there can be no question that cities and towns in Montana are only permitted to increase their indebtedness to an amount exceeding three per cent of the value of the taxable property therein by submitting that proposition and the total amount of the proposed increase of indebtedness to the vote of the taxpayers affected and securing their consent or approval by a majority vote on both questions. The failure to so submit such questions goes to the very question of their power to incur this indebtedness and does not, as counsel seem to contend, simply constitute a defect or irregularity in the exercise of a power granted.

Taking up the second question, we concede that special improvement obligations are constitutional, but we fail to see the application of that rule to the issues involved in the case at bar. Counsel for appellant are now contending that the Town of Ryegate, as a municipality, is liable for the debt of a special improvement district.

As a matter of fact, the general rule undoubtedly is that if a debt is to be paid out of a special assessment only and the city is in no way responsible therefor, the amount of such obligation does not increase the municipal indebtedness under con-

stitutional provisions such as ours, and on the other hand, if the city is ultimately liable for the payment of such indebtedness, the bar of the constitution intervenes.

In volume 44 of Corpus Juris, at page 1131, the rule, supported by citation of many cases from the different jurisdictions of the country, is stated in the following words:

> "A municipality may, without increasing its indebtedness within the meaning of constitutional limitations, contract an indebtedness payable out of the proceeds of a special assessment, provided, at the time of the making of the contract, no liability on the part of the city, other than to pay over the assessment when collected, is created."

Counsel cannot ride on horses going in opposite directions with any degree of success. If it is their contention that the debt, evidenced by their client's special improvement district bonds is an obligation of the Town of Ryegate, then the indebtedness of the town is increased beyond the constitutional limit and is therefore unenforceable and void. On the other hand, in order to avoid the bar of the constitution, they must concede that the Town of Ryegate is not indebted to their client, and thus fail in their suit.

Further, and as is clearly held in the cases of Litchfield v. Ballou and State v. Helena, supra, a municipality cannot do indirectly what it is unable to accomplish directly. If the Town of Ryegate could not in the year 1920 directly assume the obligation of appellant's claim as its indebtedness on account of the constitutional limits referred to, which is conceded on the first page of the "stipulation as to the facts" herein (Tr. 52), certainly it could not do so directly through the medium of void special improvement district proceedings.

Admittedly, the indebtedness sought to be imposed upon the

defendant town in this proceeding is, and at all times has been, wholly in excess of three per cent of the value of the taxable property therein, and the fundamental unescapable fact is that no election was ever held at which the voters to be affected thereby authorized the incurring of such excess indebtedness.

Without the holding of such election it was simply beyond the power of the town council of the Town of Ryegate to bind that town to pay the claim of plaintiff, whether that claim was for a direct or indirect, present or contingent liability.

DISCUSSION OF CASES CITED BY COUNSEL FOR APPELLANT ON CONSTITUTIONAL QUESTION.

POINT AND AUTHORITIES

None of the cases cited in appellant's brief on the constitutional question are controlling or persuasive.

> Edmonds v. City of Glasgow (Mont.) 300 Pac. 203; Prince v. Quincy, 105 Ill. 215, 21 N. E. 768; Mankota v. Barber Asphalt Co., 142 Fed. 329; Addyston Pipe & Steel Co. v. City of Corry, 46 Atl. 1035; Denny v. City of Spokane, 79 Fed. 719; Parker v. Butte, 58 Mont. 531, 193 Pac. 748; Sec. 5252, Revised Codes of Montana, 1921.

In Edmonds v. City of Glasgow (Mont.) 300 Pac. 203, plaintiff was the holder of a one-thousand dollar bond issued by defendant. A special election had been held ni the City of Glasgow, at which the Town of Glasgow was authorized to issue bonds in the sum of fifty thousand dollars for the purpose of constructing a water plant. Taxes were levied annually to pay the interest, but the principal was unpaid. After issuing the bonds, the town was indebted in the sum of $64,885.12, which was 11.41 per cent of its total assessed valuation. The specific question as to whether the city should incur a debt in excess of the three per cent limit fixed by the constitution had

not been submitted to the electors. Whether such submission was necessary has never been decided by the supreme court of Montana but was decided by this court in the City of Bozeman v. Sweet, Causey, Foster & Co., 246 Fed. 370, hereinbefore referred to. The question arose as to whether plaintiff was estopped from asserting that the bonds were illegal. The bonds recited that they are issued in accordance with a vote in favor thereof by more than a majority of the taxpayers in the town, pursuant to ordinances duly passed by the council and in all respects in full compliance with the provisions of the statutes and constitution of the State of Montana and that all things, acts and conditions required by the constitution and laws of the State of Montana have happened and been properly done and performed in regular and due form and done as required by law; that the total indebtedness of said town, including the bonds in question, did not exceed any constitutional or statutory limitation.

The city council of the town is the proper body to pass upon the results of all elections in the town and is therefore authorized to declare whether or not any proposal submitted to the electors or taxpayers has been duly adopted. It was for that reason that the bonds were declared legal obligations of the city.

It will be noted that the election authorizing such bond issue was held January 12, 1909, long before this court decided Bozeman v. Sweet, etc. Co., 246 Pac. 370; that the city did not contend that its officers did not have authority to make the recitals in the bonds in question. The suit arose over the refunding of said bonds and there was no disposition on the part of the city to have the issue declared illegal. The only question was whether an election had been held as required by

the constitution. As the town council was the proper body to canvass the vote and declare the result, it had the right to state in the bonds the result of such election and, having made such statement, an innocent purchaser for value had a right to rely thereon. Those were bonds of the city, and the officers, in issuing same, were acting for and on behalf of the city. That was not true in the instant case, when the Town of Ryegate issued the special improvement bonds in question. There is no statement in those bonds that any election was held or that those bonds, in addition to the indebtedness of the city then existing, did not exceed the constitutional limitation.

In the instant case we have no attempt on the part of the Town of Ryegate to submit the question of the debt incurred by the special improvement district in the sum of $45,000.00 to the taxpayers of the town, so the decision of the supreme court of Montana in the Edmonds case is not authority in support of appellant's contention as to the liability of the Town of Ryegate.

Prince v. Quincy, 105 Ill. 215, 21 N. E. 768, is cited by appellant. It was there held that under the constitution of Illinois which provides that "no municipal corporation shall become indebted in any manner" beyond a specified limit, a contract by a city whose indebtedness exceeds such limit to pay, in monthly installments, for water to be furnished for fire purposes, is void; also, "where no fraud or deceit was practiced by the city to induce plaintiff to enter into the contract, a refusal by the city to pay for the water, followed by use of the water as before, does not constitute a substantive, actionable tort." Syllabi.

In City of Mankato v. Barber Asphalt Paving Co., 142 Fed.

329, cited on page 138 of appellant's brief, the action was brought to impose a liability upon the city because it had failed to enact the necessary ordinance levying the special assessments to pay the contractor. The suit was against the city for damages for failure to perform that statutory duty. The court held that complaint need show only (1) The circumstances creating the duty; (2) the duty; and (3) the breach of the duty. There are no such averments in the complaint at bar.

No such action was brought by appellant in this case. There is no allegation that the town did not pass an ordinance making the necessary arrangements. The complaint alleges that the town paid the interest due on the bonds January 1, 1922 and thereafter refused to pay any interest thereon and has declared its intention of never paying the principal sum due on the debt evidenced by the bonds and has repudiated its debt *in toto*. No question was raised by the pleadings, agreed statement or evidence that the town was liable because of the falure to pass an ordinance or resolution making assessments to pay principal and interest on bonds. The Belecz case was not decided against the city because assessments were not properly made, but on the ground that the town never acquired jurisdiction to create the district, that the cost was in excess of the amount allowed by statute and that the contract price was increased because of discount on bonds." (Tr. 89, 90).

It does not appear in any of the cases cited by counsel that the statutes of the states in which those cases arose were similar to ours in requiring the entire cost of the improvements in the district to be paid out of assessments and that they should not be a charge against the municipality.

In Addyston Pipe & Steel Co. v. City of Corry (Pa.), 46

Atl. 1035, cited on page 138 of appellant's brief, the opinion of the court on the constitutional question was mere dicta, as the liability of the city was fixed by a subsequent contract, the validity of which was not questioned. Moreover, in that case the city had levied the necessary assessments on abutting and non-abutting property. The former assessments were paid, as well as some on non-abutting property. Some owners of assessments on such property enjoined the collection of such assessments. There the city council could have re-assessed the deficiency against the abutting lots, which were liable. No such situation exists here.

In Denny v. City of Spokane, 79 F. 719, the gravamen of the action was the neglect and failure of the officers of the city to create a fund out of which to pay the claims in question. (Page 720). Here there is no such question, as the assessments were levied. The town officials have done all they could in making the assessments. Any new assessments they might make would be subject to the same objections made against the original assessments.

On pages 140 and 141 of appellant's brief much is said as to the duty of the Town of Ryegate in making collections and that if the same were not collected because of invalid assessments the fault is that of the town and not of the bondholder; that under the Montana statutes the council had full right to make levies and assessments, to adjust assessments and to make re-assessments to the end that the lien of the bonds should be effective and valid. Counsel seem to overlook the fact that the collection of the assessments was enjoined in the Belecz case, not on the ground that the assessments were not properly made, but because of the fact that the town never had jurisdic-

tion to create the special improvement district in question. (Tr. 84 to 92).

The Montana law with reference to reassessments will be found in Section 5252, R. C. M. 1921, which reads in part as follows:

> "Whenever, by reason of any alleged non-conformity to law or ordinances, 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 reassess and relevy the same, including the ordering of the 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."

Here we do not have a state of facts covered by the provisions of that statute. If the town had acquired jurisdiction to create the special improvement district and the bonds of the district were valid and enforceable obligations, then the assessment made was in proper form. No question was ever raised on that score. No re-assessment made by the town council would have avoided the decision of Judge Horkan in the Belecz case.

In Parker v. Butte, 58 Mont. 531, 193 Pac. 748, cited by counsel for appellant, the only question considered was whether the city could refund its floating warrant indebtedness without submitting the matter to a vote of the people. The warrants did not exceed three per cent of the assessed valuation of the city.

APPELLANT'S CRITICISM OF ASSUMPTIONS OF JUDGE PRAY AND CASES RELIED UPON BY HIM.

The criticisms made by counsel for appellant will be found on pages 252 to 263, inclusive, of their brief.

It is claimed by counsel that Gagnon v. Butte, 75 Mont. 279, and other cases cited denied the bondholders' right to hold the city for failure to make collections because the statutes under which those cases were decided specifically denied any right against the city.

Prior to 1913 there were several acts in Montana with reference to making special improvements in cities. In 1913 Chapter 89 of the laws of that year, being "An act relating to special improvements in cities and towns, and repealing sections 3367, etc." was passed by the legislative assembly of Montana, codifying the laws of the state with reference to such improvements and apparently repealing all former acts. This chapter now appears as Sections 5225 to 5257, inclusive, of the Revised Codes of Montana, 1921. Section 5238, in subdivisions (a) and (b), provides two methods of payment of cost of such improvements, no part of which may be paid by the city except that "the city council, in its discretion, shall have the power to pay the whole, or any part, of the cost of any street, avenue or alley intersections out of any funds in its hands available for that purpose, or to include the whole or any part of such costs within the amount of the assessment to be paid by the property in the district." In Section 5240 it is provided that the city council "shall, by resolution, levy and assess a tax upon all property in any district created for such purpose, by using for a basis of assessment one of the methods set forth in section 5238 of this code." Section 5249 provides that bonds or warrants of such special improvement districts shall be substantially in the form set out in that section. This form provides that "this warrant (or bond) is payable from the collection of a special tax or assessment, which is a lien against the real estate

within said improvement districts as described in said resolution hereinbefore referred to. This warrant (or bond) is redeemable at the option of the city at any time there are funds to the credit of said special improvement district fund for the redemption thereof and in the manner provided for the redemption of the same." In the same section it is specified that said bonds shall be drawn against the special improvement district fund created for the district; that they shall be redeemed by the treasurer when there are funds in the special improvement district fund against which such bonds are issued; that the interest shall annually be paid out of such funds and if any are remaining they shall be applied in payment of principal; that the treasurer shall call in for payment outstanding bonds equal to the amount of said fund on a date fixed by the treasurer. In Section 5250, when warrants or bonds of the special improvement district are issued for work done, they shall be received in payment for not less than their face value. Section 5252 covers the conditions under which there may be a re-assessment, which, as we have heretofore pointed out, does not meet any such situation as we have in the case at bar.

The supreme court of Montana, in commenting upon that section, in School Dist. No. 1 v. City of Helena, 87 Mont. 300, in which an attempted re-assessment had been made, said on page 312:

> "The city attempts to justify this procedure under section 5252, Revivsed Codes 1921. We think this section does not authorize the re-assessment of any property in a special improvement district to make up for delinquent assessments against the property. Its provisions have to do with the correction of invalid or erroneous assessments by re-assessment. A re-assessment cannot be made unless authorized by statute, and then only in the manner provided."

As we have heretofore stated, the invalidity of the assessments made by the Town of Ryegate was not because of any error in the ordinance or resolution making such assessments, but because of the fact that the town council never acquired jurisdiction to create the improvement district.

No significance should be attached to the fact that in this codification of the special improvement district laws of the State of Montana some provisions were omitted which were formerly a part of the law with reference to special improvement districts. The costs of the improvement being made payable solely out of the special improvement district fund, the town council was barred as effectively from making any part of such cost a charge against the city as though the act contained an express provision that no part of the cost was to be borne by the city. The town was indebted up to the constitutional limit, which was not extended by the vote of the electors, and therefore the non-liability of the town was fixed as definitely as though stated in express terms in the act itself. If it had been the intention of the legislature to make the city liable under any circumstances, that intention would have to have been declared in the title and set out in the act itself, and even then it would have been unconstitutional.

On page 256 of their brief, counsel call attention to the discussion of Judge Kenyon in Scott County v. Advance-Rumely, 288 Fed. 739, as distinguishing that case from Litchfield v. Ballou, 114 U. S. 190, 5 S. Ct. 820. There can be no doubt but that Judge Kenyon approved of the decision announced in the Litchfield case. On page 748 he said:

> "If the contract was one beyond the power of a county under any circumstances to make, then the keeping and

using of the machinery would not constitute an estoppel, and the act of the county under such circumstances could not be ratified. * * * It has been held that under some circumstances a corporation can deny its power to act. * * * Litchfield v. Ballou * * * is a case where bonds were issued contrary to the provisions of the state constitution. The moneys secured by the bonds were expended by the city in erecting a water works. An attempt was made to have the amount imposed as a lien upon the public works. The court held that the holders of the bonds and agents of the city are participes criminis in the act of violating the constitutional prohibition and refused to enter a decree requiring the city to return the money. Here there was no power in the city to issue the bonds."

In Mercer County v. Eyer, 1 Fed. (2d) 609, the court, in discussing constitutional limitations, said:

"Cases will occur where a breach of this constitutional limitation will be so plain and the circumstances so notorious that the lender would be likely to be put on notice and the presumption of good faith in reliance upon recitals would be unsafe."

On pages 256 and 257 of their brief counsel say that City of Santa Cruz v. Wykes, 202 Fed. 357, decided by this court in 1913, is an authority in appellant's favor, if it has any bearing at all. This assertion is not supported by the holding of the court. On page 364, after quoting the constitutional provision of the State of California, it said:

"This is an inhibition against which a municipality cannot incur any indebtedness exceeding in any year the income provided for it in such year except in a certain mode or manner prescribed. The mode therefore becomes the measure of the power of the municipality to incur an indebtedness beyond the measure fixed by the fundamental law. That is to say, before the city can encumber itself with such excess indebtedness it must have the consent of two-thirds of its qualified electors for that purpose."

It is also to be noted that before the matter was disposed of

in this court the electors of the city assented to the indebtedness and the inhibition of the constitution was thereby removed.

On pages 257 to 260 of their brief counsel comment at great length on Moore v. Nampa, 18 Fed. (2d) 860, and its affirmation by the supreme court of the United States, 276 U. S. 536, 48 S. Ct. 340. A careful study of both decisions will disclose that the comments of counsel are not justified. There, as here, the bondholder did not purchase the bonds from the city. The suit was for tort on account of false certificate issued by the officers of the city, failure to make proper estimates of cost, recitals that all things required by law had been done in order to make the bonds a valid obligation. None of these contentions were sustained.

In what counsel are pleased to term "erroneous assumptions by Judge Pray" they call attention to his statement that "plaintiff contends that the town never acquired jurisdiction to create a special improvement district." That statement of Judge Pray is based upon the reply brief submitted by counsel for appellant in the trial of said cause. Therein counsel, referring to a statement made in our trial brief, said: "In this statement they (counsel for defendant) overlook the fact that the city never acquired jurisdiction to create a special improvement district and that the bonds issued were declared by the court to be invalid." It is only fair to say that this so-called reply brief was written by Mr. C. F. Gillette, of Salem, Oregon, on behalf of plaintiff, after the cause had been submitted to the court on briefs written by Messrs. Stewart & Brown, counsel for plaintiff, and ourselves. It is rather difficult to keep up with the shifting positions of the various counsel for appellant. In their original trial brief they stated that the special improve-

ment district had been created. They began an action at law for a straight money judgment, which apparently was converted into one for money had and received. Now, on appeal, they seek to recovevr something on numerous grounds never urged upon Judge Pray, not within the pleadings nor supported by the evidence in the case.

Counsel's criticism of Judge Pray's statement as to the general bond issue of the town for $15,000.00 is mere quibbling. (Page 261). He did say that the town "found that it could lawfully issue $15,000.00 in bonds as a direct obligation, and no more."

As elsewhere stated herein, counsel repeatedly assert that an election was held on the general bond issue. There is nothing in the record to justify such statement. On page 262 of their brief they twice make the statement that there was an election on the question of exceeding the three per cent limitation, without calling the court's attention to any statement in the record justifying such assertion. The contract was let April 26, 1920. The assessed value of all property in Ryegate was then $577,-005.00. (Tr. 27). Three per cent of that amount is $17,310.15. On July 28, 1920, when the first bonds in question were issued, the general indebtedness of the town in excess of moneys in its general fund was $15,871.83, in which were included the $15,000.00 of general bonds (Tr. 28), so no election was necessary to authorize an increase of the constitutional debt limit of three per cent as to those general bonds. The record does not disclose that any election was held. If we assume that one were held it must have been such an election as is first mentioned in Subdivision 64 of Section 5039, Revised Codes 1921, which would simply be an election authorizing the issuance of

the bonds and not authorizing any increased indebtedness over the three per cent limit, because of the fact that no such increase was neecssary to make the $15,000.00 general bond issue legal.

THIS COURT MAY NOT CONSIDER QUESTIONS WHICH ARE NOT WITHIN THE ISSUES NOR CONSIDERED BY THE TRIAL COURT.

POINT AND AUTHORITIES

The only issue raised by the pleadings and considered by the trial court was whether plaintiff was entitled to a money judgment for the amount of principal and interest on its special improvement district bonds. None of the other questions now raised on appeal may be considered by this court, as they are not within the issues, were not presented to Judge Pray and were not considered or passed upon by him.

Sec. 618, 3 C. J. 718, 719 and 720; Sec. 625, 3 C. J. 730; Hull v. Burr, 244 U. S. 712, 34 S. Ct. 892; Dayton-Goosecreek Rly. Co. v. United States, 263 U. S. 456, 44 S. Ct. 169; City and County of Denver v. Denver Union Water Co., 246 U. S. 178, 38 S. Ct. 278; Rodriguez v. Vivoni, 26 S. Ct. 475; Bates v. Coe, 98 U. S. 31; Louisville & Nashville Railroad Co. v. F. W. Cook Brewing Co., 223 U. S. 70, 32 S. Ct. 189; DeJohn v. Alaska Natunska Coal Co., 41 Fed. (2d) 612; Mayor, etc. of the City of Helena v. United States, 104 Fed. 113; United States v. Kettenbach, 208 Fed. 209; Duval Cattle Co. v. Hamphill, 41 Fed. (2d) 433; Thomas v. Kansas City Southern Rly. Co., 277 Fed. 708; Albany Perforated Wrapping-Paper Co. v. John Hoberg Co., 109 Fed. 589; Tuttle v. Claflin, 76 Fed. 227; Towle v. Pullen, 238 Fed. 107; Wolfberg v. State Mutual Life Assurance Co., 36 Fed. (2d) 171; Elkan v. Sebastian Bridge Dist., 291 Fed. 532; Potter v. Cincinnati I. & W. R. Co., 272 Fed. 688; In re Grosse, 24 Fed. (2d) 305; Commerce Trust Co. v. Chandler, 284 Fed. 737; Harding v. Giddings, 73 Fed. 335; Leathe v. Thomas, 97 Fed. 136; Addyston Pipe & Steel Co. v. City of Corry, 46 Pac. 1035.

General rules here applicable are stated by Corpus Juris as follows:

> "One of the most important results of the rule that questions which are not raised in the court below cannot be raised in the appellate court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with that taken by him at the trial, and that the parties are restricted to the theory on which the cause was prosecuted or defended in the court below. Thus where both parties act upon a particular theory of the cause of action, they will not be permitted to depart therefrom when the case is brought up for appellate review." Sec. 618, 3 C. J. 718, 719 and 720.
>
> "As a general rule a party is bound in the appellate court by the theory pursued below with regard to the relief sought and grounds therefor, and he cannot obtain relief not asked in the court below or urge a ground for relief which was not presented there, especially where the new ground is inconsistent with the theory on which he proceeded at the trial." Sec. 625, 3 C. J. 730.

Equity cases decided by U. S. Supreme Court in which the above rules are followed include the following:

Hull v. Burr, 234 U. S. 712, 34 S. Ct. 892, —an action to restrain trustees in bankruptcy from asserting an established claim or interest in certain property, in which the court said:

> "As already mentioned, the specific prayer is that defendants may be restrained from asserting or claiming as trustees in bankruptcy, in any court or place, any right, title, or interest in the property. There is a prayer for general relief, but it was pointed out by the circuit court of appeals (207 Fed. 534, 544) that no right to relief other than by way of an injunction was brought to the attention of the district court or of the court of appeals upon the hearing. The general prayer should therefore be treated as abandoned." (Page 896).

Dayton-Goose Creek Ry. Co. v. United States, 263 U. S. 456, 44 S. Ct. 169, in which appellants sought an injunction

to restrain the Interstate Commerce Commission from enforcing provisions of the transportation act of 1920. The following is taken from the syllabi:

> "11. Appeal and error.—Question not raised below not considered on appeal. In suit to enjoin enforcement of a statute fixing public utility rates as unconstitutional, where the issue of confiscation in the returns permitted in earnings is not raised in complainant's bill, it is not before the appellate court.
>
> "12. Injunction.—Bill held not to raise issue of unconstitutionality of statute. In suit to enjoin enforcement of a statute, fixing public utility rates as unconstitutional, where complainant alleged that the values on which the return was estimated were not the true values, but did not allege what the true values were, such pleading did not properly tender the issue on the question of value."

City and County of Denver v. Denver Union Water Co., 246 U. S. 178, 38 S. Ct. 278. The following is contained in the syllabi:

> "3. Appeal and Error.—Contentions—Urging contention below.
>
> "A bill to enjoin the enforcement of a municipal ordinance fixing the rates for water permitted to be charged by complainant, on the ground that they did not afford a fair and reasonable compensation based on the value of complainant's property used in that service, and hence amounting to a taking of property without due process of law, alleged that complainant was entitled to have its property, devoted to public use of supplying the municipality and its inhabitants with water, remain unimpaired in value, and to receive for the water supplied and service rendered a reasonable return. The answer admitted complainant's ownership of a system of waterworks, and that it was entitled to have its property devoted to the public use of supplying the municipality, and its inhabitants with water, remain unimpaired in value, and receive a reasonable return therefor, and further alleged that the rates fixed by the ordinance were fair, reasonable, and just. The master's report showed that no question was made before him but

that the plant of complainant should be valued as a plant in use. Held, that it was not open to the municipality to urge on appeal that a large portion of complainant's property used in supplying water should be computed at its value disassociated from that service, because complainant was occupying the streets of the municipality at sufferance and might be excluded, for that contention, which substantially was that complainant's property should be computed at its junk value, was not raised below."

Rodriguez v. Vivoni, 26 S. Ct. 475, an action for partition of real estate. The following is taken from the syllabus:

"2. Appeal—questions reviewable—Questions not presented by the pleadings nor raised in the lower court will not be considered on appeal."

Bates v. Coe, 98 U. S. 31, suit in equity for infringement of patent, in which the court said:

"Two assignments of error, to-wit, the second and fifth, must not be passed over without comment. They are to the effect that the court erred in holding that the patentee was the original and first inventor of the respective improvements specified in the second and fourth claim of the patent.

"Two objections to those assignments of error exist, each of which is sufficient to show that they cannot be allowed: 1. That there is no such defense set up either in the answer or amended answer. Nothing can be assigned for error which contradicts the record, nor can an appellant be allowed to assign for error the ruling of the court in respect to any defense not set up in his plea or answer. Appellate courts cannot amend the pleadings, nor can they allow that to be accomplished by an assignment of error." (Page 47).

Louisville & Nashville Railroad Co. v. F. W. Cook Brewing Co., 223 U. S. 70, 32 S. Ct. 189. The following appears in the syllabi:

"Appeal and Error—Objections not raised below.

"2. The objection that there was an adequate remedy at law where a common carrier refused to accept interstate shipments of intoxicating liquors destined to local option or

> 'dry' points in another state, and announced its purpose in such refusals, comes too late, if ever available, when first made on appeal."

The following cases were decided by the Ninth Circuit Court of Appeals:

DeJohn et al. v. Alaska Matanuska Coal Co., 41 Fed. (2d) 612, an action to determine the right of possession to coal land. The property, at the time suit was instituted, was in the actual possession of a receiver. The receivership court granted leave to the Matanuska Company to bring suit for the purpose of determining right to possession and ordered in several parties who were asserting adverse claims, including one Agostino, who claimed the right to exclusive possession. There were also certain funds in the hands of the receiver which Agostino claimed on appeal. In holding that this question was not before the appellate court, the court said:

> "There is some contention here by Agostino that he is entitled to the funds, or a part of the funds, in the receiver's hands, but that question was not properly in issue in the trial court, was not there decided, and hence is not before us." (Page 613).

In Mayor, etc. of the City of Helena v. United States, 104 Fed. 113, the cause came before the appellate court on an alleged error of the Circuit Court of the United States for the District of Montana in awarding a peremptory suit of mandate to compel the payment of a judgment recovered in said court by James H. Mills, receiver, against the City of Helena. The following is taken from the court's opinion:

> "It is objected that neither the petition nor the alternative writ show title in the relator. The petition alleges the recovery of the judgment in the United States circuit court for the district of Montana in favor of James H. Mills, receiver, but it is not alleged that the judgment has

been assigned or transferred to the relator. It is alleged, however, that the petitioner is beneficially interested in the subject matter of this proceeding and in the relief demanded as a taxpayer on property situate within the city of Helena, and as an owner and holder of said judgment. This allegation appears also in the alternative writ of mandate. No objection to the sufficiency of the petition was taken by demurrer or otherwise in the court below, and the answer of the defendants did not deny the allegation of the petition that the relator was the owner and holder of the judgment. The objection that the relator does not show title by assignment, not having been made in the court below, cannot be taken here. To hold otherwise would involve the exercise of original instead of appellate jurisdiction. This is not permitted to us. (Citing cases). Had the objection been taken by demurrer, the petition could have been amended in the lower court, and the assignment alleged. The omission must now be considered as having been waived. O'Reilly v. Campbell, 116 U. S. 418, 6 S. Ct. 421, 29 L. Ed. 669." (Page 115).

In the case of the United States v. Kettenbach, 208 Fed. 209, a suit by the United States to cancel and annul certain patents, the court said:

"1. It is contended by the complainant in this court that the patents described in these three cases should be declared fraudulent and void on the single ground that the evidence establishes the fact that the entrymen applied to purchase the lands described in their entries for the purpose of speculation. Section 2 of the Act of June 3, 1878, does require the entryman to set forth in his sworn statement, among other things:

'That he does not apply to purchase the same (the land) on speculation, but in good faith to appropriate it to his own exclusive use and benefit.'

"The definition of the word 'speculation' is given by Webster as 'the act or practice of buying land, goods, shares, etc., in expectation of selling at a higher price.' It may be conceded that, when the entrymen made entry of the lands in controversy, it was with the expectation that they would sell them at a higher price; but we are not

required to dispose of these appeals upon these words of the statute.

"The cases are not so presented in the bills of complaint and were not so tried in the court below. The charge in the bills of complaint is, in substance, that, at the time the entrymen made application to purchase the lands described in their entries, they had made an agreement with certain persons by which the title to the land which they were to acquire from the United States should inure to the benefit of persons other than themselves. Whether this charge was true or not was the question at issue in the court below, and to this issue the voluminous testimony we find in the record was directed, and is now before the court for the purpose of determining these appeals. It is this question, and this question alone, we must determine with respect to the 61 patents assailed in these cases." (Page 213).

The following are equity cases from other circuit courts of appeal:

In Albany Perforated Wrapping-Paper Co. v. John Hoberg Co., 109 Fed. 589, it was held that:

> "Where a bill to restrain an alleged infringement of a trademark was based on the theory of the fraudulent use of certain trade-names, and was dismissed for want of equity, it cannot be alleged on appeal that a case was made out of a fraudulent and unfair competition in trade." (From syllabus).

In Tuttle v. Claflin, 76 Fed. 227, the court held that:

> "Where the pleadings are silent on the question of whether complainants marked their article as 'Patented,' or notified defendants of their alleged infringement, as required by Rev. St. Sec. 4900, and that question was never actually raised or decided in the circuit court, it is then too late for defendants to make the point upon appeal from the final decree." (From Syllabus, page 227).

On this point the court said:

> "It is too late to raise for the first time in an appellate court technical questions of pleading or proof which are

> not jurisdictional in their character, and which were not raised either in the pleadings or before the trial courts, where defects might have been remedied, and which must therefore be considered to have been waived." (Page 237).

The case of Harding v. Giddings, 73 Fed. 335, involved, among other things, a certain agreement not set up in the pleadings. It was offered in evidence and objected to as not within the issues. The lower court reserved the question of admissibility of the agreement and upon appeal the record failed to show what decision had been made by the court as to the admissibility of the agreement. On this point the court said:

> "We are further of the opinion that because the agreement was not set up, either by bill or answer, in the pleadings, and was not considered or passed upon by the court of original jurisdiction upon the hearing, this court cannot consider or give effect to it." (Page 341).

The following cases are to the same effect:

> Duval Cattle Co. v. Hemphill, 41 Fed. (2d) 433; Thomas v. Kansas City Southern Ry. Co., 277 Fed. 708; Towle v. Pullen, 238 Fed. 107; Wolfberg v. State Mutual Life Assurance Co., 36 Fed. (2d) 171; Elkan v. Sebastian Bridge Dist., 291 Fed. 532; Potter v. Cincinnati, I & W. R. Co., 272 Fed. 688; In re Grosse, 24 Fed. (2d) 305; Commerce Trust Co. v. Chandler, 284 Fed. 737; Leathe v. Thomas, 97 Fed. 136; Addyston Pipe & Steel Co. v. City of Corry, 46 Pac. 1035.

The complaint was evidently framed on the theory of money had and received. (Tr. 1 to 9). No reason is stated for bringing the action, except the total failure to pay interest or principal of bonds after January 1, 1922. (Tr. 8).

The answer contains a general denial of any liability (Tr. 25) and affirmatively avers that the bonds were payable only out of special improvement district assessments. (Tr. 27). Defendant also pleaded that, if the bonds in question were held

to be a general liability of the town, the constitutional and statutory limit of indebtedness of the town would be exceeded, and therefore they were void and they and the debt evidenced by them illegally and unconstitutional. (Tr. 28).

Other defenses pleaded in the answer were (1) that the bonds were sold for 80 per cent of their face value, (2) that the Security Bridge Co., in accepting said bonds from the town, and plaintiff, in purchasing them from that company, knew that the Town of Ryegate was not liable for the payment of either principal or interest of such bonds, and (3) that the assessments made for the payment of the bonds were adjudged null and void in suits brought by property owners to restrain their collection, because the town had not acquired jurisdiction to create the district. (Tr. 29 to 34).

Plaintiff in its reply denied that the bonds and the indebtedness so evidenced were in excess of the constitutional limit, if they were held to be general obligations of the town, denied that the bonds were sold for 80 per cent of their face value, denied that plaintiff and Security Bridge Co. knew that the town was not liable for the payment of the bonds when they were accepted and purchased, admitted knowledge of the institution of suits by property owners to have such assessments declared invalid, and admitted that the decrees entered therein prevented the collection of the principal and interest upon the special improvement district bonds.

In the "Stipulation as to Trial and Facts" it is admitted that the town could not legally and constitutionally issue sufficient general bonds to cover the entire cost of installation of water system; that the district was created for the purpose of raising the additional necessary funds (Tr. 52, 53); that the object of

the issuance of the general and special improvement district bonds was the installation of complete water works for the town and a portion of its inhabitants (Tr. 53); that the Security Bridge Co. accepted the general and special improvement district bonds in payment of cost of installation of the water system (Tr. 54, 55); that the Security Bridge Co. sold said bonds at 85 per cent of their par value to plaintiff (Tr. 55); that more than one-third of the residences and five other buildings in the town are not in the district, a portion of which have fire protection, but that 22 residences and two warehouses in the town do not have such protection (Tr. 57); that the water system is operated at a loss (Tr. 57, 58); that the interest on the district bonds to January 1, 1922 was paid out of district assessments and no part thereof out of any town funds (Tr. 58; that the allegations of Subdivision II of appellee's answer as to indebtedness of town and of assessed value of the property in the town are true (Tr. 59; that Paragraph one of subdivision IV of the answer as to the precautions taken by the town council to assure the legality of the bonds are true (Tr. 59); that Paragraph one of Subdivision IV of the answer as to the precautions taken by the town council to assure the legality of the bonds are true (Tr. 59; that practically all of the averments of paragraph two of that subdivision of the answer are true (Tr. 59, 60); that Security Bridge Co. purchased said district bonds with the knowledge that they were special improvement district bonds, with full knowledge of the laws of Montana governing their issuance, the powers of appellee with reference thereto and the method provided for their payment (Tr. 60); that suits wre brought by various property owners as alleged in Subdivision V of the answer; that the pleadings

and decree attached as exhibits to the answer are correct copies of the originals; that similar suits were filed by other property owners in which the pleadings and decrees were similar; that appellant had its own counsel associated in the defense and trial of those actions and that no appeal was ever taken from said decrees (Tr. 60); and that appellant's name does not appear in the minutes, records and files of the town, except in copies of letters of the town clerk remitting some of the bonds in question to the appellant at the request of Security Bridge Co.

The record is barren of any request of appellant for findings. No suggestion was ever made to Judge Pray that his decision did not cover the questions submitted, nor was any motion or request made that he make findings upon any of the points now on appeal urged for the first time.

Judge Pray correctly stated the only question before him in the first sentence of his decision. (Tr. 94). Again, he clearly states appellant's contention on pages 95 and 96 of the transcript. So, on page 98 of the transcript he states the issue tried in these words: "While plaintiff cannot now recover upon the contract, the question remains can it lawfully recover from the town as on an implied contract for money had and received. * * * Plaintiff claims to have no recourse against the property of the district because of a decision of the state court, from which no appeal was taken." After considering the various authorities cited by counsel, Judge Pray concluded his opinion or decision as follows:

> "It is, of course, manifest that the town had exceeded its constitutional limit of indebtedness but I cannot agree with counsel that under the circumstances here there would be a general liability on the part of the town and that the calling of an election to authorize additional indebtedness

> should be treated as a mere formality and that the failure to call it would amount to no more than an irregularity. On the contrary there was no power at all on the part of the town to incur such excessive indebtedness without the previous authorization of the qualified voters.
>
> "After consideration of both sides of the issues the court feels obliged to hold that the Town of Ryegate did not become indebted to plaintiff on account of the special improvement district bonds delivered to it. In accordance with these views judgment will be entered for the defendant with costs."

It is to be noted that in no part of his opinion does Judge Pray even intimate that any question was involved or submitted to him other than the one mentioned.

The evidence, in addition to the "Stipulation as to Facts," will be found on pages 155 to 251 of the transcript. None of it raises any question other than the issue of a general liability on the part of the town and as prayed for in the complaint.

Assignment of errors Nos. I, VII and VIII relate to the one and only issue before the court and that is whether there was any general liability on the town for the payment of the amount claimed by the appellant. Nos. II, III and IV cover matters that were merely mentioned by Judge Pray in the course of his opinion and were not considered by him as any basis for his decision. His remarks about notice to property owners, estimated cost and protest might be omitted from his opinion without changing the result or detracting in the least from his decision. In other words, his decision is amply supported by his other findings or the reasons given for conclusion. There were no such findings as referred to in Nos. V and VI.

There is nothing in the record upon which any claim for relief can be predicated other than the one question of the general liability of the town for the indebtedness of the district.

Under the foregoing authorities and the facts as disclosed by the record no other question may be considered upon this appeal. If plaintiff desires to test the theories of its counsel now advanced for the first time, it should do so in a new action or suit under suitable pleadings.

While not a part of the record, the court could more clearly ascertain what was tried and submitted to Judge Pray by having the briefs filed in the trial court certified and filed herein.

THERE WAS NO PRIVITY BETWEEN APPELLANT AND APPELLEE AND THEREFORE APPELLANT CANNOT RECOVER HEREIN.

POINT AND AUTHORITIES

Appellant purchased the bonds in question from the contractor to whom they were issued in full payment of the contract price of the work done by the contractor. The appellant paid no money to the town. There was no enrichment of the town treasury because of money paid by the appellant to the contractor. Consequently, there was no privity between appellant and the town, so appellant may not recover herein.

> Hedges v. Dixon, 150 U. S. 183, 14 S. Ct. 71; O'Brien v. Wheelock, 184 U. S. 450, 22 S. Ct. 354 on 370-371; Aetna Life Ins. Co. v. Town of Middleport, 124 U. S. 534, 8 S. Ct. 625 on 626 to 629; German Ins. Co. v. City of Manning, 95 Fed. 597 on 606; Otis v. Cullom, 92 U. S. 447 on 449; City of Henderson v. Winstead, 215 S. W. 527 on 528; Swanson v. City of Ottomwa, 106 N. W. 9.

This is a suit for money had and received. The record shows that Mr. Roscoe, an officer of the contractor and acting for the contractor, purchased the general bonds of the town and that the contractor took said general bonds and the special improvement district bonds issued by the town in full payment of the contract price of the work done by the contractor. Ap-

pellant purchased both the general and improvement district bonds from the contractor. (Tr. 54-55-60). No where in the town records does appellant's name appear in connection with the entire transaction (Tr. 60-61) nor did any of the town officials then know that appellant was purchasing the bonds from the contractor. (Tr. 205-6-8, 230-2-3-4-5-6, 248). As the result of the purchase of said bonds by appellant from the contractor, there was no enrichment of the town terasury.

Upon the trial it was admitted by appellant that the town had no authority to create the special improvement district (Tr. 97-98) and that collections on the bonds could not be made because of the decisions in the Belecz and other suits. (Tr. 50).

There was no privity between the appellant and the Town of Ryegate in the purchase of the bonds by appellant and, under the authorities cited above, there can therefore be no recovery by appellant.

The rule contended for by appellee is well stated by the supreme court of the United States in Aetna Life Ins. Co. v. Town of Middleport, 124 U. S. 534, 8 S. Ct. 625, where the court said:

> "The bill then charges that said supreme court, while holding the bonds to be void, did not deny, but impliedly admitted, the validity of the appropriation by the town, and insists that by the issue and delivery of said bonds to the railroad company, and their sale by that company to the present complainant, it is thereby subrogated to the rights of action which that company would have on the contract evidenced by the vote of the town, and the acceptance and fulfillment of the contract by the railroad company." (Pages 626-7).
>
> "The circuit court held that the statute of limitations was a bar to the present suit, and dismissed the bill on that ground.
>
> "But we regard the primary question, whether the com-

plainant is entitled to be substituted to the rights of the railroad company after buying the bonds of the township, a much more important question, and are unanimously of opinion that the transaction does not authorize such subrogation." (Page 627).

"In the present case there was no borrowing of money. There was nothing which pretended to take that form. No money of the complainants ever went into the treasury of the town of Middleport; that municipality never received any money in that transaction. It did not sell the bonds, either to complainant or anybody else." (Page 628).

"One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor; that, being forced under such circumstances to pay off the debt of a creditor who had some superior lien or right to his own, he could, for that reason, be subrogated to such rights as the creditor, whose debt he has paid, had against the original debtor. As we have already said, the plaintiff in this case paid no debt. It bought certain bonds of the railroad company at such discount as was agreed upon between the parties, and took them for the money agreed to be paid therefor. But, even if the case here could be supposed to come within the rule which requires the payment of a debt in order that a party may be subrogated to the rights of the person to whom the debt was paid, the payment in this case was a voluntary interference of the Aetna Company in the transaction. It had no claim against the town of Middleport. It had no interest at hazard which required it to pay this debt. If it had stood off, and let the railroad company and the town work out their own relations to each other, it could have suffered no harm and no loss. There was no obligation on account of which, or reason why, the complainant should have connected itself in any way with this transaction, or have paid this money, except the ordinary desire to make a profit in the purchase of the bonds. The fact that the bonds were void, whatever right it may have given against the railroad company,

> gave it no right to proceed upon another contract and another obligation of the town to the railroad company." (Page 629).

The decision ni that case was quoted with approval in Hedges v. Dixon, 150 U. S. 183, 14 S. Ct. 71, and also in German Insurance Co. v. City of Manning, 95 Fed. 597 on 606.

In Otis v. Cullom, 92 U. S. 447, the supreme court of the United States, on page 449, said:

> "Such securities throng the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand like bank-notes. The seller is liable ex delicto for bad faith; and ex contractu there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage-ground upon which it would have placed him."

Again, in O'Brien v. Wheelock, 184 U. S. 450, 22 S. Ct. 354, the same court said:

> "We think that the evidence fails to show that Palms relied, or had the right to rely, on the acts, or assurances, or silence, of any of these different classes of landowners, and was thereby misled. He purchased the bonds, not of the landowners, or any of them, nor from the levee commissioners, but in the open market, and on the advice of counsel as to the legality of the proceedings. The landowners who participated in any way in the creation of the drainage district were as vitally interested in the matter as any purchaser of bonds could be, and they acted equally in the mistaken belief that the law was valid. It would be a novel idea, as the supreme court of Illinois remarked in Holcomb v. Boynton, 151 Ill. 300, 37 N. E. 1033, 'in the law of estoppel that the doctrine should be applied to a person who has been guilty of no fraud, simply because, under a misapprehension of the law, he has treated as legal and valid an act void and open to the inspection of all'." (Page 370).

> " * * * and besides Palms, as a purchaser of bonds in the open market, was a stranger to the work." (Page 371).
>
> "Here no bonds were ever sold by the commissioners to Palms or anyone representing him. They were delivered to the contractors and were taken in payment at 90 cents on the dollar of their face value. If the acts of any of the landowners created any equities against them it was in favor of the contractors, and these equities could not be asserted by Mr. Palms, unless by subrogation, which could not be availed of." (Page 371-2).

There is authority to the same effect in the state courts. In City of Henderson v. Winstead, 215 S. W. 527, the Court of Appeals of Kentucky said, on page 528

> "As to the appeal in the suit instituted by the bank a question different from that in the Winstead Case is presented. It did not purchase the bonds held by it from the city, but received them by assignment or transfer from Eichel, who in turn had gotten them from Bray, the original purchaser; neither Bray nor Eichel is a party to this appeal. It is difficult to tell from the bank's petition whether it is seeking a recovery on the bonds, or in assumpsit; but in either event its case must fail. The bonds are void, issued as they were under an unconstitutional statute, and hence created no obligation upon the city. The bank is in exactly the same position as was the appellant in Cohen v. City of Henderson, supra. The city did not receive any money from the bank.
>
> "To support an action for money had and received there must be some privity existing between the parties in relation to the money sought to be recovered."

In Swanson v. City of Ottomwa, 106 N. W. 9, it appears that

> "The holders of the bonds also appeared and admitted their purchase of the bonds from the Chicago, Fort Madison & Des Moines Railroad Company and pleaded that they purchased the same in good faith before maturity and without knowledge of any defenses thereto * * * and further ask that in the event the bonds were held invalid they have judgment against the city for the amount they paid the rail-

road company for said bonds as for money had and received for its use and benefit." (Page 10).

It was contended that appellant was entitled to recover on the common counts as for benefits conferred upon the city. The court called attention to the fact that the bonds were delivered by the city to the railway company, that the railway company sold them to the appellants, that the railway had purchased the depot grounds and paid for them out of its own money. The original owner of the grounds had received his money and was making no complaint, just as in this case the contractor is making no complaint. That if any benefits had been conferred by the bondholders upon anyone it was upon the railroad company. That the city's act was a pure donation and as the original owner has received his money, no equities can be worked out through him.

SCOPE OF REVIEW

As elsewhere pointed out in this brief, the scope of review by an appellate court is limited by the issues presented to and considered by the trial court. Matters not brought to the attention of the trial court and not considered by it are not subject to review in the appellate court.

POINT AND AUTHORITIES

Only such issues as were presented to the trial court and passed upon it may be considered on appeal.

> Kansas City Life v. Shirk, 50 Fed. (2d) 1046; Wilson v. Merchants L. & T. Co., 183 U. S. 121, 22 S. Ct. 55 on 58; U. S. Trust Co. v. New Mexico, 183 U. S. 540, 22 S. Ct. 172 on 174; Sec. 274b. U. S. Judicial Code; Sec. 398 U. S. C. A.

This subject is treated by counsel for appellant at pages 50 to 57, in their brief.

It is to be noted that under Section 274 B of the Judicial

Code, Section 398 U. S. C. A., the decision of an appellate court must be made upon the record. No authority is given to present new issues or theories to the appellate court.

The true rule is stated in Kansas City Life v. Shirk, 50 Fed. (2d) 1046:

> "In a jury waived case, where the parties make and file an agreed statement of the ultimate facts, or the court makes and files special findings of the ultimate facts, the sufficiency of such facts to support the judgment presents a question of law reviewable on appeal. * * *
>
> "However, where a case tried before the court, a jury being waived, upon agreed facts, such agreed facts, if the ultimate facts of the case as contradistinguished from mere evidentiary facts, may be examined on review for the purpose of determining whether such ultimate agreed facts, on which the case was heard and determined, support the judgment rendered." (Page 1047).

The court also quoted with approval from the opinion of Mr. Justice Peckham in Wilson v. Merchants L. & T. Co., 183 U. S. 121, 22 S. Ct. 55 on 58, where

> "Mr. Justice Peckham, delivering the opinion for the court, said:
>
> 'The result of the decisions under the statutes providing for a waiver of trial by jury, and the proceedings on a trial by the court (Rev. St. Secs. 649, 700) is that when there are special findings they must be findings of what are termed ultimate facts, and not the evidence from which such facts might be but are not found. If, therefore, an agreed statement contains certain facts of that nature, and in addition thereto and as part of such statement there are other facts of an evidential character only, from which a material ultimate fact might be inferred, but which is not agreed upon or found, we cannot find it, and we cannot decide the case on the ultimate facts agreed upon without reference to such other facts. In such case we must be limited to the general finding by the court. We are so limited because the agreed statement is not a compliance with the statute.

'As to what is necessary in special findings or in an agreed statement of facts, the authorities are decisive. It is held that upon a trial by the court, if special findings are made, they must be not a mere report of the evidence, but a finding of those ultimate facts on which the law must determine the rights of the parties; and if the finding of facts be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by a bill of exceptions; and in such case the bill cannot be used to bring up the whole testimony for review, any more than in a trial by jury. * * *

'It has, however, been held that where there was an agreed statement of facts submitted to the trial court and upon which its judgment was founded, such agreed statement would be taken as an equivalent of a special finding of facts. Supervisors v. Kennicott, 103 U. S. 554, 26 L. Ed. 486. But as such equivalent, there must of course be a finding or an agreement upon all ultimate facts, and the statement must not merely present evidence from which such facts or any of them may be inferred'."

Again, the court quoted with approval from the opinion of Mr. Justice Brewer in U. S. Trust Co. v. New Mexico, 183 U. S. 540, 22 S. Ct. 172 on 174, as follows:

" 'An agreed statement of facts may be the equivalent of a special verdict or a finding of facts upon which a reviewing court may declare the applicable law, if such agreed statement is of the ultimate facts, but if it be merely a recital of testimony or evidential facts, it brings nothing before an appellate court for consideration. * * *

'Under all the authorities, this distinction between cases tried on agreed ultimate facts, and the finding of the ultimate facts in a case, and a statement of the evidential facts, is kept clearly in mind in determining the right of an appellate court to review the findings made for the purpose of determining whether the judgment rendered is supported by the facts found or agreed'."

In conclusion, the court, in Kansas City Life Ins. Co. v. Shirk, supra, said:

"Hence, whether the same (agreed facts) supports the

> judgment, in the absence of a declaration of law requested of the court, denied and exception saved, there is no right of review of any question of law saved for review in this court and this court is powerless to review the case."

In the case at bar there was no "declaration of law requested of the court, denied and exception saved, so there is no right of review of any question of law." At most, all that may be reviewed is the question whether the judgment is sustained by the ultimate facts as shown by the "Stipulation as to Facts" and the admission of the parties.

On pages 53 and 54 of their brief, counsel for appellant quote from Judge Pray's opinion as to defendant's statement of the issue. They should have also quoted his statement as to the contention of appellant immediately following their quotation on pages 53 and 54 from a portion of the opinion by Judge Pray. (Tr. 96, 97). He there said: "Plaintiff contends that the town never acquired jurisdiction to create a special improvement district and that the bonds issued were by the court declared to be invalid."

The record does not disclose that any requests for findings of fact or conclusions of law were made by counsel for either party. These statements as to the contention of both parties are not in the record. They must have been assumed by Judge Pray from the briefs.

Plaintiff asserted that the town never acquired jurisdiction to create the special improvement district. That was the finding of Judge Horkan in the Belecz case. (Tr. 89). He also held that the assessments were null and void. (Tr. 90, 91). Appellant, in the trial court, adopted that finding of Judge Horkan by stating that the bonds in question were by the court declared to be invalid. (Tr. 97). Appellant having taken the

position before the trial court that the town never acquired jurisdiction to create the district, cannot now be heard in contending otherwise. In other words, the sole question before this court is as to whether the record sustains Judge Pray's conclusion that the town had exceeded its constitutional limit of indebtedness and that under the circumstances as disclosed by the record the town did not become indebted to appellant on account of the special improvement district bonds delivered to it. (Tr. 111).

We admit that only the first coupons on the district bonds have been paid, but the record is silent as to what has been paid on the general bonds, so the statement as to payments on page 59 of Appellant's brief is inaccurate.

In the case of Douglas County Commissioners v. Bowles, 94 U. S. 104, 110, in which the supreme court of the United States said "common honesty demands that a debt thus incurred should be paid," the facts are not at all similar to those shown by the record in the case at bar. The same is also true of Tulare Irrigation Dist. v. Shepard, 185 U. S. 1.

RIGHT TO DETERMINE ENTIRE CASE IN EQUITY.

Under this sub-head counsel for appellant discuss the question of a supposed trust and an accounting as to the balance in such trust, which counsel state is "as to any balance which has been collected from special improvements but not paid to the bondholders." (Page 173 of brief).

We assume that counsel refer to their statement on pages 102 and 103 of their brief, where they say: "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."

Counsel do not seem to be at all chary in making assertions for which there is no basis in the record. It is difficult to understand their reasons for such statements. They can scarcely expect this court to go outside the record in order to render a decision favorable to appellant. Nevertheless, we are at a loss to conjecture what other motive they may have in making such unfounded statements.

Appellant did not ask for an accounting. It did not claim that any special assessments had been collected which were not paid to the bondholder. It made no request of Judge Pray for an accounting or for an order to require an accounting. As we have shown elsewhere in this brief no such question was before the trial court. The only controversy before it was as to whether there was a general liability against th town on account of the bonds in question.

Counsel seem to be aggrieved because appellee did not make a record sufficient to establish the fact that appellant was entitled to some relief. It is most unusual for appellant to com-

plain because appellee did not make a case for appellant. In fact, this is our first experience of that kind.

Whether any assessments were collected and not paid to the bondholder cannot be determined from the record. It is silent on that question. It is equally silent as to whether any coupons or bonds were presented for payment after January 1, 1922, or whether any demand for payment was ever made by the bondholder. If any additional assessments were in fact collected, we are sure that the town will pay same to the bondholder upon presentation of the coupons, without any suit for an accounting. At least, it might be well for appellant to make such presentment and demand before complaining for the first time in an appellate court without any record on which to base its assertions.

Under Section 2269, R. C. M. 1921, taxes and other demands may be paid under protest and the taxpayer may then institute an action to recover the payments so made. It is possible that judgments were so made and such actions instituted. If so, judgments were doubtless rendered in favor of the taxpayers. As payments were made to the bondholder January 1, 1922, it is easily conceivable that there may not have been sufficient funds on hand to pay such judgments in full.

Again it is quite conceivable that, as suits were begun in January, 1922 (Tr. 60) by a considerable number of the property owners in the district to enjoin the collection of the assessments, the other property owners in the district took the same action to prevent collection of assessments against them in 1922 and thereafter. Certainly it was not incumbent upon the appellee to prove the negative of a question not raised by appellant.

On page 178 of their brief counsel state: "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 so-called accounting for annual water rentals must refer to paragraphs (6) and (7) of "Stipulation as to Facts" found on pages 57 and 58 of the transcript. They were inserted in order to show that the system was not profitable in answer to an allegation in paragraph XIII of the complaint (Tr. 8) as follows: "That said defendant town and the inhabitants thereof now have and are using and receiving the income and benefits from valuable property totally and wholly built and constructed from moneys of this plaintiff had and received, and used by said defendant town and its officers for such public purpose, all of which moneys so had and used being evidenced by said bonds before herein referred to." That allegation was denied in the answer. (Tr. 25).

If appellant thought that there was any trust relationship between it and the town, that question would have been raised by proper pleading and proof. It is now too late.

The cases cited by counsel under this sub-head are not applicable to the facts in this cause.

We come now to consideration of the plans proposed by counsel as "Suggestions of Adjustments." (Tr. 180 to 184).

PLAN A

This plan is not even a suggested adjustment. If adopted, it would require the town to pay the full amount of the cost of the district bonds to the appellant. It is fully covered by our brief, upon the constitutional limit of indebtedness which the town might incur.

PLANS B AND C

These two proposed plans may be discussed together. That part of the specifications relating to payments is set out on pages 32 and 33 of appellant's brief. It is there stated that "the town now has available from the proceeds of general obligation bonds $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 * * * and such of the main water 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 4 in the Town of Ryegate, Montana."

Costs per lineal foot for improvements of the kind in question are provided for in Section 5226, R. C. M., 1921. The last sentence thereof contains the following:

> "Provided, however, that the whole cost so assessed shall at no time exceed the sum of $1.50 per lineal foot, plus the cost of the pipe so laid, of the entire length of the water mains laid in such district."

It will be seen that the suggestion in Plans B and C that a portion of engineering expenses, costs of printing bonds and of preliminary expenses cannot be made a part of the charge against the district unless they be included in the $1.50 per foot in excess of actual cost of pipe. This is also true as to costs of hydrants. In other words, the cost of the hydrants, engineering, bond printing and preliminary expenses, together with the actual cost of laying the pipe, must not exceed $1.50 per foot.

The entire record is silent as to the cost of the pipe, except the statement of Judge Horkan in his findings of fact in the Belecz case. On page 87 of the transcript he states "that the

cost of said pipe so used was not in excess of $17,726.47." It should be noted that he does not state what the actual cost was and there is nothing in the record from which such actual cost may be determined. As the amount of pipe mentioned by Judge Horkan covers all of the pipe laid, including the main lines, as well as the lateral distributing lines within the district, there are no means of ascertaining from the record the amount of pipe that could have been legally charged to the district.

The court's attention is called to the copy of the map of the Town of Ryegate attached to appellant's brief. From that it will be seen that the well and reservoir are situated some distance from the exterior lines of the district and that they are on opposite sides of the town. A considerable portion of the pipe mentioned by Judge Horkan is in the pipeline from the well to the reservoir and from the reservoir back to the district, where it connects with the lateral distributing lines.

Upon the record, as made, no court could determine how much of the entire pipeline was required to connect the reservoir with the well and the lateral distributing lines in the district with the reservoir so that it would be impossible to make any proper computation under either Plans B or C.

PLAN D

It is difficult to understand Plan D or how much counsel would charge to town or how much to district. They admit that their computations are not accurate, because of the state of the record. As the case was not tried on the theories underlying any one of the four suggested plans, it is easily understood why the record is not complete so as to sustain appellant's belated contentions. Counsel have embarked upon a fishing excursion, such as is never countenanced by the courts. Records

must be made in the trial and not in the appellate courts.

As Plan D concludes with the statement "Balance due from town itself—$3,042.76," it would seem that that is the amount counsel would have the court find as owing from the town to the appellant. They say on page 184 of their brief: "There is no doubt ofthe town's liability to pay small excesses developed in connection with such improvements when the complete results cannot be foreseen" and cite Salt Lake City v. Smith, 104 Fed. 457, in support of that statement. That was a case brought by the contractors against the city for claimed extras, because of necessary alterations in the work and is in no way applicable to the facts and issues in the case at bar.

If we are correct in concluding that counsel, under Plan D, would ask for a judgment against the town for $3,042.76, we call the court's attention to the fact that such judgment would increase the debt of the town beyond its constitutional limit, which may not be done, as heretofore pointed out by us.

THE BELECZ CASE

POINTS AND AUTHORITIES

The correctness of the decision of Judge Horkan in the Belecz case was not an issue in the trial of the case at bar and is not now properly before this court for review. However, Judge Horkan correctly decided that case in favor of the plaintiffs therein on the ground that the Town of Ryegate never acquired jurisdiction to create the special improvement district in question.

> 49 C. J., Sec. 333 (2) Pages 265 and 266 and cases there cited; Hough v. Rocky Mountain F. Ins. Co., 70 Mont. 244-248, 224 Pac. 858; Estate of Schuk v. Hauck, 66 Mont. 50-61, 212 Pac. 516; McEwin v. Union Bank & Trust Co., 35 Mont. 470, 90 Pac. 359; First Nat. Bank v. Silver,

45 Mont. 231, 122 Pac. 584; Secs. 3413 to 3417, inclusive, R. C. M. 1907; Sec. 3418, R. C. M. 1907; Chap. 89 Session Laws of 1913; Chap. 142 Session Laws of 1915; Chap. 175 Session Laws of 1919; Shapard et al. v. City of Missoula et al, 49 Mont. 269 on 279-280 (Decided June 8, 1914); Evans v. City of Helena, 60 Mont. 577, 199 Pac. 445; Vol. IV McQuillan on Municipal Corporations, Sec. 1796.

We do not concede the contention of appellant that this court may consider matters which were not submitted to the trial court, as has been stated heretofore in this brief. The Belecz case was not pleaded in the answer for the purpose of having the trial court pass upon the issues involved therein, but simply to show why assessments of the district had not been paid. It is admitted in the "stipulation as to facts" that the Belecz and other similar suits were brought and that Exhibits 3, 4, 5 and 6 attached thereto are, except as to formal parts, true copies of the complaints, answers, replies and decrees in said suits. (Tr. 60 and 68 to 92).

In its reply, appellant admits that the decrees in those cases have prevented the collection of the principal and interest of the bonds in question. (Tr. 50). That admission shows that appellant understood that the purpose of pleading the Belecz and other suits was to show why the district assessments were not paid. Appellant did not then challenge the correctness of the decisions in those cases. Neither did it then contend or even intimate that those decisions were not binding upon appellant or that Judge Pray might pass upon the issues involved in those cases.

Under "Defenses Offered by the Town of Ryegate," page ......, we quote from the transcript, showing that the holding of Judge Horkan as to the invalidity of the special improvement

district bonds was not only never presented to or considered by Judge Pray but the correctness of the decision of Judge Horkan was assumed by counsel for appellant, as well as by Jugde Pray, and that there was then no question but that those bonds were illegal and void; that counsel for appellant then took the position that the town never acquired jurisdiction to create the special improvement district; that appellant then claimed to have no recourse aaginst the property of the district because of Judge Horkan's decision, holding hat the bonds of the district were illegal and void, and that counsel for appellant then disclaimed any intention of trying to establish the legality of such bond issue. (Tr. 94, 96, 97, 98, 179).

True it is that appellant in its reply denies that it has any knowledge or information sufficient to form a belief as to certain allegations of appellee's answer. (Tr. 50). However, in the "stipulation as to facts" appellant admits that it had its own counsel associated in the defense and trial of those suits, so its denial of all matters connected therewith must be ignored.

The general rule is stated in Corpus Juris as follows:

> "Facts either actually or presumptively within the knowledge of defendant, or which relate to personal transactions of defendant, cannot properly be put in issue by a denial of knowledge or information sufficient to form a belief. * * * When facts which are readily accessible to defendant, by reason of being in the public records, are sought to be put in issue, this form of denial is improper." 49 C. J. Sec. 333 (2) Pages 265 and 266 and cases cited.
> Hough v. Rocky Mountain F. Ins. Co., 70 Mont. 244 on 248, 224 Pac. 858; Estate of Schuk v. Hauck, 66 Mont. 50-61, 212 Pac. 516; McEwen v. Union Bank & Trust Co., 35 Mont. 470, 90 Pac. 359; First Nat. Bank v. Silver, 45 Mont. 231, 122 Pac. 584.

Whether this court may pass upon the correctness of the de-

cision of Judge Horkan in the Belecz case, which was not presented to the trial court, we submit that that ruling was correct. The grounds upon which the plaintiffs in that case sought to enjoin the collection of the assessments in question were five in number, as follows:

1. That the description of the character of the improvements to be made in such special improvement district as set out in the resolution of intention to create said district, did not contain a sufficient description of the general character of the improvements to be made as required by law; that the only description used was "the construction of pipes, hydrants and hose connections for irrigating appliances and fire protection," while as a matter of fact the general purpose of the creation of the district was to install a complete system of water mains and water works for the entire Town of Ryegate.

2. That the cost of the improvements in said district far exceeded the sum of $1.50 per lineal foot, plus the cost of the pipe laid.

3. That no notice was given of the letting of the contract for said improvements; that the same were estimated to cost $28,350.00; that the contract price thereof was $52,829.35, and that the actual cost of the improvements, including engineering and other expenses, amounted to $57,619.22.

4. That the contractor took the warrants of the district in payment of his contract price; that in so doing he allowed a considerable discount on the bonds and added such discount to his bid; that this fact was known to the Mayor and Town Council at the time the contract was let, and thereby the cost of the work was greatly increased to the improvement district.

5. That the owners of a sufficient number of lots protested

against the creation of the district, and that interested parties, including the contractor, paid the Chicago, Milwaukee & St. Paul Railway Company, one of the protestants, the sum of $2500.00 to induce it to withdraw its protest; that it did withdraw its protest and thereby left an insufficient number of lots whose owners were protesting against the creation of the district, and thereby made their protest ineffectual.

INSUFFICIENCY OF DESCRIPTION

We desire to call the court's attention to our various statutory provisions with reference to creation of special improvement districts, with a history of the enactment of the same, so as to demonstrate to the court that the proceedings had in the creation of this district were under a statute designed solely for the purpose of authorizing the "construction of pipes, hydrants and hose connections for irrigating appliances and fire protection," and not for the purpose of establishing a general system of water works.

Until repealed by the Sixteenth Legislative Assembly of Montana, special improvement districts for the purpose of constructing or acquiring a system of water works or to lay extensions to water mains were governed by Sections 3413 to 3417, inclusive, of the Revised Codes of 1907. It will be observed that those sections did not provide for any other public improvement. Section 3418 provided for certain other special improvements in municipalities.

The Thirteenth Legislative Assembly passed Chapter 89, which provided at great length how special improvements other than the establishment of a water system or the laying of additional water mains, should be constructed and paid for in the towns and cities of Montana.

Among other improvements it included "pipes, hydrants, hose connections for irrigating and appliances for fire protection," the very things which were set out in the resolution of intention as the improvements which were to be made in the district in question. Nowhere in that chapter can be found any provision from which it may be inferred that it was intended to cover the construction of an entire system of water works. The very fact that Sections 3413 to 3416, inclusive, of the Revised Codes of 1907, having to do with the construction of a water system, were not repealed, although a large number of the sections immediately preceding and following said sections were repealed, indicates clearly the intention of the legislature not to make Chapter 89 cover the construction of a water system for any town or city.

This chapter was amended by Chapter 142 of the Fourteenth Legislative Assembly, but the sections of our Revised Codes in question were in no wise amended or repealed. No attempt was made to have the amended act cover the creation of an entire water system. It was still restricted to the establishment or acquisition of "pipes, hydrants, hose connections for irrigating appliances, for fire protection."

It was not until the Sixteenth Legislative Assembly, in Chapter 175, amended section 2 of the aforesaid chapters 89 and 142, by adding thereto the words "water works, water mains and extension of water mains," and specifically repealed sections 3413 to 3417 inclusive, of the Revised Codes of 1907, that the creation of special improvement districts for the purpose of establishing a system of water works was covered by this general law.

Resolution No. 10, a copy of which is attached to the com-

plaint herein, (Tr. 10), which is the resolution of intention in question, in section 6 states the character of the improvements to be" the construction of pipes, hydrants and hose connections for irrigating appliances and fire protection."

There can be no question from a perusal of this resolution, that the town council was acting under Chapter 89 of the Session Laws of 1913, and Chapter 142 of the Session Laws of 1915, and that in all probability the town council then had no knowledge that section 2 of those chapters had been amended by Chapter 175 of the Laws of 1919, then just recently enacted.

The notice to the public of the construction of pipes, hydrants and hose connections for irrigating appliances and fire protection could not be notice that the town intended to establish a complete water system, including pumping plant.

The resolution of intention not having given notice of the character of the improvements intended to be made, was not a compliance with our statutory law, and therefore, the town council failed to acquire jurisdiction to proceed with the organization of such district and the construction of a water works system.

> "The statute having defined the measure of the power granted, and also the mode by which it is to be exercised, the validity of the action of the legislative body of the municipality must be determined by an answer to the inquiry whether it has departed substantially from the mode prescribed. Particularly is this true when it is engaged in making street improvements, the expense of which is to be a charge by assessment upon the property included in a special improvement district. The power to proceed at all is a restricted and qualified power and may be exercised only upon the terms granted. The law on the subject is well settled, so well, indeed, that no municipal officer should be ignorant of it, or fail to understand that

> a special improvement district cannot be created without observance of every requirement of the statute on the subject. * * * *Nor is the proceeding aided in any way by the failure of any property owner to file with the city clerk his written objection to the regularity of the proceedings, within sixty days after the letting of the contract.* The conclusive presumption of waiver, declared in section 13 of the Act is predicated upon the passage of the resolution of intention and the publication of the required notice as a condition precedent; and, though the section may be regarded as having a curative purpose and may accomplish this purpose so far as regards other irregularities in the proceedings, *it cannot supply jurisdiction when it has not been acquired by observance of the antecedent steps necessary to acquire it.* (Page & Jones on Taxation, Sec. 981; Comstock v. City of Eagle Grove, 133 Iowa, 589, 111 N. W. 51; Smith v. City of Buffalo, 159 N. Y. 427, 54 N. E. 62.)"
> Shapard et al v. City of Missoula et al, 49 Mont. 269 on 279-280 (Decided June 8, 1914).

Our supreme court, in Evans v. City of Helena, 60 Mont. 577, 199 Pac. 445, had under consideration the question of the sufficiency of the description of the character of the improvements to be made in a similar resolution of intention. It quoted from Section 3 of Chapter 89 of the Laws of 1913, as amended, in part as follows:

> "Which resolution shall designate the number of such district, describe the boundaries thereof, and state therein *the general character of the improvement or improvements which are to be made.*"

Commenting upon what was necessary to describe the improvements in compliance with the statute, the court said:

> "It would require a very strained construction of language to hold that 'incidental work' to paving, by implication, includes the several subjects embraced in the contract, each of which constitutes a class or a distinct city improvement."

The City of Helena had attempted to include the installment

of storm sewers, extension of parking, tearing out old curbing and installing new curbing under the words "incidental work" to paving. The court went on to say:

> "From the resolution of intention and notice given to the taxpayers affected in connection with the creation of improvement district No. 125, no one can reasonably be held to have been advised by the general designation of paving and 'incidental work' that any improvement other than the paving of the streets was designed or intended, for within the district large portions of territory have already been included in parking, curbing and sewer districts. * * * It is the established rule of law that the city council, in the resolution of intention, must describe the character and nature of the improvements, with sufficient particularity in order that the taxpayers affected may be fully advised, and the improvements to be made must correspond substantially with those set forth in the resolution of intention and no material change or departure therefrom can be made. * * * These proceedings have for their ultimate purpose the subjecting of the property within the district to taxation to bear the cost of the improvements. They are *in invitum,* and in recognition of these facts the Legislature has provided a complete, but direct, plan of procedure designed to protect property from confiscation and at the same time permit beneficial improvements to be made. * * * Any one or all of the several improvements contemplated may be included in the resolution of intention but each separate character of improvement must be embraced by specific mention and at least a general description. * * * But where the improvements about to be made are essentially different from those authorized by the resolution, and the cost of the same is materially increased, the courts will interfere, although as regards the work to be done a substantial compliance with the resolution is all that is necessary."

See also IV McQuillin on Municipal Corporations, Section 1796.

A careful consideration of our statutory provisions with reference to improvement districts, the history of the legislation

with reference to the construction of water systems under the improvement district law, and the interpretation of our supreme court in the cases cited with reference to the necssary information to be furnished by the resolution of intention, seem to admit of only one determination, and that is that the improvements made were not covered by resolution No. 10, and therefore the town council of Ryegate had no jurisdiction to create the district and to install such improvements.

COST IN EXCESS OF $1.50 PER FOOT

It was provided in Section 3413 of the Revised Codes of 1907 that the whole cost of a water system should not exceed $1.50 per lineal foot, of the entire length of the water mains laid in the district. No such provision was contained in any other act of the legislature until the construction of water mains and a water system was included under Chapter 89 of the Laws of 1913, and Chapter 142 of the Laws of 1915, by the amendments thereto contained in Chapter 175 of the Laws of 1919. In that chapter, section 2 is as follows:

> "Provided however, that the whole cost so assessed shall at not time exceed the sum of $1.50 per lineal foot, *plus the cost of the pipe so laid*, of the entire length of the water mains laid in such district."

This section is word for word the provision in Section 3413 supra, with the addition of the words underscored.

NOTICE OF LETTING AND COST

Where it was estimate dthat the improvements would cost $28,350.00 and no notice was given of the letting of the contract for the construction of said improvements, and the contract price agreed upon was $52,829.00, and the actual cost of the entire work, including engineering services, etc., amounted to $57,619.00, the court should interfere for the protection of

the property owners even after the construction of the improvements.

DISCOUNT ON WARRANTS

It is the settled law of this state that warrants or bonds may not be taken by a contractor in payment of special improvement district work when any discount is made thereon, even though such discount is covered up by an increase in the bid of the contractor for the work, rather than in a discount offered for the warrants or bonds themselves. Where the contractor increases his bid in order to cover such discount, and it is known to the municipal authorities that he has done so, that fact invalidates the entire proceeding. Evans v. City of Helena, 199 Pac. 448.

PURCHASE OF WITHDRAWAL OF PROTEST

While we have no authority on this question, we submit to the court that public policy will not permit a contractor and others interested in public improvements to purchase the withdrawal of certain protests so as to bring the number below that required by law in order to defeat the construction of the desired improvements. Such corruption is only a little less than the bribery of officials and should be punished by the court by denying to the contractor and those interested with him, the fruits of such corrupt manipulation.

On page 141 of their brief, counsel for appellant say: "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."

If appellant was not satisfied with the record as to the Belecz case and had any desire to question the correctness of Judge Horkan's decision, which the record fails to show, its counsel should have presented that matter to the trial court by appropriate pleadings, proof and request for findings. Having failed to do so, it may not now complain.

However, the record is sufficient to show that the decision of Judge Horkan was correct.

On pages 246 and 247 of the transcript is set out the final estimate of the engineer as to the cost of the entire system. It there appears that the excavation at the reservoir, concrete at reservoir, reservoir complete, excavation at well, pumping equipment, pump house and extra rock excavation cost $16,500.90, none of which was any part of the expense of "pipes, hydrants, hose connections for irrigating and appliances for fire protection," for the construction of which it was attempted to create the special improvement districti n question. In addition thereto, frost casing, fifteen per cent profit on same, printing bonds and engineering expenses totaled $3,707.83, which was not a proper charge against the district, or at least a considerable portion thereof was not a proper charge against the district. These two totals aggregate $20,208.73. It is admitted on page 181 of appellant's brief that only $12,016.82 derived from the general bond issue was used in payment of cost of the system, the remainder thereof, $2,983.19, having been expended for preliminary expenses and other deductions. That being so, $8,191.91 of the aggregate of the above totals was charged to the district. In addition thereto, there was the cost of building the pipeline from the well to the reservoir and from the reservoir back to the district, which, as we have heretofore pointed out, cannot be

determined from the record, but it must have been a considerable sum and certainly was not a proper charge against the district.

Clearly the resolution of notice of intention to create the district did not cover the cost of any part of reservoir, well, pipeline from well to reservoir and from reservoir to district and certainly not a considerable portion of the other expenses mentioned above, and therefore the Belecz case comes clearly within the rules announced by the Supreme Court of Montana in Shapard v. City of Missoula, 49 Mont. 269 (decided June 8, 1914) and Evans v. City of Helena, 60 Mont. 577, 199 Pac. 445.

In the absence of any record upon which Judge Horkan based his other findings and in the absence of any proof to show that his findings were not correctly made upon the record in the Belecz case, the presumption should be indulged that his findings were correct and that the district never was legally created.

Counsel for appellant discuss the case of Evans v. Helena, 60 Mont. 577, 199 Pac. 445, at great length in an effort to show that it was not authority for Judge Horkan's decision.

The evidence in the Belecz case is not before this court. The presumption must be indulged that it supported the findings of Judge Horkan. On pages 89 and 90 of the transcript he found:

> "That the Town Council of the Town of Ryegate in awarding the contract for said improvement knew that the contract price was increased by reason of the fact that the bonds issued in payment therefor would have to be disposed of at less than par and knew that the bid would have been a lower bid and the contract price lower if the bonds could have been sold at par, and that for this reason

the proceedings of the Council in letting said contract were null and void."

Counsel state that "the record discloses that the same contractor installed the sewerage system" and cites page 212 of the transcript in support of that assertion. On page 212 of the transcript is set out the method of payments contained in the specifications and there does not appear therein or elsewhere in the transcript any statement in support of that assertion of counsel. The fact is that the sewerage system was never constructed and the sewer bonds were never sold. While there is no direct statement to that effect in the transcript, it may be inferred from the admission of counsel for appellant, as shown in the "Stipulation of Facts," (Tr. 59), that all of the allegations of Subdivision II of answer of appellee, except as to a part not here material, were true. In that subdivision of the answer (Tr. 27-28) is set out the general indebtedness of the Town of Ryegate at vavrious dates, the maximum debt at any one time being $17,180.35, so it is very apparent that the sewer bonds were never issued; otherwise the town debt would have exceeded thirty thousand dollars.

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

The authorities cited on this portion of appellant's argument merely relate to the question of procedure in the Federal courts, holding that inasmuch as a writ of mandamus is only granted in aid of an existing jurisdiction, a judgment is a necessary preliminary to obtaining such a writ. The Federal courts have accordingly held that in a proper case a judgment might be entered against a county or municipality, even where such county

or municipality is not itself liable for the debt, the judgment to be enforced, if necessary, not by execution but by mandamus to compel a proper levy. These authorities simply determine the procedure in Federal court in the event the bond issue itself is valid.

In connection with the same argument, counsel again call attention to 5252 Revised Codes of Montana, 1921, providing for reassessment where the original assessment is invalid by reason of some omission or irregularity in the assessment. As pointed out elsewhere, herein, there is no contention in this case that the assessment was invalid because the assessment itself was not properly made; it is our contention that the town never acquired jurisdiction to create the district and the provisions of No. 5252 are accordingly inapplicable.

RES JUDICATA AND STARE DECISIS
POINTS AND AUTHORITIES

I.

In the trial of this case counsel for appellant conceded the correctness of Judge Horkan's decision in the Belecz case and may not now be heard to question it. That case was correctly decided by Judge Horkan under decisions of the supreme court of Montana.

> Shapard et al v. City of Missoula et al, 49 Mont. 269, 141 Pac. 544; Evans v. City of Helena, 60 Mont. 577, 199 Pac. 445.

It is stated by Judge Pray in his decision that appellant, upon the trial, claimed that the Town of Ryegate "had no authority to resort to the special improvement district plan to make the improvements and, although bonds used in payment of the work were illegal and void, nevertheless the town, having the general

power to make such improvements and having received and retained the benefits of the improvements and the construction thereof, is liable as upon an implied contract. * * * That the town never acquired jurisdiction to create a special improvement district and that plaintiff claims to have no recourse against the property of the district because of a decision of the state court." (Tr. 95, 96, 97 and 98). Having taken that position in the trial court, appellant may not now be heard to contend otherwise.

The decision of Judge Horkan is amply supported by the decisions of the supreme court of Montana.

Where the city council has not acquired jurisdiction to create a special improvement district, property owners are not required to protest within sixty days after the letting of the contract. Their failure to do so cannot supply jurisdiction when it has not been acquired by observance of the antecedent steps necessary to acquire it. Shapard v. City of Missoula, 49 Mont. on 279-280, 141 Pac. 544 (Decided June 8, 1914). It will be observed that the Shapard case was decided six years before appellant purchased the bonds in question from the contractor.

Thereafter the supreme court of Montana, in Evans v. City of Helena, 60 Mont. 577, 199 Pac. 445, decided that the city did not acquire jurisdiction to create a special improvement district where the description of the improvements to be made was not in substantial compliance with the statute. The description in the resolution of intention adopted by the Town of Ryegate was "the construction of pipes, hydrants and hose connections for irrigating appliances and fire protection" when, as a matter of fact, the construction of a complete water system was contemplated by the town and was installed. Certainly there was

as much difference between the description of the proposed improvements in the resolution of intention and the improvements actually made as there was in the Evans case.

II.

Even where the decision of a state court is rendered after the rights of a claimant have attached, the federal courts, where there is any doubt, will render judgment in conformity with such decisions of the state court.

> Burgess v. Seligman, 107 U. S. 20; Yazoo & M. V. R. Co. v. Adams, 21 S. Ct. 729, 181 U. S. 580; Flash v. Connecticut, 109 U. S. 371, 3 S. Ct. 263; New Orleans Board of Liquidation v. Louisiana, 179 U. S. 622, 21 S. Ct. 263; Kuhn v. Fairmont Coal Co., 215 U. S. 345, 30 S. Ct. 140; Messinger v. Anderson, 225 U. S. 436, 32 S. Ct. 739; Eaton v. Shiawassee County, 218 Fed. 588; Perkins v. Boston & A. R. Co., 90 Fed. 321; Holden v. Circleville L. & P. Co., 216 Fed. 490; Hiland Park Mfg. Co. v. Steel, 232 Fed. 10.

Counsel for appellant devote twenty-three pages of their brief (pp. 63-85) to their argument that the rules of res judicata and stare decisis are inapplicable to this case, although no such contention was made in the lower court. In explaining this portion of their argument, counsel suggest that Judge Pray "has labored under the impression, 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" although "it is difficult to put one's finger on the specific assumption in the trial court's decision." (Page 84 of appellant's brief).

In view of the position taken by counsel for appellant upon the trial of this cause, as pointed out above, Judge Pray had the right to assume that Judge Horkan's decision in the Belecz case was correct. Counsel for appellant in the trial having ad-

mitted or claimed that the town council had no authority to create the special improvement district in question, that it never acquired jurisdiction to create such district, that the bonds were invalid and that the plaintiff had no recourse against the property of the district because of Judge Horkan's decision (Tr. 95 to 98), Judge Pray rightfully relied upon such admissions and claims of counsel for appellant. He was not called upon to review the decision of Judge Horkan or to pass upon the question as to whether or not the district had been legally created. That question was not before the trial court and therefore should not be considered in this court.

Appellant cites a number of authorities in support of the rule that federal courts have concurrent jurisdiction with state courts in the interpretation of state statutes where the construction of the statute has not been settled in the highest court of the state prior to the fixing of the federal litigant's rights. Conceding this rule, it is equally well settled that where a statute has been interpreted by the state court between the date of the accrual of the litigant's rights and the trial in federal court, the federal courts will "lean towards an agreement with the state courts if the question seems to them balanced with doubt." This rule is well stated in the principal case relied upon by appellant, —Burgess v. Seligman, 107 U. S. 20, from which counsel quote at length at pages 81 to 84 of their brief. The portion here applicable reads as follows:

> "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."

In the case of Yazoo & M. V. R. Co. v. Adams, 21 Supreme Ct. Rep. 729, the rule was again stated by the United States Supreme Court as follows:

> "and the settled rule of this court is that, even in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of that construction of the state statute which has been adopted by the court of last resort in that state." (p. 730)

Other decisions of the United States Supreme Court to the same effect include the following:

- Flash and others v. Connecticut, 109 U. S. 371, 3 Sup. Ct. Rep. 263.
- New Orleans Board of Liquidation v. Louisiana, 179 U. S. 622, 21 Sup. Ct. Rep. 263.
- Kuhn v. Fairmont Coal Co., 215 U. S. 345, 360, 30 Sup. Ct. Rep. 140.
- Messinger v. Anderson, 225 U. S. 436, 32 Sup. Ct. Rep. 739.

The case of Eaton v. Shiawassee County, 218 Fed. 588 is particularly applicable to the facts in this case. On this question this court said:

> "If we adopt plaintiff's alternative theory that the money should be treated as having been borrowed to pay running expenses, then we are met with a decision of the Supreme Court of Michigan in McCurdy v. Shiawassee County, 154 Mich. 550, 118 N. W. 625. This case involved another loan made at about the same period, of money to meet current expenses, and the Supreme Court of Michigan held

that the county and the board were wholly without constitutional power to borrow the money, and that the county was not liable either on the theory of implied promise or on the theory of equitable liability for money had and received. Since this decision determines the extent and character of the power of one of the political subdivisions of Michigan, and so is a construction of the Michigan Constitution, it is authoritative in this court. Claiborne Co. v. Brooks, supra. It is true this decision was made after the date of the loans here involved, but that is not controlling. The case is not one where there has been a settled rule in state or federal court regarding the construction of state Constitution or laws, where rights have been acquired in reliance on such construction, and where, therefore, the Supreme Court refuses to follow a later state decision inconsistent with that rule. Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359.

"In the present case, when Mr. McCurdy made these loans, there had never been any settled construction by the federal courts in Michigan or by any court of the Michigan Constitution in this respect. The question was at best one unsettled in Michigan, and one untouched by the federal court. There is an entire absence of that analogy to equitable estoppel, which alone would justify us in declaring that, as against plaintiff's rights, the Michigan Constitution does not mean what the Michigan Supreme Court says it means." (pp. 592, 593).

Other Federal decisions holding that the Federal courts will lean to an agreement with the State courts if the question is balanced with doubt, include the following:

Perkins v. Boston & A. R. Co., 90 Fed. 321.
Holden v. Circleville Light and Power Co., 216 Fed. 490, 494.

Hiland Park Manufacturing Co. v. Steel, 232 Fed. 10.

QUANTUM MERUIT

POINT AND AUTHORITIES

Section 6 of Article XIII of the constitution of Montana makes any and all obligations of a town in excess of three

per cent of the taxable value of the property in the town void. Because of that constitutional provision, appellant may not recover on the theory of quantum meruit or implied contract or upon any other theory.

> Great Northern Utility Co. v. Public Service Commission, 88 Mont. 180 on 219, 293 Pac. 294; Hitchcock v. City of Galveston, 96 U. S. 341; Sub. 64 of Sec. 5039, R. C. M. 1921; Chap. 56, Part IV, R. C. M. 1921; Deer Creek Highway Dist. v. Doumecq Highway Dist., 218 Pac. 371 on 373; Mittry v. Bonneville County, 222 Pac. 292 on 293; Mayor v. Planter's Bank, 108 S. E. 480; Hampton v. Board of Com'rs., 43 Pac. 324; Richardson v. Grant County, 27 Fed. 495; Gillette-Herzog Mfg. Co. v. Canyon County, 85 Fed. 396.

Appellant's discussion of the liability of appellee in quantum meruit will be found on pages 185 to 213 of its brief.

We must confess that we cannot see the application of Section 1 of Article III, Section 1 of Article IV and Section 1 of Article V of the constitution of Montana.

It is true that under the decisions of the supreme court of Montana the constitution of the state is not a grant of power but rather a limitation upon powers exercised.

It was said in Great Northern Utility Co. v. Public Service Commission, 88 Mont. 180 on 219, 293 Pac. 294, that

> "The constitution of Montana is not a grant of power but rather a limitation upon powers exercised by the several departments of the state government."

The court then cited the other cases referred to on page 186 of appellant's brief. We fail to see wherein they are at all applicable to any of the issues involved in this case.

We concede that a town in Montana has the *power* to install a water system if the constitutional and statutory provisions with reference to an election are complied with but we do not

concede that it is the *duty* of the town to do so.

In the numerous cases cited by counsel for appellant under this heading only two or three of them make any reference to the doctrine of quantum meruit, and those are not in point.

Counsel frequently refer to the case of Hitchcock v. Galveston, 96 U. S. 341. Indeed, it might be said to be their leading case. Therein the City of Galveston agreed to pay the contractor in bonds of the city. The contractor started the work and at the end of forty-six days was stopped by the city. (Pages 343-4). The court said:

> "The resort to the lot owners is to be after the work has been done, after the expense has been incurred, and it is to be for the reimbursement of the city." (Page 348).

The chartef of the city prohibited it from borrowing more than fifty thousand dollars for *general purposes.* The court held that it was evident "that the provision could not have been intended to prohibit incurring indebtedness exceeding the sum named. It is in no sense a limitation of the debt of the city." Building sidewalks was held not to be included under the term "*general purposes.*" (Page 349). The city had power to enter into the contract and the city itself agreed to pay the contract price and was therefore liable. (Page 350). Certainly that case is no authority in support of appellant's contention in view of the facts as disclosed by the record.

It seems to us that counsel's argument in this part of their brief is based entirely upon their assertion that an election was held, not only upon the authorization of the fifteen thousand dollars of general bonds but also of exceeding the three per cent limit of the constitution. This assertion is made on page 193 of the brief and frequently in other portions of their brief. They concede, on page 193, that "the printed record does not

include a transcript of the election proceedings under which these bonds were authorized and issued." That is not only true, but the transcript is barren of any suggestion that any election of any kind was ever held in connection with the water works system of Ryegate.

In the "Stipulation as to Facts" (Tr. 52) appellant admits that "because of the small assessed value of all property within its corporate limits it (the town of Ryegate) could not legally and constitutionally issue sufficient general bonds to cover the entire cost of such installation."

> "It seems clear that because of the constitutional inhibition the town was unable lawfully to contract for the installation of a water system without the approval of the taxpayers." (Tr. 97).
>
> "The town apparently set about to accomplish in a lawful manner indirectly what it could not lawfully do directly without an election and favorable majority vote." (Tr. 98).
>
> "If, in this instance, the proper officers had been authorized to enter into the contract on the part of the town after submitting the question to a vote of the taxpayers as required by law and receiving favorable action thereon, there would be no question whatever as to the liability of the town." (Tr. 99).

On pages 99 and 100 of the transcript, Judge Pray refers to the statutory provision under which the town might secure a water works system, the first being under paragraph 64 of Section 5039 of the Code of Montana, 1921, which results in a general obligation of the town after a favorable vote of the taxpayers, and to the district method under Chapter 56, Part IV of the same code.

> "This (the district plan) was the plan adopted by the town for the balance of the necessary funds, and it failed." (Tr. 100).
>
> "One dealing with the agents of a municipality is bound

to know the limits of its power. When the Town of Ryegate issued fifteen thousand dollars in general bonds as a direct obligation of the town those dealing therewith well know, or should have known, that the city could contract no greater indebtedness at that time for the purpose in view." (Tr. 103).

"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 upon 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." (Tr. 104).

"From the evidence, there were many taxpayers outside of the district who were not benefited by the water system and who were given no opportunity to be heard on the question of creating the indebtedness." (Tr. 109).

"It is, of course, manifest that the town had exceeded its constitutional limit of indebtedness but I cannot agree with counsel that under the circumstances here there would be a general liability on the part of the town and that the calling of an election to authorize additional indebtedness should be treated as a mere formality and that the failure to call it would amount to no more than an irregularity. On the contrary there was no power at all on the part of the town to incur such excessive indebtedness without the previous authorization of the qualified voters." (Tr. 111).

It is very apparent that there was no proof whatever of any election having been held and that the case was tried upon that theory. The admission of counsel for appellant in "Stipulation as to Facts," on page 52 of the transcript referred to above, precludes appellant from now contending that any election was held on the general bond issue, on the extension of the constitutional limit of indebtedness or upon any question relating to the construction of a water works system in the Town of Ryegate.

Not only did appellant fail to make any request for findings on the question of an election, but after Judge Pray rendered his decision, which is now considered as his findings of fact, counsel for appellant did not make any objections to his numerous statements to the effect that no election was ever held; neither did they save any exceptions to the court's finding on that question, nor did they predicate any errors thereupon in their specification of errors. (Tr. 254-256). They cannot now be heard to urge a reversal on their mere assertion that an election of some kind was held. Without such election, their whole argument on quantum meruit falls.

While a letter from John C. Thompson, an attorney of New York City, was introduced in evidence, it does not seem to have been incorporated in the transcript and we have no means of verifying the quotation therefrom on page 194 of appellant's brief. Assuming that quotation to be correct, the opinion of Mr. Thompson cannot be accepted as proof of the validity of the special improvement district bonds; neither is it evidence of any election having been held. As Mr. Thompson holds that the bonds mentioned by him are "valid and legally binding obligations of the Town of Ryegate, Montana," he doubtless was referring to the general bond issue of fifteen thousand dollars. However that may be, appellant can base no right to relief herein on that opinion.

Counsel also state that appellant furnished the money for doing the work in the Town of Ryegate with the full knowledge of the town. This is denied by every witness who was a town official at the time the bonds were issued, and all such officials who were available upon the trial of the action were called as witnesses.

The rule as to recovery on quantum meruit as to constitutional provision is well stated by the Idaho supreme court in Deer Creek Highway Dist. v. Doumecq Highway Dist., 218 Pac. 371 on 373:

> "Almost all of the authorities agree with the holding of this court in School District v. Twin Falls County, supra, that there can be no estoppel if the contract was expressly prohibited by the Constitution or statute, or if it was entirely beyond the power of the municipality. Appellant relies strongly on Argenti v. City of San Francisco, 16 Cal. 255, and Pimental v. City of San Francisco, 21 Cal. 351. While some of the language used in these opinions, isolated from the context, would seem to bear out appellant's contention, the decisions as a whole do not go the length of holding that there may be a recovery upon quantum meruit where a municipality has entered into a contract rendered void by express constitutional or statutory prohibitions. The true doctrine is expressed by Chief Justice Field in Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96, as follows:
>
> 'A municipal corporation, acting under a charter expressing the mode in which its contracts for the improvement of its property shall be made, cannot be rendered liable for improvements made in the absence of such contract, on the ground of an implied contract to pay for benefits received. The law never implies an agreement against its own restrictions and prohibitions; it never implies an obligation to do that which it forbids the party to agree to do'."

That case was cited by the supreme court of Idaho in Mittry v. Bonneville County, 222 Pac. 292 on 293, where it was held that when an indebtedness is forbidden by the constitution and statutes without the authority of an election and a certain indebtedness was authorized by vote but the indebtedness incurred was largely in excess of that authorized there could be no recovery for such additional indebtedness. The court said:

"When an indebtedness is forbidden by the Constitution

and statutes of this state without the authority of a bond election, and the people at such election authorize the commissioners to incur indebtedness in a certain amount, the commissioners cannot incur a valid indebtedness above such amount. For reasons given in Deer Creek Highway Dist. v. Doumecq Highway Dist., supra, and which need not be repeated here, any indebtedness above the amount in the courthouse fund was void and cannot be recovered on quantum meruit or in assumpsit. Respondent, dealing with the county, was bound to take notice of constitutional and statutory limitations of its powers in regard to incurring indebtedness. Deer Creek Highway Dist. v. Doumecq Highway Dist., supra."

"A municipality cannot be held liable upon an implied contract for the value of any benefits received by it under a contract made with one of its officials, where the municipality is expressly forbidden to make such a contract. Such a contract, being void, cannot be ratified by an acceptance or use by the municipality of the benefits furnished thereunder." Mayor v. Planters' Bank, 108 S. E. 480.

"It is contended by the plaintiff that, notwithstanding the contract under which the services were performed was null and void, still, as the services were performed by him at the request of the board, he is entitled to his compensation therefor, upon a quantum meruit. * * *

"And the case under consideration is an apt and instructive illustration of how little regard has been paid by boards of county commissioners of this state to the provisions of the constitution and the statutes. * * *

"The plaintiff cannot recover in this case upon any implied contract to pay for services, for the reason that there was no authority vested in the board to make the contract under which the services were performed. * * *

"If the board were not originally authorized (as they were not) to make the contract, no liability can attach upon any ground of implied contract." Hampton v. Board of Comm'rs., (Ida.) 43 Pac. 324 on 325-6.

"By the first section of an act of the Indiana legislature, which took effect August 24, 1875, it is provided that 'it shall not be lawful for any board of county commissioners in this state to make any contract for the construction of any court-house, jail, or any other county or

township building or monument, until plans and specifications have been adopted by such board. * * *

"But the plaintiff insists that, upon the averment that the board of commissioners, acting for the county, had received and was in the enjoyment of the work done and materials furnished by him, he is entitled, upon the common count, to recover the quantum meruit. * * *

"The common count or claim to recover a quantum meruit must rest upon an implied promise or liability; but where a municipal body is required to make certain contracts in a prescribed way, and forbidden to make them in any other way, there is left no room for an implied obligation." Richardson v. County of Grant (Ind.) 27 Fed. 495 on 496.

"Whatever may be drawn from these authorities, the case of Litchfield v. Ballou, 114 U. S. 190, 5 S. Ct. 820, is decisive of this case. Waterworks had been constructed, and bonds issued in payment, which having been held void because issued in violation of a constitutional provision similar to ours, it was asked that the city be required to refund the money paid for them or surrender the waterworks. The court distinctly held that, the contract having been made in violation of the constitution, there was 'no more reason for a recovery on an implied contract to repay the money than on the express contract found in the bonds,' and granted no relief whatever. * * *

"When the contract is absolutely and directly prohibited by some statutory or constitutional enactment, the contract is void, and it cannot be enforced either as an express or implied contract. * * *

"While courts prefer enforcing contracts when honestly made and complied with, and to require all parties to pay for what they have the benefit of, yet they cannot and should not disregard such positive constitutional prohibitions as warned the parties in this case against the consummation of this contract. Unfortunately, there is so much ardor in the commercial world to transact business that the heed which should be given the law is obscured by the enticing profits of a business transaction. Important constitutional provisions for the protection of the people—and there is none upon the statute books of Idaho more important than the one in question, must be enforced, and

those who are so heedless as to violate them must bear the consequences. Judgment for defendant." Gillette-Herzog Mfg. Co. v. Canyon County (Ida.) 85 Fed. 396 on 398-9.

The principles announced by the courts in the decision of the cases cited by us in our discussion of the effect of Section 6 of Article XIII of the constitution of the State of Montana are applicable to the question of quantum meruit or implied contract. As the constitution makes all obligations of the town in excess of three per cent of the value of the taxable property therein void, appellant is not entitled to recover upon any theory.

RECITALS IN BONDS

POINT AND AUTHORITIES

The Town of Ryegate is not estopped from denying liability to the appellant by reason of the recitals in the bonds in question.

Sections 5033 (Subdivision 3), 5034 (Subdivisions 3, 4, 5 and 8), 5083, 5205, 5206, 5207, 5211, 5214, 5278 to 5281, inclusive, of the Revised Codes of Montana, 1921; Buchanan v. Litchfield, 102 U. S. 278; Edmunds v. City of Glasgow, 300 Pac. 203; Dixon v. Field, 111 U. S. 83, 4 S. Ct. 315-319; Lake County v. Graham, 130 U. S. 654, 9 S. Ct. 654-656; District Township of Doon v. Cummins, 142 U. S. 366, 12 S. Ct. 220-221 and 224; Hedges v. Dixon County, 150 U. S. 182, 14 S. Ct. 71-73; Sutliff v. Board of County Commrs., 147 U. S. 230, 13 S. Ct. 318-321; Moore v. City of Nampa, 276 U. S. 536, 48 S. Ct. 340-341.

The following principles are established by the Supreme Court of the United States:

If bonds contain recitals that the city's indebtedness, increased by the amount of the bonds in question, was within the constitutional limit, then the city *might* have been estopped from disputing the truth of such representations.

Estoppel does not arise except upon matters of fact which

the corporate officers had authority by law to determine and certify.

A certificate reciting actual facts and stating that thereby the bonds were conformable to the law, when they were not, does not work an estoppel.

Where the indebtedness evidenced by bonds exceeds the constitutional limit, the purchaser has no right to rely upon the recitals in the bonds.

Where the recitals in the bonds pretend to state facts which, by statute, are required to be entered upon the public records, the municipality is not concluded by such recitals.

Recitals that merely reflect opinion as to the legal effect of the bonds are not actionable and furnish no support for bondholders' claim against the municipality.

The sections of the code of Montana cited above were a part of the Montana Codes of 1907 in effect at the time of the issuance of the bonds in question. They are referred to by their 1921 number rather than by the number in the Codes of 1907 or amendments thereto adopted in 1911 and 1913 and in force when the bonds in question were issued. Under these code provisions, the assessed valuation of the property in the Town of Ryegate and its indebtedness were matters of public record.

> "The assessment made by the county assessor for state and county purposes is the basis of taxation for cities and towns for the property situated therein." Section 5205.

> "It is the duty of the county assessor, in making the assessment book, to designate therein the real and personal property, stating each separately and distinctly, situated within the cities and towns of the county." Section 5206.

When requested, it is the duty of the county assessor to furnish the towns within the county with a complete certified

copy of his assessment book, so far as it pertains to property within the limits of said town. Section 5207.

It is the duty of the county clerk to make a duplicate of the corrected assessment book for each city in the county which requires its rteasurer to collect its taxes. Section 5211.

The county treasurer of each county must collect the taxes levied by all *towns* in his county. Section 5214.

It is the duty of the town clerk "to enter in a book kept for that purpose the date, amount and person in whose favor, and for what purpose, warrants are drawn." Section 5033, Sub. 3.

The town treasurer must make monthly reports to the council, showing the state of each particular fund and the moneys recevied and disbursed by him during the preceding month, keep the books and accounts of the town in such manner as to correctly present the condition of the finances thereof, keep separate account of each fund and keep a register of all warrants paid. Section 5034, Subdivisions 3, 4, 5 and 8.

The issuance of general bonds of a town is covered by Sections 5278 to 5281, inclusive, from which it appears that public records must be kept of all general bond issues.

Moreover, prior to the time that the bonds in question were delivered to the appellant it had purchased from the contractor the general bond issue of the town in the sum of $15,000.00, so that it had actual knowledge of the bonded indebtedness of the town at that time and by referring to the records of the town could easily ascertain its warrant indebtedness and by referring to the assessment roll of the county could easily determine the assessed valuation of the property in the Town of Ryegate at that time.

The case of Buchanan v. Litchfield, 102 U. S. 278, was an action on assumpsit:

> "The declaration, besides a count upon the coupons themselves, contains the usual counts for money lent and advanced, and for money had and received." Page 279.

The bond in question contained this recital:

> "This bond is issued under authority of an act of the General Assembly of the State of Illinois, entitled 'An Act authorizing cities, incorporated towns and villages to construct and maintain water works,' approved April 15, 1873, and in pursuance of an ordinance of the said city of Litchfield numbered 184, and entitled 'An Ordinance to provide for the issuing of bonds for the construction of the Litchfield waterworks,' approved Dec. 4, 1873."

The court said, on page 290:

> "As, therefore, neither the Constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their 'existing indebtedness,' it would seem that if the bonds in question had contained recitals which, upon any fair construction, amounted to a representation upon the part of the constituted authorities of the city that the requirements of the Constitution were met, —that is, that the city's indebtedness, increased by the amount of the bonds in question, was within the constitutional limit, —then the city, under the decisions of this court, *might* have been estopped from disputing the truth of such representations as against a *bona fide* holder of its bonds."

It is to be noted that in the case of Edmunds v. City of Glasgow, (Mont.) 300 Pac. 203, commented upon at great length by counsel for appellant, the bonds there in question contained recitals similar to those suggested in the above case, which is not the case in this suit.

In commenting upon the effect of recitals in bonds, the Supreme Court of the United States, in County of Dixon v. Field, 111 U. S. 83, 4 S. Ct. 315 on 319, said:

"All parties are equally bound to know the law; and a certificate reciting the actual facts, and that thereby the bonds were conformable to the law, when, judicially speaking, they were not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law. Otherwise it would always be in the power of a municipal body, to which power was denied, to usurp the forbidden authority, by declaring that its assumption was within the law. This would be the clear exercise of legislative power, and would suppose such corporate bodies to be superior to the law itself. And the estoppel does not arise, except upon matters of fact which the corporate officers had authority by law to determine and to certify."

That statement was quoted with approval in Lake County v. Graham, 130 U. S. 654, 9 S. Ct. 654, on page 656.

In District Township of Doon v. Cummins, 142 U. S. 366, 12 S. Ct. 220, the bonds contain the following recital:

"This bond is executed and issued by the board of directors of said school-district in pursuance of and in accordance with chapter 132, Laws 18th Gen. Assem. Iowa, is in accordance with the laws and constitution of the state of Iowa, and in conformity with a resolution of said board of directors passed in accordance with said chapter 132 at a meeting thereof held 9th day of July, 1881."

On page 224 the court said that the bondholder knew:

"that the district, in issuing them, exceeded the constitutional limit, as appearing by public records of which he was bound to take notice, and that it intended still further to exceed that limit. Under such circumstances he had no right to rely on the recitals in the bonds, even if these could otherwise have any effect as against the plain provisions of the constitution of the state."

So also in Hedges v. Dixon County, 150 U. S. 182, 14 S. Ct. 71 on 73, the court said:

"Again, the constitution of the state having prescribed the amount which the county might donate to a railroad company, that provision operated as an absolute limitation

upon the power of the county to exceed that amount; and it is well settled that no recitals in the bonds, or indorsed thereon, could estop the county from setting up their invalidity, based upon a want of constitutional authority to issue the same. Recitals in bonds issued under *legislative authority* may estop the municipality from disputing their authority, as against a bona fide holder for value; but, *when the municipal bonds are issued in violation of a constitutional provision,* no such estoppel can arise by reason of any recitals contained in the bonds."

In Sutliff v. Board of County Commissioners, 147 U. S. 230, 13 S. Ct. 318, the bonds contained these recitals:

> "This bond is one of a series of five thousand dollars, which the board of county commissioners of said county have issued for the purpose of constructing roads and bridges, by virtue of, and in compliance with, a vote of a majority of the qualified voters of said county, at an election duly held on the 7th day of October, A. D. 1879, and under and by virtue of, and in compliance with, an act of the general assembly of the state of Colorado entitled 'An act concerning counties, county officers and county government, and repealing laws on these subjects,' approved March 24, A. D. 1877; and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond." Page 318.

In passing upon the legal effect of such recitals, the court, on page 321, said:

> "The case at bar does not fall within the Chaffee Co. v. Potter, and cannot be distinguished in principle from Dixon Co. v. Field or from Lake Co. v. Graham. The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas here two facts are to be shown, —the valuation of the property, and the amount of the county debt. But, as both these facts are equally required by the statute to be entered on the public records of the county, they are both facts of which all the world is bound to take notice,

and as to which, therefore, the county cannot be concluded by any recitals in the bonds."

Where each bond stated:

> "that respondent acknowledges itself to be indebted and promises to pay bearer the sum stated; it contains recitals to the effect that all the things by law required in respect of the creation of the district, the construction of the sewer, and the issue of the bond in order to make it a valid obligation of the city have been done,"

the court held:

> "Recitals that merely reflect opinion as to the legal effect of the bonds or of the statements therein are not actionable and furnish no support for petitioner's claim." Moore v. City of Nampa, 276 U. S. 536, 48 S. Ct. 340-341.

APPELLANT'S POSITION HEREIN IS NOT EQUIVALENT TO THAT OF A BONA FIDE HOLDER.

POINT AND AUTHORITIES

It is admitted by counsel for appellant that the bonds in question are not negotiable instruments. That admission is in accordance with practically all of the authorities. The question of the good faith of a bondholder is not involved in the case at bar, where the bonds were not negotiable instruments and the indebtedness evidenced by such bonds would exceed the constitutional limit of indebtedness, if they were held to be obligations of the town.

> King Cattle Co. v. Joseph, 199 N. W. 437 on 438; Smith v. Pacific Improvement Co., 172 N. Y. S. 65 on 71-72.

ARGUMENT

The question of the *bona fides* of the holder applies only to the owner of a negotiable instrument. The holder of a special improvement district bond is not a holder in due course. The bonds in question refer to the resolution creating the district

and "all laws, resolutions and ordinances relating thereto in payment of the contract in accordance therewith. * * * This bond is payable from the collection of a special tax and assessment which is a lien against the real estate within said improvement district as described in Resolution No. 14, as well as in Resolution No. 10, passed and adopted December 30th, 1919. This bond is redeemable at the option of the Town of Ryegate at any time there are funds to the credit of said special improvement district fund for the redemption thereof." (Tr. 17). These recitals put the purchaser on notice that he must look to the proceedings to see whether the town acquired jurisdiction to create the district and is chargeable with knowledge of any jurisdictional defects in the proceedings. He is also chargeable with knowledge that there is no liability on the part of the town to pay the bond and that he must look solely to the district fund for payment.

On this question the supreme court of Minnesota, in King Cattle Co. v. Joseph, 199 N. W. 437, said: on page 438:

> "A purchaser of a note or bond does not acquire the rights of a holder in due course unless the instrument is complete and regular upon its face, section 5864, G. S. 1913 (section 52, Uniform Neg. Inst. Act); hence when the language of a bond not only refers to the provisions of the trust deed securing it, but makes the bond subordinate to the conditions of the deed, the bond shows upon its face that it is not a complete and regular negotiable instrument. A purchaser cannot determine from a mere inspection of the bond that it contains an unconditional promise to pay a sum certain at a fixed or determinable future time, but must examine the deed to ascertain the precise nature of the obligation of the maker of the bond. Hull v. Angus, 60 Or. 95, 118 Pac. 284."

In discussing a similar question, the supreme court of New

York, in Smith v. Pac. Improvement Co., 172 N. Y. S. 65, said, on pages 71 and 72:

> "It will thus be seen that the merger of 1899 was consummated under a statute which made one of the conditions of such merger that the constituent corporations should remain in being for the purpose of meeting obligations of creditors and lienors; that they should continue to exist that they might sue or be sued in respect to prior engagements; and that the properties should be subject to the lien of prior incumbrances or of such judgments as should be procured against the corporations. In accepting this privilege the corporations must be deemed to have accepted the conditions imposed, and persons investing in the securities of the consolidated corporation, or in the certificates of its receiver, must be presumed to have known the law, and to have purchased their securities in the light of the statutory provision above quoted."

The cases cited by counsel for appellant on this question (pages 6 0and 61 of their brief) are not in point.

In Caldwell v. Guardian Trust etc. Co., 26 Fed. (2d) 218, mere irregularities were relied upon to defeat the bondholder.

In Board of Education v. James, 49 Fed. (2d) 91, the holder of the bonds was assumed to be a *bona fide* holder. It does not seem to have been questioned. The bonds there involved were an issue of a school district and seem to have been negotiable.

The bonds under consideration in Presidio County v. Noel-Young Bond Co., 212 U. S. 58, were negotiable and the holder was presumed to be a *bona fide* holder. No question was raised on that score.

In State v. West Duluth, 78 N. W. 115, it does not appear that the question of the *bona fides* of the holder was involved. What the court did hold was that the payment of ten per cent of the face of the bonds for brokerage fees, etc. under the circumstances in that case was not a violation of the statute

which forbade the sale of bonds for less than their face value.

In Cuddy v. Sturtevant, 190 Pac. 909, the holder of the bonds purchased them from the person to whom they were originally sold for less than par. It was held that the city was estopped to deny their validity in the hands of an innocent purchaser.

The Northwestern Bank v. Centerville, 143 Fed. 81, it seems that the bonds were negotiable and that the owner was a *bona fide* holder.

In all of the above cases, as well as in Troy Bank v. Russell County, 291 Fed. 185, Flagg v. School Dist., 58 N. W. 499 and Fairfield v. School Dist., 116 Fed. 838, no special improvement district bonds were involved. They were all direct issues of the municipalities.

In Dakota Trust Co. v. City of Hankinson, 205 N. W. 990, the contractor was engaged in constructing a public improvement. During the progress of the work the city council approved estimates of the city engineer and made partial payment to the contractor in the form of warrants. The city council was authorized to issue such warrants to the contractor upon partial performance of his contract. The contractor did not completely perform his contract. The warrants were purchased by a third party before the contractor defaulted in his contract. Because of the default of the contractor the city did not levy special assessments to pay such warrants and it was held that the city was liable for the payment of the same. The court said, on page 994:

> "When, during the course of performance, partial estimates are allowed from time to time upon the report of the engineer and warrants are issued, the city has effectually made a representation that the contractor, through

> partial performance, is entitled to that portion of the consideration incorporated in the estimate and the approval. It retains the withheld portion of the consideration and the contractor's bond as security for the uncompleted part of the contract. * * * So where the city, having by resolution of its city council declared the contract to have been so far performed that the contractor was entitled to a stated portion of the compensation, and it having given to it written evidence of its right to be satisfied pro tanto out of funds which it was the city's duty to raise, is precluded, as against any person relying upon a representation, to assert the contrary."

In Long Beach School Dist. v. Lutge, 62 Pac. 36, under a contract for the erection of a school building, monthly estimates were made as to the value of the work done and warrants were drawn by the school trustees in favor of the contractor for seventy-five per cent of such estimates. The warrants had been sold by the contractor and materialmen furnishing materials for the building attempted to enforce their claims against the school district as entitled to priority of payment over such warrants. The court said, on page 38:

> "The presentation of these claims of materialmen created no liability against the school district which could increase its contract liability. The contract, as we have seen, required monthly estimates to be made by the architect of the value of the work done * * * and the trustees were to draw a warrant in favor of seventy-five per cent of such estimate. * * * If these materialmen, who have, since the abandonment of the contract by Lutge, given notice of their claims, had given such notice before the order was delivered, the plaintiff would have been required to retain the amount thereof, as well as of future estimates, sufficient to pay them, and that would have been the extent of plaintiff's liability. * * * That the subsequent breach of the contract by Lutge could not affect the right of the assignee to require the payment of the order whenever there should be funds applicable to its payment and that the materialmen who gave notice of their

> claims after the order was issued to the contractor and assigned to the intervenor could not hold the plaintiff or the assignee liable for the money represented by it, is conclusively settled."

It is clear that neither of these cases supports the contention of appellant.

We especially call the attention of the court to the fact that the *bona fides* of the bondholder is not an element to be considered where the constitutional debt limit has been exceeded, as is shown in the cases cited by us under "Section 6 of Article XIII of the Constitution of Montana Bars the Recovery of any Sum by Appellant." Page 19 of this brief.

THE TOWN OF RYEGATE IS NOT GENERALLY LIABLE TO THE BONDHOLDER. IT DID NOT FAIL TO PERFORM ITS DUTY IN MAKING THE NECESSARY ASSESSMENTS FOR PAYMENT OF COSTS OF IMPROVEMENTS.

These matters are discussed by counsel for appellant on pages 104 to 134 of their brief. The points urged therein are fully covered elsewhere in this brief and we will, under this sub-head, content ourselves with comments upon cases quoted from by counsel for appellant.

Nowhere in the record is there any proof, or even suggestion, that the ordinance or resolution levying the assessments were not properly passed. The invalidity of such assessments was not because of anything the town council failed to do after the contract in question was entered into. Judge Horkan's decision was based wholly upon lack of jurisdiction on the part of the town council to create the special improvement district in question. This fully appears from the "Stipulation as to Facts."

An agreed statement of facts voluntarily made and submitted to the trial court is binding upon the parties and the court.

> "It was competent under the statute, *supra,* for the attorneys representing the plaintiff and the defendant to stipulate the facts. The stipulation having been voluntarily made and submitted to the court, counsel for defendant cannot be heard to urge the objection they now make." Read v. Lewis and Clarke County, 55 Mont. 412-419; 178 Pac. 177.

The testimony does not add to or detract from the "Stipulations as to Facts" herein. It (the testimony) and documentary evidence not included in the "Stipulation as to Facts" does not tend to establish any of appellant's numerous contentions. They do not furnish any grounds for the various forms of relief that appellant on appeal claims to be entitled to. Appellant admits that the facts agreed upon are not as complete as it would like them to be, but blames appellee for not making a more complete record. As appellant, not appellee, was seeking recovery, it was incumbent upon appellant to see to it that the record included every fact upon which it might base its claims for judgment.

> "This case was submitted to the lower court on an agreed statement of facts, and it was stipulated that the agreed statement contained all the facts in the case. That the lower court was, under such circumstances, obliged to draw its legal conclusions from such facts alone is well settled in this jurisdiction.
>
> "It is further well settled, and this is made apparent by the opinions delivered in the cases just quoted from, that to sustain a judgment for the plaintiff, the agreed statement must show all the facts necessary to his recovery." Billings Hardware Co. v. Bryan, 63 Mont. 14-18 and 19; 206 Pac. 418.

On page 111 of their brief counsel for appellant assert that it is clear by the admissions of the pleadings and the stipula-

tions of the agreed facts that the district was regularly and legally created. We call the court's attention to Judge Horkan's decision, which is a part of the "Stipulation as to Facts" and appears on pages 147 to 153 of the transcript. On page 152 he expressly holds that the town council of Ryegate never acquired jurisdiction to create the improvement district.

On page 112 of their brief, counsel discuss the obligation of the town to make assessments and reassessments, if necessary. This matter is fully covered in other portions of our brief.

Certainly the town had the right to act in accordance with the decrees of Judge Horkan, especially as appellant brought no suit or action in Federal Court, under its claimed right to do so, to secure a contrary ruling. So long as Judge Horkan's decision remains in force and there is no other adjudication as to whether the district was legally created, the town officials would have been in contempt of court if they had acted contrary to that decision. The mandate of that decision was from a court having *actual* and not *apparent* jurisdiction, as counsel assert on page 113 of their brief.

On pages 122 and 123 of their brief counsel again discuss the effect of statutory changes as to the improvement district laws of Montana, which we have discussed elsewhere in this brief.

While mandamus would not lie on January 1, 1922 against the Town of Ryegate because of the payment of interest coupons on that date, the appellant should have commenced an action for a writ of mandate or other appropriate relief on January 1, 1923, when the second year's interest on the bonds was not paid, if Judge Horkan's decision was wrong or if

appellant thought so. Evidently the conclusion of appellant that that decision was incorrect was arrived at after the appeal was taken in this case.

In Phliadelphia Co. v. New Whatcom, 19 Wash. 225, 52 Pac. 1063, cited by counsel, the first assessment was invalid and the city council made a reassessment sufficient to pay the principal, but not the interest, of the warrants. The law permitted only one reassessment. The court held that, because of the city council not making assessments sufficient to pay interest, the city was liable for its neglect of duty. No question of the constitutional debt limit was involved; neither had the courts of Washington held that the district was not *legally* created.

In Barber Asphalt Paving Co. v. City of Denver, 72 Fed. 336, page 126 of brief, the city contracted with the company to pay for a portion of the pavement by special assessments against abutting property, by a sum of money the street railway companies had agreed to pay the city and that the balance of the cost was to be paid by the city. The city did not attempt to enforce payment of the stipulated payment from the railway companies and the court held that the city was liable to the contractor for that amount, —hardly a case in point here.

In Mankato v. Barber Asphalt Co., 142 Fed. 329, there was no question of the legality of the creation of a district. The city refused to levy the assessments and because thereof it was held liable to the defendant contractor.

The same is true of Bates County v. Wills, 239 Fed. 785, where the further fact appears that the contract did not provide from what fund the cost was to be paid and the city had no power to make a general levy for the purpose of payment. So also of Oklahoma City v. Orthwein, 258 Fed. 190.

In Barber Asphalt Co. v. Harrisburg, 64 Fed. 283, the city had the power to pave its streets and to pay the cost out of its treasury, —not so in the case at bar.

Elsewhere we comment at length on Hitchcock v. Galveston, 96 U. S. 341, and show wherein it is not applicable to the facts in this case.

In the following cases, cited and quoted from by counsel for appellant, the city officials had refused to make the necessary assessments and the city was held liable:

> Reilly v. Altoona, 19 N. E. 508; Dennis v. Willamina, 157 Pac. 799; O'Neil v. City of Portland, 113 Pac. 655; Jones v. Portland, 58 Pac. 657; Little v. Portland, 37 Pac. 911; Commercial Bank v. Portland, 33 Pac. 532.

We comment on Addyston Pipe Co. v. Corry, 197 Pa. St. 41, and on Mankato v. Barber Asphalt Co., 142 Fed. 329, on pages 38 and 39 of our brief.

Denny v. City of Spokane, 79 Fed. 719, was decided upon the authority of McEwan v. City of Spokane (Wash.), 47 Pac. 433, where the court, on page 434, said:

> "There is an attempt to plead an indebtedness by the city beyond its charter limit but we think no such indebtedness was pleaded." Page 434.

In only one of the above cases was the question of constitutional limit of indebtedness involved. Counsel for appellant place much reliance upon the case of Ft. Dodge El. L. & P. Co. v. City of Ft. Dodge, 89 N. W. 7. At one portion of their brief they state that the constitutional provision with reference to limitation of debt was the same in the Iowa constitution as in Montana, except as to percentages, and argue that, Montana having taken its constitutional debt limit provision from the constitution of Iowa, we must have adopted also the construc-

tion placed thereon by the supreme court of the State of Iowa. That section of the constitution of Iowa is not set out in full in the Fort Dodge case and is not accessible to us. However, we call the court's attention to the fact that Section 12 of Article IX of the Constitution of Illinois, set out in full in City of Litchfield v. Ballou, 114 U. S. 190, 5 S. Ct. 820, is almost in the exact words of the constitutional provision of Montana, except as to percentages and approval vote of taxpayers. As we have elsewhere pointed out in this brief, the decisions of the Supreme Court of the United States in that case and in Buchanan v. Litchfield, 102 U. S. 278, are decisive as to the question of the general liability of the Town of Ryegate.

Contrary to the contention of counsel for appellant, the State of Montana did not adopt the construction of the supreme court of Iowa in the Fort Dodge case. This fully appears from the decision of our court in State v. City of Helena, 24 Mont. 521, 65 Pac. 99 (decided December 17, 1900), from which we quote at length on pages 22 and 23 of our brief. It appears that at that early date the supreme court of Montana followed the decision in Buchanan v. City of Litchfield, *supra,* and City of Litchfield v. Ballou, *supra.* After quoting from those decisions, our supreme court said:

> *"Such was the interpretation by the highest court in the land of this constitutional provision of the State of Illinois when our own constitution, containing a like provision, was adopted."*

In the Fort Dodge case the court held that the constitutional limit as to debt did not apply where the city had the power to make valid assessments and did not do so. In the instant case the town council of Ryegate does not have the power to make

any valid assessments because of lack of jurisdiction to create the district.

At times it has been the contention of appellant that it should recover as upon an implied contract to pay, on which point the Fort Dodge case furnishes it no support.

In the Fort Dodge case the court said, on page 9:

> "But intervener contends that the city is liable for the amount represented by certificates issued against the assessments of the plaintiff, which, as we have seen, are invalid. If the city had no authority to assess any portion of the cost of this improvement to plaintiff, then the entire amount which was assessed to plaintiff might have been included in the assessment to abutting property owners, and certificates representing such assessments would have been valid. * * * This is not a case where the city undertook to do something which it could not do, and which the party contracting with it was bound, as matter of law, to know it could not do. Here the city could have done what it agreed to do (that is, have made a valid assessment on abutting property for the entire cost of the improvement not directly assumed by the city), and it failed to do so."

In Gable v. City of Altoona, 49 Atl. on page 371, the court said:

> "The cases on this subject are conflicting. See Dill. Mun. Corp. (4th ed.) Secs. 480-482 and notes. They show that there is no disposition of the question which is wholly free from difficulty."

As we have heretofore pointed out, the supreme court of Montana took the opposite view and decided otherwise at an early date in State v. City of Helena, 24 Mont. 521, 65 Pac. 99. See page 119 of our brief.

DEFENSES OFFERED BY THE TOWN OF RYEGATE

These are discussed by counsel for appellant at pages 213 to 246 of their brief.

As we point out in our discussion of the Belecz case, it was not pleaded in the answer for the purpose of having the trial court pass upon the issues involved in that case, but simply to show why assessments of the district had not been paid and that, in its reply, appellant admitted that the decree entered in that case prevented the collection of the principal of and interest on the bonds in question. (Tr. 50). The entire transcript is barren of any suggestion that Judge Pray ever passed upon the correctness of the rulings of Judge Horkan in the Belecz case or that that question was ever presented to the trial court.

The following quotations from the transcript are proof of the fact that the question of the validity of the special improvement district bonds was never presented to or considered and passed upon by Judge Pray:

> "The purpose of this action is to establish a liability against the Town of Ryegate, Golden Valley County, Montana, on an implied contract for the balance due on the construction of a water supply system, which otherwise would have been paid from bonds issued by a special improvement district of that town, had the entire issue not been declared illegal and void, after the water supply system had been fully constructed." (Tr. 94).
>
> "Plaintiff claims * * * that the Town of Ryegate had general authority to procure a water supply and construct a complete waterworks system and therefore contends that since the city had general power and authority to do the work and construct the improvements embraced in the special improvement district in question, although it had no authority to resort to the special improvement district plan to make the improvements and although bonds used in payment of the work were illegal and void, nevertheless, the town, having the general power to make such improvements, and having received and retained the benefit of the improvements and the construction thereof, it is liable as upon an implied contract." (Tr. 95-96).
>
> "In commenting on the foregoing statements of the issue

of law involved plaintiff contends that the town *never acquired jurisdiction* to create a special improvement district and that the bonds issued were *by the court declared to be invalid.*" (Tr. 96-97).

"Plaintiff claims to have no recourse against the property of the district because of a decision of the state court, from which no appeal was taken, declaring the bonds of the district illegal and void." (Tr. 98).

"Whether it be held, as contended by plaintiff, that there was no grant of power under the statute conferred upon the municipality to install and pay for a waterworks system, as provided in chapter 56 of Part IV, Political Code of Montana (1921) * * *" (Tr. 98).

"By the COURT.—Are you starting out to establish the legality of the bond issue.

Mr. BROWN.—No, your Honor. Before you can recover for money had and received, we have got to bring home to the defendant the knowledge that it was our money that was had and received and used." (Tr. 179).

It is significant that appellant, in its prayer for relief, asks for a money judgment equal to the face of the special improvement district bonds, with interest thereon from the date to which interest had been paid and made no suggestion that any other issue was involved in the case. (Tr. 9).

The appellee, in its prayer, simply asked that "plaintiff take nothing by this action." (Tr. 34). No additional or other relief was asked in the reply. (Tr. 51).

There is no suggestion in the pleadings or the prayers attached thereto that any issue was involved except for a money judgment for the full amount of the face of the bonds, with interest.

As we have said, the record shows that the legality of the special improvement district bonds was not presented to the trial court and was not considered or passed upon by Judge Pray, and we therefore do not consider it necessary to further

consider the argument of counsel for appellant on the alleged "defenses offered by the Town of Ryegate."

While we think it entirely immaterial, we call the court's attention to the fact that there is not even a suggestion in the record of the installation of any sewerage system, as stated by counsel on page 240 of their brief.

We likewise call the attention of the court to the fact that the record does show that appellant purchased the general bonds of the Town of Ryegate, even though counsel for appellant, on page 241 of their brief, state that it is not the holder of any of those general bonds, which statement is not based upon any fact appearing from the record.

If appellant sincerely believes that the decision of Judge Horkan in the Belecz case was incorrect and that it may have the validity of the special improvement district bonds passed upon by the federal courts, it should begin an appropriate action or suit for that purpose.

CONCLUSION

This cause was tried upon the theory of money had and received and a judgment was asked by appellant for the face of the special improvement district bonds, with interest thereon. The right of the appellant to recover such money judgment was the only issue presented to or considered by Judge Pray. There is no allegation in the complaint or reply upon which appellant may predicate its claim for any judgment other than on the theory of money had and received; neither does the record contain any evidence or admissions of facts upon which an appellate court could render any judgment in favor of appellant upon any one of the many theories now advanced, but none of which were submitted to Judge Pray.

Any judgment in favor of appellant would have to be borne in part by the owners of property within the corporate limits of the Town and outside of the district. Only a very small portion of the town property outside of the district derives any benefit whatever from the construction of the water system. As shown by the map of the town, the district comprises less than one-sixth of the entire area of the town. The owners of approximately five-sixths of the entire area of the Town of Ryegate had no voice in the installation of the water system except possibly a vote on the question of the issuance of the $15,000.00 general bonds. They had no right to protest against the creation of the district. The injustice sought to be done to them is most glaring. They had, and have, if appellant prevails, no chance to protect themselves and their property. The protection afforded by the constitution of Montana will be taken from them. A crushing burden without benefits will be imposed upon them in violation of the constitution should appellant prevail herein.

The complaint avers that interest on the bonds was paid on January 1, 1922, that no further payments have been made and that the town has declared its intention of never paying the principal. (Tr. 8). Doubtless a payment on the principal of the bonds was to have been made on that date, as required by Section 5240, Revised Codes of Montana, 1921. The bondholders doubtless knew on January 1, 1922 that there was a default in payment of principal on that date; certainly on January 1, 1923 it knew that there was a default in payment of any interest or principal on that date. If the bondholder, being a non-resident of Montana, is entitled to sue in the federal courts for the various forms of relief now advanced by its

counsel, it had that right on January 2, 1922 and certainly not later than January 2, 1923. More than eight years, probably nine years, elapsed before appellant ever asserted any of the rights now contended for, save only its right to a money judgment as prayed for in its complaint. The statute of limitations has run against any such relief except the one asked for in its complaint. Section 9027 to 9041, Revised Codes of Montana, 1921.

In addition to the bar of the statute, appellant has been guilty of laches in not instituting appropriate proceedings for the enforcement of its claimed rights now asserted for the first time upon appeal.

We respectfully urge that the only question which, on the record and under the authorities cited, may be considered on this appeal is whether or not appellant is entitled to a money judgment against the Town of Ryegate, as prayed for in its complaint in violation of the constitutional provisions of Montana and that the long line of decisions of the supreme court of the United States on similar questions which we have cited and quoted from prohibit such recovery by appellant. The record fully sustains the decision of Judge Pray and should be affirmed.

Respectfully submitted,

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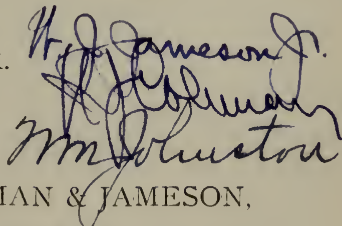
W. M. JOHNSTON
JOHNSTON, COLEMAN & JAMESON,



Attorneys and Solicitors for Defendant and Appellee.