No. 6564

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LUMBERMENS TRUST COMPANY,
a Corporation,
Appellant,

vs.

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

REPLY BRIEF FOR APPELLANT

Upon Appeal from the United States District Court for the District of Montana.
HON. CHAS. N. PRAY, *Judge.*

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By way of reply to appellee's brief, appellant submits herewith its further brief as a summarization of its position and the applicable authority. The respective parties will be referred to as "plaintiff" and "defendant", as in the trial court.

As we read the brief of defendant-appellee, there appear to be three general groups of defense argued:

1—That irrespective of the Montana constitutional limitation of indebtedness touching municipalities defendant cannot be held liable to the claim asserted by plaintiff.

2—That the Montana constitutional limitation of municipal indebtedness would bar the imposition of such liability if otherwise present, defendant being indebted in excess of the prescribed 3% of the taxable value.

3—Procedural objections now made to form of action, trial, record and review, as a basis of immunity from liability, regardless of the underlying facts and merits of the case.

Without too great elaboration we will touch upon these general groups of defense and will discuss the third or procedural objections first, since they come naturally at the threshold of the case on review.

I.—SCOPE OF REVIEW ON APPEAL

Theories Applicable To Complaint

The case at bar was begun by filing a complaint (Tr. 2-9) which alleged a cause against defendant sustainable on a number of theories.

1—The complaint was good as a cause either at law or in equity based on nonpayment of interest or principal, contrary to the terms of the bond itself, shown as an exhibit to the complaint, which would support a judgment against defendant for money or an accounting, based on collections actually made, had and received, for the benefit of bondholders, under the doctrine of *Gladstone v. Throop,* 71 Fed. 341; *Spydell v. Johnson,* 128 Ind. 235, 25 N. E. 385; and the law further *presumes that collections have been made,* under the doctrine of *Warner v. New Orleans,* 87 Fed. 826.

2—If the town *had not collected* the funds, the pleading would, in the Federal Courts, support a special judgment against defendant to be enforced by further mandatory orders compelling levies and the collection of

assessments under the doctrine of *Mather v. San Francisco,* 115 Fed. 37; *Cass County v. Johnston,* 95 U. S. 360, and *Burlington Bank v. Clinton,* 106 Fed. 269.

If defendant had on hand only a part of the funds which should have been collected, then the pleading would support a judgment against the town directly as for money had and received for the portion on hand, and would support a special judgment for the balance to be specially enforced by further orders, all under the doctrine of the cases last cited. See Dillon: *Munic. Corpns.* (5th Ed.) p. 1395.

3—It appears by the complaint that special improvement district No. 4 was legally created; that the improvements were legally contracted for, were constructed and accepted by defendant; that the bonds in question were issued in payment thereof; that plaintiff had purchased the same for value; that the bonds had not been paid, notwithstanding the lapse of nearly five years' time, but that on the contrary defendant had refused payment, declared its intention of never paying the bonds and repudiated the obligation *in toto* (Tr. 8). Under these allegations a *prima facie* liability is declared against defendant, which may be based either *ex delicto* or *ex contractu,* it being the legal duty and the implied contract of a municipality to do every needful thing to make valid assessments and to make special improvement collections. Dillon: *Municipal Corporations* (5th Ed.) Sec. 827, p. 1251; *Barber Asphalt Co. v. Denver,* 72 Fed. 336; *Commercial Bank v. Portland,* 24 Ore. 188, 33 Pac. 532; *Jones v. Portland,* 35 Ore. 512, 58 Pac. 657; *Reilly v. Albany,* 112 N. Y. 30, 19 N. E. 508.

4—The complaint set forth as an exhibit a copy of one of the bonds in question, which bond included certain recitals and certifications of fact by defendant to the effect that the bond was regularly issued for work done *as authorized under the resolutions of intention and creation* of the district; that the bond was secured by assessments *which were a lien* upon the real estate within the district and that *all things necessary under the law* to make the same a legal obligation *had been complied with.* Defendant, having issued such special improvement bonds to a purchaser for value before maturity, is liable to such holder upon the recitals and certifications made under the doctrine of *Hauge v. Des Moines* (2nd count), 207 Ia. 1209, 224 N. W. 520; *First Bank v. Elliott,* Ia. , 233 N. W. 712; *Cuddy v. Sturdevant,* 111 Wash. 304, 190 Pac. 909; and see also *Edmunds v. Glasgow,* 89 Mont. 596, 300 Pac. 203. The liability of the defendant under these recitals is based on (a) misrepresentation, with respect to which plaintiff may waive the tort and hold the defendant for money had and received under familiar principles, or (b) defendant will be held estopped to deny the truth of the recitals and the validity of the bonds, from which there results the further obligation of making lawful levies, assessments and collections on the part of defendant, such being an implied contract on the part of defendant in creating the special improvement district and issuing the bonds.

5—The complaint further stated a cause of action on the theory of *quantum meruit,* it appearing that defendant had received and accepted for itself the improve-

ments which were water distributing pipes, etc.—proprietary and lucrative in nature—which had been and were being used by defendant continuously since completion, and similarly had had and used the income derived therefrom. Defendant had thus acquired a water distributing system for itself and was thereby enriched both by the plant itself and the income therefrom, for which it had paid nothing and refused to pay anything, though it had legal power to acquire and own such under Section 5039 (subd. 64) *Revised Code* 1921. Under these allegations defendant is liable for the reasonable value of the improvement represented by the moneys paid in defendant's behalf by plaintiff, under the doctrine of the numerous authorities shown in *Appellant's Opening Brief,* pp. 188, 189.

Defendant's Answers

Defendant answered apparently at law (Tr. 19-36). The first part of the answer comprised admissions and denials and some affirmative allegations in paragraphs numbered 1 to 20. The admissions and denials are of no importance at this time other than the *repeated admission of the regular and legal* creation of the district *for the purpose contemplated in the original resolutions,* and admission on the part of defendant that *it had* received, *acquired and used the improvements as the improvement contemplated in the resolution of intention,* thereby affirming the validity of the contract and the subsequent details touching the bond issue as legal and within the jurisdiction of the council of the Town of Ryegate; but in its paragraph 17 (Tr. 26) defendant

alleged passage of Ordinance No. 28 on June 9, 1920, and referred to a copy of the same as its Exhibit "B" and by paragraph 18 (Tr. 26) it alleged the passage of Ordinance No. 29 on the same date, which authorized the execution, issuance and form of bonds involved, which was made Exhibit "C"; and by paragraph 19 (Tr. 27) defendant alleges that such bonds were so issued as provided and were not general obligations of defendant. However, Ordinance No. 29, made "Exhibit "C" as a part of defendant's answer, discloses the form of the bond which included its recitals and certifications as to regular compliance with all necessary and lawful things, and by Sections 7 and 8 of such ordinance it was provided (Tr. 46) that a "continuing direct annual tax be and the same is hereby levied upon all the taxable real estate within the district", which assessments shall be in amounts sufficient to pay the interest and principal, and that all money derived and received from the collection of the special assessments *shall be deposited to the credit of District No. 4* and *"shall be paid out for no purpose other than* in payment of the *principal and interest"* of said bonds.

The ordinance in question shows a declaration of trust and the establishment of a special trust fund for the benefit of the bondholders, and set forth a situation of trustee and beneficiary, with respect to which defendant took occasion in its paragraph 19 to plead that its obligation was not a general one under these provisions. In other words defendant sought the protection of the trusteeship to declare itself as an agent or trustee and not a principal. This defense is an equitable one.

Defendant's answer further alleged so-called affirmative defenses. These are:

1—Allegations (Tr. 27) to the effect that if the town were held liable the obligation would exceed the constitutional limitation of indebtedness. This is not a good defense but will be treated separately hereafter.

2—That (Tr. 29) plaintiff had paid 80% face value or $36,481.94 for the bonds and no more; at most this is a *pro tanto* defense.

3—That (Tr. 29) skilled lawyers were employed to assist defendant and its attorneys in every effort to make the improvement district proceedings valid, and that the contractor employed skilled counsel for the same purpose, and that it believed plaintiff to have relied on advice from its counsel in purchasing these bonds to the effect that they were obligations of the improvement district and not of the town. For obvious reasons these obligations suggest no *defense* whatever.

4—Defendant (Tr. 31) undertook to plead facts relating to the so-called *Belecz* suit which had been brought in the state court, which was alleged to have resulted in decrees enjoining the enforcement of assessments and collections against the properties in question. This could be a defense only by way of excuse of defendant as trustee under Ordinance No. 29 for failure to collect assessments against the property so litigated. It had no value as a plea of *res judicata* for the reason that plaintiff was not shown to be a

party to the proceedings nor was it bound thereby under any other allegations under the doctrine of *Cramer v. Singer Mfg. Co.,* 93 Fed. 636; *Mankato v. Barber Asphalt Co.,* 142 Fed. 329, and numerous cases cited in *Appellant's Opening Brief,* pages 64-65. The allegations touching the *Belecz* suit referred to matters of alleged illegality in the proceedings and a pretended lack of jurisdiction on the part of the counsel to order the improvements made. As to this want of jurisdiction, the earlier pleadings of the answer in its admissions and allegations clearly admit and allege the legal creation of the district by which the town council had full jurisdiction to proceed with the improvements in question. The repeated admissions cannot be construed otherwise.

Having in mind, however, the statutes with respect to amendments of pleadings in the federal court since the enactment of the new judicial code, it may be, though the pleading is very bad, that the issues as to the legality in the proceedings involved in the creation and authorization of improvements in Special District No. 4, could by amendment be brought before the federal court for redetermination, as under the federal decisions they must before plaintiff as a bondholder shall be bound thereby. If defendant, therefore, intended by its pleading of the fourth affirmative defense to have the federal court pass upon or redetermine or *affirm* or *sustain* the invalidity of the special improvement proceedings and contract and issuance of the bonds, then it is most clear that to make such a finding and decree defendant must take the issues to

the equity side of the court for determination since a determination of rights as to legality and *application to funds and properties involved* cannot be determined as a legal issue by the verdict of a jury under any theory. Such a determination would require not only an accounting as to the funds collected but a complete adjustment of levies and assessments on a winding-up of the bond issue affairs, including the discharge of defendant as trustee and upon its distribution to the proper parties of the funds in hand, if any it had at such time.

Insufficiency of the Answers

Briefly we advert to the insufficiency of the Answers. By showing itself to be an agent or trustee for the collection of the assessments, and admitting the issuance of the bonds in the form set forth and the ownership of the same by plaintiff as a purchaser for value, defendant admits its legal duty and liability as such trustee to pay over to plaintiff what it has collected and thereby absolve itself from liability further, if all other theories of liability were eliminated. Now defendant has completely failed to make this further showing as pointed out in our *Opening Brief* (p. 86-103). The law *presumes* that collections have been made; *Warner v. New Orleans,* 87 Fed. 826; and the municipality held as if they were made, in the absence of contrary proof. See also the statutory presumptions of Montana *Revised Code,* 1921, Sec. 10606 (subd. 15). Defendant's argument (Appellee's Brief, pp. 69-72) to the effect that such is part of plaintiff's case completely overlooks the legal presumptions either by statute or the equity rule ex-

pressed in the maxim that equity considers that as done which should have been done. *Warner v. New Orleans, supra.* The moneys if collected in whole or in part belong to plaintiff as the holder of all the bonds, *Gladstone v. Throop, supra, Spydell v. Johnson, supra,* even though the collection were based on illegal proceedings. It is defendant who must explain. Plaintiff's presumptions support its right until overthrown by further evidence. The argument of defendant has no convincing force. Its speculative suggestions *(Appellee's Brief,* p. 71) as to what may have happened in other *possible* actions or suits have no application. If there were such other proceedings, it is *defendant* and not plaintiff who *must show the fact.* Having completely failed either to plead or prove such, defendant is liable for such balance. Under such circumstances a court should, either itself or through a refereee or master, find the amounts on hand or due if the parties cannot agree on a statement of the balances as the court should order to be submitted, under familiar and usual practice.

The further argument of appellee to the effect that an accounting was not prayed for, does not change the situation under the new Judicial Code, Secs. 269, 274a, 274b, which gives the right at *any stage of the cause* as we shall hereafter more fully develop.

The cause came to trial upon an Agreed Statement of Facts, which will be found beginning at page 24 of our *Opening Brief* and at Tr. 52-61. A jury was waived in writing, and a very little further testimony, which was not necessary to the determination of the issues, was taken. The only fact of interest which was

not stipulated was the matter of *bona fides* or actual notice on the part of plaintiff as to the defects complained of in the state court case. The testimony was uncontradicted and showed that there was no notice whatever. Even this was unnecessary, because the law presumes *bona fides* where value has been paid before maturity, as set forth in numerous cases cited in our *Opening Brief,* pages 60-61. Nothing being offered to the contrary, this presumption would obtain under the Agreed Facts showing purchase for value before maturity.

Case at Law or in Equity on Review

Whether the cause was tried as an action at law or a suit in equity is not controlling on appeal. We call attention to Sections 274a and 274b of the *Judicial Code* (U. S. C. A., Secs 397, 398). They are respectively found in the following language: (Italics ours)

> 274a. *Amendments to pleadings.* In case *any* United States *court shall find* that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the *court shall order* any amendments to the pleadings which may be necessary to conform them to the proper practice. *Any party* to the suit *shall have the right, at any stage of the cause,* to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.
>
> 274b. *Equitable defenses and equitable relief in actions at law.* In all actions at law equitable defenses

> may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal *the appellate court shall have full power to render* such judgment upon the records as law and justice shall require.

Under these statutes a case may be considered open to transfer at any stage of the proceedings. This is not limited to the trial court but may be transferred in and by the appellate court. The language of the act is broad and is made to apply "at any stage of the cause". The theory, therefore, upon which pleadings may be drafted or upon which the cause may be tried in the first instance are not controlling where rights involved are of a different nature and which properly should be disposed of in equity, though first brought at law, or *vice versa.* The law as to this is well settled under the new statutes, and the cases are uniform and emphatic.

The leading case is *Liberty Oil Co. v. Condon National Bank,* 260 U. S. 235; 43 S. Ct. 118; 67 L. Ed. 232. This was an *action at law brought* in the District Court of Kansas, based on diversity of citizenship. Condon National Bank was made defendant. Certain allegations were made with respect to a deposit made with the bank, together with a contract in the nature of an escrow, upon which certain deliveries were to be made

upon showing a marketable title through an abstract of title to certain property involved. If title were good certain further payments were to be made or the deposit forfeited; if the title were bad the deposit was to be returned. The bank made its *answer at law,* admitted the facts generally and after other allegations stated that the bank had no interest in the deposit itself and asked that the vendors of the property be made parties and required to set up their claims to the deposit; that the court would order the disposition of the money and discharge the bank from liability. Accordingly the court ordered the vendors to be made parties and set up their claims. Certain issues were involved and determined as between them. The case came on for trial, a jury was waived in writing, a *bill of exceptions was made up,* which included all of the evidence. The district court made general findings in favor of the vendors, discharging the bank from further liability.

An appeal was taken to the Circuit Court of Appeals and it considered the same as an *action at law with general findings,* with respect to which the old rule was applied that there was nothing before the court for review in that state of the record, and ordered an affirmance. *Certiorari* was then taken on a writ from the United State Supreme Court. The case is worthy of careful reading. Without further analysis, it is enough to say that under the new statutes then construed the court considered the answer made by the defendant bank as in the nature of a bill of interpleader proper to be heard in equity, and that being true it was incumbent upon the court to treat the whole cause as in equity, from which it followed that the Circuit Court of Appeals must

review the case as on a trial *de novo,* notwithstanding the fact that the case was apparently tried without objection as an action at law before the court, a jury being waived.

This court has gone even further in the case of *Fiorito v. Clyde Equipment Co.,* 2 Fed. (2d) 807. This was an *action at law* brought in the Western District of Washington claiming special damages as for a breach of warranty touching certain machinery purchased by plaintiff from defendant. Defendant *answered at law,* denying the contract as alleged and setting forth a contract in writing covering the machinery in question, which *contract* by its stipulations *did not include the warranty* complained of. Plaintiff replied to the effect that the written contract had been signed without reading and in reliance upon defendant's representation that it conformed to the prior oral agreement which included a general warranty. The *parties treated the matter as at law* without an effort to transfer the same to the equity side of the court to determine the matters suggested by the reply. At the *jury trial* on hearing the evidence, the trial court threw out the contentions made by the reply and directed the jury to bring in a verdict for the defendant for the balance claimed due on the machinery. On review in our Circuit Court of Appeals, Judge Bourquin discusses the matter in the light of the new sections of the Judicial Code, and upon the authority of *Liberty Oil Co. v. Condon Bank, supra,* and holds the evidence fairly to show the equivalent of misrepresentation and fraud, with respect to which relief should be granted. The case was remanded to the trial court with directions to so consider (in equity) the written

contract as to conform to the findings of the opinion and proceed thereon to a new trial *as for a rescission,* damages and balance of account. We must notice the importance of this case. The *theory* of the *case as brought had nothing to do with rescission or reformation,* and had nothing to do with a balance of account or an equitable investigation. It had been brought as an action at law for damages for breach of a warranty when the facts developed that no such contract had been entered into, with respect to which there could be no breach of warranty. The *theory presented in the trial court had nothing whatever to do with the equitable result finally reached* in the disposition of the case.

We further call attention to the case of *Clarksburg Trust Co. v. Commercial Cas. Ins. Co.,* 40 Fed. (2d) 626. This was a case brought *at law* suing *on a bond* given by the defendant to secure the integrity of a deposit made in a certain bank. This bank had failed and the liability on the bond was asserted. This would be one of the clearest cases of an action at law upon a bond, covered at common law by the action of debt. The defendant answered and denied liability upon the bond complained of, and upon the *trial at law and before a jury,* it was found that the bond in question in fact had been written to cover or guarantee the integrity of a deposit made *subject to check,* while in fact the deposit made had been placed upon *time deposit* on a so-called time certificate issued by the bank. The liability of the bank is, of course, very different, the time certificate being a negotiable instrument which could easily be transferred to other parties by endorsement before maturity, while a checking deposit cannot so be trans-

ferred, the bank having, if necessary, a lien upon a checking deposit for obligations owing to the bank, which would not obtain in the case of the certificate of deposit. Accordingly *the trial court* held that the bond actually written did not cover the deposit as alleged in the initial pleading and *directed a verdict in favor of the defendant.* On the appeal the Circuit Court of Appeals had before it the question of redetermining the correctness of *this* ruling, which it proceeded *to affirm,* holding the bond as executed not to cover the deposit actually made. However, *it was further contended in the Circuit Court of Appeals* that if *the bond* as executed did not cover the deposit it *was intended that it should* do so when issued, that being the purpose of the bond, and that although the parties were mistaken as to the legal construction of the instrument it was nevertheless intended by the parties *to guarantee the deposit represented by the time certificate.* This becomes a most interesting case. Judge Parker fully discusses the law of equity with respect to a mistake at law, for the mistake, if any, was in the legal interpretation of the instrument, and finds that in a proper case equity will grant relief for a mistake of law. Further, he holds that the Circuit Court of Appeals will *of its own motion* transfer the cause to the equity side of the court *in order to do justice* under the statutes quoted above. That being the purpose of courts, it is no objection that the parties thought their right lay at law when it should have been in equity, and that the pleadings were laid according to the theory upon which the case had been tried below. Accordingly the case was reversed and remanded to the

trial court for further equitable proceedings looking to a *reformation* in accordance with his opinion.

The further case of *American Trust Co. v. Butler,* 47 Fed. (2d) 482, shows the same rule to obtain where the cause is tried upon an agreed statement of facts before a court, a jury being duly waived, as the court says no harm can result in such a case, since the trial court must hear all of the evidence whether it be considered at law or in equity, and approves the handling of the case though it may have been technically on the wrong side of the court at the time of the trial.

Many other cases may be found dealing with the liberality of the new statutes. We have referred to some of these in our original brief (pp. 55 to 57) but the cases discussed above so clearly cover the power and duty of the court under the new statutes as to make unnecessary any further elaboration.

The Agreed Statement of Facts

In our *Opening Brief* (p. 51) we showed the federal rule long established to the effect that "forms of action" are not open to objection on a cause tried to the court on Agreed Facts, a jury being waived, therefore the original theory of a declaration, complaint or petition is not of legal importance. *Willard v. Wood,* 135 U. S. 309, 314, and since the amendments to the Judicial Code, there is no merit in the argument of having *elected* to try the cause in whichever side of the court it was filed. *Clarksburg Trust Co. v. Com. Insurance Co., supra.* The pleadings, aside from the admissions of facts alleged, are not considered of importance. The Agreed

Facts are on appeal the equivalent of special findings or special verdicts. The important thing on review is the application of the law to those Agreed Facts.

In this case, the Agreed Facts included as exhibits either from the pleadings as admitted or further exhibits to the Agreed Statement, the various ordinances, contract for construction, form of bond with its recitals and pleadings and findings, etc., in the *Belecz* suit in the state court. The *Belecz* pleadings and findings merely admit what those *records* are. The *Belecz* decree is not stipulated to be binding on the parties to this cause. The *Belecz* pleadings can be treated only as a showing of fact. As to this, however, they have value where they may be admissions or declarations against interest. Plaintiff made no declarations or admissions in the *Belecz* case and was not a party thereto. Defendant was a party and did make statements and declarations therein, and such are, if against defendant's interest, part of this case as a part of the Stipulation of Agreed Facts. The important declaration is that of Paragraph II (Tr. 82) wherein defendant declared that no notice was filed by the *Belecz* plaintiffs within 60 days from the date of the contract's award as required by the Montana statute. This was *admitted by Belecz plaintiffs in their reply* (Tr. 83) who were represented by the same careful counsel who represent defendant now in the case at bar. This important fact so stipulated goes to the heart of the *Belecz* proceedings. It should have settled that suit, and if the alleged defects of the *Belecz* suit are by liberal construction, and perhaps amendment of the pleadings of defendant, to be consid-

ered as now before the federal court for redetermination, that declaration against interest should stand as an admitted fact now.

Judge Pray must have considered the importance of this because he made a finding on it which is the subject of our Assignment of Error IV (Tr. 255) and which is in direct opposition to this declaration of defendant against interest, and adopted a *finding* of Judge Horkan in the *Belecz* suit which had no legal support whatever in the record in the state court as shown, and which is not binding on the federal court as *res judicata* against plaintiff herein. Evidently Judge Pray was acting to that extent in determining underlying *Belecz* facts, though he fell into manifest error.

Further Judge Pray evidently intended to consider the case at bar as to liability of the town under "any theory" as he stated in his opinion (Tr. 96) where he quoted defendant's "proposition" *verbatim* set forth in direct quotation marks. Defendant now makes a claim in their brief somewhat to the contrary. See *Appellee's Brief* (p. 4) where counsel have carefully deleted *"any theory"* from their proposition of law which is an interesting deviation under the present circumstances to say the least.

Judge Pray cited certain cases such as *Moore v. Nampa,* 18 Fed. (2d) 860, *Capitol Heights v. Steiner,* 211 Ala. 640, 101 So. 451, which touch on the liability of a municipality where it has failed in its alleged duty to make valid assessments or collections. We have shown the great weight of State authority to the contrary, and practically every Federal case is in opposi-

tion to the *Capitol Heights* case, which can be supported only, as can the old law of Montana as expounded in *Gagnon v. Butte,* 75 Mont. 279, by the statutes giving the bondholder a direct lien on the benefited property and his own right independently to enforce the same. See *Steiner v. Capitol Heights Co.*. 213 Ala. 539, 105 So. 682, which clears up that situation. *Moore v. Nampa,* 18 Fed. (2d) 860, deals with *recitals* but it must be considered only in the special light of the peculiar liability attempted and determined by its pleadings as authoritatively determined on *certiorari* by the Supreme Court. See 276 U. S. 536, 48 S. Ct. 340, and the *prohibitory character* of Idaho's statutes which have nothing in common with Montana. Judge Pray also considered the *quantum meruit* theory of liability and erroneously, we think, confused the Constitutional Limitation in denying such. He also mentions (Tr. 97) a further theory propounded in a brief filed by Mr. C. F. Gillette.

It is clear that the various theories were before and considered by the court—in fact the court accepts and states defendant's proposition as covering "any theory" of liability (Tr. 96). In the trial court, especially on Agreed Facts, "any theory" is properly before the court. Defendant has filed a motion in this court asking that memorandum briefs below be forwarded as a means of limiting the theories of liability apparently. While such briefs may be instructive in part, we know of *no rule of a trial court* which *limits* the rights of *the parties* to that portion of counsel's argument which for convenience may happen to be stated in a memorandum

supplementing general argument, or to limit the legal value of the *record stipulated* in the Agreed Statement of Facts.

Reviewability of Judge Pray's Findings

Further we observe that in determining this cause Judge Pray filed his so-called "decision" and entered his order thereon in a form of "decree" rather than a judgment, and thereafter entered his supplemental order denominated "Order Amending Decision" (Tr. 254) in which he ordered that his "decision" shall *"stand as the findings* of fact *and conclusions* of law *required under Equity Rule 70½, to avoid any question* that may arise *as to whether it is* an action at law or *a suit in equity,"* etc. If this order means anything, it must be that Judge Pray intended to make his decision and decree the findings and conclusions required under the equity rule and not at law, and would interpret his views as equitable rather than legal. There can be no doubt as to the propriety of this further order in complying with the requirement of the new Equity Rule 70½. In addition to the cases mentioned in our *Opening Brief* (p. 54) we now call attention to the following additional authorities: *American Can Co. v. M. J. B. Co,.* 52 Fed. (2d) 904, wherein the District Court of Delaware followed *Briggs v. U. S.,* 45 Fed. (2d) 479; and this court a few weeks ago, and since the printing of our Opening Brief, has similarly decided in *Parker v. St. Sure,* 53 Fed. (2d) 706.

Counsel have in *Appellee's Brief* (pp. 67-69) attempted to argue the insufficiency of findings for purposes of review at law relying on *Kansas City Life Co.*

v. Shirk, 50 Fed. (2d) 1046. They have overlooked several important features. 1. The case at bar *has no material facts not covered* by the Agreed Facts as we have several times pointed out. This case is complete so far as establishing defendant's liability is concerned on the Agreed Facts alone. Detail of amounts if equitable relief or balance of account is ordered can be had in the customary method of reference to an auditor or master. 2. The Federal Supreme Court has held that where the *parties have agreed* to treat the court's opinion as special findings the court will so consider it for purposes of review on appeal. *Mutual Ins Co. v. Tweed,* 7 Wall. 44, *Lehnen v. Dickson,* 148 U. S. 71. In the case at bar plaintiff and defendant by a Further Stipulation, following the omission in the printing of the transcript, have so agreed, the Stipulation having been filed in this court last September. 3. Even if the findings were general, the Agreed Facts and Pleadings are reviewable, the addition of further testimony not changing the material or ultimate facts agreed upon. *Wilson v. Merchants L. & T. Co.,* 98 Fed. 688; *Anderson v. Messinger,* 146 Fed. 929.

The cause may be properly considered under the issues as one in equity; the court has so considered it as to findings under Rule 70½; irrespective of that, the issues being present, the Circuit Court of Appeals may so consider it of its own motion. Further, the new rules in equity have not changed the right to a trial *de novo* on appeal and the entire record is now before the court for its determination, with respect to which the court may develop the case on "any theory" as suggested by

defendant's counsel in the trial below, and repeated by Judge Pray in his decision; and in the furtherance of justice, the court may consider the cause upon a theory which may not have been precisely briefed or accepted in the court below, as shown in the *Fiorito* case, supra, and the *Clarksburg Trust Co.* case, supra.

In complying with the mandates of the statutes, not only may the court take this broader view of the cases sought to be reviewed, but the court may, if it shall find the same necessary, remand the case to the court below for further proceedings rather than attempt to determine the thing once and for all on the trial *de novo,* which is the usual rule when all of the evidence is before the court. Thus did this court do in the *Fiorito* case, which Judge Bourquin remanded to the District Court for further proceedings in accordance with the equitable theory herein determined; thus also did Judge Parker do in the *Clarksburg Trust Company* case in remanding the case for further proceedings looking to the reformation of the bond sued upon; thus did Chief Justice Taft do in the *Liberty Oil Co.* case, supra, which was remanded to the court below to rehear the case upon the full record of the evidence rather than determine the same in the Federal Supreme Court, as it might have otherwise done. In determining the record for review under the recent cases, the court takes a liberal view, since, as is well known, it is not easy to determine in every case whether the matter be one at law or in equity. The United States Supreme Court said in *Whitehead v.*

Shattuck, 138 U. S. 146, 151, speaking through Justice Field:

> "It would be difficult, and perhaps impossible, to state any general rule which would determine, in all cases, what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; . . ."

It is therefore proper that the appellate court remand a case for further proceedings below to take further evidence if the record does not disclose facts sufficiently to show the basis of a proper decision and decree, *Standard Scale Co. v. Computing Scale Co.,* 145 Fed. 627; and where the evidence was not duly considered a further hearing will be required, *Hawkins v. Dannenberg Co.,* 253 Fed. 529; and where the parties can produce further important testimony it should be remanded for the taking thereof. *Kirkpatrick v. McBride,* 203 Fed. 449. That an appellate court in equity has the inherent right to remand a case for further proceedings is, of course, well established. *Parker v. St. Sure,* 53 Fed. (2d) 706; *Panama SS. Co. v. Vargas,* 281 U. S. 670; 50 S. Ct. 448; 74 L. Ed. 1105.

While the record seems fully to justify the position of this cause as in equity, if the court shall hesitate in so considering the matter, plaintiff, *under the Statute* (274a, Judicial Code) *so permitting any party at any stage of the cause in any United States Court,* asks leave to so amend its pleadings as to ask for an accounting and administration of the trust in favor of the bondholders created by Ordiance No. 29, and for all further

equitable relief including the right to compel the appearance of all other interested property owners to the end that justice be accomplished in the matter of assessments; or to hold defendant itself for its breach of duty in the premises, or by reason of its recitals in the bonds issued.

The foregoing relief is appropriate and just and is recognized and enforced among others in the following authorities: Dillon: *Municipal Corporations* (5th Ed.) p. 1395; *Spydell v. Johnson,* 128 Ind. 235, 25 N. E. 885; *Burlington Bank v. Clinton,* 106 Fed. 269; *Warner v. New Orleans,* 87 Fed. 826; *New Orleans v. Warner,* 175 U. S. 120, 130; *Fetzer v. Johnson,* 15 Fed. (2d) 145; *Road District No. 7 v. Guardian S. & T. Co.,* 8 Fed. (2d) 932; *Hauge v. Des Moines,* 207 Ia. 1209, 224 N. W. 520; *Edmunds v. Glasgow,* 89 Mont. 596, 300 Pac. 203.

Scope of Independent Determination in Federal Courts

It seems to be in the mind of defendant's counsel that because Judge Horkan signed a decree following findings in the *Belecz* suit, and among other things declared defendant to have "never acquired jurisdiction" to make the improvements actually made, that finding is conclusive on the whole world including the Federal Courts, and apparently Judge Pray shared in that opinion, else his opinion would be self-contradictory. Now such is not the law. We point out a few cases which are fully determinative of the question.

Where the law had not been clearly settled in the State's Supreme Court before the plaintiff's rights were

vested, the federal courts have the duty to determine the matter independently; and if the *earlier* decisions are opposed to the current holding of the state court made *after plaintiff's* rights vested, then the federal courts will protect its litigants by giving effect to the law *as previously declared* and before those rights were created. *Burgess v. Seligman,* 107 U. S. 20; *Fetzer v. Johnson,* 15 Fed. (2d) 145; *Mankato v. Barber Asphalt Co.,* 142 Fed. 329. The federal courts are not deterred because the creation of a special improvement is held invalid by the state courts. It will itself determine whether jurisdiction to create the district was present and may sustain such jurisdiction as present and valid in opposition to the state's highest court.

This very situation was developed in the case of *Fetzer v. Johnson,* 15 Fed. (2d) 145, where a property owner's suit had been brought in the Oklahoma courts attacking the validity of assessments, etc., and *claiming* the county supervisors to have had *no jurisdiction to create the district,* the boundaries being fatally defective in description, etc. The trial court so held and on appeal the Supreme Court affirmed the ruling, holding the decisive question to be that of having acquired jurisdiction to create the district, which was denied in *Mulligan v. Johnson,* 77 Okla. 68, 186 Pac. 242. Thereafter Fetzer, a nonresident *owner of bonds* issued by the district which by their recitals were "payable *solely out of* the proceeds of the *special assessment* for the benefit heretofore legally levied * * * and out of *no other fund* whatsoever," brought his suit in the Federal Court to compel assessments and payments. The Federal Court

in its independent determination refused to follow the State Court's adjudication, held the district to be lawfully created within the jurisdiction of the supervisors, enjoined Johnson from using his State decree as a defense, and ordered mandatory writs against the county treasurer compelling assessments and their enforcement. The court treats the State decree as having destroyed the district as an entity, but that would not disturb plaintiff's right to valid assessments.

In the case at bar the legal creation of the district is stipulated. District No. 4 was not and is not an entity, but the Town of Ryegate is, and its position and that of its officials are open to a court of equity as proper agents for the enforcement of this just obligation.

It should be remembered that the bonds involved in the Fetzer case though called "negotiable coupon bonds" were not fully negotiable, being payable only from a special fund and cannot be distinguished from those involved in the case at bar in respect to "negotiability."

Another recent case is that of *Road District No. 7 v. Guardian S. & T. Co.,* 8 Fed. (2) 932. This improvement district was created under certain Arkansas enactments and assessments made and confirmed by the Legislature upon which a bond issue was predicated. These bonds were sold in June, 1920, and thereafter certain property owners brought a suit in the Chancery court of Poinsett County, which resulted in a decree setting aside the assessments and enjoining the work and paying out of any moneys. Thereafter the reported case was begun by the trustee for bondholders in the Federal Court which held the bonds to be valid obliga-

tions and ordered enforcement of the assessments. On appeal it was contended that the trial court had not given effect to mistakes and *errors in* the proceedings for the *district's creation* alleged to be sufficient to make the bonds void. The specific errors related to mistaken description of boundaries and acreage—allegedly *jurisdictional defects.* Applying Arkansas earlier decisions, the Circuit Court of Appeals held the district to be validly created, rejected the contention that the State Court had first acquired jurisdiction of the subject matter in its suit, since the Federal plaintiff was a *bondholder,* not a property holder and could not be bound by the decree in a suit where he was not a party and where the bondholder's rights *as such* were not in issue.

As we read the admissions and stipulations of defendants in this cause—see *Opening Brief,* pp. 90-96, and (Tr. 20, 24, 53, 54, 55, 56), any question as to legal *creation* of District No. 4 and the *character of* the *improvements* contracted for, constructed, accepted and used as complying with the Resolution of Intention and Creation is foreclosed, it being repeatedly stipulated that the improvements do so comply. Only on some such pretext could any possible question of jurisdiction be invoked; and pleadings, by the answer's admissions, and the Agreed Facts settle that issue in favor of the jurisdiction.

Plaintiff's Right to Rely on Montana Decisions Prior to July, 1920

All other alleged defects are of a non-jurisdictional character and must fall under the 60-day-protest statute if not earlier barred by failure to object to the dis-

trict's creation. Now, the Montana law was pretty well settled as to the protest statute prior to the Ryegate activities. Thus we find *Power v. Helena,* 43 Mont. 336, 116 Pac. 415, decided May 27, 1911, holding a property owner must first make his protests to the council, and if denied or ignored, thereafter seek relief in the courts; and *Shapard v. Missoula,* 49 Mont. 269, 141 Pac. 544, decided June 8, 1914, which refers to the 60-day statute period for protest as determining a "conclusive presumption of waiver" where a valid resolution of intention exists—as here—jurisdiction being present; and on March 22, 1920, in *Harvey v. Townsend,* 57 Mont. 407, 188 Pac. 897, the doctrine was reaffirmed and it was held that failure to make objection to creation (15-day notice) foreclosed a property owner of the later right to object; and subsequent failure to object or protest (under the 60-day statute) to the award of the contract was *conclusive.* This is still the expressed law of Montana, see *Swords v. Simineo,* 68 Mont. 164, 216 Pac. 806, approving *Power v. Helena,* supra, and stating rule of laches as applied to property owner sitting by without objection while improvements are being made and his property benefited—in the case at bar over 1½ years elapsed before bringing the *Belecz* suit.

The Montana Supreme Court passed on the *sufficiency of description of proposed improvements* in *Mansur v. Polson,* 45 Mont. 585, 125 Pac. 1002, decided June 12, 1912, holding the statutory requirement of "character of improvement" did not require a detailed or specific description, distinguishing Montana's language from that of California and Illinois and declining

to follow their decisions further than a sufficient notice under "due process" requirements and holding the omission of "gravelling" from the contract, though included in the initial resolutions to be of no importance in the absence of evidence to show it to be a substantial part of the contemplated improvement. (In the case at bar the contention resolves itself into "pipes, hydrants, etc.," being a fatal misdescription, where the pipes were to hold water, and might have been described as water mains as well.) The later case (in July, 1921) of *Evans v. Helena,* 69 Mont. 577, 199 Pac. 445 (which inspired the *Belecz* suit) does not seriously affect the description in the Ryegate matter even if controlling, which it is not, decided *after* the Ryegate work was done, the bonds sold, and the benefited property owners had observed and secured the benefits of the laying of the "pipes" in question, and no doubt drawn for their benefit and convenience, water from and through the same. The *Evans* opinion says the improvement must correspond *substantially* with the description in the resolution. We submit that pipes for water or water mains with attached hydrants, etc., do "substantially correspond" to the description of "pipes, hydrants for irrigating appliances and fire protection." The opinion says the "character of improvement" must be embraced by at least a *general description.* The English dictionaries will fortify us in saying that pipes, hydrants, etc., are such a "general description." The court correctly states the law that it will not interfere with the council generally, but only where the improvement is *essentially* different. The obvious query answers itself here. But

in the *Evans* case the resolution referred to "incidental work" and said nothing about new *curbing* and *parking* and *reduction of street widths,* and the installation of *storm sewers* otherwise, accordingly the court could not stretch "incidental work" to mean a general description of such, nor could it say such improvements *substantially corresponded* to "incidental work."

With respect to the construction of the statutes regarding sale of bonds as below par, there is no opinion prior to *Evans v. Helena.* That question was entirely free from construction and in no degree settled in 1920.

The Federal Courts are not only free to determine the matter of sale below par, if such there were, and there is no record to prove the fact in the case at bar (which is defendant's burden), but to protect federal litigants under *Burgess v. Seligman,* supra, doctrines, the Federal Courts must apply the law which was settled as to protests and the 60-day statute upon which plaintiff had a right to rely, and also as to the law of *Mansur v. Polson, supra,* touching the general description of the improvements contemplated and made, though the conclusive presumption of waiver should conclude the matter of description, estimates, etc., in itself. And as to the effect of the bond sale the entire matter is open, without Montana precedent in 1920, to Federal construction.

It is also true that the matter of estoppel by recitals is open to federal determination, such question being a matter of *general* law; although the Montana court last summer in *Edmunds v. Glasgow,* 89 Mont. 596, 300 Pac. 203, took occasion to approve *Hauge v.*

Des Moines, 207 Ia. 1207, 224 N. W. 520, where the municipality was held liable for its recitals in the bonds of a special improvement district which was not a direct or general obligation of the city—a most important and convincing opinion which defendant's counsel have not undertaken to reconcile. It represents the present Montana trend, since it was not particularly necessary to the *Glasgow* decision, there being a multitude of cases of direct obligation character in accord. It is highly persuasive in showing Montana's views as well as for the unanswerable quality of its reasoning.

We therefore conclude the matter of federal review as showing the full right to determine the issues, the *Belecz* decree having no binding force in any degree. This court should consider the cause as in equity, permitting either party any amendments in pleading if necessary notwithstanding the Agreed Facts, as to such details as may be necessary (if the court shall not impose, as it properly may, sole and full liability and judgment against defendant for its breach of duty and implied contracted obligation to plaintiff, or on its untrue recitals) to bring in all other parties, property owners and officials to render justice. *Fetzer v. Johnson,* 15 Fed. (2d) 145, *Mankato v. Barber Asphalt Co.,* 142 Fed. 329; *Hauge v. Des Moines,* 207 Ia. 1207, 224 N. W. 520; *Spydell v. Johnson,* 128 Ind. 235, 25 N. E. 889; *Burgess v. Seligman,* 107 U. S. 20.

II.—LIABILITY OF DEFENDANT IRRESPECTIVE OF THE CONSTITUTIONAL LIMITATION OF INDEBTEDNESS

This branch of the case is the subject of Appellee's Brief (pp. 4-19). The argument is not persuasive nor does it cover the various theories of liability which the Complaint and the Agreed Facts support.

1. We have heretofore shown the record as sufficient to charge the defendant with liability as a trustee or agent on account of such moneys as it may have collected or which it should have collected under the legal presumptions. We submit that no cases can be found in opposition to the proposition heretofore stated that as to such the municipality is liable to the bondholders. Defendant has made no effort and has cited no cases to prove the contrary.

2. A further liability which the record supports is that of a special judgment, under the federal practice, against defendant, which in turn may be the subject of special enforcement orders mandatory in nature. We need no elaboration of this theory further than to restate that such a liability and proceeding is in a broad way the equivalent of a mandamus which cannot be originated in the federal practice to compel defendant to perform its duties. Many of the cases referred to by defendant's counsel at various points in its brief, particularly *Gagnon v. Butte,* suggest in the state courts the desirability that bondholders proceed through a mandamus proceeding. The very suggestion is met upon the theory of *Mather v. San Francisco,* supra, which the record herein will support.

3. A most important liability which was given considerable attention by Judge Pray, as disclosed by his opinion and findings, is one imposing damages upon the town because the town has failed to perform its duty in the matter of collection or assessments, or the making of valid ordinances upon which such assessments could be based. The line of federal authority is clear to the effect that such liability will be imposed. The leading cases are: *Barber Asphalt Co. v. Denver,* 72 Fed. 336; *Barber Asphalt Co. v. Harrisburg,* 64 Fed. 283; *Mankato v. Barber Asphalt Co.,* 142 Fed. 329; *Oklahoma City v. Orthwein,* 258 Fed. 190; *Denny v. Spokane,* 79 Fed. 719; *District of Columbia v. Lyon,* 161 U. S. 200. Whatever may be the rule in a few of the states, which suggest the contrary under extremely different statutes, particularly those giving the bondholder an independent right to enforce his security, there can be no doubt of the federal doctrine which imposes this liability either *ex delicto* or as an implied contract imposed by the law upon the defendant as a part of its agreement in connection with contracts and bond issues touching special improvements. On this branch of the case defendant has not made a satisfactory showing by way of explanation or reconciliation of these important federal cases.

4. Another liability found in the record is based upon bond recitals. Where a municipality has disposed of securities based upon special improvements, and has made recitals to the effect that all necessary and lawful things have been done and performed sufficient to give valid and legal standing to the bond issue, the federal rule through a long line of cases is well settled that

where there *might be any state of facts* under the existing law and under which the bonds so issued would be valid, then as against a purchaser for value, the municipality is estopped to deny the truth of such recitals and the fact that the bonds so issued shall in themselves be direct obligations of the municipality, but are rather those of a special improvement character intended to be paid only from collections of special assessments, does not disturb the rule of estoppel as above stated. The cases in support of this doctrine are numerous and are set forth in our Opening Brief (pp. 145-172), and particularly *Troy Bank v. Russell County,* 291 Fed. 185; *Hauge v. Des Moines,* 207 Ia. 1209, 224 N. W. 520; *First Bank v. Elliott,* .... Ia. ....., 233 N. W. 712; *Cuddy v. Sturdevant,* 111 Wash. 304, 190 Pac. 909.

The general federal rule was settled in *Evansville v. Dennett,* 161 U. S. 434, and will be found vigorously restated in *Road Dist. No. 7 v. Guardian S. & T. Co.,* 8 Fed. (2d) 932, 935, and *Aurora v. Gates,* 208 Fed. 101.

5. The fifth ground of liability, that of *quantum meruit,* is in the absence of the constitutional limitation, very clear. The question is solely one of power to acquire. Municipalities in Montana, as in other states, have no power other than the same shall be found in the legislative enactments. Montana's Constitution provides specifically that all political power is vested in and derived from the people (Art. III, Sec. 1). It has further distributed its powers into the three usual departments of legislative, executive and judicial (Art.

IV, Sec. 1), and has provided that the legislative authority shall be vested in its Assembly through which the state's power and authority is expressed (Art. V, Sec. 1). Acting under this authority the Legislature of Montana authorized towns to acquire water supplies and water systems, including distributing systems. The power was therefore granted to the Town of Ryegate under the general laws of Montana and there is no suggestion to the contrary in the Montana cases. Furthermore the court has directly passed upon the matter stating that such power was granted. See *Edmunds v. Glasgow,* 89 Mont. 596, 300 Pac. 203; *Carlson v. Helena,* 39 Mont. 82, 104, 114; 102 Pac. 39. The legislative enactment in connection with this matter covers the granting of power to the Town of Ryegate. Being, therefore, an authorized improvement insofar as the legislative enactments are concerned, in the absence of a constitutional limitation, there can be no question whatever as to the liability of defendant for the reasonable value of the improvements, which by the stipulated record it has acquired, received, accepted and used, and is in possession and operation of the same and deriving revenues therefrom. Under the interpretation most favorable to defendant of the cases found in our *Opening Brief* (p. 188) such a liability would be imposed. We do not wish to reargue this phase of the case at length.

A good many years ago there was developed a classic statement of the law with respect to this type of liability, which seems to have had its first expression in the case of *Argenti v. San Francisco,* 16 Cal. 256. Two

opinions were written in the cause, the first by Justice Cope and a later opinion on rehearing by Justice Field. The expressions of Justice Field have been repeated down through the years to the effect that a municipality is not exempted from the obligation to do justice such as binds individuals; that such an obligation rests upon all persons, whether natural or artificial; that if a municipality obtains money of another by mistake or without authority of law it becomes its duty to refund it, and if the municipality obtains other *property* which does not belong to her it is her duty to restore it, or *if used to pay for the same.* The expressions of Justice Cope went even further in holding the city estopped to deny indebtedness where the contract has been fully executed and the improvements secured.

Whatever may be the rule in some states it is clear that Montana has aligned itself on the side of common honesty and justice in such matters, as shown by the expression of the court in *State v. Dickerman,* 16 Mont. 278; *Morse v. Granite County,* 19 Mont. 450, and this court on appeal from the District Court of Montana in *Hill County v. Shaw & Borden Co.,* 225 Fed. 475. See also *State v. Board of Comrs.,* 86 Mont. 595, 605, 285 Pac. 932, 937, stating municipality's obligation as requiring officials to do every act to prevent failure of justice in duty toward bondholders.

III.—THE CONSTITUTIONAL INDEBTEDNESS LIMITATION AS A BAR TO LIABILITY

Let us briefly consider the effect of the provisions of Article XIII, Section 6, of the Montana Constitution as applied to the liability of the defendant in the case at bar. We will discuss this in the same order as heretofore.

1. The liability of the Town of Ryegate to pay to the plaintiff as the holder of bonds of District No. 4 whatever funds it may have collected on account of assessments made or which the law presumes it to have collected, has in its nature nothing whatever to do with the constitutional limitation of indebtedness. It is merely the accounting of an agent or trustee to its principal or beneficiary, the case at bar presenting facts which clearly show the relation to exist which defendant itself has pleaded, but for which as an unfaithful trustee it has failed to account. The constitutional limitation is not a shield to a municipality for its failure to pay over funds which it has collected or which the law presumes it to have collected. So to construe the constitution would in effect condone embezzlement.

2. The matter suggested as to the liability based upon the peculiar federal practice which permits a special judgment to be specially enforced is, of course, the imposition of a liability upon the improved property and not upon the town using the defendant as the means of imposing the liability.

3. We come now to the important liability of the town for having failed to make valid assessments or to

have set up the necessary legal machinery to make effective the means of paying the obligation herein involved. This liability is based upon the town for having failed to do its legal duty or, stated differently, having breached its implied contract so to perform its duties, upon which the town itself becomes generally liable. The question of importance now involved is whether the imposition of such a liability in the nature of damages is barred by the constitution. All of the cases coming to our attention after considerable research permit the imposition of such a liability. We have discussed these cases in our Opening Brief and find the liability imposed in such cases as *Fort Dodge Light, etc., Co. v. Fort Dodge,* 115 Ia. 569, 89 N. W. 7; *Mankato v. Barber Asphalt Co.,* 142 Fed. 329; *Denny v. Spokane,* 79 Fed. 719; *Little v. Portland,* 26 Or. 235; *Gable v. Altoona,* 200 Pa. 15, 49 Atl. 367. Defendant has cited no opposing cases which are in point.

In our Opening Brief we discussed the language and origin of Montana's constitutional provision limiting municipal indebtedness and pointed out that this provision had its origin in the Constitution of Iowa, which was later adopted by the State of Illinois, from whence it came to Montana (Original Brief, pp. 108, 136- 140). Defendant's counsel have expressed criticism of this statement (see Appellee's Brief, pp. 118-119). The peculiar language, stated negatively as it is in the limitation section of the various constitutions, can readily be traced to that of the Iowa Constitution. For compara-

tive purposes we set forth the provisions covering the inhibition in the constitutions of the various states.

IOWA—1857

Art. XI, Sec. 3

"No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness."

ILLINOIS—1870

Art. 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. . . . "

MONTANA—1889

Art. XIII, Sec. 6

"No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three (3) per centum of the value of the taxable property therein, to be ascertained by the last assessment for State and County taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district shall be void; . . . "

In our Opening Brief we have discussed the Iowa decisions under its constitution and showed the construction of the language to have been settled to the effect that the constitution was a prohibition or inhibition against indebtedness which had been *voluntarily* created only. An indebtedness imposed by reason of a judgment based upon a wrong done by a municipality was not inhibited by the constitutional provision in question. Cases are grouped at page 108 of our Opening Brief and Illinois cases similarly holding are grouped at page 109.

In support of our former statement that Illinois took its constitutional provision from that of Iowa when Illinois' new constitution was adopted in 1870, we call attention to the *official* report of *Prince v. Quincy,* 105 Ill. 215, wherein is set forth a synopsis of the brief of counsel, who without contradiction assert that fact and rely upon the Iowa construction. Both sides involved in that case cite numerous Iowa cases relying thereon. The later case of *Culbertson v. Fullerton,* 127 Ill. 30, in the opinion of Magruder, J., at page 38, makes the statement that the construction of Iowa's constitutional provision is adopted and applied to a case involving a bond issue partially valid; and in addition to the cases cited in our opening brief the later case of *Prince v. Quincy,* 128 Ill. 443, recognized the Iowa construction as not applying the constitutional inhibition to a debt unless it be a *"voluntary"* debt, and again this construction has been reaffirmed in *People v. C. & A. Ry.,* 253 Ill. 191. Illinois has generally followed the same rules of construction contended for in our opening brief. For instance a *refunding* debt is not within the constitutional inhibition, *Hamilton County v. Montpelier Bank,* 157 Fed. 19; 84 C. C. A. 523. The obligation imposed upon the town by reason of *recitals* in its bond is not inhibited by the constitution of Illinois, *Oregon v. Jennings,* 119 U. S. 74. A line of Illinois cases supports the doctrine that the town is liable, notwithstanding the constitution, on account of judgments growing out of *tort.* See also *Chicago v. Cement Co.,* 178 Ill. 373; 53 N. E. 68, which construes the constitution as inapplicable to the *statutory* liability growing out of the

mob law act, holding a city liable for three-fourths of the damage done by rioting mobs. Illinois seems not to have had before it for determination the precise question of the application of the constitution to a municipality's liability for having failed to make valid assessments for special improvements, and so far as our considerable research extends, the matter has not been the subject of a decision. Iowa's Supreme Court, however, in the case of *Fort Dodge Co. v. Fort Dodge,* 115 Ia. 568; 89 N. W. 7, had the precise question before it for determination as discussed in our *Opening Brief* (p. 137). The controlling language of these constitutional provisions being practically identical, the Iowa case is most persuasive if not controlling here and all the Illinois cases referred to generally support the broad proposition that an *involuntary* obligation of a municipality which results in an indebtedness is not inhibited.

4. Liability growing out of recitals made by defendants and made a part of the bonds in question, requires as to the application of the constitutional provision only a little careful analysis and reasoning. Defendant's argument seems to be to the effect that if the bond shall happen to be a special improvement bond then the recital is no protection whatever to its holder, who is charged with notice of the proceedings relating to the special improvement district and its bond issue, and must take the same at his peril. This argument lacks a common-sense foundation because if such were the case there would be no occasion to make recitals at all. It will not be presumed that the legislature contemplated the doing of an idle thing when it prescribed

the form of bond or warrant to be used, which included such recitals. The law as to liability imposed by recitals of this character had been settled long before the enactment of the Montana laws prescribing this form of bond; and the law is clearly settled in the federal courts as declared by Judge Sanborn in *Aurora v. Gates,* 208 Fed. 101, where he sums up the leading federal authorities and states the propositions of law applicable thereto.

Appellee's Brief (pp. 111-114) disputes the position of plaintiff as a *bona fide* holder insofar as the application of the estoppel by way of recitals is concerned. Defendant has been unable to explain the *Hauge* case and we insist that the discussion of the matter in *Cuddy v. Sturdevant,* 111 Wash. 304; 190 Pac. 909; *Troy Bank v. Russell County,* 291 Fed. 185; *Flagg v. School District,* 4 N. Dak. 30; 58 N. W. 499, and *Dakota Trust Co. v. Hankinson,* 53 N. D. 366, 205 N. W. 990, leaves no substantial grounds for the dispute of the proposition contended for by plaintiff.

There are two aspects to the matter of recitals when dealing with a special improvement bond. We have pointed these out in our *Opening Brief* with some care (pp. 165-172). The case of *Hauge v. Des Moines,* 207 Ia. 1209, 224 N. W. 520, covers the matter precisely and shows the policy of the law as to require a *more strict liability* where a town makes recitals *in the case of special improvement obligations* than when attached to its own direct or general obligation bonds. As pointed out, Montana has recently approved the *Hauge* case.

Insofar as the liability is based upon the town's *misrepresentation* of a fact the nature of the liability is that of *tort* and must be considered as *involuntarily* created under the discussion given to the liability based upon the town's failure to perform its legal obligations in making valid assessments, etc.

Insofar as the doctrine of *estoppel* shall be imposed on a town because of recitals made to a special improvement bond, the logical result is that the town will be *estopped to deny the validity* of that bond, and if that bond is valid there necessarily results the obligation of the town to make legal assessments and collections in payment thereof. This brings the matter directly under the rule of the *Fort Dodge* case, supra, as to the constitution and the "voluntarily" created debt.

5. The application of the constitution to the doctrine of *quantum meruit* as a basis of recovery develops the same line of authority as disclosed in our *Opening Brief,* where the authorities are grouped (pp. 188-190). We have inspected the cases cited by defendant in its brief and find most of the cases are not in conflict with any theory advanced by us and many of them are not in point.

The recent case of *Mote v. Carlisle,* 233 N. W. 695, ... Ia. ....., was a suit for an injunction *to prevent the issuance* of warrants and to prevent the payment of the contractor's claims. It appeared that as to certain excess indebtedness there had been no vote of the people which was required by statute, notwithstanding that the work was done. The obligation complained against, however, was the issuance of the *warrants as*

such, with respect to which there was no legal authority to issue. The court, however, took especial pains to say that in so deciding, it was not foreclosing the right to recover, nor was it expressing an opinion as to liability, on *implied contract, quasi-contract* or *quantum meruit.* It is interesting to note that on the very day this opinion was delivered, December 9, 1930, the court also decided *First Bank v. Elliott,* 233 N. W. 712, reaffirming the *Hauge* case vigorously, and the *Hauge* case it will be remembered, took occasion to recognize the constitutional provision in passing, with respect to which the court felt no embarrassment. The federal cases cited by defendant are readily distinguishable.

Buchanan v. Litchfield, 102 U. S. 278, was an action brought on the bonds themselves *as such at law,* the bonds having been issued in violation of the constitution. No one contends to the contrary in any argument advanced in the case at bar than that bonds issued in excess of the limitation of indebtedness and bearing no recitals touching the same could not be the basis of a direct action.

Litchfield v. Ballou, 114 U. S. 190, is not in point. Some of the language used by Justice Miller is emphatic, but as has been pointed out in many cases published since that time, it must be read as applied to the facts at hand. It was a suit to impose an equitable lien upon a portion of the waterworks which had been constructed from the proceeds of bonds issued, the money having been furnished in part by the plaintiff but largely by other parties. In addition to that a portion of the cost had been paid through taxes and the court

could not separate any equitable portion of the water system which might be recognized as the equitable property of the plaintiff. There can be no doubt of plaintiff's broad equitable right, but the *means of enforcing it* were too seriously complicated to permit the court to grant relief in the form prayed for. Had the plaintiff been the holder of all the bonds which in turn represented all the funds with which the water system had been purchased, there is no doubt that plaintiff's equitable right would have been established and the property sold to satisfy the same.

Bozeman v. Sweet, Causey, etc., Co., 246 Fed. 370, decided by this court speaking through Judge Hunt several years ago, held that under the Montana Constitution it was necessary that an election be held to pass on the precise question of exceeding the 3% limit. The case, however, was one for an injunction against the using of the securities *before* any work was done. There can be no doubt that such practice is the regular and legal method to be adopted.

Boston v. McGovern, 292 Fed. 705, has interesting facts, but the material difference from the case at bar is that the *identical issues* had been litigated in the state courts between the *identical parties.* It appears that the Massachusetts statutes require a written contract as a prerequisite to liability on account of any public work, and under this drastic statute the Massachusetts courts had held there was no right of *quantum meruit.* The particular case was obliged to recognize the state court's adjudication for the reasons first stated above.

Gillette-Herzog Co. v. Canyon County, 85 Fed. 396, is relied upon by defendant. Under the Idaho statutes, Judge Beatty held the agreement involved to be *void* and, apparently because of the prohibitory public policy of the state, permitted no other type of money recovery, and refused to follow the broader doctrines of *Barber Asphalt Co. v. Harrisburg,* 64 Fed. 293. The court, however, recognized that the improvement still belonged to the contractors, it not having been paid for. This case must be limited to the Idaho statutes. Reference to the *Citator* shows this case never to have been cited in a federal court and we have found no reference other than in Idaho cases. It does not represent the federal law as generally settled and expressed.

We do not wish to carry this discussion to undue length. The cases relied upon by defendant largely fall into classes. Many of them are suits brought for restraining orders and injunctions *preventing the issuance* of bonds, warrants or executions of contracts, etc. For obvious reasons there can be no dispute over the results so reached because no one contends that a timely suit should result in other than preventing irregular or illegal issuances of security.

Another group of cases fall into the class of acts specifically opposed to the public policy of the state as expressed in *prohibitory* language. The Idaho cases are among the best examples of this class. Montana does not so express its policy.

Many states recognize the right without an election to incur indebtedness which may be paid out of *current* revenues and, in the absence of constitution or statutes

expressly limiting the amount of taxation in any particular year, there is no legal inhibition against contracting for or acquiring property which might be paid in this fashion. A case of this type is *Geer v. School District,* 111 Fed. 682, cited in our *Opening Brief,* so construing the constitution and laws of Colorado as to permit the building of a school house, thus showing a lawful method wihch *might* be so applied. Many Illinois cases are in accord therewith. *People v. I. C. R. R. Co.,* 309 Ill. 277. See also *Troy Bank v. Russell County,* 291 Fed. 185, 189, touching Alabama and assembling many authorities. This would be a legal method in Montana it seems.

The Matter of an Election at Ryegate

Throughout Defendant's Brief we read complaints because, in our *Opening Brief,* we have referred to the fact that an *election was held* whereby the electors of the Town of Ryegate passed favorably upon the matter of acquiring a water system and water supply, and defendant's counsel are strenuous in asserting that the record does not support the statement. We are willing to say that the record is not as complete as it might be. The cause was tried somewhat informally, a number of public transcripts and documents being at hand, with respect to which documents were offered as exhibits and a part of the record. Apparently some of these were eliminated *sometime after the hearing,* as indicated by the letter disclosed (Tr. 216) dated January 28, 1930, nearly a month after the trial, from which it fur-

ther appears that defendant's counsel was entrusted with the privilege of adjusting these exhibits and records.

Now under the Montana laws *no municipal bond can be issued without an election.* The record pretty clearly shows that a general bond issue for the "purpose of procuring a water supply and constructing a water system for the Town of Ryegate" was actually issued. See Minutes of Meeting of Town Council (Tr. 218) which includes a report from a committee *referring to Ordinance No. 25,* passed January 14, 1920, which ordinance provided for the sale of these bonds and shows them to have been issued *for that purpose*, though not shown in full as abbreviated in the Transcript.

In our *Opening Brief* we referred to the record as disclosing that the town had available from its general bond issues $15,000 in cash to apply on the *sewer* system and $15,000 in cash to apply on the *water* system. All of this is disclosed (Tr. 212) which shows the "Payments" provision of the specifications, which were a part of the contract entered into. *This was introduced by defendant as a part of its case.* From this, it appears clearly that Special Improvement District No. 3 had been created as well as Special Improvement District No. 4, and that Special Improvement District No. 3 had been created to take care of the balance of the cost of the *sewer system.* As defendant's counsel correctly state, if the Town of Ryegate had funds to this extent it would have been indebted greatly in excess of the 3% limitation, and this seems to be the logical construction of that language. Defendant also introduced as its Ex-

hibit "D" the so-called "Notice to Contractors" together with a "Proposal" which was a part thereof. This "Proposal" is shown (Tr. 215) and it offers to furnish all material and do all the work of constructing the *proposed water and sewer systems according to the specification.* As we read defendant's statement, the facts are that no sewer system was installed and no sewer bonds were issued. The writer of this brief was not present at the trial nor is he personally familiar with the improvements of the Town of Ryegate or other than as stated in the record, from which the fair presumption is that the town was indebted in excess of 3% of its taxable value and that general bonds of the defendant could not have been issued legally without passing favorably upon the issue of exceeding the limit at an election held for that purpose under the doctrine of *Bozeman v. Sweet, Causey etc., Co.,* supra. However, the record demonstrates that the Town had *planned both water and sewer general bonds,* its contract and specifications were so drawn and the bidders made their proposal for both constructions. Having so prepared its contract and invited bids and made all preparations and arrangements, we apply the legal presumption of official duty being regularly performed and that the 3% limit *was extended by appropriate election and vote to prepare the town legally* for what it proposed to do and for which bids were invited and the "proposal" made.

The writer of this brief has no desire to obscure the truth or to prevent the facts actually relating to the matter from appearing in full view of the court. Until he read the statement of *Appellee's Brief* to the con-

trary, he had fully believed the sewer system to have been installed as provided for in the specifications and proposal referred to.

Investigation of the public records of the Town of Ryegate discloses, however, that *such an election was held,* having been provided for by Ordinance No. 23, passed December 10, 1919. This ordinance was referred to in Ordinance No. 25, which was made a part of the minutes of the meeting (Tr. 219), from which it appears both in Ordinance No. 23 and Ordinance No. 25 that the town council provided

> "For the holding of a special election upon the question of whether or not the indebtedness of the Town of Ryegate, Montana, shall be increased over and above the three percent (3) limit fixed by law and within the extended limit of ten percent (10) provided by law, by the issuance of water bonds to the amount of fifteen thousand dollars ($15,000) to be issued for the purpose of procuring a water supply and constructing a water system for said town, which water supply and water system the said town shall own and control and shall devote the revenues derived therefrom to the payment of the indebtedness incurred therefor."

The public records further show such an election was held January 8, 1920, and that votes case were, Yes, 48, and No, 22.

We now say to the court that we feel fortified in our presumption based on the record, and that, although the sewer system *was planned and prepared for,* it may or may not have been *contracted* for (defendant says it was never *constructed), defendant well knows that the Town* of Ryegate *passed affirmatively upon the question* of exceeding the constitutional limit.

This cause is in a national court. The purpose of the federal courts as stated by Judge Parker in *Clarksburg Trust Co. v. Commercial Cas. Ins. Co.,* 40 Fed. (2d) 626, is to do justice. It seems to us that the natural equities of the situation are so compelling that every presumption should be given to the record in the furtherance of justice, and to that end the specifications and proposal introduced by defendant as part of its own case and *exhibits abbreviated for the record after the hearing,* should be given every possible construction and presumption permitted to the end that those who have secured benefits through the expenditure of plaintiff's money, many of whom made no objections at all, and those who did object remained silent for more than twenty months after the completion of the work before voicing any objection whatever, should be made to pay the fair value of what they have received.

To some extent the constitutional bar, when applicable, may be considered as legal rather than equitable, if there be room for such a distinction; but when we know that the citizens of the Town of Ryegate voted by more than a two-to-one vote to exceed the constitutional limitation of debt in order to acquire this very water system and water supply, which they have acquired, and which they use, then the court should have no hesitation or reluctance in imposing upon them a liability for the reasonable worth of that improvement and benefit.

We are willing to concede upon the statement of defendant's counsel that the sewer system was *not con-*

structed, and if defendant's counsel further state such to be the fact, though we are not otherwise advised, we will concede that the sewer construction was *not contracted* for, although this be in direct opposition to the record made by defendant at the trial. [See *Construction Contract* (Tr. 61-67) as part of Agreed Facts, and the Contract (Tr. 67) which *agreed on payments as provided in specifications* which provision was put in by defendant (Tr. 212).] If defendant's counsel refuse to concede the legal presumption from the record, that a favorable vote was had on the question of exceeding the constitutional indebtedness limit, we must ask the court to apply the relief which an appellate court properly may do and remand the case for further testimony as to the truth of this important fact. Courts exist to do justice under procedure designed to develop the facts as they are and then apply the law, and not to conceal any important fact, if such happen through the technique of abbreviated exhibits or otherwise. Authorities supporting such procedure are shown at page 24 of this brief.

Now let us see what the effect of the election held January 8, 1920, actually was. The question as set forth above and as composed carried with it *two* propositions. Such have been fully discussed in the case of *Carlson v. Helena,* 39 Mont. 82, 106; 102 Pac. 39. The first of these was the question of whether or not the 3% limit shall be extended. This was necessary under the decision of *Bozeman v. Sweet, Causey, etc., Co.,* 246

Fed. 370. The second was whether $15,000 bonds of the Town of Ryegate should be issued. The better practice, as suggested in the *Carlson* case, would have submitted two separate questions. It is clear that under the constitution the matter of *"bonds"* is not involved. The constitution refers to *"indebtedness" in any form.* The requirement as to an election touching bonds is provided by *legislative enactments* and this election is necessary whether the bonds in amount are above or below the 3% limit. A town could properly vote to exceed the 3% limit, but reject the amount of bonds voted upon, and thereafter in a further election, it would be necessary only to vote upon the bond issue itself. A water supply and system under the *constitution* would be *authorized* by a vote extending the limit for such purpose, and no further vote would be required unless the municipality chose to issue bonds. The indebtedness could be evidenced in any other commercial fashion. Now when the Town of Ryegate passed favorably upon the matter of exceeding the 3% limit, although it also held itself within the 10% extended limit, which is probably inapplicable to water systems but not important to this case, the Town of Ryegate thereby approved the acquisition of a water supply and water system and, at least to the 10% limit of its taxable value, authorized the town to *indebt itself for that purpose.* That covers the constitutional matter. Now when we look to the statute (Sec. 5039, subd. 64, *Montana Revised Code,* 1921) we find that a town has power to contract indebtedness among other things for the purpose of water-

works, water by contract, water rights and then the statute provides that

> "No money must be borrowed on bonds issued for the....securing of a water plant, water system, water supply....until the proposition has been submitted to the vote of the taxpayers....of the....town, and the majority vote cast in favor thereof; and *further provided, that an additional indebtedness shall be incurred, when necessary, to....procure a water supply* for....town, which shall own or control said water supply and devote the revenue....to the payment of the debt."

Please note that the legislative enactment provides for the issuing of bonds only after a majority vote on the part of the taxpayers, but it immediately provides further that additional indebtedness when necessary shall be incurred to procure a water supply if the town owns or controls the water supply, etc. The important question is, what does the legislature mean when it states that additional indebtedness shall be incurred when necessary? "Additional", in the arrangement of the language, must refer to indebtedness in addition to the bonds voted upon, and the language seems clear beyond contention that the legislature had precisely in mind, that, where a *bond issue* had been voted and *was found insufficient* to take care of the entire water system, an "additional indebtedness" was permitted, provided the town owned and controlled the water supply and devoted the revenue to the payment of the debt. All of this is of course predicated upon the constitutional requirement that the 3% limit shall already have been extended by a vote of the people.

Apply the law to the Town of Ryegate and the question answers itself without difficulty. The taxpayers of Ryegate voted to exceed the 3% limit; they voted to issue and did issue $15,000 par value general bonds for the purpose of acquiring the water system. That did not exhaust the authority of the city to *indebt itself further* under either the constitution or the statute, while the statute itself expressly declares that additional indebtedness *shall be incurred when necessary.* These conditions have all been complied with by the Town of Ryegate. Its town council might itself through resolution have contracted for *indebtedness* on open account in excess of the bond issue, but within the extended 10% limit if it had chosen to do so. Under all the decisions, having this authority, the Town of Ryegate may be held for its irregular acquisition, under the record made in this case, where it is repeatedly stipulated and agreed that the town has acquired, received, accepted and used the improvements made but has paid nothing therefor.

From the record as printed we find clearly the fact that $15,000 general water bonds were issued. This, under the statutes above quoted, required a favorable vote on the *"proposition"* as the statute described it. This fact is proved by the records; the law requires the election; the presumption is that everything required officially to be done has been done in absence of contrary proof.

From the record made by defendant itself, and the arrangement of exhibits put in abbreviated form into the record a month *after* the hearing by defendant's counsel, we find clearly that the defendant *had made*

complete arrangements for *both* sewer and water improvements, having available $15,000 general bonds of each character, that it invited bids and proposals on such basis, and such "proposal" was received and apparently accepted as made.

The law, declared by this court in *Bozeman v. Sweet, supra,* requires that there be submitted the *"question"* as the constitution describes it, of exceeding the 3% limit. The legal presumption of official and legal regularity supports the Record as disclosing, there being no contradictory proof, that both the constitutional *"question"* of exceeding the 3% limit, and the statutory *"proposition"* of issuing bonds were in fact submitted to the electors and favorably passed upon.

IN GENERAL

Throughout appellee's brief are numerous suggestions to the effect that if the record touching the facts complained of in the State Court *Belecz* case, is incomplete and not fully before the federal court, plaintiff must be at fault. This, of course, overlooks the outstanding failure of defendant to prove its own defense based on the *Belecz* decree. That decree is neither stipulated nor sufficiently pleaded to show a semblance of *res judicata;* no stipulation touches its *legal* effect. The burden is defendant's not ours, and properly, all matters of estimates, character of work done, cost, detail of selling bonds, etc., are not now before the federal court because defendant did not bring them in either by pleading or testimony.

Defendant has signally failed to answer such cases as *Gladstone v. Throop,* 71 Fed. 341, *Fetzger v. Johnson,* 15 Fed. (2d) 145, or *Hauge v. Des Moines,* 207 Ia. 1207, 224 N. W. 52.

The attempts made to explain *Mankato v. Barber Asphalt Co.,* 142 Fed. 329, *Barber Asphalt Co. v. Harrisburg,* 64 Fed. 283, and *Dakota Trust Co. v. Hankinson,* 53 N. D. 366, 205 N. W. 990, are not apposite nor are they at all convincing. *Ft. Dodge Co. v. Ft. Dodge,* 115 Ia. 568, stands as unimpeached authority.

As the case properly presents itself, it is so apparent that the property-owners of Ryegate stood by without protest and received the benefits for nearly two years before any of them made a move in the courts, that we cannot escape the conclusion that, as expressed in *Edmunds v. Glasgow,* 89 Mont. 596, the liability should be imposed unless some insuperable legal obstacle shall prevent.

The attitude of this court toward property owners who do not (as Ryegate citizens did not) pursue their rights for relief before the council or commissioners and proceed in regular and timely fashion is expressed by Wilbur, J., in his opinion affirming Sawtelle, J., in *Tancray v. Phoenix,* 47 Fed. (2d) 448.

The Montana court has recently given pointed expression to its views of the duty of municipal officials to perform all acts necessary to prevent a failure of justice. The policy of the law and the duty toward bondholders is forcefully expressed in *State v. Board of Comrs.,* 86 Mont. 595, 605, 285 Pac. 932, 937. This recent statement is not in harmony with the interpretation

sought to be given the Montana law by defendant's counsel in their effort to apply *Gagnon v. Butte,* 75 Mont. 279, 243 Pac. 1085 (decided under the old but now repealed statutes) to the statutes in force in 1920, which have been practically unchanged since.

IN CONCLUSION

Defendant makes a plea of hardship. This is completely answered by saying that there is no hardship when one has the property which was paid for with the proceeds of the bonds. See statement of Butler, J., in *Barber Asphalt Co. v. Harrisburg,* 64 Fed. 283, 285, pointing out that where defendant has received full value for what he is required to pay there is no hardship. (In the case at bar the improvement of *water* distribution is *more* nearly a vital necessity than in the *Harrisburg* case of *street paving.*) Besides, the record shows the legal presumption (which is also the fact) that the Ryegate citizens *voted to acquire such a system and extend the debt limit for that purpose.*

A further intimation made by defendant is that the contractor had agreed to take these bonds as his pay; that the delivery of the bonds whether valid or invalid, completed the obligation of defendant. All the authorities oppose this thought. The *Harrisburg Case,* supra, states emphatically the law contemplates legal, valid bonds or warrants. The Oregon cases discuss warrants expressly declaring the warrant only to be the instrument of recovery. The thought of paying for the improvements with adorned pieces of paper only, is not generally supported by the decisions.

The case of plaintiff is just and equitable. Its money has been used to enrich defendant and defendant has used and is using the improvement for its municipal and proprietary purposes. It should pay the reasonable value thereof.

Respectfully submitted,

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