No. 6564

In the United States Circuit Court of Appeals

For the Ninth Circuit.

14

LUMBERMEN'S TRUST COMPANY,
a corporation,

Appellant.

—vs.—

THE TOWN OF RYEGATE,
a municipal corporation,

Appellee.

Petition for Rehearing and Brief in Support of Petition

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

W. J. JAMESON, JR.,
H. J. COLEMAN,
W. M. JOHNSTON,
of Billings, Montana,

Attorneys and Solicitors for Appellee and Petitioner.

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The above named Appellee, The Town of Ryegate, hereby petitions this honorable court to grant a re-hearing of the appeal in the above cause in which the opinion upon such appeal was filed August 15, 1932, with the clerk of the above entitled court and, as its grounds for such re-hearing, said appellee and petitioner shows this honorable court:

1. Upon the trial of said cause appellant made no motion for a judgment in its favor nor request for a ruling upon a principle of law and consequently the facts cannot be reviewed upon appeal.

2. Upon the trial of this cause no declaration of law was requested of the trial court by appellant, denied and exception saved, and therefore this court, upon appeal, may not review any question of law.

3. This court, upon appeal, may not consider the bill of exceptions nor the question of the sufficiency of the evidence to justify the judgment of the trial court in favor of the appellee for the reason that that question was not presented to the trial court at the proper time for its determination and that no exception is shown in the record upon which such contention can be predicated upon appeal to this court.

4. The stipulation as to facts covered only a portion of the facts and expressly allowed the parties to introduce evidence upon questions not covered by it and therefore did not cover all the ultimate facts. In the transcript there are ninety-five pages of oral testimony and documentary evidence which was introduced upon the trial of this cause. Therefore, the facts agreed to may not be considered either as special findings or as a special verdict.

5. The facts agreed to cover only a portion of the ultimate facts necessary to support a judgment in favor of appellant upon the theory adopted by this court in its decision in that:

(a) This court, in its opinion, concedes that the various sums suggested as a basis for a judgment in favor of appellant are only approximations.

(b) It cannot be definitely determined from the agreed facts the number of feet of any particular size of pipe laid in the district; whether that portion of the pipe laid from pump to reservoir which lies within the district is properly chargeable to the district upon the theory adopted by this court; there is no proof nor admission as to cost of any of the pipe installed so that it cannot be determined from the record what the cost of the pipe laid within the district plus $1.50 per linear foot of such pipe would total.

(c) If appellant had tried the case upon the theory adopted by this court it was incumbent upon it to prove all of the ultimate facts necessary to support a judgment in its favor upon such theory, which appellant did not do.

6. Appellant, in the trial court, conceded the invalidity of the bonds in that in its reply it admitted that the judgments in the state court prevented the collection of the interest on and the principal of the bonds (Tr. 50) and its counsel disclaimed any intention of trying to establish their validity (Tr. 179), which clearly precludes this court from considering the validity of the bonds.

7. Upon appeal, counsel for appellant, under the sub-head of its brief in which the theory adopted by this court was discussed, stated that "only a chancellor's decree can make such relief effective" (p. 179, appellant's brief), thereby conceding that, this being an action at law, as determined by this court, the trial judge was not authorized to grant any relief upon the theory adopted by this honorable court in its decision herein.

8. In an action at law plaintiff is limited upon appeal to the theory upon which the case was tried in the lower court and the record clearly shows that the only theory upon which this cause was tried was on the ground of money had and received or possibly on an implied contract for the balance due on the construction of a water supply system, both of which questions have been resolved against appellant by this court in its decision herein.

9. The complaint herein was not framed upon the theory that appellant was entitled to a judgment to be enforced by a levy upon the property in the district; otherwise there would have been some allegations in the complaint to apprise the trial

court, appellee and its counsel of that fact. No such allegations appear in the complaint.

10. We respectfully challenge the statement of the court on page 14 of the opinion where the court, in discussing appellee's contention that the real intention of the town was to provide a system of "water works" and that the description in the resolution of intention did not disclose that fact, upon which the court said: "This criticism would no doubt be just were it not for the fact that the proposed plan called for the construction of the 'water works outside the district,' the cost whereof was not chargeable upon the district, and that nothing was constructed in the improvement district but water mains and hydrants, which we think are sufficiently described by the words 'pipes, hydrants, hose connections for irrigation purposes and appliances for fire protection' " in that we have not been able to find any statement in the record that the water works were to be constructed outside of the district or that the cost thereof was not to be chargeable upon the district.

11. The decision of this court is based largely upon the fact that upon the trial hereof no issue was made as to the validity of the bonds. The attention of the court is called to paragraph XIV of appellant's complaint, wherein it was alleged that the rate of interest at six per cent claimed by appellant "is a reasonable rate of interest in the State of Montana for money had, received and used." The prayer of the complaint is for a straight money judgment, in which interest is claimed "on said principal obligation" and not upon said bonds. In its fourth affirmative defense in its answer the appellee pleaded the proceedings and judgments in the state court in the Belecz and other cases for the purpose of showing why no payments were made on prin-

cipal or interest of said bonds after January 1, 1922, and counsel for appellant, in their reply, admit that those judgments "prevented the collection of said principal and interest upon such special improvement district bonds," clearly showing that the validity of the bonds was not in issue and that counsel for appellant in the lower court in effect conceded the invalidity of the bonds both in his pleadings and his statement which appears on page 179 of the transcript, where, in answer to the court's question, "Are you starting out to establish the legality of the bond issue?" Mr. Brown, of counsel for appellant said, "No, your honor, before you can recover for money had and received we have got to bring home to the defendant the knowledge that it was our money that was had and received and used," which clearly establishes the fact that this action at law was begun and prosecuted in the lower court for money had and received and that appellant did not then base its right to a judgment against the town upon the validity of the bonds.

12. Under the decision of the Supreme Court of Montana, in Evans v. Helena, 60 Mont. 577, the Town of Ryegate did not acquire jurisdiction to create the special improvement district in question and therefore the bonds were invalid.

13. The assignments of error (Tr. 254) clearly show that appellant in the lower court did not rely upon the validity of the bonds but solely upon the theory that appellee was liable "on account of moneys advanced by it (appellant) and had and received by the Town of Ryegate, the benefits of which the defendant Town of Ryegate is now using and enjoying."

14. Under the decision of this honorable court, the lower court will not be able to enter appropriate judgment against the Town of Ryegate without the taking of additional testimony.

As this is an action at law, the granting of a new trial is governed by the statutory provisions of Montana which are found in Section 9397, R. C. M. 1921. That portion of said section which authorizes a new trial for the purpose of introducing additional evidence is as follows:

> "The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved for any of the following causes, materially affecting the substantial rights of such party:
>
> * * * *
>
> (4) Newly discovered evidence material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial."

ARGUMENT

Upon the trial of this cause no motion was made by appellant for judgment nor did it make any request for a ruling upon any principle of law. No declaration of law was requested of the court, denied and exception saved, nor was the sufficiency of the evidence to justify a judgment in favor of appellee presented to th trial court at the proper time. These matters are covered by our first three grounds for re-hearing.

In the case of Kansas City Life v. Shirk, 50 F. (2d) 1046, the court, on page 1049, said:

> "Hence, whether the same (agreed facts) supports the judgment, in the absence of a declaration of law requested by the court, denied and exception saved, there is no right of review of any question of law saved for review in this court and this court is powerless to review the same."

This court, in the case of First National Bank of San Rafael v. Philippine Refining Corp., 51 F. (2d) 218, said, on page 219:

> "It has been held by this court in an opinion by Judge Rudkin and concurred in by Judges Gilbert and Hunt that under such circumstances this court has no jurisdiction to pass upon the sufficiency of the facts to support a finding.

> Edwards v. Robinson, 8 F. (2d) 26, 27. The court there said: 'There was no motion or request at or before the close of the trial to find generally for the plaintiff or to make special findings in favor of the plaintiff and there was no ruling of the court on that question. In this state of the record, it is well settled that an appellate court cannot consider the sufficiency of the testimony to support the findings."

STIPULATION AS TO FACTS

It is our contention that because of the incompleteness of the stipulation as to facts and the fact that a great deal of testimony was introduced upon the trial of the action, which this court has said may not be considered upon appeal, the agreed facts may not be considered as special findings of the court or as a special verdict of a jury.

The Supreme Court of the United States, in Wilson v. Merchants L. & T. Co., 183 U. S. 121, 22 S. Ct. 55, on 58, said:

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

This statement was quoted with approval in K. C. L. Ins. Co. v. Shirk, 50 F. (2d) 1046 on 1048. This same rule, in substance, has been adopted by all courts that have passed upon the question, so far as our investigation discloses.

Upon this question, the Supreme Court of Wyoming, in Chicago, B. & Q. R. Co. v. Tolman, 224 P. 671, on page 672 said:

> "A special verdict must find all the facts essential to judgment and necessary to entitle the party having the burden of proof to recover, and cannot be aided by intend-

> ment or by extrinsic facts, and nothing must remain for the court to do but to draw conclusions of law or to make mathematical calculation to ascertain the damages."

The Supreme Court of Indiana has passed upon similar questions in a great many cases. In Wamire v. Lank, 22 N. E. 735, that court said:

> "The appellant had the burden of the issue; and if the special verdict fails, as his counsel asserts, to state all the material facts, the judgment was rightly entered in favor of the defendant. The party having the burden cannot have judgment unless the special verdict finds all the facts essential to a recovery."

The Supreme Court of Oregon, in Turner v. Cyrus, 179 P. 279 on 280, said:

> "When we consider the reason which gave rise to special verdicts, we at once perceive that it is the office of a special verdict to find and place on record all the essential facts, so that the judge can apply the law to those facts. The special verdict must find all the facts essential for a judgment; ultimate and constitutive rather than evidentiary facts should be stated. Facts must be found expressly and specifically, not generally and impliedly; the findings must be certain and cannot be aided by intendment or by extrinsic facts."

In the case of Boulger v. N. P. Rly., 171 N. W. 632, the Supreme Court of North Dakota, on page 633, said:

> "The rule seems to be well established that 'the failure of a special verdict to find upon any material fact in issue is equivalent to a finding against the party upon whom the burden rests to establish such fact'."

The statutory provisions of the State of Montana with reference to special verdicts are as follows:

> "A special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusion of facts as established by the evidence and not the evidence to prove them; and

> those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law." Sec. 9360, R. C. M. 1921.

The Supreme Court of Montana, in Coburn Cattle Co. v. Small, 35 Mont. 288, 88 P. 953, on page 293 of the Montana Report said:

> "A special verdict should find all the facts that are necessary to enable the court to determine by the consideration of the pleadings and the verdict alone which party is by law entitled to judgment, without reference to the evidence."

Among the numerous decisions of the courts on this question, we call attention to:

Supervisors v. Keunicott, 103 U. S. 554.
Town of Freedom v. Norris (Ind.) 27 N. E. 869 on 871.
Lake Shore & M. S. Ry. Co. v. Stupak (Ind) 23 N. E. 246 on 252.
Louisville N. A. & C. Ry. Co. v. Carmon (Ind.) 48 N. E. 1047.
Pac. Mut. L. Ins. Co. v. Turner (Ind.) 47 N. E. 231.
Schellenback v Studebaker (Ind.) 41 N. E. 845 on 846.
Goben v. Philips (Ind.) 40 N. E. 929 on 930.
Louisville N. A. & C. Ry. Co. v. Costello (Ind.) 36 N. E. 299 on 300.
Strasser v. Goldberg (Wis.) 98 N. W. 554.
Leeman v. McGrath, (Wis.) 92 N. W. 425 on 426.
Reffke v. Patten Paper Co. (Wis.) 117 N. W. 1004.
Davis v. Chicago, etc. R. Co. (Wis.) 67 N. W. 16.
Murphy v. Weil (Wis.) 61 N. W. 315.
Newbolt v. Lancaster (Tex.) 18 S. W. 740.
Texas, etc. R. Co. v. Watson (Tex.) 36 S. W. 290.
Hall v. Ratliff (Va.) 24 S. E. 1011.
Dubs v. N. P. Ry. Co. (N. D.) 195 N. W. 157.

The court, on page 5 of its opinion, calls attention to the case of Fleishmann v. U. S., 270 U. S. 349, but that case does not treat either of special verdicts nor of agreed facts.

The case of Kansas City Life v. Shirk, 50 F. (2d) 1046, also

cited by the court, from which we quote above, does not seem to be an authority in support of the decision of this court, for the reason that the agreed facts do not cover all the ultimate facts necessary to support a judgment in favor of appellant.

The stipulation as to facts nowhere contains a statement as to the number of feet of pipe of any dimension laid within the district nor the number of hydrants installed in the district, nor does it appear therein how much any one of the three sizes of pipes laid cost per foot or in the aggregate and it cannot be determined from the agreed statement of facts how much the installation of the improvements specified in the resolution of intention cost the district in excess of the price paid for the pipe so as to determine whether it exceeded th amount allowed by statute, $1.50 per foot, the statutes of Montana providing that the whole cost to be assessed against the district shall at no time exceed the sum of $1.50 per lineal foot, plus the cost of the pipe so laid, of the entire length of the water mains laid in such district. Section 5226, Revised Codes of Montana, 1921.

It may be contended that the map attached to the agreed statement of facts as an exhibit was drawn to scale and from such map it can be ascertained how many feet of pipe were laid outside of the district and how many feet of pipe within the district. Apparently, as stated in the opinion of this court, this map shows 1,425 feet of pipe outside of the district, from which the court assumes that the length of the pipe laid in the district is 10,413 feet. However, actual measurement of the pipe lines within the district, as shown on such map, would indicate that only 10,100 feet of pipe were laid within the district, or 313 feet less than the amount stated in the decision of this court. It would appear that there is no information in the agreed facts

from which the court may determine the exact amount of pipe laid within the district. It is also to be observed that a considerable portion of the pipe line leading from the pump to the reservoir lies within the district. That portion of the pipe line is as much a part of a general system of water works as the portion of the pipe line laid outside of the district. Even if some of the hydrants within the district tap such main pipe line, which the agreed statement of facts does not show, those hydrants might just as well have been attached to the lateral pipe lines, which were covered by the resolution of intention to create the district, so if the decision of this court stands, the lower court will be compelled to take additional testimony before any judgment may be rendered herein against the appellee upon the theory adopted by this court.

This court evidently recognized the difficulties confronting it because of the fact that the agreed statement was never designed for the purpose of securing a judgment for the amount of the cost of the improvements within the district covered by the resolution of intention, to be enforced by a new levy against the property within the district. The agreed statement, together with the evidence introduced upon the trial, covered fully the theory upon which the case was tried, that is, for money had and received. If counsel for the appellant in the lower court had ever thought they were trying a case for a judgment against the Town of Ryegate for the actual cost of the installation of the improvements called for by the resolution of intention, without including the cost of any portion of the general water system, to be enforced by a new levy against the property within the district, it would have been an easy matter for counsel to include the necessary facts in the agreed statement or to establish

the same by proof upon the trial and appellant's counsel would have done so. This was not done because the case was not tried upon that theory, as we think the record conclusively shows.

VALIDITY OF BONDS AND THEORY UPON WHICH CASE WAS TRIED

In its complaint, paragraph XIV (Tr. 8), appellant alleged that the Town of Ryegate, after January 1, 1922, refused to pay any interest on said bonds and "declared its intention of never paying the principal sum due upon *said debt evidenced by said bonds,* or any part thereof, and has repudiated *in toto* said debt and its obligation to pay the same." In the same paragraph appellant alleges that interest at the rate of six per cent "is a reasonable rate of interest in the State of Montana for money had, received and used" and in its prayer prayed for judgment for a certain sum, "being accrued interest on said principal obligation." It would appear plain from the portions of the complaint quoted that the appellant was suing on what it was pleased to term an obligation evidenced by the bonds and not upon the bonds themselves; otherwise, it would have mentioned the bonds and not the obligation and would have been content to mention the interest agreed to be paid on the bonds and not allege that the interest was a reasonable rate in the State of Montana.

In the fourth affirmative defense of appellee's answer, in order to show why the interest on the bonds was not paid after January 1, 1922, we pleaded the Belecz and other judgments obtained in the state court, enjoining the collection of assessments levied to pay principal and interest of bonds. (Tr. 31 to 34) In its reply the appellant admitted that those judgments "have prevented the collection of said principal and interest upon

such special improvement district bonds" (Tr. 50). The judgments entered by Judge Horkan were renderd upon the theory that the town never acquired jurisdiction to create the district in question and therefore, of necessity, it follows that the judgment of the state court was in effect that the bonds were invalid. That appellant, upon the trial of the cause, so considered the effect of the judgments rendered by Judge Horkan is evidenced on page 179, where the court asked counsel for appellant this question: "Are you starting out to establish the legality of the bond issue?" to which Mr. Brown replied: "No, your honor, before you can recover for money had and received we have got to bring home to the defendant the knowledge that it was our money that was had and received and used." Even if those bonds were valid, as this court has held, that fact cannot now avail appellant upon appeal in this case by reason of the fact that it is apparent from the record that the cause was not brought to recover on the bonds, in whole or in part, and that appellant, in the trial, in effect conceded the invalidity of the bonds.

The court, in its opinion, on page 3 states that "there is no special allegation in the complaint that the bonds are either valid or invalid" but the complaint, reply and statement of Mr. Brown clearly show that counsel for appellant then considered the bonds invalid. The court goes on to say, on the same page, "The other allegations of the complaint, however, tend to confirm the view of the appellee that the action was intended to be an action for money had and received." The court also holds that appellant may not recover for money had and received. We contend that the complaint cannot be interpreted as anything other than as attempting to state a cause of action for money had and received, that it was tried upon that theory and that

appellant must recover on that theory or not at all.

The court, in its opinion, has not pointed out any statements in the complaint from which anyone could infer that plaintiff was seeking to recover on its special improvement district bonds to the extent of the actual cost of installation of improvements covered by the resolution of intntion. We submit that no attorney reading such complaint would have come to any conclusion other than the complaint attempted to state a cause of action solely for money had and received. Pleadings are designed to advise opposing counsel what relief is sought by the plaintiff and not for the purpose of tricking or deceiving such opposing counsel. We do not charge any such motive to counsel for appellant because we are certain that he framed his complaint on the ground that appellant was entitled to judgment as for money had and received for the full amount prayed for in the complaint and not simply for cost of improvements covered by the resolution of intention. The complaint clearly showing that it was not an action on the bonds, there was no reason why appellee should plead the invalidity of the bonds or of the assessments levied to pay same, as was done in the cases brought in the state court and decided by Judge Horkan.

Even on appeal, counsel for appellant regarded the case as a suit in equity and, in discussing the proposed theory under which this court has said that appellant may recover for the actual costs of the improvements installed which were covered by the resolution of intention, said that "only a chancellor's decree can make such relief effective. (p. 179, appellant's brief).

The assignments of error made by counsel who tried the cause in our judgment preclude appellant from now claiming that this action is one for judgment on the bonds, to be collected out of

assessments levied upon the district. The assignments of error are found on pages 255 and 256 of the transcript. Nowhere therein are the bonds mentioned. The only assignments which throw any light upon the character of the action as viewed by counsel for appellant at the time the assignments of error were made are findings V, VII and VIII.

Assignment V is as follows:

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

Although there is no such statement in Judge Pray's decision, which, in his order made after judgment, was to stand as his findings of fact (Tr. 254), it is apparent that counsel for appellant would have made no such assignment of error if, upon the trial in the lower court or when he made his assignments of error, he had thought that his action was brought to recover only as to the improvement made within the district and covered by the resolution of intention, the judgment to be enforced by new levy of assessments upon the property within the district. Assignment number V conclusively demonstrates that the case was not tried upon any such theory.

In assignment VII it is claimed that the court erred in finding that the defendant had not "become indebted to the plaintiff on account of moneys advanced by it and had and received by the Town of Ryegate, the benefits of which the defendant Town of Ryegate is now using and enjoying." That assignment alone determines the theory upon which the case was tried. Assignment VIII is that "the court erred in holding that the indebt-

edness sought to be imposed upon the defendant Town of Ryegate is unconstitutional and in violation of any provision of the Constitution of the State of Montana, including Section 6 of Article XIII of said Constitution." When counsel for appellant made that assignment of error he still had in mind that appellant was endeavoring to secure a money judgment against the Town of Ryegate and had no thought of endeavoring to enforce any such judgment by an assessment upon the property within the district.

It is to be further noted that in paragraph III of the complaint appellant alleges that the resolution of intention to create the district was passed for the purpose of supplying the town and *its residents* with water for municipal and private use. The allegation was not limited to the residents within the district, undoubtedly because of the fact that appellant desired to secure judgment against the town, not only for the cost of the improvements within the district but also for the cost of the entire water system. The allegation in paragraph V of the complaint, "which improvement district was to all intents and purposes co-extensive with the boundaries of said town" was doubtless inserted for the same reason. The same is true for the allegations in paragraph VI of the complaint "that the true object and purpose of each and all of said foregoing proceedings was the establishment and installation in and for the Town of Ryegate of a complete water works and a complete water works system * * * for the supplying of water for municipal purposes to said town and water to the inhabitants thereof"; also in paragraph VII, where it is alleged that contract was entered into "for the construction of said water works system as contemplated by the creation of the special improvement district." Counsel for appellant, in the complaint, studiously avoided any allegation tending to show

that the suit was brought on the bonds. In paragraph VIII of the complaint it is alleged "that the said Town of Ryegate should issue negotiable evidence of the debt in form of special improvement district bonds to evidence the obligation to pay for the construction of said water works," clearly indicating that counsel was suing upon the debt and not upon the bonds.

The foregoing quotations of allegations of the complaint show that it was the understanding of appellant that the true intention of the town in the adoption of the resolution of inention was not stated in the resolution but that it was the intention and purpose of the town to construct a complete water system and to charge a portion of the cost thereof against the special improvement district. In its complaint, appellant not only makes this allegation but acquiesces therein, doubtless for the reason that appellant thought such allegations would aid it in its attempt to recover a money judgment against the town for the full amount of cost of system evidenced by the special improvement district bonds. This, we think, brings the case squarely within the ruling in the Evans case, except that there the attack was made before and not after construction, which difference appellant apparently thought of no moment, as in its reply it conceded that the judgments of Judge Horkan prevented the collection of assessments levied. In the Evans case the resolution of intention stated that the district was to be created "for the purpose of paving with reinforced concrete pavement, with the necessary excavations, cutting, filling, grading, curbing and incidental work therewith and therefor." Our court said:

> "There is nothing in the resolution of intention to install storm sewers, extend the parking or to completely tear out the old curbing and install new curbing."

It appears, however, from the plans and specifications such improvements were to be made and the court held that they were not covered under the words "and incidental work therewith and therefor." Evans v. City of Helena, 60 Mont. 577 on 586, 199 Pac. 445. Surely the intention of the town of Ryegate to construct an entire water system under a resolution of intention which stated the character of the improvements to be made to be "the construction of pipes, hydrants and hose connections for irrigating appliances and fire protection" is as much a violation of the statutory provisions of Montana on special improvement districts as the action of the City of Helena which was condemned in the Evans case.

If appellant had brought this action on the theory upon which this court has held that the town is liable, the complaint would doubtless have asked for judgment against the town for the costs of the installation of the improvements specified in the resolution of intention" to be enforced by assessments upon the property within the district" or some similar allegation or prayer, as is customarily done in cases of that character.

MONEY JUDGMENT TO BE FOLLOWED BY MANDAMUS

The case of County of Cass v. Johnston, 95 U. S. 360, cited by this court on page 3 of its opinion, was a suit against the county "as trustee for the township" (p. 360) that issued the bonds, acting through the county court. The judgment was against the "county, trustee for said township," to be paid "out of and from taxes to be levied on the taxable property of said township." (p. 364)

The case of Jordan v. Cass County, 3 Dill. 185, also cited

by this court in its opinion, is not accessible to us.

In Davenport v. County of Dodge, 105 U. S. 237, also cited by this court, the prayer to the petition was for a money judgment, "to be collected by a tax upon the taxable property within the territory comprising said Fremont precinct at the time said bonds were voted and issued." (p. 239) The court said:

> "An action at law will lie in the courts of the United States against the county for the recovery of *the special judgment asked for*." (p. 242)

In Mather v. City and County of San Francisco, 115 Fed. 37, also cited by this court, the relief prayed for was "that plaintiff in error have the amount due him upon his bonds and coupons ascertained and paid and that he have judgment against the defendant in error therefor, 'said judgment to be paid only from the fund and in the manner provided by said act of March 23, 1876, or by the enforcement of the lien, if any, thereby created against the lands referred to in the act and not from the general funds or other property of the defendant in error'."

In those cases there was no question as to the nature of the action brought by the plaintiffs, which cannot be said of the case at bar if any theory is adopted other than that of a suit for money had and received, which clearly appears from the complaint.

A case more clearly in point is that of Meath v. County of Phillips, 108 U. S. 553, 2 S. Ct. 869, where the court, on page 870, said:

> "The cases of County of Cass v. Johnston, 95 U. S. 360, and Davenport v. Dodge Co. 105 U. S. 237, presented entirely different facts. In the case of the county of Cass, the law provided in terms for an issue of bonds in the name of the county, and in that of the county of Daven-

> port we construed the law to be in effect the same. Consequently there were in those cases obligations of the counties payable out of special funds. Here, however, there was a manifest intention to bind the levee districts only by the obligations incurred, and not to make the county, in its political capacity, responsible for the payment of the debts that were created for levee purposes under these laws. The machinery of the county was to be used in the levy and collection of the special taxes required, but the county, as a county, was to be in no way involved. It follows that the prayer for a money decree against the county, as well as that for an exchange of the bonds authorized by the act of 1873 for the orders or warrants held by the appellants, must be denied."

In the case at bar we have no obligation on the part of the Town of Ryegate to pay any portion of the principal of or interest on the special improvement district bonds, all of which was to be paid out of the collection of assessments upon property within the improvement district, which brings it clearly within the ruling of the Supreme Court of the United States in the Meath case and makes the decisions of that court in the Johnston and Davenport cases not applicable.

NEW TRIAL

As we have heretofore pointed out, no proper judgment may be entered upon the theory adopted by this court without the taking of additional evidence, which would mean a new trial of the cause. We quote the only ground upon which a new trial may be had because of additional evidence in number 14 of our reasons for requesting a re-hearing herein. Section 9398, R. C. M. 1921, provides that motions for new trials under subdivision 4 of Section 9397 shall be made only on affidavits. No motion was made for a new trial, no affidavits were filed in support of a motion for new trial and there is no contention on the part

of appellant that it is entitled to a new trial because of newly discovered evidence. The record was easily available to counsel for appellant. The amount due the appellant upon the theory adopted by this court cannot be ascertained except by the introduction of additional evidence and therefore our petition for re-hearing should be granted and the decision of Judge Pray affirmed.

In conclusion, we submit that this case was tried on the theory of money had and received, a money judgment was prayed for, not against the special improvement district nor against the Town of Ryegate as trustee for such district, to be enforced by appropriate assessments, but against the Town of Ryegate; that appellant's complaint shows conclusively that the action was one for money had and received; that there are no allegations in the complaint or reply from which it could be inferred that appellant was seeking a judgment against the Town of Ryegate, as trustee for the special improvement district, for the actual cost of installation of improvements covered by the resolution of intention, to be recovered out of assessments to be levid upon the property within such district; that the stipulation as to facts does not cover all the ultimate facts necessary for the entry of a judgment upon the theory adopted by this Court; that the effect of the decision of this court is to remand the cause for a new trial, because under the record there is not sufficient proof from which the court could say what judgment should be entered against the town on the theory adopted by this court; that the statutory provisions of Montana with reference to the granting of a new trial in an action at law preclude a new trial in this cause; that the pleadings and the stipulation as to facts, as well

as the entire record, support the decision of Judge Pray and that this petition for re-hearing should be granted.

Respectfully submitted,

W. J. JAMESON, JR.,
H. J. COLEMAN,
W. M. JOHNSTON,
of Billings, Montana,

as Attorneys and Solicitors for the Town of Ryegate, Appellee and Petitioner herein.

We, the undersigned, as attorneys and solicitors for the Town of Ryegate, appellee and petitioner in the above cause, do each of us hereby certify that in our judgment the foregoing petition for a re-hearing in said cause is well founded and that it is not interposed for delay.

Signed and dated September 9, 1932.

W. J. JAMESON, JR.,
H. J. COLEMAN,
W. M. JOHNSTON,
of Billings, Montana,

as Attorneys and Solicitors for the Town of Ryegate, Appellee and Petitioner herein.